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ARTICLE

Council of Europe Expulsion and the European Convention on Human Rights: The Foundations of Involuntary Treaty Withdrawal

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Abstract

Article 58 of the European Convention on Human Rights (ECHR) contains a provision which allows for the involuntary withdrawal, or expulsion, of a State from the ECHR if it has been expelled from, or ceased to be a member of, the Council of Europe (CoE). By comparing Russia's exit from the ECHR in 2022 with that of Greece in 1969, this article demonstrates that involuntary withdrawal poses a number of legal problems—partly as a result of it not having been considered during the drafting of the ECHR or the Statute of the CoE, and partly because of the highly unclear basis on which involuntary withdrawal operates. The article then conducts a comparative analysis of other regional human rights systems and public international law principles on treaty withdrawal in order to suggest a more comprehensive legal foundation for expulsion.

Keywords: public international law; human rights; European Convention on Human Rights; treaty withdrawal; Council of Europe

1. Introduction

In 1871, the first set of principles on the law of treaty withdrawal was set out in the London Declaration. A year earlier, the Russian Foreign Minister had denounced the Black Sea clauses of the 1856 Treaty of Paris which had demilitarised the Black Sea at the end of the Crimean War. There was no clause in the treaty expressly permitting withdrawal from particular treaty provisions and, at the end of a political crisis, a subsequent treaty was signed with a protocol attached to it clarifying that, as a principle of international law, a State could not 'liberate itself from the engagements of a Treaty, nor modify the stipulations thereof, unless with the consent of the Contracting Parties'.¹ These were the origins of the principle, eventually codified in the Vienna Convention on the Law of Treaties (VCLT), that

¹ For a discussion of the London Declaration, see D Bederman, 'The 1871 London Declaration, Rebus Sic Stantibus and a Primitivist View of the Law of Nations' (1988) 82 AJIL 1, 3.

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a State requires either the express consent of the other treaty parties or, more significantly, their implied consent in the form of a denunciation clause to allow it to withdraw from its obligations under that treaty.² The obligation to comply with the substantive provisions of a withdrawal clause comes from the act of ratification; for example, an obligation to comply with a requirement to implement the rulings of a tribunal, after a State has denounced the treaty giving that tribunal jurisdiction, stems from the original act of *pacta sunt servanda* committing the withdrawing State to that treaty.³

In contrast to a number of other international human rights treaties, the European Convention on Human Rights (ECHR or Convention) contains a withdrawal clause in Article 58.⁴ From the perspective of those promoting human rights, it is desirable for an exit clause to be used rarely, if at all—a view which has been echoed over the years by the Council of Europe (CoE), the international organisation which promotes democracy in Europe and requires all Member States to be party to its foundational treaty, the ECHR.⁵ Yet, at the same time, legal coherence is important to maintain the stability of the Convention system and the authority of the European Court of Human Rights (ECtHR or Court) in moments of crisis. In recent years, Article 58 has become increasingly significant following Russia's exit from the CoE and repeated threats of withdrawal from leading United Kingdom (UK) politicians.

Historically, Article 58 has been somewhat underdiscussed in comparison with other procedural and jurisdictional provisions of the ECHR. It has only been interpreted and applied twice, in relation to Greece in 1969 and Russia in 2022. Greece announced its intention to withdraw from the CoE and denounce the ECHR in 1969 following a finding by the European Commission on Human Rights (Commission) that serious human rights violations, including torture and indefinite detention, were being committed by the military government, which had taken power following the 1967 coup.⁶ Following Russia's invasion of Ukraine, the CoE took the unprecedented step of deciding to expel Russia. It was also assumed,

² Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1115 UNTS 331 (VCLT) art 54.

³ See V Pergantis, *The Paradigm of State Consent in the Law of Treaties: Challenges and Perspectives* (Edward Elgar 2017) 154–7; L Helfer, 'Terminating Treaties' in D Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 648.

⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, as amended by Protocol Nos 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR) art 58. For discussion on withdrawal from human rights treaties, see G Naldi and K Magliveras, 'Human Rights and the Denunciation of Treaties and Withdrawal from International Organisations' (2013) 33 *PolishYBIntlL* 95; E Bates, 'Avoiding Legal Obligations Created by Human Rights Treaties' (2008) 57 *ICLQ* 751.

⁵ For an example of this type of statement from Council of Europe (CoE) officials, see N Muižnieks, 'Observations for the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill' (Memorandum, 10 October 2013) 3 <<https://rm.coe.int/09000016806db5c2>>; N Muižnieks, 'Transitional Justice in the Context of European Convention Obligations: The Right to Life and Dealing with the Past' (Transitional Justice Institute conference, Belfast, 6 November 2014) <<https://rm.coe.int/09000016806da55c>>.

⁶ Note Verbale of the Greek Foreign Minister of 12 December 1969 announcing withdrawal from the Council of Europe (Greek Withdrawal). This is reproduced in Permanent Delegation of Greece to the CoE, 'Denunciation No 2844bis' in European Commission and European Court of Human Rights, *Yearbook of the European Convention on Human Rights* (Martius Nijhoff 1970) vol 12, 78; see also W

as set out in Section 3 below, that expulsion from the CoE automatically led to an involuntary denunciation of the ECHR under Article 58(3). On 15 March 2022, mere hours before the CoE was due to formalise Russia's expulsion, Russia gave notice of its intention to withdraw from the CoE and the ECHR.⁷ In examining the very different circumstances of these two instances of interpretation and application of Article 58, this article highlights the difficulty of identifying coherent principles regarding its use.

Expulsion from a multilateral treaty is a distinct legal action. It is different from withdrawal, even though it performs a similar function by removing a State from the legal obligations under a given treaty. Unlike the concept of treaty termination, both expulsion and withdrawal presume that the legal existence of the treaty or organisation being left by the departing State continues.⁸ Withdrawal describes a voluntary termination of a State Party's obligations under a treaty following a notice of denunciation, and the voluntary nature of withdrawal is reflected in some of the early literature on treaty law prior to the VCLT's drafting.⁹ Expulsion, linguistically speaking, does not describe a voluntary act and refers to a decision to terminate a State's obligations taken by individuals other than the State Party.¹⁰ This strains the idea of consent which underpins many doctrines in treaty law.¹¹ As will be shown, discussion concerning expulsion from the ECHR have occurred when a State has engaged in mass human rights violations, so it is possible to argue that the State is not fulfilling its commitments under the Convention and there is a wider need to remove it in order to promote human rights. Even though the boundaries between expulsion and withdrawal may be less sharp than, say, between termination and arguments relating to changed circumstances, both of which have been distinguished from withdrawal, there is less sovereign autonomy in a case of expulsion than in a case of withdrawal.¹² There has been some thinking on the expulsion of States from international organisations, such as Dzehtsiarou and Coffey's analysis of CoE suspension which usefully synthesises some of the principles in this area, although it was written three years prior to the

Benedek, 'The Effectiveness of the Tools of the Council of Europe against Democratic Backsliding: What Lessons Can be Learned from the "Greek Case"?' (2020) *AustrianLJ* 1.

⁷ Russian Federation, Foreign Ministry Statement on Initiating the Process for Withdrawing from the Council of Europe (15 March 2022) (Russian Withdrawal).

⁸ See introduction in F Cowell, *The Law, Politics and Theory of Treaty Withdrawal* (Hart Publishing 2023) 4.

⁹ These attempts in the 1930s to synthesise denunciation all describe voluntary behaviour by State Parties: see e.g. H Tobin, *The Termination of Multipartite Treaties* (Columbia University Press 1934) 194–8; J Burnes, 'Conditions of Withdrawal from the League of Nations' (1935) 29 *AJIL* 40; 'Article 34. Denunciation' (1935) 29 *AJIL* 'Supplement: Research in International Law' 1173.

¹⁰ Expulsion from the CoE was dealt with in depth prior to the expulsion of Russia in K Dzehtsiarou and D Coffey, 'Suspension and Expulsion of Members of the Council of Europe: Difficult Decisions in Troubled Times' (2019) 68 *ICLQ* 443. On the theoretical basis of expulsion, see EM Hausteiner, 'Can Federations Expel Member States? On the Political Theory of Expulsion' (2020) 16 *JIntlPolTheory* 47.

¹¹ S Fleming, 'A Political Theory of Treaty Repudiation' (2020) 28 *JPolPhil* 3; P Diehl, 'Reconceptualizing Treaty Consent' (2002) 6 *GonzagaJntL* 1; Pergantis (n 3).

¹² On changed circumstances not being the same as withdrawal, see *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Merits) [1997] *ICJ Rep* 7.

events of 2022.¹³ What has not been previously considered is how an involuntary withdrawal from the CoE affects the law of withdrawal under the ECHR.

As Section 2 of this article shows, the idea that CoE expulsion causes an involuntary withdrawal from the ECHR is not expressly contained in the ECHR, nor was it really considered at the time of drafting. The decisions on CoE membership in relation to both Greece and Russia, as Section 3 demonstrates, were made as a matter of expediency without much consideration of the consequential effect on ECHR obligations. In relation to Russia, a notice of withdrawal from the CoE arrived a few hours before it was due to be expelled.¹⁴ Whilst, as noted in Section 4, it suited the CoE politically to maintain that Russia had been expelled, there are two important conceptual tensions between expulsion from the CoE and the provisions in the ECHR withdrawal clause. First, expulsion appears identical in substance to terminating Convention obligations whilst there is an ongoing breach of those obligations, in contravention of both the substance of Article 58 and the customary international legal norm that a breach of human rights obligations cannot terminate treaty obligations. Second, Article 58 creates obligations on States in relation to decisions of the ECtHR, which continue after withdrawal has become effective. An involuntary withdrawal significantly strains the legal foundations for the continuing authority of the ECtHR. In relation to Russia, this is unlikely to be significant, given its defiant attitude to the ECtHR and the CoE even before its withdrawal became effective on 16 September 2022. However, with some States threatening ECHR withdrawal or contemplating legal moves to avoid complying with the Court's judgments and the Convention, giving greater coherence to the termination of obligations is important for the Convention as a whole. This article demonstrates how expulsion could be better regularised as part of the ECHR's law of withdrawal, as a process to be used *in extremis*, in spite of the conceptual challenges to the legal assumptions behind human rights treaties.

Human rights treaties are distinct from other types of treaty as the application of the principle of reciprocity does not underpin legal doctrines such as reservations and treaty termination.¹⁵ This is in part due to the metapolitical morality of human rights treaties; while they aspire to be universal and protect the rights that they claim are universal, in practice they have to bring States into their orbit as State Parties in the broader expectation (or hope) of shaping their behaviour in the future. Historically, the mission of the CoE was to incorporate States into the CoE and encourage them to become party to the ECHR in order to promote human rights.

¹³ Dzehtsiarou and Coffey (n 10); for general thinking on the legality of expulsion from international organisations, see TV Olsen, 'Ejection for Democracy Protection: On the Expulsion of EU Member States' (2023) 29 ResPublica 321 (on the European Union); L Sohn, 'Expulsion or Forced Withdrawal from an International Organization' (1963) 77 HarvLRev 1381 (on the United Nations [UN]).

¹⁴ Russian Withdrawal (n 7); Ministry of Foreign Affairs of the Russian Federation, 'Foreign Ministry Statement on Initiating the Process of Withdrawing from the Council of Europe' (Press Release, 15 March 2022) <https://mid.ru/en/foreign_policy/news/1804379/>.

¹⁵ M Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law' (2000) 11 EJIL 489; Y Dutton, 'Commitment to International Human Rights Treaties: The Role of Enforcement Mechanisms' (2012) 34 UPaJIntLL 1.

Yet, at the same time, the CoE has also been acutely aware of its own need to maintain human rights and guard against what it describes as democratic backsliding, characterised by, amongst other things, the weakening of constitutional institutions and compliance with international human rights bodies, a principle emphasised by the CoE's 2023 Reykjavik Declaration.¹⁶ Referring to some comparative examples, this article analyses how the law of withdrawal ought to operate in cases of expulsion. It argues that expulsion comes from understandable motives but needs to be put on a sounder legal footing.

2. The nature and origins of Article 58 of the ECHR

The legal principles governing treaty withdrawal exist to create a broader sense of stability when terminating legal obligations.¹⁷ There is an argument that human rights treaties by their nature are not capable of being withdrawn from. This is derived from the conclusion of the International Court of Justice (ICJ) in its *Advisory Opinion to Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* that there are principles 'recognized by civilized nations as binding on States, even without any conventional obligation' and, in these cases, there is instead 'one common obligation' binding on all States.¹⁸ The treaty body of the International Covenant on Civil and Political Rights (ICCPR), the United Nations (UN) Human Rights Committee (HRC), in General Comment No 26 also broadly made the argument that human rights treaties 'in general do not imply an inherent right of denunciation', unless they include a withdrawal clause.¹⁹ However, even though, as shown below, human rights treaties are unique by nature, this argument has only been applied in relation to treaties without a withdrawal clause, such as the ICCPR, and the VCLT is careful to distinguish between treaties with and without withdrawal clauses, and the different legal principles governing them.²⁰ Sir Gerald Fitzmaurice in his Second Report on the Law of Treaties in 1957 noted that it was 'always open to the parties to make express provision for termination' and went on to argue that, in the absence of express provision allowing for withdrawal, it was appropriate to say that the possibility of withdrawal did not exist unless implied by the treaty.²¹ The inclusion of a withdrawal clause in a treaty should be acknowledged as a conscious design decision and the various provisions of a withdrawal clause are

¹⁶ CoE, 'Reykjavik Declaration: United Around Our Values' (16–17 May 2023) <<https://rm.coe.int/4th-summit-of-heads-of-state-and-government-of-the-council-of-europe/1680ab40c1>>.

¹⁷ A Morelli, *Withdrawal from Multilateral Treaties* (Brill 2021) 31–2.

¹⁸ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23.

¹⁹ UN Human Rights Committee, 'General Comment No 26: Continuity of Obligations' (8 December 1997) UN Doc CCPR/C/21/Rev.1/Add.8/Rev.1, para 6. This was supported by the CoE: see Committee of Ministers (CoM), 'Declaration on the Occasion of the 50th Anniversary of the Universal Declaration of Human Rights' (10 December 1998) <<https://rm.coe.int/09000016804c1b39>>.

²⁰ On human rights treaties and circumstances not permitting withdrawal, see Y Tyagi, 'The Denunciation of Human Rights Treaties' (2008) 79 BYIL 86.

²¹ GG Fitzmaurice, 'Second Report on the Law of Treaties', UNYBILC, vol II (1957) UN Doc A/CN.4/107, 38.

reflective of the underlying dynamic of the treaty in question.²² The text of Article 58 and the history of its drafting give some indication of how withdrawal from the ECHR was intended to operate but, significantly, leave a number of potential scenarios surrounding withdrawal unaddressed.

2.1. Assessing the text of Article 58

Article 58 is located in the ‘Miscellaneous Provisions’ section of the ECHR, in common with most withdrawal clauses, and is simply entitled ‘Denunciation’. As a technical term, ‘denunciation’ refers to a State Party communicating that it is leaving a treaty, whereas ‘withdrawal’ refers to the whole process of terminating obligations, from the issuing of a notice of denunciation to the day on which withdrawal becomes effective and obligations on the now former State Party under the relevant treaty cease. Article 58 contains four separate paragraphs. The first paragraph describes the functional process of denunciation and withdrawal, with time limits set out both for the time a State needs to have been party to the treaty before it is entitled to denounce it (five years in the case of the ECHR), and the period a State must wait before withdrawal becomes effective (six months in the case of the ECHR)—in form, these provisions are standard for a withdrawal clause.²³ There is no substantive pre-notification requirement on a State prior to issuing a notice of denunciation under Article 58, which is relatively common as it preserves a form of sovereign autonomy. There are only a few treaties that have pre-notification requirement provisions in their withdrawal clauses. One example is the Treaty on the Non-Proliferation of Nuclear Weapons, which requires the withdrawing State to include in their notice of denunciation a ‘statement of the extraordinary events it regards as having jeopardized its supreme interests’ necessitating withdrawal from the treaty, but outside of weapons control treaties these provisions are very rare.²⁴ The codification of the principles surrounding withdrawal clauses in international treaties in Article 54 of the VCLT is, as Giegerich argues, an ‘adaption of, rather than exception to, the general rule of *pacta sunt servanda*’, entailing that an obligation in a withdrawal clause binds a State like any other provision.²⁵

The second paragraph of Article 58 acts as a savings provision preventing a State Party from being released from its obligations in relation to conduct ‘capable of constituting a violation’ of the ECHR performed before the ‘date at which the denunciation became effective’.²⁶ This is designed to preserve rights to a point after withdrawal and serves to prevent abuse of the withdrawal process by

²² See B Koremenos, *The Continent of International Law: Explaining Agreement Design* (CUP 2016) 150–5.

²³ Cowell (n 8).

²⁴ Treaty on the Non-Proliferation of Nuclear Weapons (adopted 1 July 1968, entered into force 5 March 1970) 729 UNTS 161, art 10.

²⁵ See T Giegerich, ‘Article 54: Termination of or Withdrawal from a Treaty under Its Provisions or by Consent of the Parties’ in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012).

²⁶ ECHR (n 4) art 58(2).

notionally preventing a State from withdrawing in order to legalise a series of ongoing human rights violations. Commenting on international human rights law and treaty withdrawal in 1973, Schwelb noted that it was recognised as a general principle of international law that States should not be able to use their withdrawal from a treaty to normalise, or in any way facilitate, a human rights violation.²⁷

The third paragraph describes the consequences in relation to the ECHR of ceasing membership of the CoE, stating that any party which ceases to be a member of the CoE will also cease to be a party to the ECHR. 'Ceasing to be a member of the CoE' can refer to the withdrawal of the State Party or its expulsion. On the face of it, an ambiguity is created by this as Article 7 of the Statute of the CoE (CoE Statute) states that withdrawal shall 'take effect at the end of the financial year in which it is notified', which has the potential, depending on when the notification of denunciation is received, to create a timeframe for withdrawal that is out of synchronisation with the six-month timeframe in Article 58(1).²⁸ For example, Greece's withdrawal from the CoE took place on 31 December 1970, whereas Greek withdrawal from the ECHR took place on 13 June 1970. However, the final date for withdrawal in the case of Russia was harmonised and agreed relatively quickly despite this ambiguity.²⁹ Article 8 of the CoE Statute provides the basis for expulsion of a State which has seriously violated the CoE's core principles of the rule of law or human rights: after suspension and requesting the Member State to leave, the Committee of Ministers (CoM) of the CoE has the power under Article 8 to 'decide that [the suspended State] has ceased to be a member of the Council as from such date as the Committee may determine'.³⁰

The final paragraph of Article 58 relates to Article 56 of the ECHR, which requires State Parties to make a declaration extending the application of the ECHR and the jurisdiction of the ECtHR to its overseas territories. Article 58(4) clarifies that the process described in Article 58(1)–(3) also applies to territories covered by Article 56 but, interestingly, the wording of Article 58 seems to indicate that these are two separate, not dependent, processes.³¹

Based on the text of Article 58, there are thus three ways in which a State can leave the ECHR: it can voluntarily withdraw from the ECHR (Article 58(1)); it can withdraw from the CoE (Article 58(3) of the ECHR following the procedure of Article 7 of the CoE Statute); or, it may be expelled from the CoE (Article 58(3) of the ECHR following the procedure of Article 8 of the CoE Statute). Voluntary withdrawal from the ECHR would most likely be incompatible with CoE membership, given that Article 3 of the CoE Statute requires all CoE members to

²⁷ E Schwelb, 'The Law of Treaties and Human Rights' (1973) 16 *AdV* 1, 26.

²⁸ Statute of the Council of Europe (adopted 5 May 1949, entered into force 3 August 1949) ETS 1 (CoE Statute) art 7.

²⁹ For this discussion, see S Mantilla Blanco, 'A Backdoor Exit from the European Convention on Human Rights' (*Verfassungsblog*, 5 April 2022) <<https://verfassungsblog.de/a-backdoor-exit-from-the-european-convention-on-human-rights/>>.

³⁰ CoE Statute (n 28) art 8.

³¹ ECHR (n 4) art 58(4): 'The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 56.'

‘accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms’, and may potentially lead to expulsion under Article 8 of the CoE Statute. In practice, this results in the same outcome as the other two options, meaning that these methods represent three different paths to the same destination.³² The Russian and Greek cases discussed below were examples of the State Party attempting to withdraw by using either the first or second mechanisms in anticipation of the operation of the third mechanism.

2.2. The drafting of Article 58

In May 1949, the CoE first met in London to draft what was to become the CoE Statute. The final Statute committed CoE members to maintaining human rights, but this did not confer any direct rights on the individuals living within CoE Member States.³³ Article 8 of the CoE Statute stated that should ‘serious violations’ of Article 3—which protects the CoE’s organisational aims of ‘the rule of law’ and ‘the protection of human rights and fundamental freedoms’—take place in a Member State, this would be grounds for suspension.³⁴ There has been very little clarity offered on what was meant by a ‘serious violation’, both at the time of drafting and in relation to subsequent practice—the 1967 Greek military coup, the 1974 Turkish invasion of Cyprus, the 1980 Turkish coup, the 2000 Chechen war and the 2008 Georgian war did not give rise to Article 8 action.³⁵

The formal withdrawal process from the CoE by a State is contained in Article 7. Article 8 allows for the CoM to decide that a State in breach of Article 3 ‘has ceased being a member of the Council’. This, as Dzehtsiarou and Coffey note, is an express power to expel members, but other similar organisations, such as the Organization of American States (OAS), which effectively expelled Cuba in 1962, have found political solutions even where there was no express legal power.³⁶ However, there is no direct connection between the membership of the OAS and denunciation of the American Convention on Human Rights (ACHR), as there is with the CoE and the ECHR under Article 58. Writing in 1995, Benoit-Rohmer and Klebes noted that legal experts were divided on what exactly Article 8 entailed, and practice until that point had been to try to keep States in the CoE, with the Turkish military regime in the 1980s cited as an example.³⁷ The drafters of the CoE Statute evidently could not comment on the relationship of Article 8 of the CoE Statute to Article 58 of the ECHR, since the ECHR had not yet been drafted,

³² CoE Statute (n 28) art 3. However, this assumption has not been tested given that there has yet to be a voluntary withdrawal by a State from the ECHR, or any of the other treaties which require CoE membership.

³³ The activities of the CoE in promoting and protecting human rights went beyond the ECHR, but that was the instrument that individuals could utilise: see M Bond, *The Council of Europe: Structure, History and Issues in European Politics* (Routledge 2012) Ch 3.

³⁴ CoE Statute (n 28) art 3.

³⁵ E Klein, ‘Membership and Observer Status’ in S Schmahl and M Breuer (eds), *The Council of Europe: Its Law and Policies* (OUP 2017) 66–8.

³⁶ Dzehtsiarou and Coffey (n 10) 449.

³⁷ F Benoit-Rohmer and H Klebes, *Council of Europe Law: Towards a Pan-European Legal Area* (CoE Publishing 1995) 39–40.

but nor did they discuss in detail what constituted a serious violation under Article 3 and its impact in terms of continued membership under Article 8.

In August 1949, the Consultative Assembly of the CoE met in Strasbourg to look at drafting a human rights convention inspired in part by the Universal Declaration of Human Rights (UDHR), which had been passed in December 1948 by the UN General Assembly. The creation of a judicial mechanism (which was to become the Commission and the Court) to hear human rights cases was strongly contested during the drafting process, but there is no real evidence of denunciation emerging as a feature of these discussions. Instead, the inclusion of a provision on denunciation was more directly linked to the provisions on extending the Convention to overseas territories (which is now Article 56 of the ECHR). At the meeting of the CoE's Sub-Committee on Human Rights on 4 August 1950, the British delegate introduced a series of amendments with a revised text of the colonial clause and a denunciation clause.³⁸ The text did not specify anything beyond the right of a State to denounce the Convention. Three days later, the CoM unanimously adopted a revised version which included time limits on the length of membership, the savings provisions and the reference to CoE membership, provisions which are all contained in the final text of Article 58.³⁹ As Bates argues in his history of the drafting of the ECHR, the focus on the colonial clause and other mechanisms to control or limit the scope of the Convention⁴⁰ was part of a 'sovereignty conscious' trend of British amendments to the draft Convention in the summer of 1950.⁴¹ In a letter of 24 June 1950, David Maxwell-Fyfe from the British delegation revealed that in closed sessions there had been a number of different points of view about the application of the Convention in overseas territories and, more generally, about how it would operate, and discussions later in August appeared to draw a direct link between those earlier concerns and the overall concept of withdrawal.⁴² In the final text of the Convention, Article 65 was the clause titled 'Denunciation'. Although after the adoption of Protocol No 11 to the ECHR in 1998 it was changed to Article 58, there has been no real attempt to revise the substance of this provision since the ECHR's conclusion. Therefore, for the purposes of simplicity and consistency, the rest of this article refers to it as Article 58.⁴³

What is lacking from *travaux* are any details of how Article 58 might function; for example, there is no discussion of how cases would be decided after denunciation (both before and after withdrawal becomes effective), and no discussion of how any potential expulsion or suspension from the CoE would interact with ECHR obligations. A couple of years before the drafting of the ECHR, the lack of a denunciation clause in the UN Charter was subject to a detailed analysis by Hans

³⁸ CoE, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights* (Martinus Nijhoff 1979) vol V, 68–70.

³⁹ *ibid* 108–10.

⁴⁰ See *ibid* 120.

⁴¹ E Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010) 90.

⁴² *ibid* 60.

⁴³ W Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 942.

Kelsen,⁴⁴ but early commentary on the Convention saw little to no reference to denunciation. The first State to contemplate withdrawal was the UK in 1956, after Greece had raised an inter-State case in relation to the situation in Cyprus, but this never really progressed much beyond internal discussion in the British Foreign Office.⁴⁵ The interplay between expulsion from the CoE and denunciation of the ECHR was noted in Greenberg and Shalit's 1963 analysis of the Convention, in which they argued that the Commission needed to operate 'between these extremes of expulsion and resignation' in shaping political solutions for the implementation of decisions.⁴⁶ Around this time there was some concern about denouncing the provisions on individual petition in the Convention, but only limited engagement with the substance of Article 58 in academic commentary.⁴⁷ In the summer of 1970, the CoE Committee of Experts on Human Rights produced a report for the CoM highlighting the inconsistency between the ECHR and the ICCPR in terms of withdrawal, but 'did not wish to formulate any conclusions on this question [treaty withdrawal]', noting that the subject was at the time still 'under discussion at the Vienna Conference on the law of treaties'.⁴⁸

3. Expulsion and Article 58

Following the invasion of Ukraine, in order to understand how to proceed in a situation of grave human rights violations by a State, Jörg Polakiewicz, the Director of the Directorate of Legal Advice and Public International Law at the CoE, instructed staff to review all source material on the Greek case carefully, but they struggled to identify a clear set of principles which could serve as a template for how to proceed.⁴⁹ To understand the difficulty in the Russian case, it is necessary to examine its history in tandem with the Greek case. In both cases the political desire to take action against a State committing widespread human rights abuses drove considerations about the procedure for suspension, and expulsion was, to some extent, engineered in response. Further, in both cases, expulsion was threatened but a notice of denunciation under Article 58(1) of the ECHR and Article 7 of the CoE Statute arrived before the trigger was formally pulled on expulsion under Article 8 of the CoE Statute, which would have triggered Article 58(3) of the ECHR and removed the States as States Parties to the ECHR.

⁴⁴ H Kelsen, 'Withdrawal from the United Nations' (1948) 1 WestPolQ 29.

⁴⁵ Bates (n 41) 54.

⁴⁶ J Greenberg and A Shalit, 'New Horizons for Human Rights: The European Convention, Court, and Commission of Human Rights' (1963) 63 ColumLRev 1384, 1408.

⁴⁷ Prior to Protocol No 11 of the ECHR, it was possible to withdraw from the system of individual petition: for a contemporary analysis, see H Rolin, 'Has the European Court of Human Rights a Future?' (1965) 11 HowLJ 442, 450.

⁴⁸ CoE Committee of Experts on Human Rights, 'Problems Arising from the Co-existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights' (1 August 1970) H(70)7, paras 35–36. It is important to note that the VCLT had been concluded by this time and that this document appears to be referring to discussions in early 1969 prior to the opening of the VCLT for signature on 23 May that year.

⁴⁹ J Polakiewicz, 'Forum 2: Fairness in the Practice of International Law and Organisations' (European Society of International Law conference, Aix Marseille University, 31 August 2023).

3.1. CoE sanctions and suspension

Greece's departure from the CoE was precipitated by a military coup in 1967, shortly before elections were due to take place. The coup was initially peaceful, but the new military government quickly instigated martial law and one-party authoritarian rule.⁵⁰ Five days after the coup, the Consultative Assembly of the CoE issued a resolution protesting against violations of rights protected under the ECHR by the new military government.⁵¹ Although the Greek Government announced that it intended to return to civilian rule as soon as possible, it was quick to use military forces against any political dissent.⁵² According to one account 'the regime imposed and maintained strict press censorship, forbade political gatherings ... imprisonment and torture of political opponents became notorious'.⁵³ When, in 1968, the Consultative Assembly of the CoE passed a resolution urging the transition to democracy, a senior member of the military regime described the resolution as little more than a 'a mosquito on the horns of an ox'.⁵⁴ In November 1969, the Commission handed down its decision (in a confidential session, as was the practice at the time) in relation to the inter-State application brought by Denmark, Norway, Sweden and the Netherlands. It made several findings of serious human rights violations under the Convention, including torture and arbitrary detention.⁵⁵ A Danish commentary on the case shortly afterwards argued that there was a 'strong moral obligation' to bring such a case given the scale of human rights violations taking place under the military regime in Greece.⁵⁶

Following the decision, a CoE meeting was scheduled for December 1969 to discuss the consequences of the case and what the next steps would be against Greece. As the leading history of the case notes, the applicant States and many members of the CoM were aware of how the case was being used to bring broader pressure on the regime and fitted into other international advocacy efforts.⁵⁷ Most States seemed to be ready to vote for Greece's expulsion, including the UK, which had previously tried to support the military government. Then Prime Minister Harold Wilson indicated the British Government's support for expulsion to Parliament on 8 December 1969.⁵⁸ However, before the CoE could take action, on 12 December 1969 the Greek Foreign Minister announced Greece's withdrawal from the CoE under Article 7 of the CoE Statute.⁵⁹ Even though there was no

⁵⁰ C Danopoulos, 'Military Professionalism and Regime Legitimacy in Greece, 1967–1974' (1988) 98 PolSciQ 485.

⁵¹ CoE Consultative Assembly, Directive No 256 (26 April 1967).

⁵² S Xydis, 'Coups and Countercoups in Greece, 1967–1973 (with Postscript)' (1974) 89 PolSciQ 507.

⁵³ Danopoulos (n 50) 491.

⁵⁴ EGH Pedaliu, 'Human Rights and International Security: The International Community and the Greek Dictators' (2016) 38 IntlHistRev 1014, 1023

⁵⁵ *The Greek Case (Denmark, Norway, Sweden and the Netherlands v Greece)* App Nos 3321/67, 3322/67, 3323/67 and 3344/67 (Commission Decision, 5 November 1969).

⁵⁶ O Espersen, 'Denmark and the European Convention of Human Rights' (1970) 18 AmJCompL 293, 304.

⁵⁷ K Kornetis et al, 'Introduction' in K Kornetis et al (eds), *The 1969 'Greek Case' in the Council of Europe: A Game Changer for Human Rights* (Bloomsbury 2024) 8–11.

⁵⁸ V Fernández Soriano, 'Facing the Greek Junta: The European Community, the Council of Europe and the Rise of Human-Rights Politics in Europe' (2017) 24 EurRevHist 358, 368.

⁵⁹ Greek Withdrawal (n 6).

requirement to do so, the notice stated that Greece recognised and supported international human rights law and the UDHR, but was denouncing the ECHR due to the 'interference' by the Commission.⁶⁰

At a colloquy of experts on the Convention in Brussels in September 1970, shortly after the Greek withdrawal from the ECHR had become effective, the view was expressed that 'more was to be gained by retaining Greece as a member of the Council of Europe' because it would be subject 'to a great deal more moral pressure to reform' than it would as 'a lone wolf, rejected by her former friends and allies in Western Europe'.⁶¹ However, writing before Greece had withdrawn, another contemporary source observed that the 'feeling [was] that democracy could be restored, and human rights respected only when the [military] regime was overthrown, and expulsion would help this end'.⁶² When, in early 1970, the Greek Government was offered an opportunity to take part in the CoM's discussion on the Commission's report, it responded with a letter saying that it had 'no intention whatsoever' of doing so, with the CoM later concluding that Greece was not prepared to comply with its continuing obligations under the Convention.⁶³

Russia joined the CoE on 28 February 1996, only a year after it had committed what were widely considered to be war crimes in Chechnya. At the time, non-governmental organisations warned that the CoE would be responsible for Russia's repeated human rights violations and Rolv Ryssdall, the then President of the ECtHR, warned that Russia was 'not yet in a position to meet the standards required by the Convention'.⁶⁴ A report commissioned by the CoE two years earlier had reached a similar conclusion, but admission to the CoE and subsequent accession to the ECHR were seen through a teleological lens of encouraging internal democratisation and reform which, by 2000, appeared to have happened, with a set of rights protected in a civil code and the modernisation of the criminal code.⁶⁵ By the mid-2000s, however, there were early signs that Russian compliance with the ECtHR was poor, Russian applications to the Court began to increase and, by the end of the decade, growing internal crackdowns on political dissent and civil society were common.⁶⁶ By the early 2010s, Russia's non-compliance with ECtHR judgments and its involvement in a number of activities which were incompatible with membership of the CoE were relatively well known. For example, a Parliamentary Assembly of the Council of Europe (PACE) report in 2014 noted a series of issues with Russian compliance with the ECtHR, including 'the recent

⁶⁰ *ibid.*

⁶¹ R O'Hanlon, 'The Brussels Colloquy on the European Convention on Human Rights' (1970) 5 *IrJur* 252, 253.

⁶² J Beckett, 'The Greek Case before the European Human Rights Commission' (1970) 1 *HumRts* 91, 106.

⁶³ CoM, Res DH(70)1 on the Greek Case (15 April 1970) paras 18–19.

⁶⁴ Cited in B Bowring, 'Russia's Accession to the Council of Europe and Human Rights: Compliance or Cross-Purposes?' (1997) 6 *EHRLR* 628, 629.

⁶⁵ I Busygina and J Kahn, 'Russia, the Council of Europe, and "Ruxit", or Why Non-Democratic Illiberal Regimes Join International Organizations' (2019) 67 *ProbPostComm* 64, 69–70.

⁶⁶ *ibid*; WD Jackson, 'Russia and the Council of Europe: The Perils of Premature Admission' (2004) 51 *ProbPostComm* 23.

phenomenon, observed in the Russian Federation, of the temporary disappearance of applicants protected by interim measures' in a form of extraordinary rendition.⁶⁷

The 2014 military incursion into Ukraine and the annexation of Crimea led to a motion at the PACE condemning 'without reservation the violation of the territorial integrity and sovereignty of Ukraine by the armed forces of the Russian Federation' and calling for the credentials of the Russian delegation to be suspended.⁶⁸ Two weeks later, Russia's voting rights in PACE were suspended, as was its right to be represented in PACE bodies, although it continued its membership of other CoE bodies, including the CoM.⁶⁹ These political sanctions were a CoE process imposed under the rules of PACE, and had no formal effect on its position as an ECHR State Party.⁷⁰

Throughout the entirety of its time under sanctions from PACE, Russia remained bound by the ECHR and was required to comply with ECtHR judgments and decisions.⁷¹ Yet, in 2015, the Duma passed a law which allowed the Russian Constitutional Court to declare ECtHR judgments and decisions unenforceable in Russia, which followed an earlier Constitutional Court decision that summer in which it had refused to implement an ECtHR decision.⁷² This sat uneasily with the obligation to implement ECtHR judgments contained in Article 46 of the ECHR, but the Constitutional Court argued that the ECtHR's evolutive interpretation of the ECHR meant that this changed the nature of the obligations to which Russia had acceded in 1998.⁷³ There was little basis to this as a matter of public international law, as the VCLT prohibits the use of a provision in domestic law to justify non-compliance.⁷⁴

When the Russian Government began to threaten to leave the CoE in 2018 there was considerable concern about what this would mean for the protection of human rights and for the pending applications against Russia before the ECtHR.⁷⁵ Partially in response to these concerns, Russian sanctions were lifted. Commenting on the

⁶⁷ Parliamentary Assembly of the Council of Europe (PACE), 'Urgent Need to Deal with New Failures to Co-operate with the European Court of Human Rights' (28 February 2014) Doc 13435.

⁶⁸ PACE, 'Credentials of the Russian Delegation' (21 March 2014) Doc 13457.

⁶⁹ PACE, 'Citing Crimea, PACE Suspends Voting Rights of Russian Delegation and Excludes It from Leading Bodies' *Council of Europe News* (Strasbourg, 10 April 2014) <<https://pace.coe.int/en/news/4982>>.

⁷⁰ PACE, Res 1990 on Reconsideration on Substantive Grounds of the Previously Ratified Credentials of the Russian Delegation (10 April 2014).

⁷¹ K Baranov and Y Dzhibladze, 'Council of Europe vs Russia: Stay or Go?' (*EUObserver*, 24 June 2019) <<https://euobserver.com/opinion/145235>>.

⁷² L Mälksoo, 'Russia's Constitutional Court Defies the European Court of Human Rights: Constitutional Court of the Russian Federation Judgment of 14 July 2015 No 21-II/2015' (2016) 12 *EuConst* 377; M Aksenova and I Marchuk, 'Reinventing or Rediscovering International Law? The Russian Constitutional Court's Uneasy Dialogue with the European Court of Human Rights' (2018) 16 *ICON* 1322; K Dzehtsiarou and F Fontanelli, 'Unprincipled Disobedience: The Doctrine of the Russian Constitutional Court after the Yukos Case' (2018) *YBEurConvHumRts* 319.

⁷³ J Khan, 'The Relationship between the European Court of Human Rights and the Constitutional Court of the Russian Federation: Conflicting Conceptions of Sovereignty in Strasbourg and St Petersburg' (2019) 29 *EJIL* 933, 939–40.

⁷⁴ M Bennetts, 'Ruxit' Specter Haunts Russian Human Rights Activists' *Politico* (Moscow, 7 May 2019) <<https://www.politico.eu/article/ruxit-russian-human-rights/>>.

⁷⁵ A Drzemczewski, 'The (Non-) Participation of Russian Parliamentarians in the Parliamentary Assembly of the Council of Europe: An Overview of Recent Developments' (2020) *EurDtsLibertés/EurRtsLib* 7; see also B Bowring, 'Russia and the European Convention (or Court) of Human Rights: The End?' (2020) 3 *RQDI* 201.

decision, Tatiana Kastouéva-Jean, a researcher for the Institut français des relations internationales, noted that the ‘Council of Europe is giving everything away without any concessions from Russia’.⁷⁶ It was hard to see what had materially changed by 2019: Russia was still effectively violating Article 3 CoE Statute with its actions in eastern Ukraine and, although it was required to implement previous PACE resolutions by 2021, there were limited signs it was doing so.⁷⁷ However, a different view was expressed by the President of the ECtHR who, writing in that year’s annual report of the Court, noted that 12,000 cases against Russia were still pending before the Court and that it would be ‘a huge setback for human rights not only for [Russia] ... but for all member States’ were Russia to withdraw.⁷⁸ Two years before Russia’s CoE membership was terminated, the European Implementation Network estimated that there were 223 leading judgments—that is, judgments identifying a new significant or systemic problem within a country—pending implementation in Russia, the highest number of pending leading judgments of all CoE Member States.⁷⁹

3.2. *Expulsion or withdrawal?*

In the Greek case, withdrawal in December 1969 took place before a formal vote on whether to suspend or expel Greece could be taken. Prior to the debate at the CoM, tensions had been raised as a result of the Commission’s confidential report on Greece being leaked, with both the *Sunday Times* in London and *Le Monde* in Paris publishing extensive details of the human rights violations examined.⁸⁰ The sense that Greece had departed before it had been expelled was a feature of the contemporary commentary. A moral justification for action in relation to Greece came from the 1970 colloquy of experts: one of the delegates asked the others to imagine what would happen if ‘a delegation from one of the newly-emergent African nations’ came to them for advice, noting the ‘impressive looking’ nature of the ECHR, but then found out that the institutions imposed the ‘minimum amount of restrictions’ on a government when they had been found to be violating human rights.⁸¹ As paternalistic and imperialist as this reads today, it was a way of framing the general concern about the lack of sanction for Greece’s violations of the Convention. The Secretary-General of the International Commission of Jurists,

⁷⁶ JL Mounier, ‘Russia’s Undiplomatic Return to the Council of Europe’ *France 24* (Paris, 28 June 2016) <<https://www.france24.com/en/20190628-russia-undiplomatic-return-council-europe-ukraine>>.

⁷⁷ L Glas, ‘They Did It Again: Russia’s Continued Presence in the PACE’ (*Strasbourg Observers*, 23 February 2021) <<https://strasbourgobservers.com/2021/02/23/they-did-it-again-russias-continued-presence-in-the-pace/>>.

⁷⁸ G Raimondi, ‘Opening of the Judicial Year, 25 January 2019’ in ECtHR and CoE, *Annual Report of the European Court of Human Rights: 2019* (CoE Press 2019) 14.

⁷⁹ M Zamboni, ‘New Country Report on the Implementation of Judgments of the European Court of Human Rights in Russia’ (European Implementation Network, January 2021) <<https://www.einnetwork.org/news-2021/2021/2/5/xjxklc31b9ufb71hur8u8mpdhmpill>>.

⁸⁰ I Risini and A Forde, ‘Parting Paths – Russia’s Inevitable Exit From the Council of Europe’ (*Völkerrechtsblog*, 12 March 2022) <<https://voelkerrechtsblog.org/parting-paths-russias-inevitable-exit-from-the-council-of-europe/>>.

⁸¹ O’Hanlon (n 61) 254.

writing a few months after the Greek withdrawal, complained about the lack of an 'automatic procedure' to bring violators before the Court and that it was possible for a State to 'violat[e] the Convention while the machinery of the Council of Europe remains inoperative'.⁸² This meant that Greece needed to be 'goaded into taking the first step toward its own isolation'—as a comment piece in 1971 put it—yet this was seen as a 'victory' at the time, with action to marginalise the Greek regime also being taken by the European Economic Community and the United States.⁸³

Before a vote on suspension had taken place, and before Greece's notice of denunciation had been received, there was some uncertainty about how to ensure cooperation from the Greek military government.⁸⁴ Interestingly, on the same date as Greece's letter of withdrawal, the CoM issued a resolution which noted that because it 'understands that the Greek Government will abstain from further participation in the activities of the Council of Europe ... [therefore] there is no need to pursue the procedure for suspension'.⁸⁵ Because of the lack of cooperation from the Greek Government after 1970, the Commission did not pursue enforcement of these decisions, even though Greece was required to execute them under the terms of Article 58 of the ECHR.

Less than three years after the PACE sanctions on Russia were lifted, in the early morning of 24 February 2022, after months of escalation, an all-out Russian attack on Ukraine began. A day later, the CoM agreed to suspend Russia under the provisions of Article 8 of the CoE Statute.⁸⁶ At this point, there was no explicit consideration of Russia's role as a party to the ECHR, notwithstanding the fact that the conflict would be likely to lead to mass human rights violations, although it was clarified a week later in a draft resolution that Russia remained bound by the ECHR and the role of the Russian judge would be a matter to be clarified by the ECtHR.⁸⁷

Following Russia's acts of aggression there appeared to be a clear desire on the part of the CoE to remove Russia from the organisation and to do so formally via expulsion. This was reflected in some of the media coverage and briefings which emphasised the word 'expelled'.⁸⁸ This was pithily put by Jörg Polakiewicz, who speaking a year later noted that a person 'may choose to leave a tennis club, and they will be expected to comply with the notice period and settle their bill ... but if they set the clubhouse on fire, their membership would be terminated'.⁸⁹

⁸² S MacBride, 'The European Court of Human Rights' (1970) 3 NYUJIntL&Pol 1, 14–15.

⁸³ J Agrest, 'Human Rights and Preventative Detention: The Greek Case' (1971) 38 SocRes 298, 318.

⁸⁴ FE Dowrick, 'Juristic Activity in the Council of Europe: 25th Year' (1974) 23 ICLQ 610, 626.

⁸⁵ A copy of this is reproduced in CoE (ed), *Yearbook of the European Convention on Human Rights: The European Commission and European Court of Human Rights* (Martius Nijhoff 1972) vol 16, 118.

⁸⁶ CoM, Decision 1426ter/2.3 on the Situation in Ukraine – Measures to be Taken, including under Article 8 of the Statute of the Council of Europe (25 February 2022).

⁸⁷ CoM, Note 1427/2.5 on the Situation in Ukraine – Continuation of the Procedure under Article 8 of the Statute (2 March 2022).

⁸⁸ G Gotev, 'Russia Leaves Council of Europe, Avoiding Being Kicked Out' *Euractiv* (10 March 2022) <<https://www.euractiv.com/section/global-europe/news/russia-leaves-council-of-europe-avoiding-being-kicked-out/>>; Z Siddiqui and K Zvobgo, 'The Council of Europe Expelled Russia. That Hurts People, Not Putin' *The Washington Post* (12 April 2022) <<https://www.washingtonpost.com/politics/2022/04/12/russia-human-rights-ukraine-council-of-europe/>>.

⁸⁹ Polakiewicz (n 49).

The draft opinion from the Committee on Political Affairs and Democracy of PACE, authored by the Norwegian politician Ingjerd Schou, made a similar point when it noted that Russia had ‘failed to implement numerous decisions of the European Court of Human Rights, including its interim measures, asking the Russian Federation to refrain from military attacks against civilians and civilian objects’.⁹⁰ The explanatory memorandum pointed out that ‘even if Russian troops were withdrawn immediately’, trust in the Russian authorities had been irreparably shattered, meaning that the only option was for Russia to withdraw and any readmission application would need to show ‘a profound change ... in the direction taken by its leadership’.⁹¹ Schou’s opinion concluded with something of a tension, saying that PACE should call for the ECtHR to ‘consider giving priority to applications brought by Ukrainian citizens against the Russian Federation for acts committed in the temporarily occupied areas of Ukraine’ because they may ‘have no access to effective remedies against such acts at national level’.⁹² Yet, it went on to say that the CoM ‘should request the Russian Federation to immediately withdraw from the Council of Europe’ and, were that unsuccessful, the CoM should ‘envisage the immediate possible date from which the Russian Federation would cease to be a member of the Council of Europe’, presumably referring to Article 8 of the CoE Statute.⁹³ Such an action would presumably engage Article 58(3) of the ECHR, meaning that there may have been a temporal issue of jurisdiction with the cases that the opinion also expected the ECtHR to fast-track. However, there is no evidence in the amendments to the opinion proposed by other PACE members, or in any other PACE documents, that this eventuality was considered.⁹⁴

On 15 March—the same day that PACE’s debate on Russia and the situation in Ukraine based on this draft opinion began—a letter arrived at the CoE Secretary-General’s office from the Russian Foreign Ministry withdrawing Russia from the CoE and, at the same time, announcing Russia’s intention to denounce the ECHR, seemingly engaging Article 58(1) and (3) of the ECHR.⁹⁵ News of the notice reached PACE mid-session. Upon receiving the information, the President of PACE, Tiny Kox, interrupted the ongoing debate to declare that the Russian

⁹⁰ PACE, ‘Report of the Committee on Political Affairs and Democracy on Consequences of the Russian Federation’s Aggression against Ukraine, Draft Opinion 300/2022 by Rapporteur Ingjerd Schou’ (14 March 2022) Doc 15477 (PACE Draft Opinion) para 8.

⁹¹ PACE, ‘Report of the Committee on Political Affairs and Democracy on Consequences of the Russian Federation’s Aggression against Ukraine, Explanatory Memorandum by Rapporteur Ingjerd Schou’ (14 March 2022) Doc 15477, paras 86–87.

⁹² PACE Draft Opinion (n 90) para 15(3).

⁹³ *ibid* para 18.

⁹⁴ For details of the amendments, see PACE, ‘Consequences of the Russian Federation’s Aggression against Ukraine – Compendium of Written Amendments’ (15 March 2022) Doc 15477.

⁹⁵ The text of the notice is detailed in CoM, ‘Cessation of the Membership of the Russian Federation to the Council of Europe’ (16 March 2022) CM/Res(2022) 2. The CoE did not reproduce the letter in their list of documents, although the Ministry of Foreign Affairs of the Russian Federation (n 7) published a statement detailing what appeared to be its likely contents: see CoE, ‘Exclusion of the Russian Federation from the Council of Europe and Suspension of All Relations with Belarus’ (Press Release, 17 March 2022) <<https://www.coe.int/en/web/cdcj/-/russian-federation-excluded-from-the-council-of-europe>>.

letter ‘does not intervene in our discussions’ stressing that ‘our [PACE and the CoE] process goes on’.⁹⁶

There was considerable support in the extraordinary debate in PACE for Russia’s expulsion: Krista Baumanė from Latvia was clear that Russia ‘should be expelled in the fastest and most direct manner’ and María Fernández from Spain said that the ‘immediate and unanimous decision to expel Russia’ was necessary because of ‘its failure to support the fundamental values of this institution’.⁹⁷ Indeed, the CoM voted unanimously to adopt the draft opinion following Kox’s request,⁹⁸ and agreed that a date should be set by the CoM for when Russia’s membership should cease.⁹⁹ The opinion noted it was ‘the profound breach of trust caused by [Russia which] fully justifi[ed] the further recourse to Article 8 of the Statute’.¹⁰⁰ Although this determination was largely academic by the time of its adoption thanks to the Russian withdrawal, it was still a very clear statement of intent. Had the withdrawal and denunciation notification not arrived during the debate, Russia would almost certainly have been expelled from the CoE, and there is little evidence to suggest that a further set of sanctions or other political solution would have instead been taken that would not have involved activating Article 58(3).

The next day, the CoM formally declared, in the context of the suspension procedure launched under Article 8 of the CoE Statute, ‘that the Russian Federation ceases to be a member of the Council of Europe as from 16 March 2022’.¹⁰¹ As Philip Leach noted, the CoE favoured describing Russia’s withdrawal as an ‘expulsion’, referring to the language of the CoE Statute and also using this term in press releases and other public-facing documents.¹⁰² Russia placed greater weight in its communications on the notice of denunciation from the CoE and ECHR of 15 March 2022, claiming that it withdrew not because it had to terminate its membership because of the situation in Ukraine, but because of the organisation’s hostility and ‘double standards’ towards it.¹⁰³

There was no formal statement from any organ of the CoE about what the position was in relation to the Russian notice of denunciation, even though the notification had reached the Secretary-General before expulsion from the CoE was confirmed. From the actions of PACE and subsequent statements it is possible to infer that the process of expulsion in practice took precedence over withdrawal, but there was never any formal decision or reasoning published justifying why, as a matter of law, this was the case. Drzemczewski and Lawson have examined a number of

⁹⁶ PACE, ‘Sitting No 4 Debate: Consequences of the Russian Federation’s Aggression against Ukraine’ (15 March 2022) 18:54:01 (Tiny Kox) <<https://pace.coe.int/en/verbatim/2022-03-15/pm/en/speech-16886>>.

⁹⁷ *ibid* 15:37:35 (Krista Baumanė), 16:20:44 (María Fernández).

⁹⁸ *ibid* 20:45:32 (Tiny Kox).

⁹⁹ PACE Draft Opinion (n 90) para 20. The issue is somewhat confused by the text of the opinion in para 20 including a reference to Russia being ‘asked to withdraw’ and then expelled, but the text appears to have been superseded by events.

¹⁰⁰ *ibid* para 19.

¹⁰¹ CoM (n 95).

¹⁰² P Leach, ‘A Time of Reckoning? Russia and the Council of Europe’ (*Strasbourg Observers*, 17 March 2022) <<https://strasbourgobservers.com/2022/03/17/a-time-of-reckoning-russia-and-the-council-of-europe/>>.

¹⁰³ A Meżykowska, ‘Legal Dilemmas of the European Court of Human Rights after Russia’s Expulsion from the Council of Europe’ (2023) 12 *PolRevIntL* 115, 118.

different hypotheses on this point, for example, Russia was trying to circumvent Article 8 by withdrawing from the CoE, or the notice of denunciation arrived in the wrong form and the notice of denunciation constituted *rebus sic stantibus*.¹⁰⁴ Although Drzemczewski and Lawson dismiss all of these potential theories, their analysis focuses on the CoE and not on the concomitant impact on the ECHR.¹⁰⁵ The notice from the Russian Government specified that it was intending to denounce both instruments. There was no explicit reference to denouncing them sequentially, and it is arguable that legally Article 58(1) of the ECHR came into play independently of Article 8 of the CoE Statute. There is a further alternative possibility: the Russian letter to the Secretary-General, the text of which formed part of the CoE's opinion, said that Russia 'intended' to withdraw from the ECHR but was 'withdrawing' from the CoE, which would implicitly mean that Article 7 of the CoE Statute preceded any action under Article 58(1) of the ECHR.¹⁰⁶ The difficulty for this reading is that it was never given any explicit acknowledgement either by PACE or the CoM. Politically, it suited Russia to treat the withdrawals as one and the same and, in June 2022, the Duma symbolically passed legislation ending ECtHR jurisdiction.¹⁰⁷ Indeed, it is not entirely clear that such weight can be put on the formulation of words contained in the Russian notice of denunciation; it was very clear what Russia intended to do—Russia had announced on 10 March 2022 that it was not cooperating with the CoE any further and the content of its 15 March 2022 statement made it fairly clear that it was withdrawing from the ECHR.¹⁰⁸ Furthermore, generally speaking, where there is some requirement for a notice of denunciation to contain specific additional detail as part of the obligations under a withdrawal clause this is expressly stated.¹⁰⁹ There was nothing in the text of Article 58 of the ECHR or Article 7 of the CoE Statute that indicated that PACE's deliberations about a State's actions under Article 8 of the CoE Statute ought to take precedence. The most plausible explanation is that, in March 2022, there was an overwhelming desire from PACE members to proceed symbolically with an expulsion.

At the end of March 2022, a resolution was adopted by the ECtHR on the Russian case which both acknowledged the CoE's suspension of Russia and the 'notification of the same date by the Russian Federation of its withdrawal from the Council of Europe ... and of its intention to denounce the European Convention on Human Rights'.¹¹⁰ The preamble also 'had regard to' the PACE opinion that effectively considered that

¹⁰⁴ A Drzemczewski and R Lawson, 'Exclusion of the Russian Federation from the Council of Europe and the ECHR: An Overview' (2023) 21 BaltYIL 38, 52–4.

¹⁰⁵ *ibid.*

¹⁰⁶ CoM (n 95).

¹⁰⁷ 'Russian MPs Vote to Quit European Court of Human Rights' *Al Jazeera* (7 June 2022) <<https://www.aljazeera.com/news/2022/6/7/russia-exits-european-court-of-human-rights-jurisdiction>>.

¹⁰⁸ See Ministry of Foreign Affairs of the Russian Federation (n 14); see also K Istrefi, 'Russia Will No Longer Participate in the Council of Europe: A Problematic Member State Who Could Not Commit to Peace' (*ECHR Blog*, 10 March 2022) <<https://www.echrblog.com/2022/03/russia-will-no-longer-participate-in.html>>.

¹⁰⁹ See Cowell (n 8) 60–78.

¹¹⁰ Resolution of the European Court of Human Rights on the Consequences of the Cessation of Membership of the Russian Federation to the Council of Europe in light of Article 58 of the European

Russia could no longer be a member of the CoE following its invasion of Ukraine.¹¹¹ The ECtHR resolution therefore covered all three possibilities for termination of ECHR obligations under Article 58. A press release from the Secretary-General of the CoM on 15 September 2022—the day that Russian withdrawal from the ECHR became effective—also glossed over the precise mechanism by which Russia terminated its obligations saying that it was ‘regrettable that, with its departure from the European Convention on Human Rights, Russia will further isolate itself from the democratic world’.¹¹² The rest of the March 2022 ECtHR resolution concentrated on clarifying the role of the Court. There was some criticism that the ECtHR would simply hear all Russian applications still pending before the Court and continue hearing applications until Russia’s withdrawal became effective, with the idea of a triage of cases on the basis of severity mooted.¹¹³ In a press release in February 2023, the Court said that the obligations in Article 58(2) applied in cases involving ‘withdrawal or expulsion from the Council of Europe and/or denunciation of the European Convention’.¹¹⁴ The Russian Government, however, despite the obligations that existed under Article 58(1), made clear that it had no interest in complying with the ECtHR or having any further cooperation with the CoE.¹¹⁵

4. The problem of expulsion

Even though the rules on expulsion are unclear, and in both the Russian and the Greek cases withdrawal took place before expulsion could happen, the motivation to utilise and develop the powers of expulsion was understandable. The CoE was founded explicitly to respond to the expanding threat of totalitarianism and to create a collective political identity for European States that would differentiate them from Nazism and Communism.¹¹⁶ Over the years, the prevention of totalitarianism has come to define the CoE’s commitment to the promotion of democracy.¹¹⁷ In

Convention on Human Rights (22 March 2022) (ECtHR Resolution) <https://www.echr.coe.int/documents/d/echr/Resolution_ECHR_cessation_membership_Russia_CoE_ENG>.

¹¹¹ *ibid* preamble.

¹¹² CoE, ‘Secretary-General: Millions of Russians No Longer Protected by the European Convention on Human Rights’ (Press Release, 15 September 2022) <<https://www.coe.int/en/web/portal/-/secretary-general-millions-of-russians-no-longer-protected-by-the-european-convention-on-human-rights>>.

¹¹³ K Dzehtsiarou, ‘The Range of Solutions to the Russian Cases Pending before the European Court of Human Rights: Between “Business as Usual” and “Denial of Justice”’ (*ECHR Blog*, 16 August 2022) <<https://www.echrblog.com/2022/08/the-range-of-solutions-to-russian-cases.html>>.

¹¹⁴ ECtHR Registrar, ‘Press Release: Latest Rulings by the European Court Set Out the Procedure for Future Processing of Applications against Russia’ (3 February 2023) Doc ECHR-036.

¹¹⁵ This is explained in J Emtseva, ‘The Withdrawal Mystery Solved: How the European Court of Human Rights Decided to Move Forward with the Cases against Russia’ (*EJIL:Talk!*, 8 February 2023) <<https://www.ejiltalk.org/the-withdrawal-mystery-solved-how-the-european-court-of-human-rights-decided-to-move-forward-with-the-cases-against-russia/>>.

¹¹⁶ S Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP 2006) 56; AWB Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (OUP 2004) 348.

¹¹⁷ E Demir-Gürsel, ‘Shifting Frames of the Council of Europe: From Totalitarianism to Authoritarianism, From Populism to Backsliding’ (Frames of European Human Rights conference, Berlin, 16–17 November 2023).

addition to the Court, the CoE has other institutions, such as the Committee on the Prevention of Torture, that specifically assess the human rights records of Member States, and the CoE engages in promotional activities relating to human rights.¹¹⁸ The concern about the backsliding of democratic values in CoE Member States in the 2010s was driven in part by the rise of authoritarian governments directly challenging the ECtHR's authority.¹¹⁹ More generally, these political trends have had an impact on other organisations, leading to a discussion about the prospects for the suspension of a State's membership of the European Union (EU) for a breach of EU values as set out in Article 6 of the Treaty on European Union.¹²⁰ Other, less formally constituted international bodies have also developed categories of suspension, some of which amount to *de facto* expulsion.¹²¹ Maintaining a values-based community of States in an organisational structure means ensuring that Member States adhere to that set of values and, by implication, responding to those who breach that set of values.

Expulsion is, in short, a measure consistent with the aims of the CoE, but the concomitant involuntary termination of ECHR obligations is unique among regional and international human rights treaties. The termination of the obligations of human rights treaties, as discussed in the introduction to Section 2, occurs on a different basis to the termination of obligations in other treaties. Consequently, expulsion from the CoE and the contingent subsequent termination of obligations under the ECHR create two legal tensions which were not considered during the drafting of the ECHR and, given the rapidity of events in the Greek and Russian cases, have yet to be explored by the ECtHR or the CoE.

4.1. Expulsion and breach of obligations

The basic principle of the law of treaty termination and of suspension as a result of breach, codified in Article 60 of the VCLT, is one of negative reciprocity: if one party breaches a treaty, another party can cite that breach as grounds for suspending the operation of a treaty, either as between themselves and the defaulting State, or between all parties.¹²² This principle serves a different purpose from treaty withdrawal, as it is designed not to reflect a change of a State's preferences; rather, it reflects the assumption that, as Tams puts it, States 'do not conclude or become party to treaties in order for them to be breached'.¹²³ Given this, as Giegerich argues, it would be 'unjust ... for a party to continue to demand what would

¹¹⁸ K Brummer, 'Enhancing Intergovernmentalism: The Council of Europe and Human Rights' (2010) 14 *IJHR* 280.

¹¹⁹ Benedek (n 6); E Turkut, 'The Venice Commission and Rule of Law Backsliding in Turkey, Poland and Hungary' (2021) 2 *EurConvHumRtsLRev* 209.

¹²⁰ See, for an overview, B Blagoev, 'Expulsion of a Member State from the EU after Lisbon: Political Threat or Legal Reality?' (2011) 16 *TilburgLRev* 191; Olsen (n 13).

¹²¹ Dzehtsiarou and Coffey (n 10); A Duxbury, *The Participation of States in International Organisations: The Role of Human Rights and Democracy* (CUP 2013) 291–2.

¹²² B Simma and C Tams, 'Article 60' in O Corton and P Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP 2011) 1351.

¹²³ C Tams, 'Treaty Breaches and Responses' in C Tams, A Tzanakopoulos and A Zimmermann (eds), *Research Handbook on the Law of Treaties* (Edward Elgar 2016) 476.

amount to “contractual fidelity” from other parties when it itself is defaulting on its own obligations, a position which has both a customary basis and is rooted in national contract law.¹²⁴

However, as already set out, human rights treaties do not function in a reciprocal manner; they are designed to create obligations which are binding on State Parties because they contain rights that ought to be universal.¹²⁵ Article 60(5) includes a crucial caveat that the doctrine of termination or suspension as a consequence of breach does not apply to ‘treaties of a humanitarian character’.¹²⁶ As Schwelb argues, during the drafting of the VCLT the concept of ‘humanitarian character’ was settled on to reflect a wide range of treaties, not just human rights treaties, that might confer individual rights.¹²⁷ Shortly after the VCLT was concluded, in its *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, the ICJ confirmed that termination or suspension in the event of breach was a general principle of international law which could only be excluded expressly, unless the treaty was of a humanitarian character, specifically citing Article 60(5).¹²⁸

Expulsion, arguably, is technically compatible with this general principle. The consequences of the breach of a State’s human rights obligations under a treaty are not extinguished but, rather, highlighted by the act of expulsion as being so egregious that the State may no longer be part of an international legal regime that sees itself as a norm-bound community, committed to protecting human rights. This is an extension of the reputational theory surrounding international human rights treaties, which maintains that the reasons States commit to and comply with human rights treaties is because of their reputational benefits, and therefore the negative reputational consequences of non-compliance—especially when that non-compliance is called out by an international court or tribunal—act as a form of sanction.¹²⁹ Expulsion, following this logic, is a form of mega-sanction, to indicate the severity of a State’s actions. Moreover, a State’s continuing membership of a human rights treaty, after it has committed systemic violations of that treaty, weakens the reputational and political benefits of the human rights regime as a whole. There are other States that engage in serial non-compliance, though not to the extent of Russia’s pre-2022 behaviour in terms of acts of

¹²⁴ T Giegerich, ‘Article 60: Termination or Suspension of the Operation of a Treaty as a Consequence of Its Breach’ in Dörr and Schmalenbach (n 25) 1096.

¹²⁵ See Craven (n 15); *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (n 18).

¹²⁶ VCLT (n 2) art 60.

¹²⁷ Schwelb (n 27).

¹²⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para 96.

¹²⁹ For literature on the subject, see D Hill Jr, ‘Estimating the Effects of Human Rights Treaties on State Behaviour’ (2010) 72 JPol 1161; M Lohaus and S Stapel, ‘Who Commits to Regional Human Rights Treaties? Reputational Benefits, Sovereignty Costs, and Regional Dynamics’ (2023) 22 JHumRts 386; A Geisinger and MA Stein, ‘Rational Choice, Reputation, and Human Rights Treaties’ (2008) 106 MichLRev 1129.

aggression or non-execution of ECtHR judgments.¹³⁰ Non-compliance is something that the CoE and ECtHR have had to grapple with, and it could be argued that drawing a hypothetical line in relation to State behaviour helps to maintain the spirit of Article 3 of the CoE Statute that ‘every member of the Council of Europe must accept ... the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms’.¹³¹ However, such an argument is problematic for two reasons.

First, when a State is expelled, its obligations under the Convention are terminated with effect from a particular date, meaning—relatively speaking—it has fewer international legal obligations prohibiting human rights violations and that future conduct which constitutes a violation of human rights will not be subject to investigation, legal sanction or supervision. This does not provide an escape for the consequences of violations of human rights obligations that occurred prior to that date as they remain the responsibility of States after they have withdrawn, following the general principle in treaty law that States are responsible for the consequences of a breach of obligations in any treaty prior to withdrawal or the termination of obligations by any other means.¹³² As Padskocimaite notes, in relation to the execution of the ECtHR judgments against Russia, the general obligation under Article 46 of the ECHR to abide by a judgment of the ECtHR and implement that judgment corresponds to that found in Article 12 of the International Law Commission’s 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), meaning that responsibility for violations of the Convention has not ceased.¹³³ However, this does mean that it becomes more difficult to ensure that effective remedies for breaches of the ECHR are obtained by applicants as the responsible State will then be outside the framework for monitoring compliance. As Agrest argues, although Greece’s withdrawal was hailed as a ‘victory’ at the time, a year later it had become a ‘frustrating obstacle’ with no discernible change noticed and no obvious next step to deal with the ongoing political situation that was the cause of the human rights violations prior to withdrawal becoming effective in June 1970, and which continued to cause such violations afterwards.¹³⁴ A similar critique could be made of Russia today; in one sense, the organisational integrity of the CoE has been maintained, yet, in another sense, it has become harder to ensure ECtHR compliance or the protection of rights in Russia.¹³⁵

¹³⁰ For literature on non-execution of judgments, see D Panke, ‘The European Court of Human Rights under Scrutiny: Explaining Variation in Non-Compliance Judgments’ (2020) 18 *CompEurPol* 151; F De Londras and K Dzehtsiarou, ‘Mission Impossible? Addressing Non-Execution through Infringement Proceedings in the European Court of Human Rights’ (2017) 66 *ICLQ* 467.

¹³¹ CoE Statute (n 28) art 3.

¹³² J Crawford, *State Responsibility: The General Part* (CUP 2013) 251–3.

¹³³ A Padskocimaite, ‘Execution of the ECtHR’S Judgments against Russia: Some Legal (and Political) Aspects’ (*Strasbourg Observers*, 15 May 2023) <<https://strasbourgobservers.com/2023/05/15/execution-of-the-ecthrs-judgments-against-russia-some-legal-and-political-aspects/>>. See also International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN General Assembly Res 56/83 (12 December 2001) arts 12–14.

¹³⁴ Agrest (n 83) 318.

¹³⁵ For an overview, see M Quell, ‘One Year after Russian Expulsion from Top European Human Rights Body, Ukraine War Rages On’ *Courthouse News Service* (Connecticut, 15 September 2023) <<https://www.courtsnewsservice.com/2023/09/15/one-year-after-russian-expulsion-from-top-european-human-rights-body-ukraine-war-rages-on/>>.

Although in both cases the State Party wished to withdraw, were a State Party to be expelled against its wishes, it is hard to see how the lack of cooperation would not be made worse. As detailed in the CoM's report at the end of 2022, all attempts to negotiate or engage with the Russian authorities were effectively closed down shortly after the notice of withdrawal was issued.¹³⁶

Second, expulsion replicates the risk that Article 60(5) of the VCLT seems to be designed to avoid. Commentary on Article 60 states that it was designed to prohibit 'reprisals against persons protected by such treaties', indicating the way in which the principle of termination as a result of breach was codified to avoid incentivising the abuse of the individual.¹³⁷ As Schwelb notes, the reason for the inclusion of the humanitarian exception in Article 60 was not to 'deprive a State [of] the right to denounce a humanitarian treaty' in conformity with its withdrawal clause, but to protect the treaty from 'immediate termination or suspension'.¹³⁸ Expulsion, however, removes the right of citizens to bring their claims in relation to a violation of their rights under the ECHR. Even though this is the case with any use of Article 58 in an expulsion case, unlike a voluntary withdrawal, the CoE is the instigator in an expulsion under Article 8 of the CoE. A political punishment is levelled against the State, through the process of expulsion, but ultimately it is the citizens of that State who suffer as a consequence of that punishment. Preserving the capacity of citizens to bring a claim against a State at least allows their claims of violations of Convention rights to be heard, recorded and findings of violations made. It also serves the aims of the CoE, as an organisation which promotes human rights, to ensure that the victims of human rights abuses have a forum to claim for the protection of their rights, even if the State in whose jurisdiction they find themselves no longer cares about their rights or the international institutions that protect them.¹³⁹

Expulsion is, in effect, a reversal of the normal approach of human rights treaties to political persuasion, i.e. bringing States into the legal regime of a treaty and then incentivising them to comply with that treaty's terms through the normative power of publicly highlighting their compliance, or non-compliance, with a human rights instrument or the rulings of a human rights court.¹⁴⁰ The ways in which human rights treaties are treated differently from other types of treaties can be seen in relation to other legal doctrines, such as reservations, where dialogue with a State inside a legal regime, with the hope of persuading it to remove an impermissible

courthousenews.com/one-year-after-russian-expulsion-from-top-european-human-rights-body-ukraine-war-rages-on/.

¹³⁶ CoM, 'Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 2022' (30 March 2023) <<https://rm.coe.int/annual-report-2022/1680aad12f>>.

¹³⁷ D Rietiker, 'The Principle of "Effectiveness" in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law – No Need for the Concept of Treaty Sui Generis' (2010) 79 *NordicJIntLL* 245, 248.

¹³⁸ Schwelb (n 27) 26.

¹³⁹ This point is made by J Jahn, 'The Council of Europe Excludes Russia: A Setback for Human Rights' (*EJIL:Talk!*, 23 March 2022) <<https://www.ejiltalk.org/the-council-of-europe-excludes-russia-a-setback-for-human-rights/>>.

¹⁴⁰ M Durkee, 'Persuasion Treaties' (2013) 99 *ValRev* 63; see, more generally, O Hathaway, 'Why Do Countries Commit to Human Rights Treaties?' (2007) 51 *JConflictResol* 588.

reservation to a human rights treaty, is prioritised over a reciprocal action which might be taken in relation to such reservations under other types of treaties.¹⁴¹ In both the Greek and the Russian cases, pressure was exerted by other States and the CoE to encourage withdrawal from the Convention, admittedly in response to serious violations of the ECHR or the CoE Statute, yet such pressure could arguably constitute a manifestation of the situation that Article 60(5) of the VCLT was designed to prevent—that a State in breach of its obligations under the ECHR was in essence being pressured to terminate them.

4.2. *Obligations after withdrawal*

Following Greece's notice of withdrawal, the CoE sent a note verbale to the Greek Government on the terms of withdrawal and, in line with the provisions of Article 58, a letter was sent to the Ministers of Foreign Affairs of the CoE Member States on 9 January 1970 announcing the Greek withdrawal and clarifying that its membership would cease on 10 June.¹⁴² In April that year, in response to a mass arrest and a court martial of anti-government protestors, Denmark, Norway and Sweden brought another case against the Greek Government. When the Greek Government challenged the competence *ratione temporis* of the Commission, it was pointed out that the competence of the Commission and the Court remained and, not only was this in the text of Article 58 (then Article 65), it was also in the note verbale which the Greek Government had acknowledged.¹⁴³ Despite this, the Greek Government did not cooperate with the CoE or the Court over this application, and the Greek judge was removed from sitting in an ongoing case in the ECtHR following withdrawal.¹⁴⁴ Greece eventually rejoined the CoE at the request of the new democratic government in 1974, also re-acceding to the ECHR.¹⁴⁵ Shortly after this the applicant States in the *Second Greek Case* indicated that they did not wish to proceed any further.¹⁴⁶

In relation to Russia, the ECtHR in its resolution of 22 March 2022 stated that it remained 'competent to deal with applications directed against the Russian Federation' in relation to alleged ECHR violations 'provided that they occurred until 16 September 2022'—the date ECHR withdrawal was to become effective.¹⁴⁷

¹⁴¹ On this direct point, see L Mullins, 'The Ramifications of Reservations to Human Rights Treaties' (2020) 8 *GroningenJIntlL* 150. On the general background of human rights treaties and general principles of treaty law, see E Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin?* (Martinus Nijhoff 1995) 77–98.

¹⁴² This is reproduced in CoE Secretary-General, 'Note Verbale' in European Commission and European Court of Human Rights (n 6) 82.

¹⁴³ *The Second Greek Case (Denmark, Norway and Sweden v Greece)* App No 4448/70 (Commission Decision, 4 October 1976) para 4.

¹⁴⁴ The ECtHR held when considering one case that 'Judge G Maridakis, who had attended the oral hearings, could not take part in the consideration of the present cases' after withdrawal became effective: see *De Wilde, Ooms and Versyp ("Vagrancy") v Belgium* App Nos 2832/66, 2835/66 and 2899/66 (ECtHR, 18 June 1971) para 11.

¹⁴⁵ See Invitation to Greece to rejoin the Council of Europe, Resolution (74) 34 of the Committee of Ministers of the Council of Europe (28 November 1974) <<https://rm.coe.int/native/0900001680535d1b>>.

¹⁴⁶ *The Second Greek Case* (n 143) para 10.

¹⁴⁷ ECtHR Resolution (n 110) para 2.

This gave effect to Article 58(2) of the ECHR which operated, as set out in Section 2 above, as a savings clause preserving the jurisdiction of the Court for ongoing violations and acts, in a similar way to ‘sunset’ provisions in other treaties which allow the withdrawing State to conclude any outstanding business before an international court or tribunal.¹⁴⁸ As of January 2025, over 40 decisions finding a violation against Russia have been handed down by a Chamber or the Grand Chamber since September 2022. The doctrinal foundation of the ECtHR’s authority in this area is the good faith principle that treaties once committed to must have their substantive provisions executed in good faith by a State Party and, following Article 42 of the VCLT, withdrawal clauses are no exception to this general rule.¹⁴⁹

The ECtHR resolution in the Russian case also clarified that beyond the general principle of State consent in relation to Article 58, ‘the object and purpose of the Convention, as an instrument of human rights protection’ meant that it needed to ‘ensure practical and effective protection’ for the rights contained in the Convention.¹⁵⁰ In *Fedotova v Russia*, a case challenging the lack of legal recognition of same-sex couples in Russia under Article 8 of the ECHR, the Grand Chamber grounded its continuing jurisdiction in the text of Article 58(2), in other words, in Russia’s original act of consent.¹⁵¹ Other cases have been continuing at the ECtHR, such as the inter-State case brought by Ukraine against Russia relating to alleged human rights abuses in the 2014 occupation of Crimea, and further cases are being brought by individuals from occupied Ukraine against Russia.¹⁵² There have, however, been a number of procedural issues in these cases regarding the Court’s authority and continuing jurisdiction. An example of this is the status of the Russian judge who has continued sitting in the cases involving Russia—including *Fedotova*—in contrast to the Greek case where the Greek judge did not continue sitting.¹⁵³

This combination of consent-based reasoning along with an assertion of the object and purpose of human rights treaties can also be seen in the disputes over the substantive provisions of withdrawal clauses of other regional human rights instruments. These cases involved optional protocols, or provisions where States had voluntarily acceded to the jurisdiction of a tribunal separate from being a party to the treaty (which is distinct from the ECHR and the ECtHR) following a

¹⁴⁸ On the rationale behind art 58 specifically, see Schabas (n 43) 942; Helfer (n 3) (on withdrawal clauses generally).

¹⁴⁹ On the interpretation of art 42, see J Klabbers, ‘Reluctant Grundnormen: Articles 31(3)(c) and 42 of the Vienna Convention on the Law of Treaties and the Fragmentation of International Law’ in M Craven, M Fitzmaurice and M Vogiatzi (eds), *Time, History and International Law* (Brill Nijhoff 2007) 141.

¹⁵⁰ ECtHR Resolution (n 110) preamble.

¹⁵¹ *Fedotova v Russia* App Nos 40792/10, 30538/14 and 43439/14 (ECtHR, 17 January 2023) paras 71–72.

¹⁵² For details of all of these cases, see K Dzehtsiarou, ‘Ukraine v Russia (re Crimea): The European Court of Human Rights Goes “All-in”’ (*EJIL:Talk!*, 27 June 2024) <<https://www.ejiltalk.org/ukraine-v-russia-re-crimea-the-european-court-of-human-rights-goes-all-in/>>.

¹⁵³ This is explored in D Kusnov, ‘No Easy Way Out: The Strasbourg Court and Legacy Russian Cases’ (*Strasbourg Observers*, 24 March 2023) <<https://strasbourgobservers.com/2023/03/24/no-easy-way-out-the-strasbourg-court-and-legacy-russian-cases/>>.

clear process of making a declaration consenting to jurisdiction, but with a less clear process for withdrawing a declaration.¹⁵⁴

While the Inter-American Court of Human Rights (IACtHR) was hearing the *Ivcher-Bronstein v Peru* case, the Peruvian Government attempted to withdraw from the IACtHR's contentious jurisdiction, but not the ACHR.¹⁵⁵ Analysing the provisions of Article 78 of the ACHR, the IACtHR noted that a withdrawal from the ACHR only becomes effective one year after a notice of denunciation and could not be used by the withdrawing party to legitimise rights abuses being committed at the time of withdrawal, and therefore reasoned that the withdrawal of Peru's consent to jurisdiction could not be used to stymie proceedings as the Peruvian Government was attempting to do. This reasoning attracted some criticism for its basis in the unique and transcendent properties of human rights law, which seemingly was at odds with the consent-based system of jurisdiction under the ACHR.¹⁵⁶ Yet, what the IACtHR was attempting to do was to resolve a discrepancy that occurred with the very notion of consent itself: the savings provisions in Article 78 of the ACHR, which Peru had consented to on accession to the ACHR, were being effectively undermined by the Peruvian Government's withdrawal of a declaration which would have removed the IACtHR's capacity to hear the case.

A more expansive justification of this principle came from the African Court of Human and Peoples' Rights (AfCtHR) in *Ingabire Umuhoza v Rwanda*, a similar case of a withdrawal of a declaration by the Rwandan Government to stymie proceedings against it. Here, the AfCtHR distinguished the aspect of State consent in committing to its jurisdiction from the conditions in which a withdrawal was made, noting that the 'discretionary character of the withdrawal is not absolute'.¹⁵⁷

In cases of CoE expulsion, the operation of Article 58 of the ECHR could, on one reading, be presumed to be automatic; the text of Article 58(3) uses the words 'cease to be a member' in relation to a State 'cease[ing] to be Party to the Convention', seemingly encompassing all three scenarios for membership termination envisaged under Articles 7 and 8 of the CoE Statute: voluntary withdrawal, requested withdrawal and expulsion. Article 58(3)'s operation is also 'under the same conditions' as Article 58(1)–(2), which would indicate that the provisions on duration in Article 58(1) and the savings provisions in Article 58(2)—see

¹⁵⁴ The ICJ noted that it was 'far from established' what the legal principle was in this case, even though the good faith principle means that States cannot simply bypass the process of withdrawal where one exists: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392, 420.

¹⁵⁵ *Ivcher-Bronstein v Peru*, Competence, Inter-American Court of Human Rights Series C No 74 (24 September 1999) 24.

¹⁵⁶ D Berry, 'Hyper-Interpretation: Promise or Peril?' (2008) 102 ASILPROC 416; C Romano, 'The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent' (2006) 39 NYUJIntL&Pol 791.

¹⁵⁷ *Ingabire Victoire Umuhoza v Republic of Rwanda* App No 003/2014 (African Court on Human and Peoples' Rights, 3 June 2016) para 60. For a commentary on how Rwanda was seeking to use the doctrine of consent in relation to the withdrawal of their declaration, see O Windridge, 'Assessing Rwexit: The Impact and Implications of Rwanda's Withdrawal of Its Article 34(6)-Declaration before the African Court on Human and Peoples' Rights' (2018) 2 AfrHumRtsYB 243, 251.

Section 2.1—automatically apply and that a State in these circumstances is required to accept the ECtHR's jurisdiction for alleged human rights abuses before withdrawal becomes effective. However, this is where there are three grounds for caution.

First, Article 58(1) says that States 'may denounce' the ECHR, indicating the voluntary nature of Article 58, which, as laid out Section 2.2 of this article, is a position consistent with its drafting history. When Article 58(2) refers to 'such a denunciation' in order to construct a savings clause—which is the basis of the ECtHR's continuing jurisdiction as the cases from Russia have indicated post-September 2022—this directly refers to Article 58(1), again supporting the conception of withdrawal as a voluntary right. The potential counterargument is that the phrasing of Article 58(3)—where a State 'shall cease' to be a member of the CoE they also 'shall cease' to be a party to the ECHR—indicates with the use of 'cease' as opposed to 'withdraw' that methods of leaving the ECHR other than voluntary withdrawal were envisaged. At the very least, this would mean that States, when ratifying the ECHR, would be aware of the potential ways other than voluntary denunciation by which their obligations under the ECHR may be terminated.

This, however, directly leads to the second reason for caution in assuming that the principle of *pacta sunt servanda* extends to cases of expulsion in the same way as it does to cases of voluntary withdrawal. In the *travaux*, there are no signs that an involuntary withdrawal from the ECHR was even considered. Indeed, the evidence which does exist points the other way. At the end of August 1950, two weeks after the inclusion of a denunciation clause in the draft Convention, the text was discussed by the Consultative Assembly. Several delegates expressed concern about the CoE's lack of powers: the Swedish delegate argued that 'so long as the [CoE] lacks sufficient powers' to compel a State to enforce and apply the ECHR it would remain a member of the CoE and the ECHR and, as a consequence, there was a need to 'establish what can be called a norm' against totalitarian States.¹⁵⁸ There was no direct reference to denunciation, withdrawal or expulsion in this debate or any reference as to what the provision which eventually became Article 58 was meant to do in the event of a political crisis of this sort. Even though there are methodological limitations in relying too closely on the *travaux* for interpretation, it is nevertheless noteworthy that there is an absence of evidence of any contemplation of the particular set of circumstances of expulsion.¹⁵⁹ Given that the expelled State is expected to comply with the ECtHR after withdrawal has become effective and is no longer in the CoE to engage with the supervision and implementation of those decisions, the absence of any evidence that this was the true construction of those terms is problematic for directly inferring an obligation on the departing State on the simple grounds of predictability and certainty, which

¹⁵⁸ CoE (n 38) 332.

¹⁵⁹ For a general overview of the arguments surrounding the use of *travaux préparatoires* in interpretation, see P Merkouris, "Third Party" Considerations and "Corrective" Interpretation in the Interpretative Use of *Travaux Préparatoires*: Is It Fahrenheit 451 for Preparatory Work? in M Fitzmaurice, O Elias and P Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Brill Nijhoff 2010) 75, 76.

underpin the doctrine of *pacta sunt servanda*.¹⁶⁰ In a similar fashion, even though it could be argued that a good faith interpretation of Article 58(3) implies obligations under Article 58(1), as Binder and Hofbauer note, as a matter of public international law good faith cannot ‘serve to fill gaps of a treaty in a manner to create additional obligations for contracting parties’.¹⁶¹ As noted above, in the Greek case the CoM did invite the Greek Government to participate in discussions about the implementation of the first inter-State case; however, this was a purely political move and there was no clear basis in the treaties or the Rules of the Court about what would be expected of a State Party in these cases.

The third and final reason for caution is that Article 58(4) and Article 56, which collectively cover denunciations of the extension of the ECHR to overseas territories, are framed in voluntary terms with the word ‘may’ included. The fact that every other process for leaving the ECHR and CoE is voluntary gives weight to the idea that denunciation was envisaged as a voluntary act, hence the imposition of obligations through a withdrawal clause after the moment of withdrawal would be justified in the case of the voluntary exercise of those powers, including the voluntary use of Article 58(3) by a State withdrawing from the CoE. It is not expressly clear that this covers the involuntary application of Article 58(3).

This interpretive issue can be resolved by the argument that human rights treaties are different from other treaties. The IACtHR’s 2020 *Advisory Opinion on Denunciation* was explicit in saying that the ‘special nature of human rights treaties has a practical impact’ on individuals and ‘consequently, a different approach is required to the norms of general international law’.¹⁶² The interpretation of obligations under withdrawal clauses has consistently emphasised the continuity of obligations after withdrawal. The ECtHR in its resolution on Russia endorsed this approach, although it did not provide the same level of detail as the IACtHR in *Ivcher-Bronstein* and in the *Advisory Opinion on Denunciation*. Furthermore, as the IACtHR’s *Advisory Opinion on Denunciation* sets out, a good faith interpretation of a withdrawal clause’s effect would conclude that its exercise was not meant to have a retroactive effect; it cannot regularise or render legal an ongoing breach of rights.¹⁶³ Therefore, if called to interpret a dispute arising in the future about the scope of the obligations on a State which has been expelled from the CoE without first denouncing the ECHR and which is contesting the precise effect of Article 58 on its obligations, there would be precedent and a justificatory template for extending the full set of obligations under Article 58(1) to a situation under Article 58(3).

¹⁶⁰ See C Binder, ‘Stability and Change in Times of Fragmentation: The Limits of *Pacta Sunt Servanda* Revisited’ (2012) 25 LJIL 909, 911–12.

¹⁶¹ C Binder and J Hofbauer, ‘The *Pacta Sunt Servanda* Principle or the Limits of Interpretation: The *Gabčíkovo-Nagymaros* Case Revisited’ in S Forlati, MM Mbengue and B McGarry (eds), *The Gabčíkovo-Nagymaros Judgment and Its Contribution to the Development of International Law* (Brill Nijhoff 2020) 58, 64.

¹⁶² *The Obligations in Matters of Human Rights of a State that has Denounced the American Convention on Human Rights and the Charter of the Organization of American States*, Advisory Opinion OC-26/20, Inter-American Court of Human Rights (9 November 2020) para 48.

¹⁶³ *ibid* paras 76–79.

5. Conclusion: re-founding the idea of expulsion

Even if some of the issues described in Section 4 of this article are not directly relevant to the Russian case given Russia's serial history of non-compliance and public position of non-cooperation with the ECtHR, as argued above, there are important ambiguities in the position that expulsion from the CoE automatically triggers an involuntary withdrawal from the ECHR. Given the procedural framework of Protocol No 16 to the ECHR, the ECtHR is unlikely to be able to emulate the IACtHR and give an advisory opinion setting out the legal principles governing the termination, in all circumstances, of obligations under the ECHR.¹⁶⁴ There is the possibility for the ECtHR to issue a resolution, especially as the subject-matter relates to Rule 44A of Rules of the Court, which sets out the 'duty to cooperate fully in the conduct of the proceedings'.¹⁶⁵ In any such resolution, three areas would need to be addressed.

First, it would need to be made clear that obligations under the ECHR in respect of violations do not expire at the point at which withdrawal becomes effective. This is important for the temporal jurisdiction of the ECtHR under Article 58(2), but also to recognise, as set out in Section 4.1, that ongoing breaches remain important even after obligations under the ECHR have terminated, thus clarifying the distinction between termination by way of expulsion and termination as a result of breach, which is prohibited in relation to human rights treaties. In the ongoing inter-State cases involving Russia at the ECtHR, in particular *Ukraine v Russia*, where a party claims damages resulting from violations, Article 31 of the ARSIWA makes clear that there is an obligation to make reparations for injury caused arising from a breach of obligations.¹⁶⁶ However, other cases where the rights violation relates to ongoing domestic policy, such as *Fedotova* which related to the failure to recognise same-sex relationships, are harder to deal with.¹⁶⁷ Russia's approach to LGBT (lesbian, gay, bisexual and transgender) rights was also criticised by the HRC in *Krikerik v Russia* in December 2023, demonstrating that the discriminatory treatment of the LGBT community in Russia persists despite the *Fedotova* judgment imposing an obligation on the Russian Government to take action to remedy it.¹⁶⁸ Clarifying the nature of obligations where violations are ongoing, regardless of how a State's ECHR obligations have terminated, or its position with respect to the CoE and ECtHR as institutions, is important for the

¹⁶⁴ A request for an Advisory Opinion needs to come from a 'court or tribunal seek[ing] an advisory opinion only in the context of a case pending before it', meaning that there would need to be a domestic case specifically challenging an issue relating to an aspect of Article 58, with a domestic court making a request: Protocol No 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms (adopted 2 October 2013, entered into force 1 August 2018) CETS 214, art 16(1).

¹⁶⁵ CoE, 'Rules of the Court' (30 October 2023) rule 44B <https://www.echr.coe.int/documents/d/echr/Rules_Court_ENG>.

¹⁶⁶ Padskocimaite (n 133).

¹⁶⁷ *Fedotova v Russia* (n 151). On the point of continuing obligations, see Cowell (n 8) 106–7. As Crawford (n 132) argues, this is compounded by a relatively unclear standard about what constitutes a 'continuing breach' of the ECHR in the ECtHR jurisprudence.

¹⁶⁸ *Krikerik v Russia* Comm No 2992/2017 (21 June 2023) UN Doc CCPR/C/137/D/2992/2017.

ECHR system as a whole given its quasi-constitutional role in the wider European legal order.

Second, the scope of the original act of *pacta sunt servanda* would need to be clarified to state that Article 58(2) applies in all circumstances: denunciation of the ECHR, voluntary withdrawal from the CoE and expulsion from the CoE (involuntary withdrawal). Even though the history of the drafting of both instruments lacks any basis for arguing that this was intended by the parties, it is nevertheless an entirely plausible interpretation of the ECHR in line with the overall object and purpose of the ECHR and of human rights treaties in general. The preamble of the ECHR reiterates Member States' 'profound belief in those fundamental freedoms' and says that the purpose of the Convention is the 'effective recognition and observance of the Rights therein', making it reasonable to conclude that effective recognition requires that these rights cannot be terminated abruptly by subsequent unilateral actions by a Member State.¹⁶⁹

Third, the vague wording of Articles 3, 7 and 8 of the CoE Statute would need to be interpreted and clarified to indicate the type of threshold that the ECtHR would expect from CoE organs in making a decision not just to expel a State from the CoE, but also to trigger its withdrawal from the ECHR. This would not have any legal effect, but would help to shape the decision making of the CoM concerning the threshold of severity if considering this drastic step in the future. As Section 2 sets out, historically the use of these provisions in the CoE has not been consistent and the absence of a clear historical example in the Greek case created uncertainties as to the correct response in the Russian case. Related points that would need to be clarified are what happens in the case of simultaneous denunciations of the ECHR and CoE Statute, including the question of which takes precedence, and when a denunciation can be ignored in order to proceed with an expulsion. As noted in Section 3, there was no real basis in either the CoE Statute or Article 58 of the ECHR to ignore what was otherwise a perfectly valid notice of denunciation of the ECHR by Russia in March 2022. The ECtHR setting an expected threshold would help to set a standard for the expulsion of a State. In turn, this could provide clarity in relation to other types of withdrawal. For example, at various points between 2014 and 2024, senior politicians in the UK Government contemplated withdrawal from the ECHR as part of different legal and political strategies, which would have been a lawful act under Article 58(1).¹⁷⁰ However, on some occasions, for example, over the policy of removing asylum seekers to Rwanda, there were calls to leave the ECHR in order to carry out this policy—which would have involved withdrawal to legitimise an ongoing violation—which would be unlawful under Article 58(1).¹⁷¹ Clarifying the law on the termination of obligations under the ECHR, and the legality of any

¹⁶⁹ ECHR (n 4) preamble.

¹⁷⁰ For a summary of the current debate in the UK, see J Jones, 'The European Convention on Human Rights: Leave or Stay? You Decide' (*Institute for Government*, 18 October 2023) <<https://www.instituteforgovernment.org.uk/comment/ECHR-leave-or-stay>>.

¹⁷¹ See J Grogan, 'Leaving the European Convention on Human Rights Won't Stop the Boats – But It Will Create Other Problems for the UK' *The Conversation* (London, 15 April 2024) <<https://theconversation.com/leaving-the-european-convention-on-human-rights-wont-stop-the-boats-but-it-will-create-other-problems-for-the-uk-227403>>.

withdrawal, at a time when some governments have publicly contemplated withdrawal as a means of legitimising ongoing human rights abuses, would help to preserve the legal integrity of the ECHR as a whole.

It is entirely understandable that a human rights regime may wish to remove States that are persistent human rights violators, as human rights treaties operate in part by the creation of a community of States bounded by shared morals. During the drafting of the ECHR, one member of the Italian delegation argued that ‘totalitarianism can in fact become established in any country which is a Member to-day’ and, if that happened, it would still ‘have the right to send its representatives [to the CoE] and there will not even be the possibility of making a moral protest’.¹⁷² As set out in Section 3, the response of the CoE to the Russian and Greek cases was, in essence, an echo of this concern. Between June 2019 and February 2022, Russia was poor at implementing or acting upon judgments and decisions of the ECtHR and the CoE and the theory that a human rights organisation can persuade and modify State behaviour was, certainly in the eyes of the officials at the CoE, irreparably shattered on 24 February 2022. Pushing for expulsion was thus rational given the organisational aims of the CoE, even if the expulsion procedure had never been fully used before and there was no real template from other organisations with respect to its consequential effect on obligations under the ECHR. The issue, as set out above, is to ensure that there is maximum clarity on the continuing obligations on a State after its obligations under the ECHR terminate—a situation in which the incentive on a State Party to break those continuing obligations is likely to be at its highest.

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¹⁷² CoE (n 38) 138–40.