



BIROn - Birkbeck Institutional Research Online

Bowring, Bill (2020) Russia and the European Convention (or Court) of Human Rights: the end? *Revue Québécoise de Droit International* 2020 (3), pp. 201-218. ISSN 0828-9999.

Downloaded from: <https://eprints.bbk.ac.uk/id/eprint/40951/>

Usage Guidelines:

Please refer to usage guidelines at <https://eprints.bbk.ac.uk/policies.html>
contact lib-eprints@bbk.ac.uk.

or alternatively

Special issue of the Revue Québécoise de Droit International on the 70 years of the European Convention of Human Rights

Russia and the European Convention (or Court) of Human Rights: The End?

Bill Bowring, Birkbeck College

Introduction

Russia has been a member of the Council of Europe (CoE) for 25 years, and of the European Convention on Human Rights (ECHR) for 22 years, which is in itself in my view a remarkable achievement on both sides.¹ This article asks the questions: how has this been this possible? And is the close and mostly positive relationship between Russia and the Council of Europe and the ECtHR about to come to an end?

¹ For my own contributions from 1997 see:

- "Russia's Accession to the Council of Europe and Human Rights: Compliance or Cross-Purposes?" (1997) 6 *European Human Rights Law Review* pp.628-643. This has been translated into Russian, and appears in *Rossiiskii Byulleten po Prava Cheloveka (Russian Bulletin on Human Rights)* Issue 10 1998, pp.12-23;
- "Russia's accession to the Council of Europe and human rights: four years on" (2000) *European Human Rights Law Review* Issue 4, p.362;
- "Russia in a Common European Legal Space. Developing effective remedies for the violations of rights by public bodies: compliance with the European Convention on Human Rights" in Kaj Hober (ed) *The Uppsala Yearbook of East European Law 2004* (London: Wildy, Simmonds and Hill, 2005) pp.89-116;
- "Tensions Multiply between Russia and Council of Europe: Could the Malaise be Terminal?" (April 2008) Issue 6 *The EU-Russia Review* pp.4-12; at eu-russiacentre.org/assets/files/Review_FINAL16March_08.pdf;
- "Russia and Human Rights: Incompatible Opposites?" Vol 1, No 2 (2009) *Göttingen Journal of International Law* pp. 257-278 at <http://gojil.uni-goettingen.de/ojs/index.php/gojil/article/view/37/bowring.pdf>;
- "The Russian Federation, Protocol No. 14 (and 14bis), and the Battle for the Soul of the ECHR" *Goettingen Journal of International Law* 2 (2010) 2, 589-617;
- "The Russian Federation and the Strasbourg Court: The Illegitimacy of Sovereignty?" in Katja S Ziegler, Elizabeth Wicks, Loveday Hodson (eds) *The UK and European Human Rights: A Strained Relationship?* (Bloomsbury, 2015) pp.415-437;
- "Does Russia have a human rights future in the Council of Europe and OSCE?" in Doutje Lettinga & Lars van Troost (eds) *Shifting Power and Human Rights Diplomacy: Russia* (2017) *Amnesty International Netherlands*, pp. 53-63. at https://www.academia.edu/31979697/Shifting_Power_and_Human_Rights_Diplomacy_Russia?auto_accept_coauthor=true;
- "Russian cases in the ECtHR and the question of implementation" in Lauri Mälksoo and Wolfgang Benedek (eds) *Russia and the European Court of Human Rights: The Strasbourg Effect* (Cambridge, Cambridge University Press, 2018), pp.188-221;
- "Politics and Pragmatism: The Constitutional Court of the Russian Federation and Its 20 Years of Engagement with the European Convention on Human Rights" in v.1 n.1 (2018) *East European Yearbook on Human Rights*, pp.5-31;
- "Russia and the Council of Europe: an incompatible ideology, and a transplanted legal regime?" in P. Sean Morris (ed) *Russian Discourses on International Law: Sociological and Philosophical Phenomenon* (Abingdon, Routledge: 2018) pp. 133-157;
- "The crisis of the European Court of Human Rights in the face of authoritarian and populist regimes" in Avidan Kent, Nikos Skoutaris, Jamie Trinidad (eds) *The Future of International Courts: Regional, Institutional and Procedural Challenges* (Routledge 2019) pp.76-92.

In order to answer these questions, I first provide an overview of the USSR's late acknowledgment of the need for compliance in its internal affairs with UN standards, and especially the contribution of Mikhail Gorbachev. I follow this with an account of Russia's accession to the CoE and ratification of the ECHR under Boris Yeltsin, and a snapshot of the popularity for Russians of complaining to Strasbourg. Second, I turn to the very controversial rulings by the Constitutional Court of the Russian Federation (CCRF) and new legislation on the question of the CCRF ruling on the "impossibility" for Russia of implementing judgments of the European Court of Human Rights (ECtHR). Third, I analyse the controversial *Yukos* case. This was in fact the second and last until now such ruling. Fourth, the Parliamentary Assembly of the Council of Europe (PACE) imposed sanctions on Russia following the illegal annexation by Russia of Crimea. Russia seemed poised to leave or be expelled from the CoE. But in 2019 a controversial deal was done. Fifth, I ask whether President Putin's 2020 amendments to the 1993 Constitution really pose a threat to Russia's continuing relationship with the CoE and the ECHR.

1. The USSR, Russia, and the CoE

I first visited Russia in December 1983. Yuriy Andropov was in his last year as General Secretary of the Communist Party of the USSR. Had he lived longer, it is possible that the USSR would have followed a similar path to that taken by China, still ruled by its Communist Party. But he died on 9 February 1984, followed by the lack-lustre leadership of Konstantin Chernenko, who in turn died on 10 March 1985.

Mikhail Gorbachev, after a short-lived return to Leninism, began in 1986 the process which would lead to the collapse of the USSR in December 1991, with his call for a revolution in the USSR, in his speech to party officials in Vladivostok on 29 July 1986². His book *Perestroika: New Thinking for Our Country and the World* was published in November 1987, and he announced a new policy of a Common European Home in 1989.

In April 1990 a new Committee for Constitutional Supervision, conceived in 1988, started work, and during 1991 brought the USSR closer to the UN human rights systems. In its Ratification of the Optional Protocol Case (4 April 1991)³, the CCS requested the Supreme Soviet of the USSR to secure ratification by the USSR of the First Optional Protocol to the

² <https://www.nytimes.com/1986/07/29/world/excerpts-from-gorbachev-s-speech.html> . I watched this speech on TV in Krasnodar, and it was clear that the assembled apparatchiks were aghast when Gorbachev announced "Comrades, there will be a revolution!".

³ VSND SSSR *ibid*, 1991 No. 17, 502; see also *Sovetskaya Iustitsiya* I 23 December 1991, 17

UN International Covenant on Civil and Political Rights (ICCPR). On 5 July 1991 the Supreme Soviet adopted two Resolutions acceding to the Optional Protocol and recognising the jurisdiction of the UN Human Rights Committee.⁴ This was already a giant step in recognising international human rights standards. Previously there had been two pillars of Soviet international law, state sovereignty, and the prohibition of interference in the internal affairs of states.⁵

But there was no question while the USSR still existed of joining the Council of Europe (CoE), or, in obligatory consequence, ratifying the Europe Convention on Human Rights (ECHR).⁶

The Council of Europe

Russia applied to join the Council of Europe on 7 May 1992, at a time when there were a number of progressive developments, in terms of legislation and in the work of the new Constitutional Court. Despite the fact that it was then engaged in bitter internal armed conflict in Chechnya, Russia became a full member of the Council of Europe on 28 February 1996. On 28 February 1998 the State Duma of the Russian Federation voted to ratify the ECHR. A total of 294 (65.3 per cent) deputies voted for, with only 11 (2.4 per cent) against and two (0.4 per cent) abstentions. The Federal Law of the Russian Federation ‘On ratification of the ECHR’ entered into force on 30 March 1998. The ECHR itself entered into force for Russia on 1 November 1998.⁷

I had been practising at the ECtHR since 1992, mostly in cases on behalf of Kurdish applicants against Turkey.⁸ In 2000 I applied to the European Commission for a grant to assist Russian human rights activists to take cases to the European Court of Human Rights (ECtHR, the Court), and in 2002 I was awarded €1 million for a partnership between the “Memorial” society in Moscow and its Human Rights Centre, the Bar Human Rights Committee of England and Wales, and the University of North London where I was then

⁴ *Vedomosti SSSR*, 1991 No. 29, 842, 843

⁵ See Lauri Mälksoo *Russian Approaches to International Law* (Oxford: OUP, 2015). For a critique see Bill Bowring, *Review*, v.85 n.1 (2015) *British Yearbook of International Law*, 189–193

⁶ Bill Bowring ‘Human Rights in Russia: A Discourse of Emancipation or Just Another Mirage?’ in Istvan Pogany (ed) *Human Rights in Eastern Europe* (London: Edward Elgar, 1995) pp.87-110

⁷ It should be noted that on the same day the state Duma voted, by an even larger majority, to ratify the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment (CPT)

⁸ More than once in front of Judge Jean-Paul Costa, for whom I have the highest regard, including an in-country fact-finding hearing in *Ipek v Turkey* (Application no. 25760/94, judgment of 17 February 2004), from 18-20 November 2002, in Ankara.

teaching. The European Human Rights Advocacy Centre (EHRAC) was founded in 2003, in partnership with Memorial, and is still going strong.⁹ EHRAC has assisted applicants in securing 247 judgments from the Court establishing Russian responsibility for aerial bombardment, extra-judicial killings, enforced disappearances and torture during the conflict in Chechnya.

Vladimir Putin became President of the Russian Federation in April 2001, after starting the Second Chechen War as Prime Minister in 1999, and has effectively been in power for more than 20 years. He is not a friend of human rights, to say the least. Nevertheless, as noted above, Russia has now been a member of the CoE for 24 years, and of the ECHR for 22 years. During his period of rule the supremacy of international law and of the ECHR in particular has been further strengthened by the Supreme Court of the Russian Federation (SCRF).

On 10 October 2003 the SCRF adopted a Resolution ‘On application by courts of general jurisdiction of the commonly recognized principles and norms of the international law and the international treaties of the Russian Federation.’¹⁰ This Resolution, drafted with the participation of the justices of the CCRF and Anatoliy Kovler, then Russia’s judge at the ECtHR, is binding on all lower courts and contained the following with reference to the ECHR:

10. It is clarified to the courts that international treaties should be interpreted in accordance with the Vienna Convention on the Law of Treaties of 23 May, 1969 (Section 3; Articles 31-33).

In accordance with item “b” of paragraph 3 of Article 31 of the Vienna Convention, any subsequent practice in the application of a treaty, which establishes the agreement of the parties regarding its interpretation, should be taken into account along with its context for the purposes of interpretation of the treaty.

As a member state of the [ECHR], the Russian Federation recognizes the jurisdiction of the [ECtHR] as compulsory in issues of interpretation and application of the Convention and its Protocols in the event of presumed breach of provisions of said

⁹ <https://ehrac.org.uk/> ; <https://ehrac.org.uk/about-our-work/where-we-work/russia/>

¹⁰ Ruling of the Plenary session of the Supreme Court of the Russian Federation No 5 ‘On application by courts of general jurisdiction of the commonly recognized principles and norms of the international law and the international treaties of the Russian Federation’ 10 October 2003 at www.supcourt.ru/catalog.php?c1=English&c2=Documents&c3=&id=6801

treaty acts by the Russian Federation, if such a breach took place after their entry into force in respect of the Russian Federation (Article 1 of Federal Law “On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols”, No. 54-FZ of 30th March 1998). This is why the said Convention should be applied by courts with regard to the practice of the [ECtHR] in order to avoid any violation of the Convention.

On 27 June 2013 the SCRF passed a Ruling ‘On application of the ECHR by the courts of general jurisdiction.’¹¹ This affirmed the principles contained in the 2003 Resolution, and directed that the judgments of the ECtHR in cases against Russia are mandatory for Russian courts, and judgments against other countries must be taken into account.

2. As follows from Article 46 of the Convention, Article 1 of [the Federal Law on Ratification], the legal positions of the European Court of Human Rights contained in the final judgments of the Court delivered in respect of the Russian Federation are obligatory for the courts.

Indeed, the ECtHR dealt with 9,238 applications concerning Russia in 2019, of which 8,793 were declared inadmissible or struck out. It delivered 198 judgments (concerning 445 applications), 186 of which found at least one violation of the European Convention on Human Rights.¹² Russia complies with almost all judgments in terms of payment of just satisfaction (compensation), and there are many examples of substantive implementation.

2. Russia, the ECtHR, the Constitutional Court and “impossibility”¹³

Very soon after the 2013 Resolution, Russia was taking a rather different position.

On 14 July 2015 the CCRF handed down its *Postanovleniye* (Resolution) of 14 July 2015, No. 21-P.¹⁴ This judgment resulted from a request by a group of 93 deputies of the State Duma as to whether a number of legislative enactments were compatible with the Constitution. These were Article 1 of the 1998 Law “On Ratification of the ECHR”; Article

¹¹ Ruling of the Plenary session of the Supreme Court of the Russian Federation No.21 ‘On Application of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and Protocols thereto by the Courts of General Jurisdiction’ 27 June 2013. Available in English at www.supcourt.ru/catalog.php?c1=English&c2=Documents&c3=&id=9155

¹² https://www.echr.coe.int/Documents/CP_Russia_ENG.pdf

¹³ See Bill Bowring ‘Russian cases in the ECtHR and the question of implementation’ in L. Mälksoo and W. Benedek (eds) *Russia and the European Court of Human Rights: The Strasbourg Effect* (2018) 188

¹⁴ Published in *Rossiiskaya Gazeta* 27 July 2015, Federal edition No. 6734, at <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5720&cat=15>
<http://www.rg.ru/2015/07/27/ks-dok.html>

32(1) and (2) of the Federal law “On international treaties of the Russian Federation”; and provisions of the Civil Procedural Code, Arbitrazh (Commercial) Procedural Code, Code of Administrative Misdemeanours, and the Criminal Procedural Code. In the view of the deputies, these enactments were incompatible with Articles 15(1),(2) and (4), and Article 79 of the Constitution, since they in fact obliged Russian organs of legislative, executive and judicial power, to unconditionally implement judgments of the ECtHR, even in cases where such judgments contradicted the Constitution.

The Court ruled that these provisions were compatible with the Constitution, but laid the basis for the amending Law discussed below. The judgment, for which the Judge-Rapporteur was the Court’s Deputy Chairman Sergey Mavrin, confirmed the subsidiary nature of the Strasbourg system and the obligatory nature of Strasbourg judgments, and paid close attention not only to the provisions of the 1969 Vienna Convention on the Law of Treaties, but also to the case-law of the German Constitutional Court (the *Gorgulu* and *Solange-1* judgments), the Italian Constitutional Court in its judgment of 31 May 2011 on the *Maggio v Italy* case and its 22 October 2014 judgment following the ICJ’s *Jurisdictional Immunities of the State* (2012) case; the Austrian Constitutional Court’s judgment of 14 October 1987; and of course the UK Supreme Court’s judgment of 16 October 2013 following *Hirst v UK*. State organs could apply to the Constitutional Court in a concrete case to ask whether a judgment of the ECtHR was “impossible” to implement because it contradicted the foundations of the Russian constitutional order.

The Court gave as an example the judgment in *Anchugov and Gladkov v Russia* of 14 July 2013¹⁵, the Russian *Hirst*, on prisoners’ voting rights. In the Court’s view, to implement the judgment would mean violating a series of Articles of the Constitution (Article 15(1), 32(3), and 79), or adopting a new Constitution.

Anna Pushkarskaya, writing on the day of the judgment in *Kommersant*, pointed out that the background to the application was the Yukos just satisfaction decision, and expected that there would be a further application to the CCRF in respect of that decision.¹⁶ However, the following day she published an interview with Sergey Mavrin in which he stated that the CCRF would always seek a compromise with Strasbourg and avoid a direct collision. The

¹⁵ Applications nos. 11157/04 and 15162/05

¹⁶ <http://www.kommersant.ru/doc/2767837>

effect of an application to the CCRF in a concrete case would be to provide a breathing space.¹⁷ I will turn below to some recent compromises.

On 14 December 2015 President Putin signed the Federal Law “On enacting amendments to the Federal constitutional law on the CCRF.”¹⁸ One headline on the day of signature read, “Putin approved a law permitting the non-implementation of decisions of the European Court of Human Rights.”¹⁹ The Law came into force on its publication on 15 December 2015 in the *Russian Gazette*²⁰. It amended Article 3(3) of the Federal Law “On the Constitutional Court” so as to give the Court the jurisdiction to decide the question on the possibility (*vozmozhnost*) of implementing the decision of an international organ for the protection of the rights and freedoms of the person; the CCRF can declare “possibility” or “impossibility.”

The word “possibility” is not defined. I now turn to its deployment in the CCRF’s Resolution of 14 July 2015 in the context of the judgment of the ECtHR in *Anchugov and Gladkov v. Russia* of 14 July 2013,²¹ the Russian *Hirst v. UK*,²² and the *Yukos* judgment.

On 19 December 2015, Philip Leach and Alice Donald wrote under the headline: “Russia Defies Strasbourg: Is Contagion Spreading?”²³ This was a reference to their article of 21 November 2013, “Hostility to the European Court and the risks of contagion,”²⁴ which focused not on Russia but on the United Kingdom’s position. They quoted the former President of the European Court, Sir Nicolas Bratza, who had expressed his concern about the risks of contagion:

There is a risk of this attitude in the UK to judgments of the Court negatively impacting on other states and complaints being made of double standards ... [which] could result in a wider refusal to implement ECtHR judgments across the Council of Europe. (p. 176)

¹⁷ <http://www.kommersant.ru/doc/2768367> (accessed on 31 December 2015)

¹⁸ Федеральный закон Российской Федерации от 14 декабря 2015 г. N 7-ФКЗ “О внесении изменений в Федеральный конституционный закон “О Конституционном Суде Российской Федерации” (*Federalniy zakon Rossiiskoi Federatsii ot 14 Dekabrya 2015 N 7-FKZ “O vnesenii izmeneniy v Federalniy konstitutsionniy zakon “O Konstitutsionnom Sude Rossiiskoi Federatsii”*).

¹⁹ <http://newsru.com/russia/15dec2015/podpisal.html>

²⁰ <http://www.rg.ru/2015/12/15/ks-site-dok.html>

²¹ Application Nos. 11157/04 and 15162/05.

²² *Hirst v. the United Kingdom (No 2)* [2005] ECHR 681, Application No. 74025/01, Judgment (Grand Chamber) of 6 October 2005.

²³ <http://www.ejiltalk.org/russia-defies-strasbourg-is-contagion-spreading/> (accessed on 14 January 2018).

²⁴ <http://ukhumanrightsblog.com/2013/11/21/hostility-to-the-european-court-and-the-risks-of-contagion-philip-leach-and-alice-donald/>

And they referred to the Commissioner for Human Rights of the CoE, Nils Muižnieks, who suggested in a memorandum to Nick Gibb MP that

... continued non-compliance would have far-reaching deleterious consequences; it would send a strong signal to other member states, some of which would probably follow the UK's lead and also claim that compliance with certain judgments is not possible, necessary or expedient. That would probably be the beginning of the end of the ECHR system, which is at the core of the Council of Europe.²⁵

Their fears of “contagion” seemed to be confirmed by the new Russian law. In their view, it did not “simply concern the relationship between the Strasbourg Court and the domestic courts (reflecting, for example, the long-standing debate in the UK about the implications of Section 2 of the Human Rights Act).”²⁶ It went, they asserted, much further than that. It denied the enforceability of ECtHR judgments as regards the Russian state altogether, thereby purporting to extinguish the effect of Article 46 of the ECHR, unprecedented in the history of the European human rights regime.

The response of the CoE was more measured. On 15 December 2015 the then Secretary General of the CoE, Thorbjørn Jagland, said:

[I]t will be up to the Constitutional Court of Russia to ensure respect for the Convention if it is called upon to act under the new provisions. The Council of Europe will only be able to assess Russia's compliance with its obligations when and if a specific case arises. The compatibility of Strasbourg judgments with the national constitutions has been examined in some other member States. So far, countries have always been able to find a solution in line with the Convention. This should also be possible in Russia.²⁷

The Russian Hirst?

²⁵ Nils Muižnieks “Observations for the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill” 10 October 2013, at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933800&SecMode=1&DocId=2062696&Usage=2>

²⁶ <http://ukhumanrightsblog.com/2013/11/21/hostility-to-the-european-court-and-the-risks-of-contagion-philip-leach-and-alice-donald/>

²⁷ [http://www.coe.int/en/web/secretary-general/news/-/asset_publisher/EYIBJNjXtA5U/content/russia-s-new-LAW-on-the-constitutional-court-jagland-a-solution-should-be-possible-/16695?desktop=true](http://www.coe.int/en/web/secretary-general/news/-/asset_publisher/EYIBJNjXtA5U/content/russia-s-new-law-on-the-constitutional-court-jagland-a-solution-should-be-possible-/16695?desktop=true) (13 January 2018).

However, on 19 April 2016 the CCRF rendered a judgment²⁸ in which it examined the question of the possibility of executing the judgment of the ECtHR of 4 July 2013 in the case of *Anchugov and Gladkov v. Russia* in accordance with the RF Constitution.²⁹

There were amicus curiae briefs before the CCRF arguing that the problem could be resolved by interpreting the RF Constitution, rather than seeking to amend it, which the CCRF cannot do. The CCRF, with three powerful dissents, disagreed and held that in 1998, when Russia ratified the ECHR, there was no case law under Article 3 of Protocol 1 (right to democratic elections) prohibiting a “blanket ban” on prisoners’ voting. Otherwise, ratification would have contradicted the RF Constitution. However, the CCRF suggested that by an amendment to the criminal law persons detained in Russian “open prison” correctional colonies could be reclassified so that they do not fall within Article 32(2) of the RF Constitution. If this was done, Russia would in effect implement the ECHR’s judgment. The CCRF emphasized the priority of international law, especially the ECHR, over Russian domestic law, while insisting that it is the final judge in issues concerning the RF Constitution.³⁰

Indeed, the pragmatism of the CCRF prevailed, and on 25 September 2019, the Committee of Ministers (CM) of the CoE, which pursuant to Article 46(2) of the ECHR supervises the execution of judgments of the ECtHR, adopted a final resolution³¹, which closed the supervision of *Anchugov and Gladkov v. Russia*.³² The closure of the case means that Russia, taking the advice of the CCRF, has complied with the ECtHR’s judgment, according to the CM’s assessment. According to the Action Report³³ submitted by the Russian authorities on 27 June 2019, the judgment was executed through the introduction to the Russian Criminal Code of a new category of criminal punishment – “community work” (translation provided in

²⁸ No. 12- П/2016, 19 April 2016.

²⁹ For an early analysis, see Marina Aksenova “Anchugov and Gladkov Is Not Enforceable: The Russian Constitutional Court Opines in Its First ECtHR Implementation Case,” 25 April 2016, at http://opiniojuris.org/2016/04/25/anchugov-and-gladkov-is-not-enforceable-the-russian-constitutional-court-opines-in-its-first-ecthr-implementation-case/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29 – this article has very useful links.

³⁰ See J. Haak, ‘Constitutional Court of the Russian Federation, Decision from 19 April 2016, No. 12-P/16. An Assessment from a German Point of View’ 6 *Journal of Siberian Federal University. Humanities & Social Sciences* (2017) 845

³¹ CM/ResDH(2019)240

³² See, for a very critical response, Gleb Bogush and Ausra Padskocimaite “Case Closed, but what about the Execution of the Judgment? The closure of *Anchugov and Gladkov v. Russia*” 30 October 2019, EJIL: Talk!, at <https://www.ejiltalk.org/case-closed-but-what-about-the-execution-of-the-judgment-the-closure-of-anchugov-and-gladkov-v-russia/>

³³ [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD\(2019\)740E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD(2019)740E%22%5D%7D)

the Action Report)³⁴. The Action Report further explained that such punishment is carried out through “placement in correctional centres for community work and may be imposed for committing a small or medium gravity offence or in case of a grave offence is committed for the first time.” These persons would have the right to vote, and in this way Russia was able to comply with the ECtHR’s judgment.

The ECtHR seeks to maintain good relations with Russia

The ECtHR had in any event attempted to maintain good relations with Russia. On 6 December 2016 it was reported that the IX Congress of Judges of the Russian Federation had been addressed by Guido Raimondi, the then president of the ECtHR.³⁵ According to the report, he was careful to sidestep difficult issues, and praised the Russian authorities for the fact that they were implementing the decisions of the ECtHR. He approvingly observed that Russia was no longer the main source of complaints to the Strasbourg Court. Mr Raimondi also praised the practice of reversing sentences in connection with violations of Article 6 of the ECHR on the right to a fair trial. And in the work of the CCRF, he was attracted by the way in which it interwove the practice of the ECtHR in its decisions.

As to the problems in relations between Russia and the ECtHR, he preferred to pass them by, preferring to “look at the picture as a whole.” He did not mention, for example, that on 15 December the Russian CC was to consider the question of the possibility of implementing the judgment of the ECtHR as to paying €1.8 billion to the former shareholders of Yukos. In fact, the question of noncompliance with this judgment was soon to be considered by the Committee of Ministers³⁶. Also, he did not call to mind that on 16 November 2016 the RF Supreme Court had overturned the sentence in the *Kirovles* case concerning the opposition leader and fighter against corruption, Aleksei Navalny.³⁷ Mr. Navalny did not agree with the RF Supreme Court’s decision that there must be a retrial, considering that the ECtHR had ruled that there was no criminal element in his activities³⁸.

³⁴ http://www.consultant.ru/document/cons_doc_LAW_10699/fbf561e8e76ded47846e0b625229d7933bbcc93a/

³⁵ https://zakon.ru/discussion/2016/12/06/predsdatel_espch_pohvalil_rossiyu_za_ispolnenie_reshenij_suda_ot_krytie_devyatogo_sezda_sudej_prosh

³⁶ <http://kommersant.ru/doc/3162703>

³⁷ https://zakon.ru/discussion/2016/11/16/prezidium_vs_otpravil_delo_kirovlesa_na_novoe_rassmotrenie_posle_resheniya_espch_o_narushenii_prav_

³⁸ *Navalny and Ofitserov v. Russia*, Application Nos. 46632/13 and 28671/14, Judgment of 23 February 2016. The Russian courts had found the applicants guilty of acts indistinguishable from regular commercial activities. In other words, the criminal law had been arbitrarily construed to the applicants’ detriment. The courts had failed to address Mr. Navalny’s arguable allegation that the reasons for his prosecution were his political activities.

3. The *Yukos* Case – Had Russia Finally Decided against Strasbourg?

The long-awaited judgment in the *Yukos* case was delivered on 19 January 2017.³⁹ Once again, the Court was furnished with, and accepted for consideration, expert amicus curiae briefs. On 30 November 2016 Kanstantsin Dzehtsiarou of Liverpool University and Maxim Timofeyev of the European Humanitarian University in Vilnius submitted their eighteen-page amicus brief,⁴⁰ and on 7 December 2016 the Institute for Law and Public Policy provided a closely argued thirty-three-page brief, drafted by the young advocate Grigoriy Vaipan⁴¹, arguing against a finding of “impossibility,” both briefs warning of damage to the reputation and authority of the CCRF.⁴²

In his dissenting opinion, Judge Yaroslavtsev argued that the judgment of the CCRF contradicted the principle of legality and by taking on the function of a legislator exceeded its competence.⁴³ Judge Aranovskiy concluded: “But taking the judgment as a whole, the court does not find a correct basis for its decision, and, shifting its coordinates, loses itself in a general series of political, administrative and financial considerations, which are not equal to legal reasoning.”

On 21 January 2017 the co-rapporteurs of the Monitoring Committee for the Russian Federation of PACE expressed their deep concern at the CCRF judgment.⁴⁴ They reiterated that the full implementation of the judgments of the ECtHR is a legal commitment to which Russia has subscribed under the ECHR. They added:

Unconditionally honouring the Convention is an obligation incumbent on all member States and it is therefore unacceptable that Russia would not enforce a judgment of the European Court of Human Rights. The Russian authorities should therefore consider implementing the recommendation of the Venice Commission of the Council of Europe that the authorities consider revising the constitutional provisions at odds with

<http://hudoc.echr.coe.int/eng?i=001-161060>

³⁹ See <https://rg.ru/2017/01/19/reg-szfo/konstitucionnyj-sud-rf-vynes-reshenie-po-delu-iukosa.html>

Text of the judgment with the two dissenting judgments at <http://doc.ksrf.ru/decision/KSRFDecision258613.pdf>

⁴⁰ This is to be found on the website of the Russian CC at

http://www.ksrf.ru/Sessions/Documents/Yukos_Zaklyucheniye_30_11_2016.pdf

⁴¹ A member of the Russian team from Moscow State University which became World Champion in March 2012 in the final in Washington DC of the Jessup International Law Moot Court Competition, see

<https://www.facebook.com/StudyInRussiaStudyInMoscow/photos/msu-team-wins-jessup-international-law-moot-court-competitionmoscow-state-univer/263034803802841/>

⁴² http://ilpp.ru/netcat_files/userfiles/Litigation_Treinings/Amicus/8_YUKOS_Amicus%20Curiae%20Brief_07-12-2016.pdf

⁴³ And see Anna Pushkarskaya, 24 January 2017, *Kommersant*, at <http://www.kommersant.ru/doc/3200196>

⁴⁴ <http://www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=6484&lang=2&cat=9>

the implementation of the ECtHR judgment. One cannot accept a selective implementation of the ECtHR's judgments.

As Maxim Timofeyev, the coauthor of one of the amicus briefs, commented on 26 January 2017,⁴⁵ this was the first time the apex court of a CoE member state had concluded that it should not pay just satisfaction. He summarized three main reasons given by the CCRF for its decision.

Firstly, the CCRF noted that both the prosecution of the company for tax evasion and subsequent enforcement proceedings were based on legal provisions that it earlier had found to be in compliance with the Russian Constitution. Secondly, the CCRF relied on the historical context of the 1990s, the "economic uncertainty," and the fact that the Russian state was seeking to take special measures to defeat the tax avoidance strategies of Yukos and to pay for social welfare. If the government had decided to apply the statutory time-bar in the Yukos case, it would have acted in contradiction with the Constitution, which requires the state to ensure the payment of taxes by every person as required by the principles of equality and fairness. Thirdly, the CCRF emphasized that Yukos was acting in bad faith by using tax avoidance schemes. Yukos should have foreseen the government's actions. Thus, payment of just compensation from the Russian budget to the shareholders of a company that was involved in vast tax avoiding activities would be contrary to the constitutional principles of equality and fairness.

On this reasoning, execution of the ECtHR judgment on just satisfaction was not possible. In Timofeyev's view, this judgment only deepened the distance between Russia and Strasbourg and increased the chances of escalating the confrontation even farther.

The response of the ECtHR has so far been more muted. On 26 January 2017, Mr Raimondi addressed the annual press conference of the ECtHR and answered a question concerning the *Yukos* judgment of the CCRF. His answer has not been published by the court but can be seen and heard on the Court's website.⁴⁶ Mr. Raimondi made the point that enforcement of judgments is not a matter for the ECtHR but for the Committee of Ministers (CoM), which had the *Yukos* case under review. His remarks were greeted with enthusiasm by Russia. The official Russian news agency TASS announced that "Strasbourg court chief says Russia

⁴⁵ Maxim Timofeyev "Money Makes the Court Go Round: The Russian Constitutional Court's *Yukos* Judgment," at

<http://verfassungsblog.de/money-makes-the-court-go-round-the-russian-constitutional-courts-yukos-judgment/>

⁴⁶ <https://vodmanager.coe.int/cedh/webcast/cedh/2017-01-26-1/lang>

fulfils 95% of court's rulings. Russia's judicial authorities generally demonstrate their full readiness for cooperation with the Strasbourg court, the ECHR president said."⁴⁷

TASS quoted Mr. Raimondi as follows⁴⁸:

Very much positive can be said about relations with the Russian Federation. The Court has excellent relations with the Russian judicial authorities. I made a visit to Russia in late 2016 and held quite fruitful negotiations, in particular, with Chairman of the Supreme Court Mr. Lebedev and Chairman of the Constitutional Court Mr. Zorkin. They have big willpower to cooperate with the ECHR and with the Council of Europe as a whole. We could state with Chairman Lebedev that the Supreme Court is carrying out excellent work for preparing judges and we know that Russia has a large judge corps, which depends on the Supreme Court's preparation programs. In most cases, up to 95% of our court's decisions are fulfilled duly in Russia and this is a positive aspect in Russia's relations with the ECHR.

Russia did not seek to appeal the *Yukos* judgment of the ECtHR to the Grand Chamber, and some years have passed.⁴⁹ Russia has agreed to pay some costs and expenses, but still refuses to pay the just satisfaction ordered. On 22 February 2019 the applicants submitted a strongly worded protest at failure to enforce the judgment⁵⁰. No more has been heard from the ECtHR or the CM.

4. The illegal annexation of Crimea⁵¹ and PACE sanctions on Russia

⁴⁷ <http://tass.com/world/927460>. For a different point of view, see <http://kommersant.ru/doc/3202083>

⁴⁸ I have checked this against the Court's webcast note 132.

⁴⁹ See I. Marchuk, 'The Tale of Yukos and of the Russian Constitutional Court's Rebellion against the European Court of Human Rights' AIC *Osservatorio Costituzionale* 1, at http://www.osservatorioaic.it/download/_rNqUPZ7lCzoX8S2kDDq8rd_vfJT0AMXT3K31xgeAyy/marchuck-aksenova-definitivo.pdf

⁵⁰ DH-DD (2019)186; 1340th meeting (March 2019) (DH) - Rule 9.1 Communication from the applicant (21/02/2019) in the case of OAO NEFTYANAYA KOMPANIYA YUKOS v. Russian Federation (Application No. 14902/04) Drafted by Piers Gardner, counsel for the applicants.

https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680932355;

<http://rm.coe.int/native/0900001680932355>;

⁵¹ See Bill Bowring "Who Are the "Crimean People" or "People of Crimea"? The Fate of the Crimean Tatars, Russia's Legal Justification for Annexation, and Pandora's Box" in Sergey Sayapin and Evhen Tsybulenko (eds) *The Use of Force against Ukraine and International Law* "Jus Ad Bellum, Jus In Bello, Jus Post Bellum" (T M C Asser / Springer 2018) pp. 21-40,

Sanctions were imposed on Russia and on a large number of Russian officials and businessmen, following inter alia the annexation of Crimea in March 2014⁵². This led to very serious economic costs to Russia.⁵³

But even more painful for Russia were the sanctions imposed by the CoE. In April 2014, after the Russian parliament's backing for the occupation of Crimea and Russian military intervention in Ukraine, PACE decided to suspend the Russian delegation's voting rights as well as the right of Russian members to be represented in PACE's leading bodies and to participate in election observation missions. However, the Russian delegation remained members of PACE. The sanction applied throughout the remainder of the 2014 session and was renewed for a full year in January 2015, lapsing in January 2016. The sanction applied only to Russian parliamentarians in PACE, the CoE's parliamentary body, and Russia continued to be a full member of the CoE as a whole.

In response, the Russian parliamentary delegation suspended its co-operation with PACE in June 2014, and in January 2016 - despite the lapsing of the sanctions - the Russian parliament decided not to submit its delegation's credentials for ratification, effectively leaving its seats empty. It did so again in January 2017, January 2018 and January 2019.

On 30 June 2017 the Russian Foreign Minister, Mr Lavrov, announced that Russia was cancelling its annual subscription payment to the CoE after claiming its 18 delegates to PACE were being “persecuted” in response to the annexation of Crimea. A Foreign Ministry statement said Moscow’s contribution for 2017 was being withheld in response to a “rampant campaign...launched to persecute [Russian] parliamentarians”. No future payments will be made until the rights of the Russian delegation to PACE “are fully restored”, it added.⁵⁴

Some kind of deal was done, though the details are obscure. On 17 May 2019 the CoM, meeting in Helsinki, voted overwhelmingly in favour of a declaration that said “all member states should be entitled to participate on an equal basis” in the CoE’s CoM and PACE. This decision was condemned strongly by Ukraine.⁵⁵ Dmytro Kuleba, Ukraine’s representative at

⁵² The sanctions were imposed by the United States, the European Union (EU) and other countries and international organisations against Russian individuals, businesses and officials

⁵³ Leonid Bershidsky “Five Years Later, Putin Is Paying for Crimea” *Bloomberg Opinion* 16 March 2019 at <https://www.bloomberg.com/opinion/articles/2019-03-16/russia-s-annexation-of-crimea-5-years-ago-has-cost-putin-dearly>

⁵⁴ <https://www.independent.co.uk/news/world/europe/russia-cancels-council-of-europe-payment-members-persecuted-a7816951.html>

⁵⁵ Jennifer Rankin, *The Guardian*, 17 May 2019, at

the CoE, said: “This is not diplomacy, this is a surrender”. According to his tweet⁵⁶ on the same occasion, five other countries opposed the decision, so the fight to keep Russia out of the Parliamentary Assembly was not over. And Vyacheslav Volodin, speaker of the Russian State Duma also expressed caution.⁵⁷

Next, on 26 June 2019, PACE members voted for a resolution in support of three key regulatory norms stipulating that the "rights to vote, speak and be represented in the Assembly and its bodies cannot be suspended or revoked or withdrawn in the context of a challenge to or reconsideration of credentials." The following day all powers of the Russian delegation were confirmed in full and without any exemptions. After that the Russian delegates rejoined the PACE activities as full-fledged participants.

Proposals by Ukraine to impose further limitations on Russian participation were rejected. PACE adopted recommendations that Russia should implement, including: releasing the 24 detained Ukrainian sailors; and immediate payment of all financial contributions to the CoE. PACE also requested Russia’s full co-operation with the investigations of the shooting down of Malaysian Airlines’ flight MH17 and the murder of Boris Nemtsov, and urged vigorous measures to prevent violations of the human rights of lesbians, gays, bisexuals, transgender and intersex people, especially in Chechnya.⁵⁸

On 2 July 2019, it emerged that Russia had paid its subscription to the CoE’s budget for 2019. Lize Glas commented in a blog entitled “Russia left, threatened and won: Its return to the Assembly without sanctions.”⁵⁹ She continued:

Russia has won. The Assembly has not only lost this fight, but also part of its credibility by permitting Russia to return without attaching any ‘internal sanctions’. As can be inferred from the debate and the report of the Monitoring Committee, the Assembly was prepared to make this ‘concession’, not only because Russia threatened to leave the Council of Europe, which would be a major blow to the Russian population of about 145 million people⁶⁰, but also because non-payment of the

<https://www.theguardian.com/world/2019/may/17/council-of-europe-votes-to-maintain-russia-membership-crimea>

⁵⁶ <https://twitter.com/DmytroKuleba/status/1129306035943071744>

⁵⁷ <http://tass.com/politics/1058908>

⁵⁸ <https://globalvoices.org/2019/09/24/russias-return-to-the-parliamentary-assembly-of-the-council-of-europe-diplomacy-or-defeat/>

⁵⁹ <https://strasbourgothers.com/2019/07/02/russia-left-threatened-and-has-won-its-return-to-the-assembly-without-sanctions/>

⁶⁰ See the Memorandum by Russian NGOs at

Russian contribution to the Organisation's budget would cause considerable difficulties for the Council of Europe. Therefore, one cannot help but wonder whether the Assembly would have taken a more principled stance, had the State in question been a State with a lower membership fee and, therefore, with less leverage (a third of the member States pays contributions that do not even cover the costs of a judge to the Court, an administrative officer and an assistant working full time).

On 29 August 2019, the Russian Prime Minister, Dmitry Medvedev, signed a decree ordering that Russia should additionally pay its debts to the CoE for 2017-2018. This payment amounted to € 54.6 million at the expense of the Federal budget.⁶¹ President Macron of France gave his full support to Russia's return. At the PACE session in October he said: "I fully support the choice made in favor of letting Russia stay in the Council of Europe, because I am certain that the Russian people are close to European humanism. They participated in creating this humanism themselves."⁶² The EU is therefore split on the question of Russia.

So Russia had indeed won, and the nature of the deal which had been done is still not clear. Russia is still in illegal occupation of Crimea, and has not complied with the other PACE recommendations.

5. Constitutional amendments in 2020

Amendments to the Constitution of the Russian Federation⁶³ were proposed by President Putin in his message to the Federal Assembly on 15 January 2020⁶⁴ and adopted as the Law on Amendment No. 1-FKZ "On improving regulation of certain issues of the organisation and functioning of public authorities" dated 14 March, 2020⁶⁵. On 16 March 2020 the CCRF ruled that the proposals were in accordance with the Constitution.⁶⁶ A total of 206 amendments were proposed to the Constitution, and all of them were submitted to the so-called all-Russian vote as a package. This was a "referendum" held in conditions of pandemic

https://www.nhc.nl/assets/uploads/2018/12/Memorandum-on-Russia-and-CoE_November_2018_eng_signatures-as-of-30.11.18.pdf

⁶¹ <https://tass.com/economy/1076413>

⁶² <https://tass.com/world/1080748>

⁶³ See William Partlett "Russia's 2020 Constitutional Amendments: A Comparative Perspective" (*Melbourne Legal Studies Research Paper Series No. 887*) June 2020, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3625390

⁶⁴ <http://kremlin.ru/events/president/news/62582>

⁶⁵ http://www.consultant.ru/document/cons_doc_LAW_346019/

⁶⁶ Zakluchenie No.1-3/2020, <http://doc.ksrf.ru/decision/KSRFDecision459904.pdf>

from 25 June to 1 July 2020, in accordance with Article 2 of the Law “On Amendments to the Constitution”. The referendum is legally referred to as an "All-Russian vote" (Russian: общероссийское голосование, romanized: obshcherossiyskoye golosovaniye), for it was not held in accordance with the Federal Constitutional Law “On the Referendum.”⁶⁷

The amendments received public support, and on 3 July 2020, Mr Putin signed a decree on their entering into force the following day.

On 8 April 2020 Yulia Khalikova of the University of Bremen published an article on the Riddle website entitled “Russia’s cat and mouse game with international courts”⁶⁸. She pointed out that Article 79 of the amended Constitution will now stipulate that decisions made by international institutions are not enforceable in Russia if their legal interpretation is contrary to the constitution. Secondly, the powers of the CCRF will be expanded: the amended Section Five of Article 125 of the Constitution gives it jurisdiction to consider such cases. Thus the CCRF will hear cases on the possibility of enforcing rulings made by international or foreign courts, including international arbitrations, if they are deemed contrary to the principles of public order.

According to Article 15 (4) of the 1993 Constitution international law already has priority over Russian law. However, according to Article 79 there are two conditions under which Russia cannot take part in the activities of international organisations: if doing so leads to a restriction of human rights and freedoms, and if it contradicts the fundamental principles of the country’s constitutional system. These restrictions will now affect all actions undertaken on the basis of international treaties ratified by Russia. Furthermore, the restriction on “decisions contrary to the principles of public order” establishes an additional basis for failing to comply with decisions of international courts. At the same time, it will be the task of the CCRF to clarify what exactly these principles are.

Conclusion

The ECHR and the case-law of the ECtHR are now deeply embedded in the Russian constitutional and legal systems. Very many judgments of the CCRF are replete with references to and citations from ECtHR judgments. Valery Zorkin, Chairman of the CCRF and Vyacheslav Lebedev Chairman of the SCRF, have made it clear that there is one court

⁶⁷ Olga Sadovskaya, EU-Russia Civil Society Forum: “The New Russian Constitution as a Pandora’s Box” at <https://eu-russia-csf.org/the-new-russian-constitution-as-a-pandoras-box/>

⁶⁸ <https://www.ridl.io/en/russia-s-cat-and-mouse-game-with-international-courts/>

which is superior to them, the Strasbourg Court. As I have shown, the Secretary General of the CoE and the President of the ECtHR are frequent visitors to Moscow and St Peterburg, and it is more than apparent that Russia wants to stay in and that the CoE is equally anxious for Russia to stay. Many observers said that the crisis over PACE representation would lead either to Russia leaving or to its expulsion. But Russia won. The chances are that despite everything, Russia will, to the great advantage of those within its jurisdiction, for whom the ECtHR is indeed a final court of appeal, remain a member of the international institution it joined in 1996.