

## Russia and the 'Legality' of Strasbourg Law

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### I.

On 28 February 1996, Russia acceded to the Statute of the Council of Europe, becoming the Council's thirty-ninth member.<sup>1</sup> Russia has been allotted eighteen seats in Strasbourg's Parliamentary Assembly, giving it, alongside France, Germany, Italy and the United Kingdom, one of the five largest national delegations.<sup>2</sup> Russia's accession followed an extensive debate within the Council of Europe about the suitability of the applicant for membership, and occurred despite an unfavourable Eminent Lawyers Report prepared at the request of the Bureau of the Parliamentary Assembly.<sup>3</sup> The Report concluded 'that the legal order of the Russian Federation does not, at the present moment, meet the Council of Europe standards as enshrined in the statute of the Council and developed by the organs of the European Convention on Human Rights'.<sup>4</sup> As a condition of joining the Council of Europe, Russia has promised to ratify the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>5</sup> within one year of its accession to the Statute of the Council.<sup>6</sup>

The aim of this essay is to comment on Russia's accession to the Council of Europe and its probable accession to the European Convention on Human Rights from the perspective of the legal theory concerning the nature of obligation in international law and the law-like character of international law. The facts of Russia's accession test a philosophical argument that has been made elsewhere about the nature, efficacy and 'legality' of the legal system of the European Human Rights Convention.<sup>7</sup> An important premise therein is that 'sometimes a happy (or unhappy) confluence of political decisions, social attitudes, and individual actors and actions makes possible the kind of breakthrough that converts ad hoc decision-making bodies into legal tribunals and turns acquiescence into legal obligation'.<sup>8</sup> The crux of the argument is the assertion that the Strasbourg system of the European Human Rights Convention, unlike so many other international legal systems, seems to have passed its 'critical moment', moving from mere acquiescence to a sense of genuine legal obligation.<sup>9</sup> This article asks what effect Russia's accession to the Convention is likely to have on the sense of legal obligation within European human rights law. It also questions whether Russia's accession, alongside the

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1. 'The 39 Member States of the Council of Europe (CoE) according to their date of membership (as at 31 July 1996),' 17 *Human Rights Law Journal* (1996) 234.

2. *Ibid.*

3. Council of Europe, Parliamentary Assembly, Bureau of the Assembly, *Report on the Conformity of the Legal Order of the Russian Federation with Council of Europe Standards Prepared by Rudolf Bernhardt, Stefan Trechsel, Albert Weitzel, and Felix Ermacora*, 7 October 1994, AS/Bur/Russia (1994) 7.

4. *Ibid.*, at 85.

5. 213 UNTS 221, ETS 5, UKTS 71 (1953), signed at Rome 4 November 1950, entered into force 3 September 1953, Council of Europe, Human Rights Information Centre edition (1995).

6. Reuter News Service, 'Yeltsin Approves Russia Entry to Council of Europe', *Reuter Textline*, 23 February 1996.

7. M.W. Janis, R.S. Kay and A.W. Bradley, *European Human Rights Law* (2nd ed., 1995). The argument is most fully made in the section entitled 'The Convention and the Efficacy of International Law', 4-8.

8. *Ibid.*, at 8.

9. *Ibid.*

upsurge in nationalistic assertions elsewhere in Europe, will imperil the legality ‘breakthrough’ of the Strasbourg system and its institutions.

It is important to recognize that these questions have broader implications than for European human rights law alone. The ‘breakthrough’ (or not) of the Strasbourg human rights system has critical repercussions on international law generally. The institutional formality and apparent efficacy of European human rights law has gone a long way towards rebutting the oft-repeated complaints about the non-law-like character of international law. If the legal system of the European Human Rights Convention is seen to fail, then faith in, and the success of, international law in general will falter as well.

## II.

H.L.A. Hart has portrayed the ordinary misgiving that many have in viewing any form of international as really ‘law’, stating that ‘though it is consistent with the usage of the last 150 years to use the expression “law” here, the absence of an international legislature, courts with compulsory jurisdiction, and centrally organized sanctions have inspired misgivings, at any rate in the breasts of legal theorists’.<sup>10</sup> Hart responded to this misgiving by pointing out that whether or not any rule system, including municipal law, is legally binding does not so much depend on whether the system has organized sanctions, such as ‘orders backed by threats’,<sup>11</sup> as upon two other ‘minimum conditions’:

On the one hand, those rules of behaviour which are valid according to the system’s ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.<sup>12</sup>

In other words, the success or even the existence of any ‘real’ legal system can rightly be judged, first, by whether or not there is actual obedience to the system’s rules, and, second, by whether or not there develops what Hart has called an ‘internal point of view’. This latter requires that there be:

... officials, lawyers, or private persons who use [the system’s rules], in one situation after another, as guides to the conduct of social life, as the basis for claims, demands, admissions, criticism or punishment, viz., in all the familiar transactions of life according to rules. For them the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility.<sup>13</sup>

For his part, Hart concluded that, although ‘no other social rules are so close to municipal law as those of international law’ and no matter how much the primary rules of international law might in fact be followed in practice, the international legal system needed more in the way of secondary systemic rules and formal legal institutions if ‘the sceptic’s last doubts about the legal “quality” of international law’ were to ‘be laid to rest’.<sup>14</sup>

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10. H.L.A. Hart, *The Concept of Law* (2nd ed., 1994) 214.

11. *Ibid*, at 216-218.

12. *Ibid*, at 116.

13. *Ibid*, at 90.

14. *Ibid*, at 236-237.

### III.

There must, of course, be some doubt about the overall thrust of Hart's critique of the law-like quality of international law. It seems, in practice, that international law is better observed and more clearly perceived 'internally' as legitimate than ordinary dismissals such as his allow.<sup>15</sup> Nonetheless, even accepting that much of international law is neither so ordinarily well obeyed nor so usually recognized as legitimate as much of municipal law, it has become increasingly difficult to accept such objections with respect to the system of Strasbourg law. This is so for several reasons.

First, there is case load. The number of admitted cases before the European Commission of Human Rights has shot up from five in the 1950s, to fifty-four in the 1960s, to 168 in the 1970s, 455 in the 1980s, and as high as 557 in the first three years of the 1990s.<sup>16</sup> The judgments of the European Court of Human Rights have exploded correspondingly: from none in the 1950s, to ten in the 1960s, twenty-six in the 1970s, 169 in the 1980s, and up to 243 in just the first four years of the 1990s.<sup>17</sup>

Second, there is efficacy. In 1950, it seemed that rendering both the right of individual petition and the jurisdiction of the Court optional (in articles 25 and 46 of the Convention) would limit the ability of the Strasbourg system to impinge upon state sovereignty.<sup>18</sup> By the 1970s, however, most governments had accepted the two optional clauses. By 1995, all thirty states then party to the Convention had consented to both article 25 and article 46. Nowadays, all new parties are expected to promptly accept both the right of individual petition and the jurisdiction of the Court.<sup>19</sup> It appears in practice that states respect the adverse judgments of the Court,<sup>20</sup> even when the Court's judgment is seen, as in the *McCann* case,<sup>21</sup> to imperil vital national interests.<sup>22</sup>

Third, there is the growth in the number of parties to the European Human Rights Convention. The Convention was ratified in 1953, with only eight member states. By the end of the 1980s, there were 22 states members, encompassing virtually all of Western Europe. In 1990, Finland, freed from its 'neutral' status, joined the Convention as the twenty-third member. From 1992 to 1996, the number of members rapidly rose to thirty-three, with all newcomers, save Andorra, from the former Communist countries in Central and Eastern Europe.<sup>23</sup> Russia and several other states new to the Council of Europe seem soon to follow.

Fourth, there has been a crucial change of attitude both within and about the Strasbourg institutions. The Strasbourg commissioners and judges have become more confident over time. They are increasingly willing not only to rule against governments, but to do so in more controversial cases. The turning point probably occurred sometime in the late 1970s and early 1980s.<sup>24</sup> This institutional boldness has in turn encouraged lawyers and their clients, who have become ever more ready to bring their complaints to the Commission and the Court, that is,

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15. L. Henkin, *How Nations Behave* (2nd ed., 1979); T.M. Franck, *The Power of Legitimacy among Nations* (1990).

16. Janis, Kay and Bradley, *supra* note 7, at 28-29.

17. *Ibid.*, at 70.

18. *Ibid.*, at 18-25.

19. *Ibid.*, at 27-29.

20. *Ibid.*, at 83-87.

21. Judgment of 27 September 1995, 17/1994/464/545.

22. 'Outrage over Death on the Rock Verdict by Euro Court', *The Times*, 28 September 1995, p. 1; '£40,000 Present for IRA Families - Britain Pays Terrorist Court Costs Early', *Daily Mail*, 27 December 1995, p. 1.

23. *Supra* note 1, at 234.

24. Janis, Kay and Bradley, *supra* note 7, at 70-87.

ever more willing to ‘take a case to Strasbourg’.<sup>25</sup> So remarkable are these changes in attitude that the European Commission and the Court of Human Rights have become victims of their own success. The Strasbourg system, deluged with cases, faces the prospect of a monumental and controversial reform in the guise of Protocol No. 11, which, if ratified by all member states, will *inter alia* merge the Commission into the Court and create a full-time Strasbourg judiciary of about forty judges.<sup>26</sup>

#### IV.

The accession of Russia and of the other Central and Eastern European states to the Council of Europe and the European Convention on Human Rights may also be seen as a price of success. The promotion of human rights in the Soviet bloc via the ‘Helsinki Process’ was long a foreign policy goal of both the United States and Western Europe. At least as early as April 1991, a political decision had been made that there was a political and moral requirement to open up the Council of Europe to the new post-Communist governments in the East.<sup>27</sup> In October 1993, the Summit of the Council of Europe reiterated its commitment ‘to pluralist and parliamentary democracy, the indivisibility and universality of human rights, the rule of law and a common heritage enriched by diversity’.<sup>28</sup> Moreover, the Summit proclaimed that it would welcome new Council members from ‘the democracies of Europe freed from communist oppression’, so long as an applicant had ‘brought its institutions and legal system into line with the basic principles of democracy, the rule of law and respect for human rights’.<sup>29</sup> To test whether an applicant’s legal system meets these standards, the Council of Europe has commissioned Eminent Lawyers Reports, such as that which Russia failed.<sup>30</sup> The decision in February 1996 to admit Russia to the Council of Europe is commonly viewed as a result of giving greater weight to political factors than to legal criteria, a realistic judgment given the importance of integrating post-Communist Russia into the more democratic liberal realm of Western Europe.<sup>31</sup>

#### V.

No matter how politically rational the decision to admit Russia to the Council of Europe, it must be recognized that Russia’s accession will result in two important and probably negative consequences for the ‘legality’ of the Strasbourg human rights law system. First, the participation of Russia increases the possibility that European human rights law will both be disobeyed and be seen to be flouted. This has, of course, occurred before, notably by the

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25. *Ibid*, at 113.

26. Council of Europe, Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, H(94), 11 May 1994.

27. Council of Europe, Committee of Ministers, 88th Session, 25 April 1991, 12 *Human Rights Law Journal* (1991) 216.

28. Council of Europe, Vienna Declaration of 8/9 October 1993, 14 *Human Rights Law Journal* (1993) 373.

29. *Ibid*, at 374.

30. Council of Europe, *Report on the Conformity of the Legal Order of the Russian Federation with Council of Europe Standards* (1994). Other Eminent Lawyers Reports have been reprinted in the *Human Rights Law Journal*, including those on Slovenia, 14 *Human Rights Journal* (1993) 437; the Czech Republic, 14 *Human Rights Law Journal* (1993) 442; and Albania, 15 *Human Rights Law Journal* (1995) 242.

31. Reuter News Service, ‘Russia: Council Vote Pleases Yeltsin, Shocks Rights Monitors’, 26 January 1996; Reuter News Service, ‘Czech Republic: Havel Gives Qualified Welcome to Russia in Council’, 26 January 1996; Reuter News Service, ‘Russia: Human Rights Commission Says “Political Expediency” Prevailing Over Human Rights’, 7 February 1996; Gazzini, ‘Considerations on the Conflict in Chechnya’, 17 *Human Rights Law Journal* (1996) 93.

Colonels' regime in Greece between 1967 and 1974. That situation led to the condemnation of Greece by the European Commission of Human Rights and the Committee of Ministers of the Council of Europe, as well as to the denunciation of the Convention by Greece in December 1969.<sup>32</sup> Moreover, doubt has been expressed about the actual efficacy of the system, even with regard to the traditional liberal democracies.<sup>33</sup>

However, three aspects of Russia's accession are particularly troubling for the future of compliance with Strasbourg law. First, at the present time, as the Eminent Lawyers Report makes clear, Russia falls short of the usual European standard of the rule of law and the protection of human rights. Second, given Russia's lack of experience in protecting human rights at the level of municipal law, it is likely that a great many violations of European human rights law will be committed there, and that they will not be remedied domestically. Third, the same political importance of Russia that has prompted the Council of Europe to accept its admittance will make it especially difficult for Strasbourg to force the Russian government to comply with adverse findings.

The other significant consequence for the system of European human rights law posed by Russia's accession is likely to be a new challenge to what, along with Hart, we can call Strasbourg's 'internal point-of-view'. Given the difficulties of Russia effectively complying with European human rights law in its municipal legal order and of Strasbourg imposing its decisions upon the Russian government, there will be a strong temptation for the Strasbourg institutions to fashion a two-tier legal order, which would allow lower than normal expectations for Russia. This will have the likely benefit of enabling Russia's continued participation in the system, but it will threaten the perception of Hart's 'officials, lawyers or private persons' that Strasbourg law 'in one situation after another [is a guide] to the conduct of social life, as the basis for claims, demands, admissions, criticism or punishment, viz., in all the familiar transactions of life according to rules'.<sup>34</sup>

These probable challenges resulting from Russia's accession come at an awkward moment for Strasbourg. Not only is the ambit of European human rights law being widened to reach out to the former Soviet bloc, but the potency of Strasbourg law is being deepened by ever bolder Court judgments against national governments.<sup>35</sup> This deepening, a welcome advance on international legal control, is proceeding just when the basic tenets of European unity are under increasing assault by nationalistic sentiments across Europe. This is true not least in the United Kingdom where both European human rights law and European economic law are perceived more and more, not as solutions to European-wide problems, but as foreign threats to national political and economic objectives. Hence, there is a danger that the failure of Russia to comply with European human rights law domestically and to obey the decisions of the Strasbourg institutions and the creation of a two-tier human rights system to accommodate Russia will give the governments of the existing member states all the more latitude in weakening their own commitment to the Strasbourg system. This all serves as a reminder that the 'breakthrough' of Strasbourg law to genuine legal obligation may not be forever.

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32. Janis, Kay and Bradley, *supra* note 7, at 51-64.

33. Churchill and Young, 'Compliance with Judgments of the European Court of Human Rights and Decisions of the Committee of Ministers: The Experience of the United Kingdom, 1975-1987', 62 *British Yearbook of International Law* (1992) 283.

34. Hart, *supra* note 10, at 90.

35. Janis, Kay and Bradley, *supra* note 7, at 113-118.