Exit Clauses in Regional Human Rights Systems: the socialisation of human rights law at work?

Frederick Cowell
Birkbeck College, University of London

ABSTRACT

Regional human rights bodies, such as the European Court of Human Rights and the Inter-American Court of Human Right, have constituent instruments, which contain clauses allowing states to leave the institution. Given that regional human rights tribunals have the power to issue rulings against states, these clauses have been relatively underused. This paper argues this is due to the socialisation of states with regional human rights regimes. Exit clauses are a reflection of underlying political forces behind a regional human rights bodies' formation. They also play an important and under examined state socialisation once a state is a member of a regional human rights body.

KEYWORDS; European Convention on Human Rights; Inter American Court of Human Rights; African Human Rights Commission; State Socialisation; Obligations in International Law; Constructivism

Introduction

Eric Posner's book *The Twilight of Human Rights Law*, argued that human rights law suffered from a naiveté in assuming that complex international legal structures with relatively limited powers could actually change the situation people faced in some countries.[1] Regional human rights organisations, with their attendant tribunals, appear to provide an answer to this problem as they can interpret rights in a manner that reflects the common values of states within their region and as a consequence means they often have far more legitimacy as organisations.[2] Nevertheless regional tribunals also suffer from the basic problem that many supranational bodies suffer from - legal rules once defined are not always obeyed by states. As constitutive theorists of international human rights law have argued, seeing legal instruments as both constituting relationships as well as defining the limits of acceptable behaviour is important for understanding how human rights law progressively changes state behaviour over time.[3] This has been accompanied more generally by a wealth of theoretical and empirical literature arguing that human rights organisations, in particular regional human rights organisations, can have a role in socialising states progressively altering their behaviour through continued interactions within an organisational framework in order to make them more human rights compliant.[4]

Yet, exit clauses – the denunciation or withdrawal provisions - of the human rights instruments legally underpinning regional human rights organisations remain underexplored in the context of state socialisation. These clauses seemingly undermine the power of tribunals to issue decisions against state parties, as it gives states a legal escape hatch to avoid future scrutiny of their human rights records. The decision of the Human Rights Committee (HRC) that the absence of an exit clause means a state cannot leave a human rights treaty has been widely accepted as a general statement of international law and some human rights obligations are binding on states outside any obligation they have under a human rights

[1] Eric Posner *The Twlight of Human Rights Law* (Oxford University Press 2014).
[2] This was a feature of early comparative literature on regional organisations Bina Obinna Okere 'The protection of human rights in Africa and the African Charter on Human and Peoples' Rights: a comparative analysis with the European and American systems.' (1984) 6 *Human Rights Quarterly* 141.
[3] Geoff Dancey and Christopher Farris 'Rescuing Human Rights Law From International Legalism and its Critics' (2017) 39 *Human Rights Quarterly* 1, 3-4.
[4] For indicative examples see Ryan Goodman and Derek Jinks Socialising States: Promoting Human Rights Through International Law (Oxford University Press 2013); Beth Simmons 'From ratification to compliance: Quantitative evidence on the spiral model' in Thomas Risse, Stephen Ropp and Kathryn Sikkink (eds.) *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press 2013) 43; Brian Greenhill 'The Company You Keep: International Socialization and the Diffusion of Human Rights Norms' (2010) 54 *International Studies Quarterly* 127.

treaty.[5] Yet viewing exit clauses through a narrow legal lens obscures the role exit clauses play in state socialisation. Whilst the escape mechanism of an exit clause provides a notional incentive for states to become party to a human rights treaty, as it and reconciles concerns about the protection of their sovereignty, once a state becomes a member of a human rights regime their preferences and incentives are shaped by that regime. Equally exit clauses work along with other provisions, serve to delineate states, which are rights compliant from those, which are non-compliant, which has the overall effect of enhancing the socialisation of states with a human rights regime.

The first section of this article looks at exit clauses within regional human rights organisations, arguing that their form and operation is a reflection of the structure of a regional instrument. In the second section exit clauses are situated within the analysis of state socialisation more generally to demonstrate how they impact incentives towards commitment and compliance with a regional human rights tribunal. Exit clauses demonstrate how rationalist theories, focusing on the relative advantage states pursue when acting inside international organisations, offer only a limited explanation of the way that human rights regimes function. The third section examines the use, and threatened use, of exit clauses in regional human rights regimes, arguing that these instances represent either the limits of organisational authority or the breakdown of socialisation underpinning a human rights regime. Where exit clauses are used by states to engage in a form of bargaining to maximise their interests, without actually withdrawing from a tribunal, this can undermine the authority of an organisation as a whole.

1. Exit clauses in regional human rights organisations

There are three regional human rights bodies which are important to assess in the context of exiting treaties – the Council of Europe (of which the European Court on Human Rights (ECtHR) is an integral part), the Inter-American Commission on Human Rights and the African Commission and Court (which are bodies under the auspices of the African Union (AU)) Out of the three human rights instruments which define the rights these bodies are empowered to protect, two contain exit clauses – the European Convention on Human Rights (ECHR) and American Convention on Human Rights (ACHR) – and one of them does not – the 1981 African Charter on Human and Peoples' Rights (ACHPR). What links all of these

[5] See Elizabeth Evatt 'Democratic People's Republic of Korea and the ICCPR: Denunciation as an Exercise of the Right of Self-Defence' (1999) 5 *Australian Journal of Human Rights* 251.

organisations in contrast to other regional human rights bodies such as the Association of South East Asian Nations Human Rights Commission, is that all three of them have tribunals, which have issued decisions by against member states. All three human rights regimes also allow a form of individual petition. These powers potentially interfere with a state's sovereign decision making and therefore are more likely to create incentives for a state to exit a regional human rights organisation.

1.1 The European Convention on Human Rights

Article 58 of the ECHR allows the Convention to be denounced by state parties, which then releases the state from its obligations under the Convention including the obligation to comply with judgments from the European Court of Human Rights (ECtHR). It however is only applicable five years after a state becomes a party and only comes into effect six months after notification of the denunciation to the Council of Europe. Furthermore Article 58(3) operates as a savings clause as it prevents a state from relinquishing their obligations under the Convention "in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective." [6] Although this proposition has never been tested there is an interesting interconnection between Article 58 and Article 6 of the Treaty on the European Union (TEU) that requires new applicant states to the EU to become party to the ECHR. Theoretically withdrawal from the ECHR and continued membership of the EU is possible as both remain separate treaties, but it would be in tension with provisions in the TEU requiring member states to respect the values of the EU.[7] The EU Justice Commissioner and the President of the Commission have both indicated that withdrawing from the ECHR would raise concerns "as regards the effective protection of fundamental rights."[8] In general terms the relatively high level of political and economic integration between states across Europe has helped to cement commitment to the ECHR.

The ECHR's Travaux Préparatoires show that Article 58 was considered in the Fifth Session of Ministers in early 1950 along with a number of other procedural measures. Some states were reluctant to include it but the United Kingdom saw Article 58 alongside Article 56 (the

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[6] *European Convention on Human Rights* 4 November 1950 213 UNTS 221 (entered into force 3 September 1953) Article 58(3).

[7] See *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union* 2007 Official Journal C 326 , 26/10/2012 P. 0001 – 0390, Article 2, 6 and 7

[8] Radoslav Milkov 'Withdrawal of a Contracting Party from the ECHR: Is it Possible and What are the Legal Consequences?' (2014) Available at SSRN <https://ssrn.com/abstract=2669220 >.

clause limiting the application of the ECHR to territories held under colonial rule by state parties to the Convention) as an important package of measures designed to limit the application of Convention.[9] Interestingly it was an early interstate case concerning the then British colony of Cyprus that first led the UK to consider denouncing the Convention.[10] Yet, the UK was to subsequently affirm the right of individual petition to the Commission, and maintain it even when faced with rulings against them arising from cases in Northern Ireland. The UK later supported the implementation of Protocol 11 in making the ECtHR's jurisdiction compulsory and abolished the Commission as a separate institution. Greece infamously withdrew from the Council of Europe – being the only state to date to take advantage of Article 58 after failing to reach a friendly settlement in a series of interstate cases involving torture and the deprivation of a right to fair trial following a *coup d'etat* in the country.[11] Yet Greece was to later apply to rejoin the Council of Europe after a change of government. In the early 1980s Turkey was faced with a similar situation following the installation of a military government but opted for a friendly resolution.[12]

1.2 The Inter-American Court of Human Rights

Although the Inter-American human rights system pre-dates the 1969 ACHR, the Convention is the instrument that is central to the operation of the Commission and the Court.[13] Article 78 is a denunciation clause shaped in a similar fashion to Article 58 of the ECHR by operating as a savings clause. The Travaux Préparatoires, the record of the 1969 Inter-American Conference on Human Rights, detail that the drafters of the Convention were concerned that states would use the denunciation provisions to escape their overall rights obligations.[14] Unlike the ECtHR, which now has compulsory jurisdiction, the Inter American Court of Human Rights (IACtHR) has a more complex system – the Inter American Commission of Human Rights can refer cases to the Court, or states can accept the jurisdiction of the Court. In 1999 when Peru tried to withdraw from the jurisdiction of the Court but remain in the Convention the Court held that the only option for Peru was to renounce the Convention as a

[9] *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights Vol.5* (Martinus Nijhoff 1975).
[10] See *Greece v United Kingdom* (II) (1957) App no. 299/57.
[11] *Denmark, Norway, Sweden and the Netherlands v Greece* (1970) App no. 3321/67, 3322/67, 3323/67.
[12] Ralph Beddard *Human Rights and Europe* (Cambridge University Press 1993) 8-9.
[13] Cristiane Lucena Carneiro and Simone Wegman 'Institutional complexity in the Inter-American Human Rights System: an investigation of the prohibition of torture' *International Journal of Human Rights* (published online 28 Feb 2017) < https://doi.org/10.1080/13642987.2017.1290322 >.
[14] Organisation of the American States 'Documents of the 1969 Inter-American Conference on Human Rights (Travaux préparatoires)' OEA/Ser.K/XVI/1.2 7-22 November 1969.

whole.[15] Peru had been one of the earliest states to deposit a declaration for the Court's contentious jurisdiction and made its attempted withdrawal six weeks after proceedings had been commenced against it, clearly was attempting exactly what the drafters of the ACHR had feared that a denunciation clause would be used for. Withdrawals, or threatened withdrawals, from Caribbean states in the late 1990s were all initiated by the specific issue of the death penalty and the ability of individuals on death row to access the Court. This is discussed in more depth in section 3 below but it is important to note that following the initial withdrawal of Trinidad and Tobago there was no real sign of a wider exodus of states.

Other denunciations of the ACHR have not followed any discernible pattern. Venezuela's withdrawal from the Court's jurisdiction in 2012 was driven by the growing concern that activists from opposition political parties could utilise the Court with the government criticising the IACtHR for engaging in "political manipulation".[16] When the Dominican Republic withdrew from the ACHR it was notionally over a technical dispute about the interpretation of constitutional law. However, the background to the dispute concerned whether individuals who were ethnically of Haitian descent were entitled to Dominican citizenship, which was a politically controversial issue, and the Dominican courts had resisted implementing several IACtHR judgments.[17] Some have attempted to frame the backlash and withdrawals from IACtHR in the context of the Court and Commission's complex evolution of powers. For instance Gerald Neuman argued that it was issuing rulings that risked becoming "too divorced from the consensual aspect" of a regional human rights organization and absent "strategic institutional design" there was a risk that the broader legitimacy of the IACtHR would be undermined.[18] Scholars of the Court have observed that it acquired its legitimacy progressively, in part through assisting some countries with transitional justice initiatives following the collapse of military dictatorships in the 1980s and 1990s.[19] Through a constructivist lens there are two ways of understanding these development; states incentives changed as they moved away from dictatorial models of governance, and therefore came to value the Court as an institution. Equally it could be argued the Commission and the Court's institutional authority was to an extent contingent on the IACtHR's performance. Both

[15] *Ivcher-Bronstein v. Peru* Judgement of Sept. 24, 1999, Inter-Am. Ct. H.R. 355.
[16] Rachel Boothroyd 'Chavez Announces "Immediate" Withdrawal from Inter-American Court of Human Rights' *Venezuelanalysis.com* (26 July 2012) <http://venezuelanalysis.com/news/7131>
[17] Addison Morris 'Dominican Republic leaves Inter-American Court of Human Rights' *Jurist* (6 November 2014) <http://jurist.org/paperchase/2014/11/dominican-republic-leaves-inter-american-court-of-human-rights.php >
[18] Gerald Neuman 'Import, Export and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 *European Journal of International Law* 101, 123.
[19] Tom Farer 'The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox' (1997) 19 *Human Rights Quarterly* 510.

explanations serve to highlight how distinct the ECtHR's political legitimacy, which was often linked to common historical factors and European integration, is from the IACtHR.

1.3 The African Charter on Human and Peoples' Rights

There are no formal mechanisms to withdraw from the African Commission on Human and Peoples' Rights and it is not mentioned anywhere in its rules of procedure or in the ACHPR. The African Court Protocol to the ACHPR contains a clause that requires states to file a declaration stating that they are willing to allow petitions from individuals within their jurisdiction.[20] It is also open for states to withdraw these declarations although this has only been used by one state to date and its relative underuse is in part a reflection of the fact that so few states made such declarations in the first place.[21] Explaining why there is no withdrawal clause in the ACHPR is not easy in part because no official Travaux Préparatoires of the Charter exist, although Bertrand Ramcharan has managed to publish a number of documents from the UN sponsored Monrovia Conference in July 1979.[22] These show that proposals for a Commission with broad powers formed part of early discussions about the Charter but these were then watered down considerably in its final draft.[23] This led to some considerable criticism from early writers on the African human rights system who claimed that it prioritised the interest of states over the protection of human rights.[24] The debate over clawback clauses – a feature of the substantive provisions within the Charter which allows states to define, implement and apply rights "in a manner that may deprive [them] of any real substance" – seems to support this argument as such clauses allow states a far larger margin of appreciation than is possible under other regional instruments.[25] Yet there were other features of the Charter that seemed to pull in the opposite direction - for example the absence of a derogation clause from the Charter is often attributed to the fear that states would abuse

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[20] 1998 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, Art 34(6).

[21] For a background see IJRC 'Rwanda Withdraws access to African court for Indviduals and NGOs' *International Justice Resource Centre* (14 March 2016) <http://www.ijrcenter.org/2016/03/14/rwanda-withdraws-access-to-african-court-for-individuals-and-ngos/ >.

[22] Bertrand Ramcharan 'The Travaux Préparatoires of the African Commission on Human Rights' (1992) 13 *Human Rights Law Journal* 307.

[23] See also Frans Viljoen 'The African Charter on Human and Peoples Rights: The Travaux Préparatoires in the Light of Subsequent Practice' (2004) 25 *Human Rights Law Journal* 316, 318.

[24] See U Umozurike, 'The Protection of Human Rights under The Banjul (African) Charter on Human and Peoples' Rights' (1988) 1 *African Journal of International Law* 82; Kevin Mathews 'The OAU and Political Economy of Human Rights in Africa: An Analysis of the African Charter on Human and Peoples Rights' (1987) 34 *African Today* 85.

[25] Quote from Laurent Sermet 'The absence of a derogation clause from African Charter on Human and Peoples Rights: a critical discussion' (1992) 7 *African Human Rights Law Journal* 142; Viljoen 'Admissibility under the African Charter' From Evans and Murray (eds.) *The African Charter on Human and Peoples Rights: The System in Practice 1986-2006* (Cambridge University Press 2nd ed. 2006) 72.

emergency powers and restrict human rights.[26] It is not clear why there is no exit clause in the Charter and there is no real scholarly explanation of the absence of an exit clause, but this may well have been a combination of caution at the potential use of an exit clause and another example of the relatively underdeveloped nature of the enforcement powers within the Charter itself.

It is also noteworthy that other treaties such as the African Charter on the Rights of the Child 1990 also contain no withdrawal clause. The only instrument in the African human rights system containing a withdrawal clause is the 2009 Kampala Convention on Internally Displaced Persons, which requires reasons to be given for a denunciation to occur.[27] This would seem to indicate that the general principle contained in Article 56 of the Vienna Convention on the law of treaties – that denunciation is only possible where there is either an express provision allowing states to do so or the right is implied from the nature of the treaty – is applicable in the case of the ACHPR.[28] But no state has yet tried to renounce the Charter all together and put this point to the test. The relationship between the Commission and the African Union (AU) is more complex than the relationship between the ECHR and EU. The 2000 Constitutive Act of the Union AU states that the promotion of the Charter is one of its core objectives and the Commission is tasked with referring its Activity Report to the AU Assembly of Heads of State and Government, however this is not really an enforcement mechanism in any meaningful sense.[29] It is possible to withdraw from the AU and Morocco infamously quit its predecessor, the Organisation of African Unity, over its disputed territorial claims in Western Sahara.[30] Along with other Sub-Regional organisations in Africa, the AU has the power to expel member states, which has proved indirectly important in the promotion of human rights, albeit mostly in the specific (and often limited) set of circumstances where human rights violations arise after an unconstitutional transfer of power.[31]

2. Exit Clauses and the Socialisation of States in Regional Organisations

[26] Ibid Sermet – this is also reflected in the Commission's jurisprudence.
[27] See Gino Naldi and Konstantinos Magliveras 'Human Rights and the Denunciation of Treaties and Withdrawal from International Organisations' (2013) 33 *Polish Yearbook of International Law* 95, 103-105.
[28] *Vienna Convention on the Law of Treaties* 23 May 1969 1155 UNTS 331 27 January 1980 Art 56 (1).
[29] Omoleye Benson Olukayode 'Enforcement and Implementation Mechanisms of the African Human Rights Charter: A Critical Analysis' (2015) 40 *Journal of Law, Policy and Globalization* 47.
[30] For background see John Damis 'Morocco and the Western Sahara' (1990) 89 *Current History* 165.
[31] See Frederick Cowell 'Preventing coups in Africa: attempts at the protection of human rights and constitutions' (2011) 15 *The International Journal of Human Rights* 749.

Regional organisations often emerge as a reflection of the shared political conditions operating within the region and their legal structure can subsequently socialise states, leading them to internalise new norms or values.[32] There is a broader dispute among theorists of international organisations about whether rationalism or socialisation explains the process of membership and compliance with an organisation.[33] The rationalist school of thought broadly maintains that states approach international organisations instrumentally, seeking out gains from membership, and see compliance as a means of gaining distinct advantages for themselves. Socialisation stems from constructivist schools of thought and maintains that a state's interests are conditioned by adherence to value systems, which may be non-material in nature, and are to a large extent constructed by the environment around them.[34]. Socialisation, and the theory of constructivism in international law, has sometimes been criticised for diluting down the role of obligation in international law or representing an unrealistic portrayal of the interactions that alter states' behaviour.[35] In practice state socialisation within a regional organisation is often subject to a variety of social factors, such as the relative political integration of states outside of that organisation, which can lead states to engage in different forms of strategic calculation about their behaviour, making the picture more complex than the sharp divide between rationalism and socialisation might suggest.[36]

Yet when it comes to human rights organisations there is little evidence that rationalist incentives, such as material gain, are particularly relevant in explaining either why states commit to them and then subsequently comply with them, seemingly casting doubt on strictly rationalist explanations.[37] Also in the precise context of regional organisations, socialisation can help explain not only why states become members of an organisation but also, in the specific context of exit clauses, why states are disincentivized from leaving an organisation. Regional human rights organisations are, as Kenneth Abbott and Duncan Snidal note, the

[32] See Jeffery Checkle 'International Institutions and Socialization in Europe: Introduction and Framework' (2005) 59 *International Organization* 801.
[33] For indicative examples see Frank Schimmelfennig 'International Socialization in the New Europe: Rational Action in an Institutional Environment' (2000) 6 *European Journal of International Relations* 109; Jeffery Checkel 'International norms and domestic politics: Bridging the rationalist—Constructivist divide' (1997) 4 *European Journal of international relations* 473.
[34] Jutta Brunnée and Stephen J. Toope. "International law and constructivism: elements of an interactional theory of international law' (2000) 39 *Columbia Journal of Transnational Law* 19.
[35] This argument can be found in criticism of constructivism more generally David Roth-Isigkeit 'The blinkered discipline?: Martti Koskenniemi and interdisciplinary approaches to international law' (2017) 9 *International Theory* 410; See also, Tomer Broude "Behavioral international law' (2014) 163 *University of Pennsylvania Law Review* 1099.
[36] Checkel 'International Institutions and Socialization in Europe: Introduction and Framework' (2005) 54 *International Organization* 801.
[37] See Emilie Hafner-Burton, Edward Mansfield and Jon Pevehouse 'Human Rights Institutions, Sovereignty Costs and Democratization' (2015) 45 *British Journal of Political Science* 1; Richard Nielsen and Beth Simmons 'Rewards for Ratification: Payoffs for Participating in the International Human Rights Regime?' (2015) 59 *International Studies Quarterly* 197.

type of organisation specifically established "to act as a representative or embodiment of states" and their values, which means that as organisations they are intending to construct value systems.[38] Their socialisation function is about encouraging and maintaining shared human rights standards and protecting human rights within a regional community of states. This involves their tribunals making findings against member states in response to complaints about human rights violations in a way that is often contested by states. To unpack how exit clauses within a regional human rights instrument interact with organisational socialisation it is first necessary to give a brief overview of socialisation theory before analysing the role of exit clauses in this process.

2.1 Commitment, compliance and the role of socialisation in regional human rights organisations

To fully understand socialisation in the context of states remaining within an organisation it is necessary to differentiate between the politics of commitment and the politics of compliance to a regional human rights organisation. Commitment to a regional organisation describes the process of becoming a member via the ratification of its constituent treaty and involves conferring on the organisation certain powers that the state would normally possess. Even though in the case of regional human rights tribunals their powers are often quite limited, the capacity of a tribunal to provide final and authoritative adjudication on particular rights claims is nevertheless a form of conferral.[39] Although the scope of this delegation is often contested by states, who argue about the relative powers of a regional human rights organisation and what the appropriate jurisdiction of a court or tribunal actually is, there is no escaping from the fact that membership of an organisation involves a degree of delegation. An important aspect of delegation is, as Dan Saroorshi notes, that the delegating authority (in this case the state) always retains the power to revoke the said delegation.[40]

The political forces at the commitment stage are largely ideographic. Christian Reus-Smit describes ideographic politics as institutional arrangements that "permit the construction,

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[38] Kenneth W. Abbott and Duncan Snidal 'Why States Act through Formal International Organizations' (1998) 42 *The Journal of Conflict Resolution* 3, 15-16.
[39] Jaanika Erne 'Conferral of Powers by States as a Basis of Obligation of International Organisations' (2009) 78 *Nordic Journal of International Law* 177.
[40] Dan Sarooshi, *The United Nations and the Development of Collective Security* (Clarendon Press, 1999) 5.

stabilization and demonstration of social identities".[41] This sort of political shared interest between states was present at the creation of the ECHR, where there was a strong desire amongst states in the Council of Europe to protect against totalitarianism in the aftermath of World War Two.[42] Some states saw membership of the Council of Europe and signing up to the ECHR as a means of 'locking in' democratic institutions and human rights. This reasoning applied both to states in Western Europe in the early 1950s, who sought to lock in democracy as a defence against a totalitarian take-over from either fascism or communism, but also to states in Eastern Europe in the 1990s, who saw the ECHR as a means of helping facilitate their post-soviet transition.[43] Under a strictly rationalist conception of institutional politics, Reus-Smit notes, there is a lack of understanding about how institutions develop and why states feel that there is a broad psychological and social obligation upon them to enter into a regime.[44] Ideographic political forces create reputation, or self-identification reasons – such as in the case of the ECHR the desire to appear a 'European' state – alongside more directly transactional reasons to commit to a regional human rights treaty.[45]

Notionally after the legal process of commitment the law surrounding compliance with a treaty, which in the case of a regional human rights treaty binds states to implement its provisions and follow the decisions of its tribunals, provides the authority for that tribunal to issue decisions against states.[46] Yet, the act of commitment does not necessarily account for the ongoing authority of a tribunal, especially when it has the capacity to issue far-reaching judgments and decisions against states with which they are then bound to comply.[47] The literature in this area has highlighted the difference between the politics of socialisation in terms of commitment and compliance.[48] In terms of compliance it is important to see socialisation in terms of an ongoing process of acculturation of the state within an institution.[49] This sees the authority of institutions being built up over time, with compliance with low cost decisions of a tribunal, positive acknowledgement from other states for ongoing

[41] Christian Reus-Smit 'Politics and International Legal Obligation' (2003) 9 *European Journal of International Relations* 591, 610.
[42] Ed Bates *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press 2010) 96-105.
[43] Andrew Moravcsik 'The origins of human rights regimes: Democratic delegation in postwar Europe' (2000) 54 *International Organization* 217.
[44] Reus-Smit (n 41).
[45] This is outlined in Hafner-Burton et.al (n 37) 10.
[46] Çalı describes this as the 'standard view' in Başak Çalı 'The Disciplinary Account of the Authority of International Law: Does It Stand Firm against Its External Critics?' (2016) 5 *ESIL Reflections* 1.
[47] Mattias Kumm, 'The legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *European Journal of International Law* 907, 914.
[48] For an example see Xinyuan Dai, 'The "compliance gap" and efficacy of international human rights institutions' in Tomas Risse, Ropp and Sikkink (n 4) 85.
[49] Goodman and Jinks (n 4) 25-35.

participation and the impact of tribunal decisions on domestic politics, all working in tandem to encourage compliance with a tribunal's decisions. Rather than ideational political forces this is closer to acculturation – the process of a state's incentives changing over time as a result of socialisation as an organisational member and its behaviour altering as a consequence, in terms of both norm adherence and in respecting the legal authority of the institution.[50] Other models of human rights compliance – such as the spiral model developed by Thomas Risse, Stephen Ropp and Kathryn Sikkink – also situates human rights regimes as actors in a cycle of change that alter a state's incentives.[51]

The notion of socialisation leading to compliance has been explored in a couple of influential studies comparing the ECtHR and the IACtHR. Courtney Hillebrecht noted in her study of IACtHR that many states in South America were keen to commit to the Convention, in order to lock in the results of the democratic transfer they made from military dictatorship in the 1980s.[52] Subsequent compliance with judgments that went against state parties, Hillebrecht argued, was in part achieved by an alignment of civil society and other actors with the rulings of the IACtHR. Hillebrecht demonstrates how in a number of high profile cases in Argentina and Brazil activists, as a result of civil society mobilisation, ensured that the government eventually complied with judgments.[53] With a compliance rate of around 60% in relation to contentious decisions the Court is less successful than the ECtHR at achieving compliance, but this is nevertheless indicative of an overall normative expectation towards compliance with IACtHR decisions.[54] Socialisation within the framework created by the Council of Europe through the ECHR occurred against the background of a much wider pattern of European integration at the economic and social level, with other supranational organisations also exercising pressure towards compliance.[55]

2.2 Understanding the role of exit clauses in state socialisation

The function of exit clauses is relatively obvious regarding incentives to commit to human rights regimes; they provide a mechanism that allows a state to depart from a human rights

[50] Goodman and Jinks 'How to influence states: Socialization and international human rights law' (2004) 54 *Duke Law Journal* 621.
[51] Risse, Ropp and Sikkink (n 4).
[52] Courtney Hillebrecht *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (Cambridge University Press 2014) 41-52.
[53] Ibid.
[54] Alexandra Huneeus 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 *Cornel International Law Journal* 493.
[55] Jack Goldsmith and Eric A Posner *The Limits of International Law* (Oxford University Press, 2nd ed. 2007) 112-115; Andrew Moravcsik "Explaining international human rights regimes: Liberal theory and Western Europe." (1995) 1 *European Journal of International Relations* 157.

instrument.[56] This works in tandem with other features incentivising commitment, such as ideographic politics, in order to create a set of incentives to encourage states to engage in the act of delegation. Whilst the actual practicalities of exiting any organisation may sometimes be unrealistic because of the high cost to the state in material or political terms, an exit clause opens the possibility of withdrawal.[57] The discussion of withdrawal clauses during the creation of the ECHR and the ACHR to an extent presupposed the existence of an adjudicative body, from which states would wish to have some mechanism to exit. The absence of a withdrawal clause can therefore be read as reflecting that a sovereignty trade-off of this sort was not anticipated by state parties in the process of regime design. For example, the African Commission's interpretative and adjudicative capacity in relation to individual communications was developed at its Third Session when the Commission interpreting its mandate from the text of the ACHPR.[58] It is unclear from the discussion at the time of its drafting what the scope of the Commission's powers to receive individual petitions actually was, but this was arguably a feature of the institution's design. Bina Okere makes this point in her comparative study of the ECHR and ACHR, noting that in contrast the ACHPR reflected the fact that African states were in the early 1980s "still jealous of their newly acquired national sovereignty" and were unwilling to envisage an "international judicial organ [for] the arbitration of human rights questions."[59] Nearly two decades later during the preliminary discussions on the development of the Protocol to the Charter for an African Court of Human and Peoples Rights some states strongly advocated mechanisms that would either weaken their powers or limit individual communications.[60] This explains why the Court has a large number of parties to it but so few states have entered a declaration under Article 34 allowing individual petition – the requirement to make a declaration to allow individual petition (which can be withdrawn) substituted for a withdrawal clause as a mechanism allowing states to ensure the protection of their sovereignty. Socialisation in the case of the ACHPR wider African system reflected the distinct history and culture of the region, where after decolonisation regional frameworks were often shaped by a defensive attitude towards state sovereignty.

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[56] Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal 'The Concept of Legalization' (2000) 54 International Organization 401, 411-412.
[57] Armin von Bogdandy and Ingo Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification' (2012) 23 *European Journal of International Law* 7, 21.
[58] Rachel Murray *The African Commission on Human and People's Rights and International Law* (Oxford University Press 2000) 17-19.
[59] Okere (n.2).
[60] Gina Bekker 'The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States' (2007) 51 *Journal of African Law* 151.

Exit clauses also help entrench a tribunal's rules and encourage rule of law type behaviour within states subject to its jurisdiction. 'Rule of law type behaviour' describes how states, that may already be compliant with international law more generally, or are inclined towards compliance, act as though the decisions of a tribunal bind them.[61] An expectation of compliance thus becomes the default mode of engagement and aggressive non-compliance from states or threats of withdrawal are limited. An exit clause, alongside suspension clauses and other clauses detailing the expectation of compliance, all underpin rule of law type behaviour by legally defining non-compliant states, outside of the general treaty framework and beyond socialisation. Oona Hathaway and Scott Shapiro argue that the out-casting of states for non-compliance with international law puts negative costs on their reputation and therefore encourages compliance with international law.[62] It is often a complex mix of reputational concerns and socialised expectations that encourage compliance and what suspension or enforcement clauses aim to do is create a juridical format for this process.[63] An exit clause allows states to leave of their own volition, which is different from out-casting, but related in that there is still a reputational cost attached to leaving a regional human rights organisation. A state considering activating an exit clause would be placed in the position of making a calculation about the reputation cost of leaving versus the costs of remaining a member – such as complying or justifying non-compliance with a set of decisions which are politically difficult.[64] Strategic calculations about the costs and benefits of remaining party to a regional agreement therefore have to be made within a treaty's framework. As both the ECHR and the ACHR impose savings clauses, meaning that states cannot legally abandon their obligations under the Convention, states are not free to exit these instruments to continue human rights abuses. Therefore, exit clauses play a function in socialisation by both acting along with other provisions to define reputation costs and creating a regime of legal constraints on a state that wishes to exit an organisation.

3. The use of exit clauses and their impact upon socialisation

The preceding section analysed how the presence (or absence) of an exit clause in an instrument reflected the natures of socialisation with respect to both commitment and

[61] See Emilia Justyna Powell, 'Two Courts Two Roads: Domestic Rule of Law and Legitimacy of International Courts' (2013) 9 *Foreign Policy Analysis* 349.
[62] Oona Hathaway and Scott Shapiro 'Outcasting: enforcement in domestic and international law' (2011) 121 *Yale Law Journal* 252.
[63] For an explanation of this theory see Frank Schimmelfennig 'Strategic Calculation and International Socialization: Membership Incentives, Party Constellations, and Sustained Compliance in Central and Eastern Europe' (2005) 59 *International Organization* 857.
[64] Rachel Brewster 'Unpacking the State's Reputation' (2009) 50 Harvard International Law Journal 232, 247-250.

compliance behind a particular instrument. That however does not capture how an exit clause is actually used by state parties, both in terms of activating it and in terms of the political discourse around its activation, which in turn affects the nature of regional socialisation. Based on current practices, the use of exit clauses can be grouped under three main headings.

3.1 *Threats of exit as leverage for organisational change*

The threat to use an exit clause can be made to alter the regime substantively or at least the expectations surrounding it in order to exact meaningful benefits for the state in question – a process that Laurence Helfer terms a coordination game.[65] As Lisa Martin argues, this is not necessarily a violation of the treaty in legal terms, but rather an indication of a state's future preferences in an attempt at leveraging the creation of a more favourable regime inside or outside that treaty's framework.[66] An example of this strategy is the discussion in the UK of a democratic override to the ECtHR. The implementation of the judgment in *Hirst v UK (No.2),* where the ECHR ruled that the blanket ban on prisoners voting was a disproportionate restriction of the right to participate in elections, proved highly unpopular and after delaying implementing the decision for as long as possible a debate was held in the UK Parliament, who finally rejected complying with the decision.[67] This led some critics of the ECtHR to suggest that, whilst it held the presidency of the Council of Europe, the UK should campaign for a democratic override – a mechanism where a legislature could vote down, or vote against the implementation of a particular ECtHR judgment.[68] If this was unsuccessful, they argued, the UK should exercise Article 58 and leave the Convention. Discussions such as these were referred to when the Russian Duma debated a law that was designed to heavily weaken the authority of the ECHR by holding that the decisions of the Russian Supreme Court took precedence over decisions of the ECtHR.[69] The Russian government accompanied these measures with a series of threats about withdrawal from the ECHR, effectively engaging in its own form of unilateral bargaining.[70]

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[65] Laurence Helfer 'Exiting Treaties' (2005) 91 *Virginia Law Review* 1579 1634.
[66] Lisa Martin 'The Rational States Choice of Multilateralism' in John Gerrard Ruggie (ed.) *Multilateralism Matters: The Theory and Praxis of an Institutional Form* (Columbia University Press 1993) 102
[67] Danny Nicol 'Legitimacy of the Commons debate on prisoner voting' (2011) *Public Law* 682.
[68] Michael Pinto-Duschinsky 'Commission must not compromise by recommending bill identical to HRA' *The Guardian* online (13 March 2012)< https://www.theguardian.com/law/2012/mar/13/bill-of-rights-commission-compromise-hra >
[69] Bill Bowring 'The Russian federation and the Strasbourg Court: The Illegitimacy of Sovereignty' in edited by Katja Ziegler, Elizabeth Wicks, Loveday Hodson (eds.) *The UK and European Human Rights: A Strained Relationship?* (Bloomsbury Publishing 2015) 415.
[70] Andrew Griffin 'Russia could withdraw from European Convention on Human Rights, state news agency RIA reports' *The Independent* online (1 March 2018)
< https://www.independent.co.uk/news/world/europe/russia-echr-human-rights-european-convention-putin-kremlin-eu-a8234086.html >

When states bargain in this manner what they are trying to do is engage in what Reus-Smit describes as "purposive politics", where they construct institutions to "enable the negotiation and stabilization of [their] collective preferences".[71] This can undermine the ideographic politics, which caused the alignment of interests underpinning the socialisation of states at the commitment stage, by incentivising states to move towards the acknowledgement of their own self-interest in their approach to an institution. The discussions around the Copenhagen Declaration illustrate how this has permeated into state behaviour even in situations where there are minimal threats of withdrawal. Denmark assumed the presidency of the Council of Europe in November 2017 in the midst of an on-going domestic political controversy surrounding domestic court decisions over the deportation of foreign nationals, in part due to their ECHR obligations, which had led to some domestic political actors calling for far reaching reforms of the ECHR and in extreme cases withdrawal.[72] The Declaration put forward a set of proposals for ECtHR reform, including a new doctrine of subsidiarity, which was heavily state centric and recommended that the Court should "avoid intervening" in asylum and immigration matters "except in the most exceptional circumstances."[73] As commentators noted, such deference would seriously undermine the ECtHR's ability to protect human rights and marked a departure from the existing process for reform of the Court.[74] Coordination games utilising an exit clause encourage behaviour from states that can undermine rather than strengthen the relative authority of a human rights tribunal because the ideographic politics encouraging commitment are replaced with a more rationalist evaluation of the relative gains states can make through membership of a human rights organisation.

3.2 Non-compliance and threats of exit

All human rights institutions suffer from some form of non-compliance, but in extreme circumstances this can morph into outright hostility or backlash, where a state withdraws from a treaty altogether. This can occur due to a decline of a tribunal's normative authority – its capacity to issue decisions on human rights matters which are broadly respected and complied with by member states. As Shai Dothan notes, one of the reasons that the ECtHR is

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[71] Christian Reus-Smit 'Politics and International Legal Obligation' (2003) 9 *European Journal of International Relations* 591, 610.
[72] Jacques Hartmann 'A Danish Crusade for the Reform of the European Court of Human Rights' *EJIL Talk* (14 November 2017) < https://www.ejiltalk.org/a-danish-crusade-for-the-reform-of-the-european-court-of-human-rights/ >
[73] Danish Institute of Human Rights *Draft Copenhagen Declaration* 5 February 2018 < https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/nyheder/draft_copenhagen_declaration_05.02.18.pdf >
[74] Alice Donald and Phillip Leach 'A Wolf in Sheep's Clothing: Why the Draft Copenhagen Declaration Must be Rewritten' *EJIL Talk* (21 February 2018) < https://www.ejiltalk.org/a-wolf-in-sheeps-clothing-why-the-draft-copenhagen-declaration-must-be-rewritten/ >

able to achieve a relatively high rate of compliance is that its reputation has been enhanced by its longevity and consistency, which gives it the freedom to issue relatively costly judgments upon state parties.[75] Yet, this is not an unlimited reservoir of authority and, as Alter, Helfer and Madsen argue, the authority of a given tribunal will in many ways depend on its audience – the states who are under its jurisdiction due to organisational membership, or who have consented to be under a tribunal's authority.[76] Alter, Helfer and Madsen differentiate between legal authority, represented by the formal delegation of authority by an international instrument, and factual authority, the political expectation that compliance with an institution is necessary.[77] Although a tribunal can maintain its legal authority, by virtue of the legal obligations in its constituent treaty, its factual authority may decline due to the way that states react to an institution and if they seek to use exit clauses for tactical political advantage.

As a former judge of the ECtHR noted, as long as the Court has existed there have been critics who argue that the Court has been going too far it its interpretations of the ECHR or that its judgments lack legitimacy.[78] He went onto observe that in the late 2000s a combination of fear over terrorism and increasing "Euro-phobia" in the wake of the financial crisis began to generate hostility towards the Court.[79] Reactions to cases such as *Lautsi v Italy*, where at first instance the ECtHR held that the Italian practice of displaying a crucifix in all school classrooms was incompatible with the right to freedom of religion, led to concerted civil society campaigns in Italy in favour of leaving the ECHR.[80] One of the most significant examples of this occurred following the *Ilias and Ahmed v Hungary* case, where two asylum seekers successfully claimed that Hungary's detention policy for refugees violated their rights under Article 3 and 5 of the ECHR.[81] Less than a week after the judgment, leading figures in the governing Fidesz party issued a warning that they would

[75] Shai Dothan 'Judicial Tactics in the European Court of Human Rights' (2011) 12 *Chicago Journal of International Law* 115.
[76] Karen Alter, Helfer Laurence, and Mikael Madsen. 'How context shapes the authority of international courts' (2016) 76 *Law & Contemporary Problems* 1.
[77] Ibid.
[78] Egbert Myjer 'Why much of the criticism of the European Court of Human Rights is Unfounded' from Spyridon Flogatis, Tom Zwart and Julie Fraser *The European Court of Human Rights and Its Discontents: Turning Criticism into Strength* (Edward Elgar 2013) 40-41.
[79] Ibid..
[80] Susanna Mancini 'The crucifix rage: supranational constitutionalism bumps against the counter-majoritarian difficulty' (2010) 6 *European Constitutional Law Review* 6.
[81] *Ilias and Ahmed v Hungary* [2017] ECHR 255.

have to review their obligations under the treaty and would consider leaving the Court all together.[82]

Unlike the leverage described above, threats of exit in this scenario are not being used to reconstruct or create new legal obligations, but to undermine existing ones. Institutional socialisation requires a clear delineation between states with the required characteristics – in this case compliance with a human rights tribunal - or states that are willing to acquire those characteristics. Where this demarcation becomes blurred what Trine Flockhart describes as the "self-other identification" process of differentiating between different types of states breaks down.[83] 'Self-other' identification, or more precisely a state's desire to not become 'outcasted' from a regional organisation, is essential to the legal framework of a tribunal as it provides one of the main socialised underpinning to compliance clauses.[84] Threatening exit whilst maintaining non-compliance undermines this process entirely as the meaningful sanction for non-compliance - institutional suspension – is rendered moot by a state's overt willingness to consider leaving, even if that overt willingness marks a covert preference of continued membership, whilst not complying with a particular decision of a tribunal. A category of bespoke organisational membership is thus engineered by default, as a state is allowed to engage in 'a la carte' compliance, where they choose which decisions of tribunal to comply with as if ordering off a menu, which in turn weakens the overall authority of the tribunal.[85]

A related problem can occur if a state is able to use an exit clause as a way of counteracting on-going proceedings against them. Rwanda withdrew its declaration allowing individual petition to the African Court of Human and Peoples' Rights as the judgment in the case of *Ingabire v Rwanda* was pending.[86] Although this did not affect the Court's ability to hear the matter and find against Rwanda for its disproportionate punishment of the applicant under the country's genocide ideology laws, the nature and timing of the withdrawal would, as Tom Daly and Micha Wiebusch note, likely encourage other states to contemplate a similar course

[82] The Hungarian Government's Flouting of European Law and Human Rights (Hungarian Spectrum 28 March 2017) < http://hungarianspectrum.org/2017/03/28/the-hungarian-governments-flouting-of-european-law-and-human-rights/>
[83] Trine Flockhart ''Complex Socialization': A Framework for the Study of State Socialization' (2006) 12 *European Journal of International Relations* 89, 95.
[84] Hathaway and Shapiro (n 62).
[85] Darren Hawkins and Wade Jacoby 'Partial Compliance: a comparison of the European and Inter-American Courts for Human Rights' (2010) 6 *Journal of International Law and International Relations* 35.
[86] International Justice Resource Centre 'African Court holds Rwanda violated Victorie Ingabire's Freedom of Expression' IJRC Blog (12 December 2017) <http://www.ijrcenter.org/2017/12/12/african-court-holds-rwanda-violated-victoire-ingabires-freedom-of-expression/#gsc.tab=0>.

of action if a case is going against them.[87] The fact so few states entered a declaration allowing individual petition in the first place meant that there was a limited social expectation for states that were party to the African Charter to make such a commitment, in turn making it relatively easy for states to simply withdraw their declaration. This context meant that the model of outcasting, outlined above, was not really applicable in this case.

3.3 *Exodus Effects: why a state leaving harms the organisation as a whole*

Each state activating, or threatening to activate, a withdrawal clause ostensibly does so for individual reasons, but given the nature of socialisation at both the commitment and the compliance stage an individual act of withdrawal has a wider impact on the process of socialisation. Given that states often do not wish to comply with decisions that go against them and are incentivised, according to acculturation theorists, to comply because of the creation of an expectation in favour of compliance, a state departing from an institutional framework weakens that overall expectation.[88] The broader problem faced by regional bodies is that an individual exercise of an exit clause could precipitate a much larger exodus effect where a number of states simultaneously leave an organisation affecting the underlying socialisation at the commitment stage.

The closest example of this is the withdrawal and threatened withdrawal of Caribbean states from the IACtHR over the death penalty. In 1997, following a decision of the Privy Council in London, 28 citizens of Trinidad and Tobago petitioned the Commission over their length of time on death row and the IACtHR ordered that interim measures be put in place for individuals on death row.[89] In response the government of Trinidad and Tobago withdrew from the ACHR alltogether, justifying its actions politically by claiming that death row inmates were "abusing" their rights by appealing to supranational courts, such as the IACtHR.[90] At an Organization of American States (OAS) summit in 1998 other governments from the Caribbean threatened to withdraw from the Court in solidarity with the Trinidadian government and human rights NGOs worried that this would undermine the rule of law more generally in the region.[91] This came alongside other denunciations of Optional Protocol One

[87] Tom Gerald Daly and Micha Wiebusch 'The African Court on Human and Peoples' Rights: Mapping Resistance Against a Young Court' (2018) 14 *International Journal of Law in Context* 200.
[88] Goodman and Jinks (n 50).
[89] Laurence Helfer, 'Over legalizing human rights: International relations theory and the Commonwealth Caribbean backlash against human rights regimes' (2002) *Columbia Law Review* 1832.
[90] Estrella Gutiérrez 'Trinidad and Tobago Stands Up to OAS' *Inter Press Service News Agency* (Online) 4 June 1998 <http://www.ipsnews.net/1998/06/rights-americas-trinidad-and-tobago-stands-up-to-oas/ >.
[91] Amnesty International, *Amnesty International Report 1999 - Trinidad and Tobago* (1 January 1999) <http://www.refworld.org/docid/3ae6aa0984.html>.

to the International Covenant on Civil and Political Rights (ICCPR) from Jamaica and Guyana, which were designed to prevent access to the Human Rights Committee (HRC) for convicts on death row.[92] At a 1999 Caribbean Community (Caricom) summit nine Caribbean states approved the establishment of the Caribbean Court of Justice.[93] This was in part intended to be a sub-regional tribunal for criminal appeals and there was a strong presumption the court was created in part to accommodate these states' particular preferences for the death penalty.

Helfer's landmark article on the case concluded that "overlegalization" had altered the implicit bargains that had led to treaty commitment in the first place.[94] In this case a relatively tiny minority who were seen to benefit from membership of IACtHR, namely convicted criminals, were so politically toxic that this undermined the overall social authority of the organisation as a whole.[95] The exodus of states, which ended up being more limited than initially anticipated, was however less a result of the legalisation of the institution in an abstract sense and more to do with socialisation. As outlined above, in contrast to the ECHR, the Court gained its legitimacy less through a larger founding ideational argument at the commitment stage, but rather over time was able to establish legitimacy through its decisions in particular areas. This meant that in places its social authority required the results of a particular case to be accepted as legitimate in order to cement its authority as an institution, making its legitimacy content dependent, rather than possessing a form of ideational political identity as the basis of its social authority, which can allow an institution to generate content independent legitimacy.[96] An exodus effect is largely dependent on the specific political circumstances of an individual exit, and thus the general overall conclusions that can be extrapolated from any one example are limited. Yet, what is important to note is that the different socialised underpinnings of a human rights body can be a factor in determining whether a broader incentive to leave is created by one state using an exit clause..

Conclusion

[92] See Natasha Parassram Concepcion 'The Legal Implications of Trinidad & Tobago's Withdrawal from the American Convention on Human Rights' (2000) 16 *American University International Law Review* 847.
[93] Glenn McGrory 'Reservations of Virtue? Lessons from Trinidad and Tobago's Reservation to the First Optional Protocol' (2001) 21 *Human Rights Quarterly* 769.
[94] Helfer (n 88) 1907-1910.
[95] Ibid.
[96] Stephen Wheatley 'On the legitimate authority of international human rights bodies' from Andreas Føllesdal, Johan Karlsson Schaffer and Geir Ulfstein (eds.) *The legitimacy of International Human Rights Regimes: Legal, Political Philosophical Perspectives* (Cambridge University Press 2014) 81.

Because human rights organisations often attempt to attract new members, as part of their mission of promoting human rights, exit clauses and the effect of exit clauses seemingly compromise this mission. The range of behaviour that they can facilitate, such as leveraging tactical concessions to suit an individual state's self-interest, can directly undermine the social authority of an organisation's tribunal. As the Council of Europe's Commissioner for Human Rights, Nils Muižnieks, warned in 2016 the 'direct challenges to the authority of the Court [ECtHR] within a handful of member states' were contributing to weakening the rule of law in the Convention system.[97] Threats of exit from both the UK and Russia were playing a crucial part in this process. But it is crucial to note that it is not the presence of exit clauses themselves that encourages states to act in this manner. The experience of the African Human Rights system demonstrates the absence of formal exit clauses can still encourage states to find ways around the authority of tribunals or utilise other mechanisms, as was the case with declarations allowing individual petition to the African Court of Human and Peoples' Rights, that operate in a manner similar to withdrawal clauses.[98]

It is the weakening or absence of ideational politics, rather than the presence of an exit clause in a regional human rights instrument, which is the major driver behind this type of state behaviour. Socialisation built on ideational political factors allows greater room for the content independent authority of a tribunal to develop. Whilst an exit clause may serve as an initial spur to commitment it is this former factor that is the most important for locking in state compliance over the long term. Simply viewing a human rights instrument through the prism of legal obligations dilutes the importance of social factors in maintaining compliance with those obligations.[99] Exit clauses in regional human rights organisations, and the fact that so few states to date have utilised exit clauses, highlights just how important the factors beyond the black-letter law of a regional human rights instrument can be.

[97] Nils Muižnieks 'Non-implementation of the Court's judgments: our shared responsibility' 28 August 2016 *Council of Europe* <http://www.coe.int/en/web/commissioner/-/non-implementation-of-the-court-s-judgments-our-shared-responsibility >.

[98] For an examination of non-compliance in the African system see Murray and Elizabeth Mottershaw 'Mechanisms for the Implementation of the Decisions of the African Commission on Human and Peoples' Rights' (2014) 36 *Human Rights Quarterly* 349.

[99] This argument is made in Reus-Smit (n 41) 595.