Universidad de Jaén
Revista de Estudios Jurídicos

https://doi.org/10.17561/rej.n24.8505

PRINCIPLED RESISTANCE AND FUTURE OF THE EUROPEAN COURT OF HUMAN RIGHTS

PRINCIPIO DE RESISTENCIA Y FUTURO DE LA CORTE EUROPEA DE DERECHOS HUMANOS

Dimitris Liakopoulos[1]
profdl@europe.com

[1] Center of European and International Justice, Estados Unidos

Cómo citar:
Liakopoulos, D. (2024). Principled resistance and future of the European Court of Human Rights. *Revista Estudios Jurídicos*. Segunda Época, *24*, e8505. https://doi.org/10.17561/rej.n24.8505
Received: 10 december 2023 / Accepted: 18 march 2024

Abstract

The present paper tries to focus and analyze a particular type of withdrawal of State members of the European Convention of Human Rights (ECHR) from it due to non-execution of judgments of the European Court of Human Rights (ECtHR). What is the legal circle of this type of withdrawal? What is the role of the ECtHR? Are there any examples of active disobedience from any State member that wants to exit the Convention? Is the legal regime of withdrawal under international treaty law also applicable in the case of the ECHR? What are the withdrawal mechanisms from the ECHR? These are some of the topics that we try to analyze in this paper taking into consideration the jurisprudence of the ECtHR.

Keywords: principled resistance, European Court of Human Rights (ECtHR), European Convention of Human Rights (ECHR), withdrawal from international Convention, international law, protection of human rights

Resumen

El presente documento intenta enfocar y analizar un tipo particular de retiro de los Estados partes de la Convención Europea de Derechos Humanos (CEDH) debido a la falta de ejecución de las sentencias del Tribunal Europeo de Derechos Humanos (TEDH). ¿Cuál es el círculo legal de este tipo de retiro? ¿Cuál es el papel del TEDH? ¿Existen ejemplos de desobediencia activa por parte de algún Estado parte que quiera salir de la Convención? ¿Es aplicable el régimen legal de retiro en el derecho internacional de tratados también en el caso de la CEDH? ¿Cuáles son los mecanismos de retiro de la CEDH? Estos son algunos de los temas que intentamos analizar en este documento teniendo en cuenta la jurisprudencia del TEDH.

Palabras clave: resistencia basada en principios, Tribunal Europeo de Derechos Humanos (TEDH), Convención Europea de Derechos Humanos (CEDH), retiro de un tratado internacional, derecho internacional, protección de los derechos humanos

SUMMARY

obligations. IV. How have states reacted to the activism of the European Court of Human Rights? V. (Follows): Principled resistance. VI. The threat of withdrawal from the European Convention of Human Rights as a pressure tool. VII.- The opponents of the withdrawal and of the principled resistance strategy. VIII. European Court of Human Rights and self-restraint. IX. The functioning of the sanction mechanism. X. Concluding remarks. XI. References.

I. INTRODUCTION

The right/power to withdraw from international treaties is the maximum demonstration of the will, good faith and democratic practice of each country to bind and release itself from any obligation it deems by now against its own interests in international practice (Hollis, 2020).[1] The possibility for each participating state to continue to withdraw from the obligations assumed during the ratification of the treaty is an important form of dissent which entails the relative legal and political consequences. Obviously, as can be understood in international practice, withdrawal is the last resort not frequent enough and questionable (Hill, 1982; Vahlas, 2005; Priollaud, Siritzky, 2005; Piris, 2006; Louis, 2006; Athanassiou, 2009; Hofmeister, 2010; De Bùrca & Weiler, 2011; Craig & De Bùrca, 2011; Tatham, 2012; Nicolaides, 2013; Auvret-Finck, 2013; Bosse-Platière & Rapoport, 2014; Emmert & Petrovi, 2014; Loth & Paun, 2014; Caddous, 2015; Grosclaude, 2015; Barnard, 2016; Hillion, 2016; Łazowski, 2016; Čapeta, 2016; Craig, 2016; Eeckhout & Frantziou, 2017; Nicolaides & Roy, 2017; Haguenau-Moizard & Mestre, 2017; Closa, 2017; Lord, 2017; Mangas Martìn, 2018; Schütze & Tridimas, 2018; Hatje et al., 2018; Aloupi et al., 2019; Schwarze et al., 2019; Huysmans, 2019; Kellerbauer et al., 2019; Berry et al., 2019; Bradford, 2020; Fitzmaurice & Merkouris, 2020)[2] especially when it comes to matters of human rights and economic relations (Helfer, 2005; Bates, 2008; Naldi & Magliveras, 2013; De Pauw, 2016; Haeck et al., 2016; Hollis, 2020).[3]

The withdrawal cannot be equated with the replacement of other types of alternatives, both informal and codified, allowing States to depart from the related obligations deriving from the treaties without proceeding with the related withdrawal. This avoids the activation of a vexatious procedure that can oriented us towards the final withdrawal.

The argument is whether the execution of the obligations deriving from the international treaty have as a consequence the connection with other related

conducts that can be framed on ad hoc legal institutions. Thus the execution of the obligations deriving from the multilateral treaties call into question not only the content but also the effect that the State should obtain by abandoning the same treaty. This is a withdrawal comparable with the release of the execution of a concrete obligation of a conventional nature. The activation of a formal withdrawal violates the pre-established obligations. This circumstance pushes States intending to free themselves from obligations of a conventional nature, and as a consequence of an alternative type, withdrawal.

In practice we can note the case of the European Convention on Human Rights (ECHR) (Grabenwarter, 2014; Harris et al., 2014; Marchadier, 2014; Schabas, 2015; Seibert-Fohr & Villiger, 2017; Rainey et al., 2017; Costa, 2017; Nussberger, 2020) as an example of this type of trend. Of course, the first problem is that the ECHR includes the European Court of Human Rights (ECtHR) as a jurisdictional body in the case of resolving human rights disputes as a Court super partes. A decision of the ECtHR is in conflict with the national political or judicial institutions and at the same time it is a super party body that manifests its resistance to the obligation to implement the related decisions of the ECtHR (O'Cinneide, 2017; Madsen et al., 2018; Breuer, 2019a; Kosař et al., 2020). If we talk about resistance, it differs from the implementation of the sentences by the States up to the motivated non-fulfillment of the will of the national institutions which must give an obligation to execute the relative sentence/s and which consider the relative prerogatives as unjust and restrictive (Breuer, 2019b).

Until now we have not noticed a withdrawal from the ECHR, so it is understood that withdrawal is not a case practiced by participating States. Thus the ECHR is not threatened by the withdrawal of the treaty system effectively following the related actions that are required for the abandonment of the treaty (Bates, 2017).[4] We cannot speak of concrete resistance for the execution of conventions' obligations of both the ECtHR and the Committee of Ministers to open the official way of replacing the withdrawal as the only possibility of exercising a form of pressure through threats for the abandonment of the treaty. A systematic and structured opposition to the execution of the EctHR's sentences is a type of an atypical formal complaint against the ECHR which in reality can assume the position of a withdrawal "à la carte" allowing participating states to abandon them immediately activating a legal instrument to avoid the disadvantages deriving from a typical withdrawal (Cowell, 2018; Roter, 2018; Cowell, 2019; Graham, 2020). The conventional system does not possess and does not use other solutions to go against this trend but this does not simultaneously justify the path of its own inertia. This type of tendency

has taken the name of the principled resistance and this conduct also includes threats of withdrawal which can be used as actual actions of formal withdrawal (Graham, 2020). As reactions of the conventional system, self-restraint type attitudes are found on the part of the ECtHR (Christoffersen et al., 2011; Davies, 2012; Kleinlein, 2017; Bates, 2020) which thus allow theories of disobedience of a system to be shaped. On the one hand there is a large row of countries that are part of it and on the other hand there is the Brexit which is not convenient (Donald & Leach, 2023).[5] So, the dynamics appear to offer an overall advantage over the conventional system.

II. WHAT ABOUT THE JUDICIAL ACTIVISM OF THE ECtHR?

By ratifying a State assumes the obligation to recognize to each person who addresses the ECtHR the relevant fundamental rights listed in the ECHR itself. This obligation is assessed in the own interpretative role of the ECtHR which has the competence for related questions of interpretation and application according to Article 32 ECHR (Leach, 2011; Brems & Gerards, 2014; Jacob, 2016; Billing, 2016; Arnardòttir, 2017a; Augenstein & Dziedzic, 2017; Van Aaken & Motoć, 2018; Van Dijk et al., 2018; Nussberger, 2020).[6] The ECtHR has shown that it is a very active court, not because it is fast and rejects or accepts cases but has shown a certain interpretative dynamism over the years, above all identifying specific interpretative criteria by taking into consideration the ECHR as a living instrument that allows for a structured evolution of conventional, guaranteed rights and related violations of the participating States (Popovic, 2009; Bjorge, 2014; Djeffal, 2016).[7] This type of judicial activism of the ECtHR is connected with the attempt to go beyond the role of the judge who approaches the laws and evaluates the protection of human rights at the national level in a non-incisive but interpretative way as a super parte body, as is it also confirms this aspiration in practice with protocol 16 (Jahn, 2014; Gerards, 2014a; Ferreira & Kostakopoulou, 2016). This trend of expansion of the ECtHR is simultaneously also a point of contrast with some supreme jurisdictions or national political institutions reaching certain discussions where the same authority of the ECtHR questions the relative legitimacy of its decisions and prerogatives (Madsen, 2016; Thym, 2017; Fokas, 2017; Mendes & Venzke, 2018; Temperman et al., 2019; Neuman, 2020; Lobos, 2020). The contracting states according to Article 46 ECHR are thus obliged: "(...) to comply with the final judgments of the ECtHR on disputes to which they are parties (…)" (Sicilianos, 2014; Glas, 2019; Piątek, 2019; Kadelbach et al., 2019).[8] It is a judicial control mechanism of an invasive nature and as a consequence of the extension of the powers it carries out

as a body and which determines the immediate willingness of the States to withdraw from the ECHR given that they consider that the obiter dictum of the sentence of the ECtHR is mandatory (Nussberger, 2020; Sudre, 2021).

The point is that the ECHR through its organ the ECtHR goes beyond the boundaries of the related prerogatives of the national legislator who is forced to modify and adopt the state legislation as well as the decisions that affect the related issues of political significance for the related States.[9] The obligation responds to the interests that are originally pushed to the States that have to assume the conventional commitments. This obligation is a commitment to respect the related human rights guaranteeing that States wish to take away (Kumm, 2004; Bobansky, 2012; Thomas, 2014).[10] But does this happen to some States or to all? And what are the reactions of States that are not willing to accept the obligation to implement the judgment of the ECtHR? (Bates, 2014).[11]

The alternative of remaining as part of the ECHR also means accepting the jurisdiction of the ECtHR (Sudre, 2021). Exiting the treaty tout court is an option that also has costs on the international scene in the image of the State which wants to withdraw (Kumm, 2004).[12] We see no other legitimate way to avoid enforcing ECtHR judgments other than the withdrawal of the ECHR as well as the abandonment of all conventional obligations as an alternative choice which constitutes a breach of an international wrongdoing which may result in the application of sanctions, or not.

III. WITHDRAWAL AND ABANDONMENT OF CONVENTIONAL OBLIGATIONS

Already Article 70 of the Vienna Convention on the Law of Treaties (VCLT) stated that: "(...) the termination of a treaty (...) releases the parties from any further obligation to perform the treaty (...)" (Corten & Klein, 2011; Dörr & Schmalenbach, 2012). Withdrawal is the liberating effect of the obligations to implement the treaty. Failure to withdraw also means fulfillment of the treaty. Any type of deviation from compliance does not formally constitute an international offense for violation of the treaty itself (Helfer, 2005).[13] Does the possibility of a partial withdrawal exist?

According to Article 58 ECHR, the possibility of denunciation is envisaged after five years from the entry into force of the treaty for the withdrawing State (Milanovič & Papič, 2018; Nussberger, 2020; Villiger, 2023). The abandonment route of the withdrawal used as a means of withdrawal has negative consequences that have to do with various previous conducts

concerning the denunciation of the treaty providing that the latter will not effect the obligations for conduct of the withdrawing State before the effectiveness of the denunciation. Even in the case of a formal complaint the withdrawing State continues to be subject to a possible judgment of the ECtHR due to the violations that have been committed in the past (Nussberger, 2020). The ECHR and the law of treaties offer no alternative. In the event that the State intends to be subjected to the related obligations that come from the ECHR, it must also follow two legitimate paths. The first is a reform process of the related treaty which must modify the obligations that do not correspond to its interests (Madsen, 2017; Kjeldgaard-Pedersen, 2018; Nussberger, 2020)[14] and/or differently the withdrawal of the treaty as a liberating act from all the obligations foreseen by this including also the mandatory jurisdiction of the ECtHR as well as the necessary execution of the sentences pronounced by this body. The misuse of the obligation in question gives rise to the discourse for an offence. For this reason, withdrawal clauses are envisaged so as to allow the relative conduct in the absence of withdrawal from violations of the treaty.

In this case, the withdrawal is described as dissent by the authority of the ECtHR (Madsen, 2019a). In the case of the ECHR the only case we noticed it dates back to 1969 when Greece under the regime of the colonels following the coup d'état of 1967 and as a consequence abandoned the Council of Europe to ratify the treaty again after fifteen years. This scarcity is based on the absence of a precise opposition of the execution of the contractual obligations as limits of a release from the related obligations. So the cost of leaving the ECHR has two paths as a result. On the one hand, damage to the state's image internationally and on the other, a cost of non-compliance which is evaluated as a less disadvantageous option from a political point of view (Cowell, 2019).

The case of non-compliance presents an advantage for the State to remain part of the organization and maintain the related prerogatives at the Council of Europe. A violation of the ECHR is presented as a violation that exposes the defaulting State to the relative risk of a sanctioning procedure of a cost to the image and a diplomatic expulsion behavior in international relations which also reaches the illegitimacy of the behavior by maintaining the State the formal obligation to implement the relevant ruling of the ECtHR.

Withdrawal is not comparable and does not mean non-fulfillment but presents an advantage of consent to the State to legitimately evade the conventional obligations. Withdrawal includes in its nature also legal or non-juridical effects. Participation in a treaty in a positive sense means collaboration for the maximum protection of human rights at the national level (Cowell, 2019). A consequent withdrawal undoubtedly also means a negative

value with a reputational cost. Especially if a candidate for a withdrawal is a state that is part of the family of the EU (Bates, 2014). Although there is no and/or we can speak for a restrictive and conditional conditionality between the two memberships, (Miller, 2014; Russell, 2017; Lang, 2018) the constraint of conventional protection standards are protected and emerge from Article 52.3 of the Charter of the Fundamental Rights of the European Union (CFREU) (Groussot & Petursson, 2015; Stern & Sachs, 2016; Picod & Van Droogbenbroeck, 2018; Dorssemont et al., 2019; Pila & Torremans, 2019; Lenaerts, 2019; Kellerbauer et al., 2019). Being part of the ECHR means simultaneously respecting and protecting human rights within the EU and above all the founding values of the Union which are included in Article 2 TEU (Folsom, 2017; Usherwood & Pinder, 2018; Decheva, 2018; Martucci, 2019; Liakopoulos, 2019; Haratsch et al., 2020).[15] There is a risk that in the event of a withdrawal from the ECHR there is a related fallout also at the European level. The conventional system thus seems not to present the elements of the non-performance, making the withdrawal decidedly convenient. This type of reaction is qualified as "principled resistance" and thus a certain justification is recognized which is linked to a certain type of default. This type of threat of withdrawal seems to also support the relative reforms to the conventional system of the needs of the States. The reactions of the EU Member States are not the same as those of the EctHR and/or to the conventional system in general. The sanctioning mechanism that is envisaged by the ECHR has not been used (Nussberger, 2020)[16] and the tendency of the ECtHR is a compliant interlocutor against the Member States which has shown that they use related interpretative methods, oriented even more towards reinvigorating the margin of appreciation, one of the main elements of the jurisprudence of the ECtHR.

Non-execution of a ECtHR judgement does not mean withdrawal. Member States are not permanently released from obligations. Freeing oneself from a conventional obligation means whether or not to execute the relative sentence, as a choice that bears the relative disadvantages of a political type which is connected with the withdrawal thus creating its own alternative mechanism (Katz Cogan, 2006; Pedersen & Kindley, 2016). States seem to be able to obtain a release from the conventional obligation by enforcing the sentences, albeit selected, without enduring the disadvantages, also of a political nature, connected to the withdrawal, thus creating a real alternative mechanism.

IV. HOW HAVE STATES REACTED TO THE ACTIVISM OF THE ECTHR?

We have already noticed that States have chosen to continue their membership to the ECHR giving various justifications regarding the non-compliance and/or withdrawal from ECtHR sentences.

We recall the case of United Kingdom which maintained a rigorous position regarding the non-acceptance of execution of decisions relating to prisoners voting (Bates, 2014; Bates, 2015; Cliquennois & De Suremain, 2017; Iglesias Vila, 2017; Bindman Qc, 2019). The ECtHR has followed a certain route of sanctions which is incompatible with the general disenfranchisement of prisoners and independently of the existing UK system and Article 3 of the relevant protocol 1 of the ECHR (Villiger, 2023).[17] The old Hirst case (Nussberger, 2020)[18] after a troubled period of time it is landed on a pilot case (Emerson et al., 2012; Rainey et al., 2017; Tyrrell, 2018),[19] where the ECtHR opened a discussion on the related legislative measures that must be adopted to comply with the rules of the ECHR (Villiger, 2023). The case was concluded with a resolution of the Committee of Ministers in December 2018. The decision of the EctHR, however, has not been properly implemented by the United Kingdom, in the absence of adequate legislative measures to eliminate the source of the conflict with the ECHR (Von Staden, 2018).

Of the same interpretative vein is a Russian law which allowed the constitutional court to exercise a check on the compatibility with the sentences of the ECtHR even before the execution of the internal legal order (Dzehtsiarou & Fontanelli, 2018; Malksoo & Benedek, 2018; Starzhentskiy, 2019). After the approval of the law in December of 2015, the problem of constitutionality was noted in relation to Russian parliamentarians and the compatibility with the obligation of unconditional execution of the related sentences of the ECtHR especially after the adoption of the decisions that were controversial (Hardman, Dickson, 2017; Gòrski, 2017; Thornhill, Smirnova, 2018; Palombino, 2019; Kahn, 2019; Scheinin, 2019).[20] The Russian law emptied the meaning and the obligation to execute the sentences of ex Article 46 thus denying the automatic binding nature of the ECtHR pronouncements (Nussberger, 2020). We arrived at the Yukos case in 2017 which bound the State to its execution both for the illegitimacy and the interpretative activity of the ECtHR and also for the opposition to the related Russian constitutional system (Starzhenetskiy, 2019). Time obviously runs and goes on and the cases follow a continuous phenomenon identifying the term of principled resistance (Breuer, 2019a).

V. (FOLLOWS): PRINCIPLED RESISTANCE

The principled resistance is a formal type (and not a motivated disobedience) towards the obligation of execution of the judgments of the ECtHR. Other terms are also used for this phenomenon: "principled noncompliance" (Breuer, 2019b), and/or "principled non-execution" (De Londras & Dzehtsiarou, 2017; Shauna Wheatle, 2017; Komanovics, 2018; Ahrens et al., 2019).

Indeed, this type of conduct is immediately terminated and distinct from the mere non-fulfilment of an obligation which requires the peculiarities of other hypotheses of non-execution of the sentences of the ECtHR to be outlined. The row of States that do not accept the execution of some sentences of the ECtHR are certainly a source of greater level of concern on the one hand as a malfunction of the system as a whole and on the other hand as the need for new changes. Of course, there is also a gray path among those who can argue that in the face of non-justice, the one offered above all for the protection of human rights would be better. But is it so? Does the lack of enforcement of a judgment of the ECtHR mean justice or crisis? It is a not justifiable resolution that adopts the relevant particular measures according to what has been pre-established by a judgment of the ECtHR. Non-execution is an illness expressed and justified before a State which is condemned. A symptom that needs treatment above all when the convicted State voluntarily decides not to implement the relative sentence through ad hoc measures at national level by putting as an argument for pressure and justification the limits reserved to the authority of the State (De Londras & Dzehtsiarou, 2017). We are not so much interested in the internal inertia of the State and/or of its excessive bureaucracy as for the political desire not to implement a definitive sentence (Breuer, 2019a).

The existence of a juridical conflict between rules or principles of constitutional relevance does not enforce the ECtHR judgements. The nonresolution of this inertia leads us to speak of a permanent blockade which according to Madsen (2019b): "(...) ultimately, the obstacle would derive either from a disagreement on the level of protection of human rights or on the of national identity (…)".

On the other hand, the principled non-compliance means the legitimate right of disobedience by the State as a reaction to an illegitimate behavior of the ECtHR. The foreseen criticism will not implement the sentences as a sort of "disobedience" towards ECtHR conducts perceived as illegitimate by the State. In essence, the reaction to the alleged excessive activism of the ECtHR would translate into the perception, for the State, of being able to be released from the obligation to implement the sentence. The distinction between this conduct and the tout court non-compliance by the States is not always easy,

but it can be discerned, for example, in the motivation of the non-compliance provided by the State, also through the establishment of a dialogue between the Courts and the proposal of alternative interpretations with respect to the decision of the ECtHR (Madsen, 2019a).

Thus the non-compliance is configured as principled based and justified on legal reasons and as selective non-compliance (De Londras & Dzehtsiarou, 2017). It is treated as a choice by states that have a higher number of compliant and oppose the enforcement of judgments to national identity.

Compliance of any kind in this case clearly distinguishes the violation from contractual obligations and gives States the "right" to evade the obligation to implement the judgments of the ECtHR. The obligations deriving from the international treaty are formally using the withdrawal clause. The justification of the non-compliance as a prince of resistance constitutes an alternative tool to the withdrawal of the obligations deriving from participation in the ex Article 46 ECHR which loses the participation advantages in the Council of Europe (Villiger, 2023).

The legitimation of this conduct in the conventional system takes place on legal issues that are linked to fundamental principles or constitutional values that are valid in the internal order of the disobedient state. The absence of counter-reactions from the ECtHR shows the deference towards the States, i.e. of the Committee of Ministers which is responsible for the infringement mechanism envisaged by the ECHR itself. The default of lack of will or strength concerns treaty violations that come to the effect of feeling: "(…) released (…) from any obligation further to perform the treaty (…)" (Madsen, 2019b). This follows the activation of the withdrawal according to the rules of the Vienna Convention on the Law of Treaties (VCLT).

VI. THE THREAT OF WITHDRAWAL FROM THE ECHR AS A PRESSURE TOOL

Principled resistance is an active position of withdrawing from the ECHR by advocating one's interests. Of course, in this way we also understand other problems that every State that makes use of this type of disobedience shows the internal problems it faces and on the other hand it is a strong sign of disengagement which cannot be underestimated and depends on a clearly illegitimate attitude (Madsen et al., 2018; Cowell, 2018). In the past we have seen that the United Kingdom is a strong protagonist in promoting withdrawal from the European Parliament perhaps due to the Brexit, thus creating problems of discretion for other states influencing public opinion

as well as nascent problems of deference and accountability. The possibility of an internal verification investigation is not excluded as a possibility of withdrawal and/or of continuing to remain a State to this conventional system that it has chosen. The instances are obviously oriented by an international political critique (Myjer, 2013), given that the threat of abandonment seems less preferable than permanence in the treaty, thus suspending the execution of sentences that each state deems necessary (Cowell, 2018). Perhaps the choice of an abandonment from international relations seems difficult as a choice to follow. At this point the major exponents of justice and the protection of human rights will be happy through a super party system that can force the State party to the ECHR to put the protection of human rights on the table as a first choice and not of the internal political one. This statement makes us think about the primacy of EU law over national law and the path it has been following for many years. But this cannot be the case at the conventional level, through the ECHR, given that the role of the ECtHR is completely different from that of the system of the Union, especially the jurisdictional one. The prelude of an effective process of abandonment from the ECHR is manifested as a form of criticism towards the work of ECtHR which perhaps shows to be very active and fast in time by the national justice and at the same time contributes to the debate of an opening of the role of the ECtHR on the limits of discretion as well as the functioning of the conventional system itself generally without a meeting with actual treaty review processes.

Thus the threat of withdrawal is a more political and less juridical choice. It also has the character of pressure to modify contractual obligations that reflect the standards of protection where the State is willing to follow up. The threats of withdrawal of the conventional system seem to be part of the ECHR with the obligation to proceed with the execution of the related sentences that fall within certain limits and rights according to national law (Cowell, 2018). Withdrawal as a replacement of formal institutions to achieve one's goals is a political strategy that has not yet reached a conclusion and/or steps of concrete choice of revision by opening the related negotiations. No one can rule out seeing in the near future the opening of negotiations for the modification of the treaty and the related alternatives of the system that respond to the interests of each interesting state.

VII. THE OPPONENTS OF THE WITHDRAWAL AND OF THE PRINCIPLED RESISTANCE STRATEGY

If the resistance has a basis of political principle to avoid the obligation to execute sentences, this path can also be a substitute function of the real

withdrawal. Certainly some States have followed cautious attitudes given that in order to safeguard the conventional system they had to respond to the opponents who reaffirm the interpretative autonomy of the ECtHR as the main argument or sanction the relative illicit resistance to the execution of the sentences in national law. Time, default and withdrawal disguised as reasons of principle are elements of construction of the violation of the principles of ECHR. The limits of justification are not absent from the counter-reactions of the conventional system. On the other hand, the ineffectiveness of the sanction mechanism that is provided for by the conventional system is the basis of a principled resistance.

VIII. ECTHR AND SELF-RESTRAINT

The political will of States that want to withdraw from the ECHR avoiding the execution of the sentences is well known. Perhaps an attitude of scaling back the creativity of the ECtHR would be a step backwards and at the same time a point of resolving the reactions that have to do with the hermeneutic activity of the ECtHR (Helfer & Voeten, 2020; Yildiz, 2020). The consensus method of the ECtHR and the identification of the margin of appreciation as the majority doctrine of the ECtHR (Benvenisti, 1999; Brems, 2013; Posner, 2014; Dothan, 2014; Besson, 2016; McGolbrick, 2016; Kapotas & Tzevelekos, 2019) verifies the existence of the positions of the States which are moving towards a recognition of the standard of protection of conventional rights assuming the legitimacy of the conduct of the State which does not conform to certain standards pre-established by the ECHR (Dzehtsiarou, 2015). The justifications are many and above all based on one's own authorities towards the Member States which do not support the decisions which, in a real or presumed way, allow the response of them in advance. Consensus on the part of the ECtHR has a legitimizing function that respects its positions and justifies the decision that supports the emerging and established consensus response of each Member State (Gerards, 2014a). Consensus is essential to determine the extent of the margin of appreciation that grants Member States a granted state discretion that is less widespread by a common position on the issue at hand. The margin of appreciation does not refer to the States but to the ECtHR and is self-limited by reserving a certain, precise judicial control (Smet, 2010; Spielmann, 2012; Legg, 2012; Liakopoulos, 2014; Paulus, 2014; Liakopoulos, 2015; Liakopoulos, 2018a; Liakopoulos, 2018b). The methods of downsizing the role of the ECtHR thus do not help its own role which increases the authority of the decisions which will thus be bound to the existence of a certain convergence between the States and legitimated to assert their own space of discretion. The recognition of this space seems essential to allow the role of the

ECtHR to be not only the safeguard of the ECHR but also an active guarantee of the functioning of the conventional system (Naldi & Magliveras, 2013).

Finally, the interpretative role of the ECtHR has been the subject of a recent formalisation. The invasion of the ECTHR into the process of discussions and of the reform proposals of the conventional system requires the strengthening of the principle of subsidiarity and the use of the margin of appreciation in the action of the ECtHR (Grabenwarter, 2014; Marchadier, 2014; Ziegler et al., 2015; Davis, 2016; Gerards & Lambrecht, 2018; Kälin & Künzli, 2019; Glas, 2020; Kunz, 2020; Alves Pinto, 2020).

IX. THE FUNCTIONING OF THE SANCTION MECHANISM

The withdrawal from a treaty allows the use of sanctioning mechanisms. A sanction that decides to unilaterally withdraw from the treaty cannot be applied to the State whatever the reasons for the withdrawal be and an offense corresponds to a possible sanction.

A mechanism of reaction to the failure of the States to enforce the sentences according to Article 46 ECHR has provided for the binding nature of the sentences of the ECtHR and the related obligatory connection of the execution which actually provides for the initiation of a procedure of offense in the event of non-compliance with the sentence by the convicted State. The relative procedure is managed by the Committee of Ministers, i.e. the body that evaluates the execution of the judgments of the ECtHR which is attributed the relative powers after the entry into force of the Protocol 14 (Quast Mertsch, 2012; Gerards & Glas, 2017; Arnardòttir, 2017b; Tan, 2018). Following the two-thirds majority, the Committee of Ministers decides on the relevant reference of the non-execution of a sentence by the convicted state, thus paving the way for the infringement procedure against the defaulting state before the Grand Chamber.

We have seen this type of procedure in the Mammadov case against Azerbaijan (Dzehtsiarou, 2019; Holterhus, 2019)[21] in relation to a preventive detention and according to the violation of the criteria of Article 5, par. 1, lit. c) of the ECHR (Rainey et al., 2017). The state conviction did not secure the applicant's release and he was subjected to the relevant infringement procedure. We have not seen the same "zeal", however, towards Russia's pre-execution sentences that led to the activation of the procedure and the possibility of starting it. The reluctance of the Committee of Ministers to initiate this type of procedure can be explained in relation to the political connotation of this body given that it is representative of the interests of

the States and performs a supervisory task and thus initiates procedures for political reasons and of choice. Or not? Why hasn't been opened the relative procedure against the United Kingdom which many times has given the right to start, following this path? The procedure has not only have an evaluation character but also a monitoring of the ECHR itself because already knows a priori that the same procedure is both the result of political pressure and also linked to the non-fulfilment of the relative sentences (Van Dijk et al., 2018).

A procedure has not been followed towards the countries of principled resistance and thus the hypothesis of the absence of counter-reactions and the consequent legitimizing effect of the principled resistance is strengthened. Obviously we can take into consideration that each case is separate and the Mammadov case cannot be assimilated with the English and Russian cases as principled resistance, since political pressures have questioned the legitimacy of the ECtHR's authority as they have not justified the non-execution of the sentence (Breuer, 2019b).

Previously we talked about the consensus of the ECtHR but now the practice speaks for itself and allows us to see the departure from the lines of reaction to the principled resistance attitude as an offense that contributes to the legitimization of the conduct aimed at avoiding the execution of the obligation to fulfill the sentences of a real withdrawal.

Perhaps because the principle of non-compliance is not the subject of ex Article 46 procedure can be explained by the presence of a justification of the non-compliance which in reality we can say legalizes the conduct of the respondent State. Failure to comply with the ECtHR judgments cannot be considered as a violation of the ECHR but as a certainly justified possibility to escape the related conventional obligations and it is clear that in the Russian case the legalization of the possible default is sanctioned as a state law (Madsen, 2019b).[22]

The illegitimacy of the principled resistance turns out to be nuanced. The reference to this type of justifications regarding the non-execution of the decisions of the ECtHR are the basis for an alleged illegitimacy in origin of the behavior of the ECtHR where the non-compliance in this case is not perceived as a violation of the ECHR but as the result of a risk that actually attributes a political connotation to such conduct.

X. CONCLUDING REMARKS

We have clearly understood so far that the activity of the ECtHR and the obligation to implement the sentence are arguments for equal, effective

counter-reactions capable of countering the phenomenon of an immediate withdrawal. The inertia of the ECtHR has put in place sanctioning mechanisms against the States that decide to evade the obligation to execute the sentences as justification of a consenting attitude to the States that remain within the organization and thus follow a certain discretionary path for the application of certain conventional obligations. The ECtHR as interpreter of the ECHR has tried to operate as a self-restraint to guarantee the conventional system as a whole and to prevent the effective abandonment of the ECHR by the Member States. The use of the withdrawal clauses and the related legal and political consequences that this includes is completely respectful of an attitude of constant and motivated resistance to the execution of the related obligations deriving from the ECHR which is tolerated.

Legalisation, justification and, motivation of non-fulfilment of the obligation to execute the sentences of the ECtHR paves the way for a continuous disobedience which makes the abandonment of the binding obligation of the sentence to be executed as an element of reactions against the ECtHR in a conventional system that seems to be inspired by a logic of compromise, modified in intensity and assuming behaviors of a deferential nature towards the States. Perhaps the consequence would be that the States are so compliant and need a modification of this relative obligation. The ECtHR has a greater interest in keeping the membership of the States intact at the cost of reaching the relative compromise and at the same time modulating its own and continuous judicial activism.

XI. REFERENCES

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Notes

1 "(…) no one likes to talk about divorce before a wedding. Yet that is, in effect, precisely what States do when negotiate new treaties (...)".

2 Closa (2017) affirms that: "(…) une ligne de défense de dernier recours autours de la souveraineté des Etats membres".

3 According to Haeck et al. (2016): "(…) although not frequent, the abandonment or threat of withdrawal from human rights treaties (or with implications for human rights) is a phenomenon not without recent examples, think of the denunciation of the Inter-American Convention on Human Rights by Venezuela or the denunciation of the Rome Statute by the Philippines (…)".

4 "(…) on the contrary, indeed, according to statistics, the United Kingdom, one of the most critical states, is at the same time one of the states most compliant with the Court's judgments, beyond the resistance shown in some specific cases, such as the case of the vote to inmates that will be discussed later (…)".

5 See in particular in argument: https://publications.parliament.uk/pa/bills/cbill/58-03/0117/220117.pdf; https://bills.parliament.uk/publications/50885/documents/3348

6 ECtHR, Medvedyev and others v. France of 29 March 2010. Birk-Levy v. France of 21 September 2010. Steck-Risch and others v. Liechtenstein of 11 May 2010. Toulmin v. Italy of 13 April 2010. Giuliani and Gaggio v. Italy of 24 March 2011. M.S.S. v. Belgium and Greece of 21 January 2011. Kebe and others v. Ukraine of 12 January 2017.

7 ECtHR, Tyrer v. United Kingdom of 25 April 1978.

8 ECtHR, Scozzari et Giunta v. Italie of 13 July 2000, par. 249. Mehemi v. France of 10 April 2003, par. 43. Ilgar Mammadov v. Azerbaijan of 29 May 2019, where the ECtHR has shown the last few years the choice of means to implement the court rulings: "(…) responsible state has a certain freedom in the choice of the means with reference to the obligation to cancel the consequences of the violation and to a greater extent as regards the obligation to avoid the repetition of the same violation ascertained by the sentence when the individual measure that constitutes violation of the agreement does not represent the inevitable consequence of the application of the internal rule but is only permitted by law (…)".

9 For example, issues related to ethical issues or the existence of different sensitivities of public opinion (among many examples, the beginning or end of life; the rights of homosexual couples) or issues for which States have traditionally enjoyed wide regulatory autonomy (among many examples, the issues of managing migration flows and migrants; welfare and social security benefits). See, above all, the example of the debate on prisoners' access to voting, which is widely discussed below.

10 According to Kumm (2004): "(…) though states have consented to the treaty as a framework for dealing with a specified range of issues, once they have signed on, the specific rights and obligations are determined without their consent by these treaty-based bodies (...)".

11 "(…) so what options, if any, does a State have in international law if it is simply unwilling to accept a legal obligation(s) created by a human rights treaty that it has already ratified? (...)".

12 "(…) the state is confronted with a take it or leave it option and the costs of not participating are prohibitively high (...)".

13 "(…) this unless you are in a situation in which it is legitimately allowed to suspend the execution of the obligations deriving from the treaty. However, the possibility of reacting with a suspension of certain obligations to the violation of other obligations by counterparties in the Treaty seems to be peacefully excluded with regard to human rights treaties (…)".

14 According to Madsen (2017): "(…) the conventional system reform processes that led to the adoption of Protocol 15 (currently not yet in force, pending ratification by all Member States) can fit into this category, aiming to contain the expansion of competence ECtHR with an explicit reference to subsidiarity and appreciation margin; the entry into force of Protocol 16 does not seem to run counter to this trend which, in addition to being optional, gives ECtHR a purely consultative competence. Among the many contributions relating to the most recent conventional reform processes and the related consequences (…)".

15 In addition to being part of the negotiation in relation to Brexit, as can be seen from the reference contained in the Resolution of the European Parliament of 14 March 2018 on the framework of the future EU-UK relationship (2018/2573 (RSP).

16 Consistent in the possibility of initiating an infringement procedure pursuant to art. 46 paragraph 4 of the Convention, at the outcome of the checks on the fulfillment of the sentences carried out by the Committee of Ministers.

17 This article establishes, in particular, the right to an active (and passive) electorate, the heart of representative democracy protected by the Convention. The principle of access to the active electorate is reflected, among other things, in the obligation of the State not to exclude groups of subjects from the electoral body in a discriminatory manner.

18 ECtHR, Hirst v. United Kingdom of 6 October 2005.

19 ECtHR, Greens and M.T. v. United Kingdom of 11 April 2011.

20 Federal Constitutional Law of 14 December 2015, N 7-FKZ. ECtHR, OAO Neftyanaya Kompaniya Yukos v. Russia of 31 July 2014, with which the Court sentenced Russia for violation of art. 1, Prot. 1 in relation to penalties for tax offenses and compensation of a particularly significant amount, equal to several million Euros, is recognized to the appellant. The case was submitted to the judgment of the Russian Constitutional Court which vetoed the execution of the sentence, Russian Constitutional Court, Decision N 1-P of 19 January 2017.

21 ECtHR, Ilgar Mammadov v. Azerbaijan of 22 May 2014.

22 According to which the example of Russia is a case of "legalization and judicialization of non-compliance (...)".