

# The Concept of ‘Principled Resistance’ to ECtHR Judgments: A Useful Tool to Analyse Implementation Deficits?

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## ABSTRACT

Recent years have seen a marked increase in ‘clashes’ between national courts on the one hand and international courts and tribunals on the other hand. This article introduces a new analytical pattern, called ‘principled resistance’, in order to analyse deficits occurring during the implementation phase of a Strasbourg judgment. This analytical concept is contrasted with other most recently developed scholarly concepts (‘reasonable resistance’: Palombino; ‘pushback’ and ‘backlash’: Madsen; ‘principled’ and ‘dilatatory non execution’: de Londras and Dzehtsiarou) in order to show differences and commonalities. Furthermore, the limits of (permissible) ‘disagreement’, as opposed to (impermissible) ‘principled resistance’, are explored from an international law point of view. It will be argued that although cases of principled resistance are extremely rare, the concept has an analytical value in that it prevents us from overestimating divergences between national and international courts and tribunals. At the same time, it will be shown that even where courts and other national actors employ legal arguments for their resistance to the ECtHR, those conflicts should be conceptualized as struggles over the proper allocation of powers between the national level and Strasbourg.

## 1. INTRODUCTION

Former judge Pinto de Albuquerque, whose term ended just recently in March 2020, is famous for his dissents. In one of them, he depicted a disturbing picture of the relationship between the European Court of Human Rights (‘ECtHR’, ‘the Court’) and the national level. In his own words: the ‘resentment against the Court has reached a new, alarming pitch, stoking sectarian rage against the Convention system itself’.<sup>1</sup> A particularly worrying result of his analysis concerns the fact that this hostile attitude towards the Court is not only found among single government representatives or the mass media but has infiltrated the judiciary. To quote again Pinto de Albuquerque: a ‘politically motivated narrative, which is aimed at the disruption of

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<sup>1</sup> *GIEM Srl and Others v Italy* [GC] Appl Nos 1828/06 et al (ECtHR, 28 June 2018), partly concurring, partly dissenting opinion by Judge Pinto de Albuquerque, para 58.

the Convention system as it was built and has evolved over the last sixty years, has contaminated the discourse, if not the hearts, of the highest judicial representatives in some countries'.<sup>2</sup>

Those warnings coincide with a growing literature on 'backlash' against international courts and tribunals.<sup>3</sup> For the Convention system, cases of outright refusal – especially of **judicial** refusal – to abide by an ECtHR judgment pose a serious risk. If cherry-picking is allowed for one State Party, why should the others still adhere to the system? There are good reasons to take those instances seriously and to deal with them from a scholarly perspective.

This article aims to introduce a new analytical pattern, called 'principled resistance', and to discuss its pros and cons. As will be seen, a peculiarity of this concept is concentration on the legal reasoning of national actors and restriction to the implementation phase of an ECtHR judgment, very much in contrast with other broader and more complex scholarly concepts. Originally developed for a conference that was convened in 2017, its results have been published recently.<sup>4</sup> Although restricted to the European Convention on Human Rights ('the Convention' or 'ECHR'), it is submitted that the results go well beyond the sole scope of the Convention context but hold equally true from the perspective of general international law.

This article proceeds mainly in three steps: first, the very concept of principled resistance to ECtHR judgments will be explained (Section 2). Next, other recently developed scholarly concepts dealing with clashes between the national judiciary and international law will be discussed, in order to find out differences and commonalities (Section 3). Finally, this article aims to give a dogmatic explanation for the difference between (permissible) disagreement and (impermissible) principled resistance (Section 4), before ending with a conclusion (Section 5).

## 2. THE NEW CONCEPT OF 'PRINCIPILED RESISTANCE' TO ECTHR JUDGMENTS

The phenomenon this article is dealing with results from a well-known 'conundrum'<sup>5</sup>: on the one hand, international law claims an almost unfettered supremacy over national law, including constitutional law.<sup>6</sup> From the perspective of international

2 *ibid* para 60.

3 See, among others, KJ Alter, JT Gathii and LR Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27 *European Journal of International Law* 293–328; W Sandholtz, Y Bei and K Caldwell, 'Backlash and International Human Rights Courts' in A Brysk and M Stohl (eds), *Contracting Human Rights. Crisis, Accountability and Opportunity* (Edward Elgar 2018), 159–178 ; MR Madsen, P Cebulak and M Wiebusch, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts' (2018) 14 *International Journal of Law in Context* 197–220; G Dimitropoulos, 'The Conditions for Reform: A Typology of "Backlash" and Lessons for Reform in International Investment Law and Arbitration' (2019) 18 *The Law & Practice of International Courts and Tribunals* 416–35.

4 M Breuer (ed), *Principled Resistance to ECtHR Judgments – A New Paradigm?* (Springer 2019).

5 FM Palombino, 'Introduction' in FM Palombino (ed), *Duelling for Supremacy. International Law vs. National Fundamental Principles* (CUP 2019), 1–5, at 3.

6 This principle can be traced back to the jurisprudence of the Permanent Court of International Justice (PCIJ), see *Case of the SS 'Wimbledon' (United Kingdom and Others v Germany)*, Judgment, PCIJ Series A No 1 (1923) 29; *The Greco-Bulgarian 'Communities'*, Advisory Opinion, PCIJ Series B No 17 (1930) 32. Today, it is enshrined both in treaty law (Article 27 VCLT) and in the rules of State responsibility, see

law, questions of national law are regarded mere questions of fact, not of law.<sup>7</sup> On the other hand, the supremacy of international law is restricted to the international realm. It does not encroach upon the national level, very much in contrast with the rules under EU law where the doctrine of primacy may result in national rules being disapplied at the national level.<sup>8</sup> International law *stricto sensu* does not require going that far, which may lead to a situation that has been characterized as a ‘legal aporia’<sup>9</sup>, namely the situation when ‘two fundamentally opposing results coexist[...] side by side’.<sup>10</sup>

It should be noted at the outset that the concept of principled resistance (the exact contours of which will be explained in greater detail in the next subsection) is restricted to the implementation phase of a Strasbourg judgment. It does not cover each and every possible conflict between national law and the Convention. In particular, it does not address possible conflicts that may arise in the future but have not yet materialized, due to a lack of pertinent ECtHR jurisprudence. It solely concentrates on the response that a national actor (typically a judge) gives to a particular judgment of the Strasbourg Court.

Equally, the concept does not pursue the objective of analysing the effects that instances of resistance had on the dialogical relationship between national actors and the Court,<sup>11</sup> on the shaping of the margin of appreciation<sup>12</sup> and on the principle of subsidiarity.<sup>13</sup> This goes well beyond the scope of inquiry because the principled resistance project as developed in 2017 aimed to find out whether (alleged or real) cases of principled resistance amounted to a ‘new paradigm’.<sup>14</sup>

Furthermore, the aim of the principled resistance concept is not to explain the root causes that induce national resistance to international judgments. Such an analysis would go well beyond the legal scope given that it requires scrutinizing the motivation underlying a national judgment contradicting an international court decision.<sup>15</sup>

Articles 3 and 32 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts. For further references, see M Breuer, ‘“Principled Resistance” to ECtHR Judgments: Dogmatic Framework and Conceptual Meaning’ in M Breuer (ed), *Principled Resistance to ECtHR Judgments – A New Paradigm?* (Springer 2019), 3–34, at 5 et seq.

7 A Nollkaemper, *National Courts and the International Rule of Law* (OUP 2011), 252.

8 See Case 6/64 *Costa v ENEL* [1964] ECR 585, at 593–94; see further M Claes, ‘The Primacy of EU Law in European and National Law’ in A Arnall and D Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP 2015), 178–211. Due to the differences between EU law and international law proper, the present author resists the temptation to discuss cases of constitutional courts’ resistance to the CJEU in the present context.

9 Palombino (n 5), at 3.

10 Breuer (n 6), at 15. In this context, the conceptual differences between monist and dualist countries is of little practical impact. Therefore, it will be neglected for present purposes.

11 See LR Glas, *The Theory, Potential and Practice of Procedural Dialogue in the European Convention on Human Rights System* (Intersentia 2016); A Müller (ed), *Judicial Dialogue and Human Rights* (CUP 2017).

12 See OM Arnardóttir, ‘Organised Retreat? The Move from “Substantive” to “Procedural” Review in the ECtHR’s Case Law on the Margin of Appreciation’ ESIL Conference Paper No 4/2015.

13 See R Spano, ‘Universality or Diversity of Human Rights?: Strasbourg in the Age of Subsidiarity’ (2014) 14 *Human Rights Law Review* 487–502; idem, ‘The future of the European Court of Human Rights: subsidiarity, process-based review and the rule of law’ (2018) 18 *Human Rights Law Review* 473–94.

14 See Breuer (n 6), at 25.

15 For the ‘very first comprehensive empirical analysis of the use of Strasbourg case law and its effect on the reasoning of domestic courts’, see D Kosar et al, *Domestic Judicial Treatment of European Court of Human*

In contrast, the principled resistance concept aims to address the difficulties that might occur in the implementation phase of an ECtHR judgment by adverse national decisions.

### A. Definition of Principled Resistance

With these preliminary remarks, it may be useful to unpack the elements constituting principled resistance. The following definition has been proposed:

It is a legal conflict, normally resulting from a clash between the national constitution and the Convention. (2) The conflict leads to a permanent blockade, in the sense that an ECtHR judgment cannot and will not be implemented. This may result either (a) from a deep disagreement between a national actor and the Court on the protection of human rights or (b) from a conflict between the ECtHR judgment and ‘national identity’ (or indeed both of them).<sup>16</sup>

This definition may be challenged, for a number of reasons. Firstly, it may be argued that instances of national disobedience are essentially **political** in character, so depicting them as ‘legal conflicts’ results in an oversimplification. This argument has some merits. Cases that fall into the ambit of principled resistance typically have a political context. Still, it is one thing to analyse the political implications that led to national resistance, and it is definitely another thing to analyse the legal methodology that is used to that end. The principled resistance concept concentrates on the latter aspect, in order to find out whether commonalities between those cases are significant enough to speak of a ‘new paradigm’. The limitation to the execution phase has its merits in this regard.

Secondly, the definition of principled resistance is not as clear-cut as one might expect (or wish). Is it not, in the end, just concerned with conflicts between national constitutions and the Convention? Would it not be more precise to speak of ‘constitutional’, rather than of ‘principled’ resistance? And does the notion ‘principled’ not imply a more principled stance in a given matter? Those questions call for a differentiated answer. To begin with, instances of ‘constitutional’ resistance are certainly the most obvious candidates for principled resistance. But neither does a conflict between the national constitution and the Convention inevitably lead to principled resistance: There have been various cases in Convention history where the national constitution was amended in reaction to a Strasbourg verdict, so there was no deadlock in the end.<sup>17</sup> Nor is principled resistance *ab initio* excluded where the conflict

*Rights Case Law. Beyond Compliance* (Routledge 2020) (quotation at 4). The root causes underlying cases of principled resistance are analysed (but still from a legal perspective) by M Breuer, ‘Principled Resistance to the European Court of Human Rights and its Case Law: A Comparative Assessment’ in H Aust and E Demir-Gürsel (eds), *The European Court of Human Rights. Current Challenges in Historical Perspective* (Edward Elgar, forthcoming).

<sup>16</sup> Breuer (n 6), at 20.

<sup>17</sup> *Demicoli v Malta* Appl No 13057/87 (ECtHR, 27 August 1991), and Committee of Ministers Resolution DH (95) 211 of 11 September 1995; *Open Door and Dublin Well Woman v Ireland* Appl Nos 14234/88, 14235/88 (ECtHR, 29 October 1992), and Committee of Ministers Resolution DH (96) 368 of 26 June 1996; *Alajos Kiss v Hungary* Appl No 38832/06 (ECtHR, 20 May 2010), and DH-DD(2012)1156.

line is between ordinary laws and the Convention. What is essential is the amount of disagreement, hence the parlance of ‘principled’ resistance, and also of ‘national identity’. This identity will often be found in the constitution, being the core document of a given polity. But it might also be encapsulated in ordinary laws – just think of the conflict over the voting rights for serving prisoners in the UK. From this, one might conclude that speaking of ‘constitutional resistance’<sup>18</sup> would be in and by itself an oversimplification.

Thirdly, the concept speaks of ‘national actors’, rather than of ‘national judges’. It might be criticized that this is too broad a definition, as it encapsulates a great variety of actors, in essence all three branches of government. Admittedly, the interplay between the Strasbourg Court and those actors is a delicate one. But concentrating solely on the judiciary and excluding the legislator and the executive would be too narrow. The principled resistance study produced some evidence that it very much depends on the national institutional design whether the line of conflict is between the national judiciary (most notably, the constitutional courts) and the ECtHR or the national legislator and the Court.<sup>19</sup> Therefore, even if the cases to be discussed below are solely concerned with conflicts between a national constitutional court and its Strasbourg counterpart, it should be made clear from the beginning that the concept as such is broader in scope. For the purposes of the present article, however, including more examples would have transgressed the limits. Instead, few but meaningful examples were selected, so as to enable comparison of the proposed concept with other scholarly concepts. Equally, one should not be irritated by the fact that the examples to be discussed in greater detail below stem mainly from one State, namely, Russia.<sup>20</sup> The preponderance of Russian cases certainly represents the tensions currently existing between the Council of Europe and Russia.<sup>21</sup> For present purposes, however, it simply reflects the need to select meaningful examples, since the aim of the present article is not to explain the principled resistance concept in all its ramifications but to compare it with other concepts.

This brings us to the two subcategories of principled resistance. As stated above, principled resistance might result ‘either (a) from a deep disagreement between a national actor and the Court on the protection of human rights or (b) from a conflict between the ECtHR judgment and “national identity” (or indeed both of them)’.<sup>22</sup>

18 This term is most often used to describe the conflicts between national constitutional courts and the European Court of Justice (CJEU), such as the *Solange* jurisprudence of the German Federal Constitutional Court, see M Kumm and VF Comella, ‘The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union’ (2005) 3 *International Journal of Constitutional Law* 473–92, at 474. But see for the ECHR context: CJ Van de Heyning, ‘The Natural “Home” of Fundamental Rights Adjudication: Constitutional Challenges to the European Court of Human Rights’ (2012) 31 *Yearbook of European Law* 128–61, at 138 et seq.

19 See M Breuer, ‘“Principled Resistance” to ECtHR Judgments: An Appraisal’ in M Breuer (ed), *Principled Resistance to ECtHR Judgments – A New Paradigm?* (Springer 2019), 323–50, at 349.

20 The principled resistance study embraced a total of six country reports (Austria, Germany, Italy, Russia, Switzerland and the UK). Including some four other States was considered but finally abandoned. See Breuer (n 6), 29 et seq.

21 See most recently, Irina Busygina and Jeffrey Kahn, ‘Russia, the Council of Europe, and “Ruxit”, or Why Non-Democratic Illiberal Regimes Join International Organizations’ (2020) 67 *Problems of Post-Communism* 64–77.

22 See n 16.

At first sight, those two subcategories might appear fairly randomly chosen. There is, however, a rationale behind it.<sup>23</sup> National resistance can be expressed in two different ways. It might target the international level, calling into question the interpretative outcome of an ECtHR case as such (subcategory a). Alternatively, it might oppose the result achieved internationally by the result of a national interpretation process (subcategory b). In addition, a national actor might also *both* contradict the ECtHR's reading of the Convention and oppose this reading with its own interpretation of national law, especially the national constitution.

### B. A Test Case: *Anchugov and Gladkov v Russia*

In this subsection, we will analyse *Anchugov and Gladkov* as a test case.<sup>24</sup> It will be seen that although this case shows many, if not most characteristics of principled resistance, in the end it does not qualify for this category because the findings of the Russian Constitutional Court did not lead to a permanent blockade of the Strasbourg ruling. The analytical value of this case study is to make it clear that real deadlock situations in the aftermath of an ECtHR ruling are extremely rare. At the same time, this case may be conceptualized as an instance of power struggle between a national actor and Strasbourg.

In *Anchugov and Gladkov*, the ECtHR held that the blanket ban on voting rights for serving prisoners as contained in Article 32(3) of the Russian Constitution was a violation of Article 3 of Protocol No 1. During the Strasbourg proceedings, the Russian Government had warned that this provision forms part of Chapter 2 of the Russian Constitution, which is 'not subject to any review by the legislature'.<sup>25</sup> The Strasbourg Court did not accept this as a general obstacle to international review, very much in line with the doctrine of supremacy of international law which allows for no constitutional law exception. It noted that compliance with Article 3 of Protocol No 1 could be achieved 'through some form of political process or by interpreting the Russian Constitution by the competent authorities the Russian Constitutional Court in the first place in harmony with the Convention in such a way as to coordinate their effects and avoid any conflict between them'.<sup>26</sup> The Russian Constitutional Court, however, declined this interpretative exercise. It expressed its criticism following two main lines of argument.

23 See Breuer (n 19), at 324.

24 It is worth mentioning that *Anchugov and Gladkov* did not appear out of the blue but that the relationship between the Russian Constitutional Court deteriorated gradually, with the *Markin* case typically being cited as the turning point. Although this context is generally important, it is not the focus of the present genuinely legal analysis. For references, see J Kahn, '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) 3 *European Journal of International Law* 933–59; M Aksenova and I Marchuk, 'Reinventing or Rediscovering International Law? The Russian Constitutional Court's uneasy dialogue with the European Court of Human Rights' (2019) 16 *International Journal of Constitutional Law* 1322–46; L Mälksoo and W Benedek (eds), *Russia and the European Court of Human Rights. The Strasbourg Effect* (CUP 2018); V Starzhenetskiy, 'The Execution of ECtHR Judgements and the "Right to Object" of the Russian Constitutional Court' in M Breuer (ed), *Principled Resistance to ECtHR Judgments – A New Paradigm?* (Springer 2019), 245–72.

25 *Anchugov and Gladkov v Russia* Appl Nos 11157/04, 15162/05 (ECtHR, 4 July 2013), para 86.

26 *Anchugov and Gladkov v Russia* Appl Nos 11157/04, 15162/05 (ECtHR, 4 July 2013), para 111.

(1) *The international law-related argument*

First, it criticized the Court's interpretation of Article 3 of Protocol No 1. To begin with, the wording of this article is not particularly clear about whether or not it actually entails a subjective right to take part in parliamentary elections. Unlike most Convention guarantees, Article 3 of Protocol No 1 is not framed 'everyone has the right' or 'no one shall' but is formulated in an objective way:

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.<sup>27</sup>

Still, in 1998 when Russia ratified the Protocol, the Court had already clarified that subjective rights could be derived from Article 3 of Protocol No 1.<sup>28</sup>

At the same time, the ECtHR had also acknowledged that the rights under this article were not absolute in nature but subject to implied limitations.<sup>29</sup> During Russia's process of ratifying Protocol No 1, none of the Council of Europe authorities had indicated that there could be problems with upholding a provision like Article 32(3) of the Russian Constitution. For the Russian Constitutional Court, this meant that Russia

in 1998 ratified the Convention for the Protection of Human Rights and Fundamental Freedoms proceeding from the understanding that Article 32 (Section 3) of the Constitution of the Russian Federation was fully in accord with the prescriptions of Article 3 of Protocol No. 1 to the Convention and therefore needed no alteration.<sup>30</sup>

In *Anchugov and Gladkov*, in contrast, the ECtHR had given the Protocol a meaning that was not previously consented to by Russia, with the consequence that Russia had a right, from the Constitutional Court's perspective, to insist on the 'original' meaning.

One can perceive a strong discontent felt by the Russian Constitutional Court with the results of the ECtHR's evolutive interpretation. In a way, the Constitutional Court seems to convey the idea that Russia has been trapped. If it had been foreseeable that electoral bans like the Russian one were not in conformity with Article 3 of Protocol No 1, the Russian State could have made a reservation, so as to preserve the national constitutional legal framework. Since *ex post* reservations are not permitted, with the date of ratification being the latest possible (Article 19 VCLT), Russia is bound by Protocol No 1 in its entirety. I think that from an outsider's perspective, it is fair to assume that at the time when Russia ratified Protocol No 1, it was not foreseeable that the ECtHR was going to proceed with its case law as it actually did.

27 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of 20 March 1952, ETS No 9.

28 *Mathieu-Mohin and Clerfayt v Belgium*, Appl No 9267/81 (ECtHR, 2 March 1987), paras 48 et seq.

29 *ibid* para 52.

30 Russian Constitutional Court, Judgment No 12-II/2016 of 19 April 2016, para 4.1 (translation available at <<http://www.ksrf.ru/en/>>).

This case law mainly resulted from *Hirst v UK (No 2)* where the Strasbourg Court for the first time criticized a blanket ban on voting rights for serving prisoners.<sup>31</sup> Interestingly, implementing this British judgment equally led to significant problems, including the argument that the Strasbourg Court had ‘forgotten that its job is to apply the principles of the Convention as originally intended by those who signed it’ and that it had stretched Article 3 of Protocol No 1 ‘beyond its proper and intended meaning’.<sup>32</sup>

On the other hand, the proclaimed ‘right’ of the Russian Constitutional Court to resist the ECtHR runs counter to the Strasbourg Court’s role of being the final arbiter in questions of Convention interpretation (Article 19 ECHR). Besides that, the way in which the Russian Constitutional Court relied on Article 32(3) of the Russian Constitution cannot be subscribed to from an international law perspective. Treaty law is governed by the principle of *pacta sunt servanda* (Article 26 VCLT). Only under strict circumstances may national (constitutional) law be relied upon so as to evade treaty obligations, one of them being that a ‘provision of its internal law regarding competence to conclude treaties’ is concerned (Article 46 § 1 VCLT). Substantive constraints even if they concern a rule of ‘fundamental importance’<sup>33</sup> must not be relied upon internationally so as to invalidate the consent to be bound by a treaty.<sup>34</sup>

## (2) *The constitutional law-related argument*

Under the second line of argument, the Russian Constitutional Court confronted Strasbourg’s understanding of Article 3 of Protocol No 1 with its own interpretation of the Russian Constitution. Unlike proposed by Strasbourg, the Russian Constitutional Court insisted on a literal understanding of Article 32(3) of the Russian Constitution, with the effect that implementing *Anchugov and Gladkov* was largely excluded. It did so pointing to the fact that provisions under Chapter 2 of the Russian Constitution belong to the fundamental principles of the legal status of the individual in the Russian Federation and may not be repealed otherwise than in a special procedure, established for the adoption of the new Constitution of the Russian Federation, ie by the Constitutional Assembly or by referendum.<sup>35</sup>

Here, the Constitutional Court referred to the unalterable *noyau dur* of the Russian Constitution. As indicated earlier, reliance on the supremacy of the national constitution alone is not sufficient to bring a case into the ambit of principled resistance. The risk of a permanent blockade exists in particular where a constitutional provision is at stake which must not be amended. Such unamendability clauses exist in many

31 *Hirst v UK (No 2)* [GC] Appl No 74025/01 (ECtHR, 6 October 2005).

32 D Davis, ‘Britain must Defy the European Court of Human Rights on Prisoner Voting as Strasbourg is Exceeding its Authority’ in S Flogaitis, T Zwaart and J Fraser (eds), *The European Court of Human Rights and its Discontents. Turning Criticism into Strength* (Edward Elgar 2013), 65–70, at 67–68.

33 See A Nollkaemper, ‘Rethinking the Supremacy of International Law’ (2010) 65 *Zeitschrift für Öffentliches Recht* 65–85, at 73.

34 In this sense also M Bothe, ‘Article 46 Convention of 1969’ in O Corten and P Klein (eds), *The Vienna Conventions on the Law of Treaties. A Commentary*, vol II (OUP 2011), MN 11; R Kolb, *The Law of Treaties. An Introduction* (Edward Elgar 2016), 91–92.

35 Russian Constitutional Court, Judgment No 12-II/2016 of 19 April 2016, para 4.1 (translation available at <<http://www.ksrf.ru/en/>>).



countries.<sup>36</sup> In the EU context, the so-called eternity clause (*Ewigkeitsklausel*) under Article 79(3) of the Basic Law induced the German Federal Constitutional Court to oppose EU law imperatives with the exigencies of ‘constitutional identity’.<sup>37</sup> This argument serves as a shelter against the over-intrusiveness of EU law vis-à-vis national constitutional law. In the ‘age of subsidiarity’,<sup>38</sup> this concept has been transferred from the EU context to the Convention level.<sup>39</sup>

But is *Anchugov and Gladkov* a principled resistance case, after all? At first sight, one might be inclined to say yes. At least, this case shows a number of elements constitutive of principled resistance. One aspect, however, makes it appear doubtful whether it should be included into this category.<sup>40</sup> At the end of its judgment, the Russian Constitutional Court indicated that there may be ways to reconcile the exigencies under national and under international law. While the Constitutional Court excluded to come to a more Convention-friendly reading of Article 32(3) of the Russian Constitution, it pointed to the possibility of implementing *Anchugov and Gladkov* as far as amendments to the Criminal Code were concerned, especially with regard to the notion of ‘deprivation of liberty’.<sup>41</sup> Thus, the Constitutional Court did not plainly say ‘no’ to Strasbourg but admitted a kind of minimalist compliance which would allow both parts to uphold their principles but at the same time to save their faces. This analysis coincides with the evaluation made by the Venice Commission, to the effect that the Russian Constitutional Court in *Anchugov and Gladkov* ‘demonstrated a certain openness to dialogue with the European Court of Human Rights’.<sup>42</sup>

Of course, it may be questioned whether such a minimalist compliance lives up to the obligations under Article 46 § 1 ECHR to ‘abide by the final judgment of the Court’. It could be argued that as long as the principle of automatic

36 See R Albert and BE Oder, *An Unamendable Constitution?* (Springer 2018); M Hein, ‘General Entrenchment Clauses in the History of European Constitutionalism’ (2019) 21 *European Journal of Law Reform* 226–42.

37 See Federal Constitutional Court, Judgment of 30 June 2009, 2 BvE 2, 5/08 et al, BVerfGE 123, 267, at 340 et seq; Federal Constitutional Court, Order of 15 December 2015, 2 BvR 2735/14, BVerfGE 140, 317, at 334 et seq. For further analysis, see N Petersen, ‘Germany’ in FM Palombino (ed), *Duelling for Supremacy. International Law vs. National Fundamental Principles* (CUP 2019), 89–105, at 92–94; S Schmahl, ‘The National Identity Criterion in the Crossfire Between European Integration and the Preservation of National Sovereignty’ in M Breuer (ed), *Principled Resistance to ECtHR Judgments – A New Paradigm?* (Springer 2019), 299–322, at 301–03.

38 See Spano (n 13).

39 From the literature, see L López Guerra, ‘National Identity and the European Convention on Human Rights’ in A Saiz Arnaiz and C Alcobarro Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia 2013), 305–21; D Szymczak, ‘L’identité Constitutionnelle dans la Jurisprudence Conventionnelle’ in L Burgorgue-Larsen (ed), *L’identité constitutionnelle saisie par les juges en Europe* (Pedone 2011), 45–60; E Cloots, *National Identity in EU Law* (OUP 2015), 45–60.

40 See further Breuer (n 19) 330–31. See also B Bowring, ‘Russia’s Cases in the ECtHR and the Question of Implementation’ in Mälksoo and Benedek (n 24), 188–221, at 213.

41 Russian Constitutional Court, Judgment No 12-Π/2016 of 19 April 2016, para 2 of the operative part (translation available at <<http://www.ksrf.ru/en/>>).

42 Venice Commission, Opinion No 981/2020, CDL-AD(2020)009, para 58.

disenfranchisement which formed the basis of Strasbourg's verdict of a violation remains unaltered, *Anchugov and Gladkov* has not been complied with.<sup>43</sup> In this context, it might be useful to look once again at the British case of *Hirst v UK (No 2)*. Here too, the principle of automatic disenfranchisement was not changed due to the British Parliament's insistence on the principle of sovereignty of Parliament. Still, supervision of execution was closed by the Committee of Ministers after some minor administrative amendments had been enacted with only an estimated group of about 100 prisoners benefiting from it.<sup>44</sup> Against this background, it did not really come as a surprise that in the Russian case, too, the Committee of Ministers contented itself with a minimalist form of compliance. In its September 2019 human rights meeting, it decided to close examination of *Anchugov and Gladkov* after the Russian Criminal Code had been changed, with the effect of introducing placement in 'correctional centres for community work' as a new criminal sanction which did not entail automatic disenfranchisement.<sup>45</sup> While the provision of the Russian Constitution remained unaltered, the Committee of Ministers pointed to the 'wide margin of appreciation in this area' when closing its supervision.<sup>46</sup> As might be seen from these examples, it is extremely difficult to define where exactly the dividing line between 'minimalist compliance' and 'non-compliance' lies. For the evaluation of *Anchugov and Gladkov*, it is essential that the Russian Constitutional Court did not plainly reject the Strasbourg judgment but left the door open for some kind of dialogue.

Against this backdrop, what is the analytical surplus of the principled resistance pattern? It enables us to evaluate more accurately difficulties in the implementation process. Not every case of reliance on the supremacy of the constitution automatically leads to principled resistance. Even in cases where the unalterable *noyau dur* of the constitution is concerned, this does not inevitably lead to a permanent blockade. This is a valuable insight as it prevents us from overestimating cases of apparent resistance. With even *Anchugov and Gladkov* being no clear-cut principled resistance case, it may be concluded that unresolvable conflicts between the Convention and 'national' or 'constitutional identity' are far less frequent than might be assumed at first sight.

In this sense, it is not argued that cases of principled resistance are particularly frequent. More often, cases of national disobedience will show at least certain *elements* of principled resistance.<sup>47</sup> However, the analytical value of the principled resistance

43 In this sense, see J Haak, 'Constitutional Court of the Russian Federation, Decision from 19 April 2016, No 12-P/16. An Assessment from a German Point of View' (2017 10) 6 *Journal of Siberian Federal University. Humanities & Social Sciences* 845–50, at 847.

44 See CM/ResDH(2018)467 adopted by the Committee of Ministers on 6 December 2018. For a critical assessment, see E Adams, 'Prisoners' Voting Rights: Case Closed?', available at <<https://ukconstitutionallaw.org>>; A von Staden, 'Pushing the Envelope: Minimalist Compliance in the UK Prisoner Voting Rights Cases', available at <<http://echrblog.blogspot.com>>; see also critical comment by E Bates, 'Principled Criticism and a Warning from the "UK" to the ECtHR?', in M Breuer (ed), *Principled Resistance to ECtHR Judgments – A New Paradigm?* (Springer 2019) 193–244, at 220–22.

45 See CM/ResDH(2019)240 adopted by the Committee of Ministers on 25 September 2019.

46 *ibid.*

47 Ed Bates characterized the British situation in the sense that *aspects* of criticism could be considered to have a principled element, see Bates (n 44) 195.

concept is to make it clear that instances of true deadlock situations are extremely rare. Seen from this perspective, national reliance on legal obstacles in the implementation phase are more akin to a power struggle between the relevant national actors and Strasbourg. We will come back to this point later.

### 3. SIMILAR SCHOLARLY CONCEPTS

In this section, we will discuss scholarly concepts that have emerged recently and identify similarities and differences regarding the principled resistance theorem.

#### A. Duelling for Supremacy: ‘Reasonable Resistance’ (Palombino)

In an edited volume published in 2019, Fulvio Maria Palombino introduced an analytical setting which comes remarkably close to the one underlying the research on principled resistance. His way of conducting the analysis equally resembles the study in principled resistance, in that he proceeds with country reports. Those reports embrace many more jurisdictions and, unlike in the case of principled resistance, cover the whole world, which is due to the fact that he explores the interaction between the national judiciary and international law in general, so it is not restricted to the ECHR context. The results presented by Palombino do not fully coincide with ours, so it is particularly worth looking at where the similarities and where the differences are.

As indicated, a fundamental difference between Palombino’s approach and the principled resistance study is that he embraces international law as a whole. As a consequence, the country reports do not only refer to treaty law but also embrace customary international law and, in the case of EU Member States, also EU law, so Palombino’s approach is more holistic. The country reports are guided by three working hypotheses, which shall be introduced and commented in sequential order.

Working Hypothesis No 1 is based on the assumption that:

conflicts between supremacy of international law and national fundamental principles produce a legal *aporia*. Here the assumption is that such conflicts give rise to a conundrum which, as such, does not lend itself to any formal solution. Accordingly, a departure from the principle of supremacy would always entail a wrongful act.<sup>48</sup>

Insofar as Palombino speaks of a ‘legal aporia’, his assumptions coincide with those presented above. Similarly, reliance on ‘national fundamental principles’ appears to be just another expression of what was called ‘national identity’ or ‘constitutional identity’ above. A difference of this hypothesis appears to be that he refers to conflicts between those principles and the supremacy of international law as such. In other words, his hypothesis (at least according to its wording) is not restricted to the phase of implementation of an international court judgment but covers the whole

48 Palombino (n 5) 3 (emphasis original).

range of conflicts, irrespective of whether an international court made a pronouncement or not.

Working Hypothesis No 2 adopts an approach that had been developed elsewhere in the literature before,<sup>49</sup> which may be summoned as ‘internationalisation of internal values’.<sup>50</sup> Its basic idea is that the legal aporia referred to under Working Hypothesis No 1 may be avoided by translating an apparent conflict between national law and international law into a conflict between two norms of international law. Of course, this has as a precondition that the domestic values relied on by the national judge are equally protected at the international level, which will be the case mostly for human rights norms. In the context of principled resistance, this hypothesis may be omitted, for two reasons: first, empirical evidence shows that national courts purposefully rely on national, rather than on international norms and values.<sup>51</sup> Secondly, even where international rights are similar or even identical in wording with national rights, the actual content inferred from them might differ.

Working Hypothesis No 3 is highly relevant for present purposes again. The assumption is that:

national courts adopt a strategy of ‘reasonable resistance’, i.e. of a kind of argumentation consisting of two elements: (i) the clear identification of the national fundamental principle, whose safeguarding entails a deviation from international law; (ii) an illustration of the reasons which justify resorting to fundamental principles as a tool to disregard international law (e.g. that the latter does not duly take into account individual interests and rights, or that it affects fundamental principles peculiar to the forum state).<sup>52</sup>

Palombino offers two different readings of this scenario: It may be seen either as a confirmation of the very principle of supremacy of international law, in that deviations are permitted only in highly exceptional cases. In the alternative, ‘this practice might be symptomatic of the emergence of a new circumstance precluding wrongfulness in customary international law’.<sup>53</sup> At the end of the publication, Palombino concludes that at present, it might be premature to affirm such a new rule of customary international law but that ‘such a scenario is anything but implausible’.<sup>54</sup>

Again, the parallels with the principled resistance concept are striking, in particular with regard to the emergence of a new norm of customary international law. In this regard, the study on principled resistance begs the question whether this phenomenon amounts to a ‘new paradigm’. But unlike Palombino, the results arrived at are more restrictive. As was demonstrated above, even the case of *Anchugov and*

49 See Nollkaemper (n 33) 78; A Tzanakopoulos, ‘Domestic Courts in International Law: The International Law Function of National Courts’ (2011-2012) 34 *Loyola of Los Angeles International and Comparative Law Review* 133–68, 161.

50 See Breuer (n 6) 9 et seq.

51 Breuer (n 6) 11–12.

52 Palombino (n 5) 3.

53 Palombino (n 5), at 4.

54 FM Palombino, ‘Conclusion’ in FM Palombino (ed), *Duelling for Supremacy. International Law vs. National Fundamental Principles* (CUP 2019), 401–05, at 405.

*Gladkov* does not fulfil all the elements of principled resistance. In sum, these instances are extremely rare, so they cannot qualify as a ‘new trend’, let alone a new (or emerging) norm of customary international law.<sup>55</sup> The fact that Palombino comes to a different evaluation is due to his reliance on ‘reasonable resistance’. This category transcends the cases of principled resistance *strictu sensu*. As will be demonstrated in Section 4, most of these cases would qualify as mere (and principally permissible) ‘disagreement’, rather than ‘principled resistance’.

### B. ‘Backlash’ Against International Courts (Madsen)

Another prominent conceptualization of national resistance to international judgments was developed in 2018 by a group of authors led by Mikael Rask Madsen. It rests on the differentiation between ‘pushback’ and ‘backlash’. The authors defined ‘pushback’ as the ‘ordinary resistance occurring within the confines of the system but with the goal of reversing developments in law’. ‘Backlash’, in contrast, is defined as ‘extraordinary resistance challenging the authority of an [international court] with the goal of not only reverting to an earlier situation of the law, but also transforming or closing the [international court]’.<sup>56</sup> It should be noted that another group of authors around Wayne Sandholtz developed a similar model. They distinguished between patterns of ‘backlash’ on the one hand (such as ceasing completely to cooperate or comply with a court, narrowing the court’s jurisdiction, restricting access to the court, withdrawing from the court’s jurisdiction or abolishing it altogether) and other forms of ‘resistance’ on the other hand (criticizing a specific judgment, non-compliance with a specific judgment, failure or refusal to cooperate with an international court in specific cases, or general criticism of a court or its jurisprudence).<sup>57</sup> In the following paragraphs, we will concentrate on the model developed by Madsen and others.

A superficial look at their definition might lead to the impression that with ‘backlash’, the authors refer to the phenomenon described as ‘principled resistance’, while ‘pushback’ might be thought to be synonymous to ‘disagreement’. Closer scrutiny reveals, however, that this is not the case.<sup>58</sup> First and foremost, the concept of backlash is much broader in scope than the concept of principled resistance. With actions like leaving an international court, blocking the selection of judges or closing an international court, it encompasses a wide variety of scenarios which clearly transcend the phase of judgment implementation, to which the principled resistance pattern is restricted. Secondly, Madsen underlines that clashes with national identities are not restricted to conflicts of a constitutional law dimension but might also occur with deeply entrenched principles of ordinary law.<sup>59</sup> Yet, this does not contradict the assumptions of the principled resistance theorem, which proceeds on the basis of a

<sup>55</sup> For a more comprehensive analysis, see Breuer (n 19) 323–50.

<sup>56</sup> Madsen, Cebulak and Wiebusch (n 3) 203.

<sup>57</sup> Sandholtz, Bei and Caldwell (n 3) 160.

<sup>58</sup> See Breuer (n 6) 23–24.

<sup>59</sup> See MR Madsen, ‘Resistance to the European Court of Human Rights: The Institutional and Sociological Consequences of Principled Resistance’ in M Breuer (ed), *Principled Resistance to ECtHR Judgments – A New Paradigm?* (Springer 2019) 35–52, at 46 et seq, citing *Kress v France* [GC] Appl No 39594/98 (ECtHR, 7 June 2001).

legal conflict which normally but not necessarily results from a clash between the national constitution and the Convention.

Finally, a major structural difference between the two concepts is that the push-back/backlash theorem, as a socio-legal concept, is much more concerned with the aims pursued with an act of national disobedience than principled resistance as a genuinely legal concept. From a purely legal perspective, the aims pursued by a national judge are necessarily beyond the scope of analysis. Legal analysis can offer insights into the dogmatic obstacles of judgment implementation but is unable to elucidate the motives underlying a specific action. It is interesting to note in this regard that from Madsen's perspective, cases of principled resistance are by definition cases of mere pushback as they take place within the confines of a given international court system. The resort to national identity arguments might appear as some kind of 'extraordinary resistance', so principled resistance cases might have some **appearance** of backlash. But against Madsen's analytical background, 'resistance stemming from Member State courts, often the supreme or constitutional courts of the Member States, can strictly speaking not in itself produce backlash outcomes'.<sup>60</sup> Referring to the Russian Constitutional Court trumping the ECtHR, he submits that 'Member State courts can produce effects that **resemble** backlash'.<sup>61</sup> This result is, however, not as plain as it might seem. In the study by Sandholtz and others, cases of judicial disobedience like the Russian one are qualified as backlash, not as an ordinary form of resistance.<sup>62</sup>

### C. 'Principled' and 'Dilatory' Non-Execution (de Londras & Dzehtsiarou)

In 2017, Fiona de Londras and Kanstantsin Dzehtsiarou developed the notions of 'principled' and of 'dilatory' non-execution. The category of 'dilatory non-execution' comprises the vast majority (the authors say) of cases where States are generally dilatory in their execution of adverse judgments from the Court, so that individual cases of non-execution might be connected to this general pattern of resistance to giving effect to the outcome of international judicial supervision in the area of rights.<sup>63</sup>

By 'principled non-execution', however, they denote cases where States refuse to execute because of a deep-seated disagreement not only with the outcome but, perhaps more significantly, with the *principle* of an international court's decision 'overturning' a domestic, democratically arrived at position in respect of a particular matter.<sup>64</sup>

Parallels with the notion of principled resistance as defined above are clearly visible. What is different, again, is the analytical purpose: while the principled resistance pattern aims at analysing and better understanding obstacles in the execution phase

60 Madsen, Cebulak and Wiebusch (n 3) 205.

61 *ibid* (emphasis added).

62 Sandholtz, Bei and Caldwell (n 3) 166. Similarly, Kosař et al (n 15), making use of the 'backlash-pushback-withdrawal triad' developed by Madsen et al, cite the Russian cases as examples of a 'court-inspired backlash' (at 245 et seq).

63 See F de Londras and K Dzehtsiarou, 'Mission Impossible? Addressing Non-execution through Infringement Proceedings in the European Court of Human Rights' (2017) 66 *International and Comparative Law Quarterly* 467–90, at 474.

64 *ibid* (emphasis original).

of a Strasbourg judgment, the notion of ‘principled non-execution’ was introduced to underscore the authors’ argument that recourse to the newly introduced infringement proceedings under Article 46 § 4 ECHR would seem futile or even counterproductive.

#### 4. THE LEGAL BOUNDARIES BETWEEN DISAGREEMENT AND PRINCIPLED RESISTANCE

As indicated earlier, not every case of ‘simple’ disagreement with the ECtHR automatically turns into principled resistance. In the same vein, Sandholtz and others regard non-compliance with, and even criticism of, the decisions of international human rights courts as ‘normal forms of resistance to adverse rulings’.<sup>65</sup> The question that has been left open so far is where to draw the line between a (generally permissible) form of disagreement and (structurally problematic) forms of principled resistance. It is submitted that basically, this dividing line is the difference between ‘*res judicata*’ and ‘*res interpretata*’.<sup>66</sup>

##### A. The Concept of *Res Judicata*

It may be regarded a general requirement of the rule of law that court decisions, at a certain point in time, become final and binding. This general observation equally holds true for international courts and tribunals.<sup>67</sup> With regard to the Convention, the binding force of ECtHR judgments is contained in Article 46 § 1 ECHR, stating that the ‘High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties’. This means that at the very least, a State may no longer claim to have acted in conformity with the Convention after the ECtHR found a violation.<sup>68</sup>

The further consequences flowing from a final ECtHR judgment are well-known from the Court’s case law. According to constant jurisprudence,

a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects.<sup>69</sup>

65 Sandholtz, Bei and Caldwell (n 3) 159.

66 The difference between *res judicata* and *res interpretata* is also the starting point for the empirical study by Kosař et al (n 15) 20 et seq. However, due to the different scope of inquiry, the authors do not contrast the two concepts as sharply as is done here.

67 See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Merits, ICJ Reports 2007, p 43, para 115. See further BS Kantor and ME Zavala Achurra, ‘The Principle of *res judicata* before the International Court of Justice: in the Midst of Comradeship and Divorce between International Tribunals’ (2019) 10 *Journal of International Dispute Settlement* 288–306.

68 JA Frowein, ‘Art 46’ in JA Frowein and W Peukert, *EMRK-Kommentar* (3rd edn NP Engel Verlag 2009), MN 2.

69 *Scozzari and Giunta v Italy* [GC] Appl Nos 39221/98, 41963/98 (ECtHR, 13 July 2000), para 249.

This obligation is addressed at the respondent State in its entirety, ie that all branches of government are required to react, be they legislative, executive or judicial in nature. With special regard to judicial responses, it might occur that a national court finds a legal obstacle which prevents it from directly enforcing a Strasbourg judgment, in which case it will be up to the legislator to amend the law in conformity with the Convention. In this sense, judicial reliance on the supremacy of the constitution might lead to a temporary delay in execution, until the *pouvoir constitué* has enacted a constitutional amendment.

Complete inaction or outright refusal to react, in contrast, is no option under Article 46 § 1 ECHR. Given the mainly declaratory character of ECtHR judgments,<sup>70</sup> it might be highly debatable which concrete measure is required in abidance of a judgment (except where the Court ordered a specific measure to be taken<sup>71</sup>). Drawing no consequences at all, however, would run counter to the binding force which Article 46 § 1 ECHR ascribes to the Court's judgments. In this sense, a situation where the national identity or constitutional identity completely pre-empts implementing a Strasbourg judgment would breach the obligations flowing from the Convention. The Venice Commission put it this way: 'The ECtHR's authority and the system's credibility both depend to a large extent on the effectiveness of this mechanism of execution of judgments'.<sup>72</sup>

Against this background, it must be seen as highly problematic that the Russian State Duma passed a law which empowers the Russian Constitutional Court to decide on the enforceability of decisions of interstate human rights protection institutions, including the ECtHR.<sup>73</sup> This law, which was largely inspired by a 2015 decision of the Russian Constitutional Court,<sup>74</sup> was sharply criticized by the Venice Commission.<sup>75</sup> In a somewhat unexpected move, President Putin in early 2020 called for a national referendum on constitutional amendments, elevating *inter alia* the legal status of the said procedure from ordinary to constitutional law.<sup>76</sup>

While in *Anchugov and Gladkov* (the first case to be decided under the new procedure), the Russian Constitutional Court shied away from a direct confrontation with the Strasbourg Court, another Russian case is more problematic in this context.

70 *Marckx v Belgium* Appl No 6833/74 (ECtHR, 13 June 1979), para 58.

71 See, eg, *Assanidze v Georgia* [GC] Appl No 71503/01 (ECtHR, 8 April 2004)—so-called 'Article 46 judgments', see P Leach, 'No Longer Offering Fine Mantras to a Parched Child? The European Court's Developing Approach to Remedies' in A Føllesdal, B Peters and G Ulfstein (eds), *Constituting Europe. The European Court of Human Rights in a National, European and Global Context* (CUP 2013), 142–80, 166 et seq.

72 Venice Commission, Opinion No 981/2020, CDL-AD(2020)009, para 51.

73 An official translation of the law is contained in CDL-REF(2016)006; see further Bowring (n 40) 190 et seq; Starzhenetskiy (n 24) 259 et seq.

74 Russian Constitutional Court, Judgment N 21-Π of 14 July 2015, para 3 (for an English translation, see CDL-REF(2016)019).

75 See: Interim Opinion No 832/2015, CDL-AD(2016)005; Final Opinion No 832/2015, CDL-AD(2016)016; for a detailed discussion, see M Kuijer, 'The Perspective of the Venice Commission' in M Breuer (ed), *Principled Resistance to ECtHR Judgments – A New Paradigm?* (Springer 2019), 275–97.

76 Закон Российской Федерации о поправке к Конституции Российской Федерации от 14 марта 2020 г. N 1-ФКЗ "О совершенствовании регулирования отдельных вопросов организации и функционирования публичной власти" (entry into force: 4 July 2020); for an unofficial translation of the draft law (provided for by the Venice Commission), see: CDL-AD(2020)021.



In *Yukos*, the ECtHR ordered the Russian State to pay the unprecedented sum of EUR 1,866,104,634 to the shareholders of the (meanwhile dissolved) Russian oil company.<sup>77</sup> The Russian Constitutional Court responded by declaring this judgment unenforceable within Russia, as far as payment from the State budget is concerned.<sup>78</sup>

Again, the Constitutional Court tried to avoid a head-on collision with its Strasbourg counterpart by underlining the ‘fundamental significance of the European system of the protection of human and civil rights and freedoms, judgments of the European Court of Human Rights being part of it’.<sup>79</sup> The ‘lawful compromise’ offered by the Russian Court, however, is much more difficult to imagine than in the case of *Anchugov and Gladkov*. According to the Constitutional Court, payment of just satisfaction may only be effected from ‘newly revealed property’ like property ‘concealed on foreign accounts’. The Constitutional Court went on to underline that such payment ‘in any event must not affect budget receipts and expenditures, as well as the property of the Russian Federation’.<sup>80</sup> As a consequence, the standard response of the Russian side to the Committee of Ministers in the execution process is that there is ‘no information on the revealed assets (including foreign ones) of the applicant company, therefore the proceedings for compensation payment to the shareholders cannot be initiated yet’.<sup>81</sup>

This is problematic because it is hard to imagine how a ‘lawful compromise’ could be found. In compensation matters, there are only two alternatives: payment or non-payment. In this regard, amending legislation as done in *Anchugov and Gladkov* is a much more feasible option. This result is somehow counterintuitive as generally, payment of just satisfaction is regarded easier to achieve than a change in legislation, due to the lower degree of complexity.<sup>82</sup> For many years (or even decades), the attitude of the Russian side was characterized by a general willingness to pay the sums of just satisfaction awarded but to leave legislation more or less unaltered.<sup>83</sup> In *Yukos*, things are different because the Russian State openly refuses the payment of just

77 *OA O Neftyanaya Kompaniya Yukos v Russia* (Just Satisfaction) Appl No 14902/04 (ECtHR, 31 July 2014).

78 Russian Constitutional Court, Decision N 1-II of 19 January 2017 (translation available at <<http://www.ksrf.ru/en/>>).

79 Russian Constitutional Court, Decision N 1-II of 19 January 2017, para 2 (translation available at <<http://www.ksrf.ru/en/>>).

80 Russian Constitutional Court, Decision N 1-II of 19 January 2017, para 7 (translation available at <<http://www.ksrf.ru/en/>>).

81 DH-DD(2018)974; to the same effect, see DH-DD(2019)124 and, most recently, DH-DD(2020)605: ‘Along with that, the competent state authorities are taking measures to search for the property of the liquidated company (including hidden in foreign accounts), but such property has not yet been identified. In this regard, it has not yet seemed possible to initiate the process of paying compensation to the shareholders of the company.’

82 A von Staden, *Strategies of Compliance with the European Court of Human Rights* (University of Pennsylvania Press 2018), 77. Similarly, it is assumed that the potential for ‘principled resistance’ is particularly high where legislative reforms are required, due to the clash with the democratically elected parliament, see Ø Stiansen, ‘Delayed but not Derailed: Legislative Compliance with European Court of Human Rights judgments’ (2019) 23 *International Journal of Human Rights* 1221–47.

83 See L Mälksoo, ‘Introduction’ in Mälksoo and Benedek (n 24) 3–25, at 5–6.

satisfaction.<sup>84</sup> Seen from this perspective, ‘minimalist compliance’ is easier to achieve by making minor revisions of existing legislation.

Our analysis may be further corroborated by the evaluation made, on the one hand, by the Venice Commission in an Opinion published mid-2020 in response to the proposed constitutional referendum and, on the other hand, by the reaction of the Committee of Ministers in its role as guardian of the implementation process in *Yukos*. The Venice Commission reiterated its ‘great concern’ about the Russian Constitutional Court’s result on the enforceability of the ECtHR just satisfaction judgment in *Yukos*. It went on to hold that ‘if it is admissible that the question of the compatibility with the Constitution of an execution measure of general character be brought before the Constitutional Court, the same cannot be said for individual measures such as orders to pay just satisfaction, even if they may admittedly touch upon important interests of the State’.<sup>85</sup> In the same vein, the Committee of Ministers in a strongly-worded Interim Resolution of 1 October 2020 insisted ‘upon the unconditional obligation assumed by the Russian Federation under Article 46 of the Convention to abide by the European Court’s just satisfaction judgment of 31 July 2014’.<sup>86</sup>

Therefore, *Yukos* is a prime candidate for principled resistance. This is so notwithstanding the fact that distinguished scholars called *Yukos* a case of ‘unprincipled disobedience’.<sup>87</sup> But this seeming contraction simply originates from a difference in reference points. Calling *Yukos* a case of ‘unprincipled disobedience’ refers to the fact that in this case, the conflict with constitutional law was much less obvious than in *Anchugov and Gladkov*. In this latter case, the outcome of the Strasbourg proceedings collided with the wording of the Russian Constitution, so there was some *prima facie* evidence of a constitutional conflict (notwithstanding the fact that the collision could have been avoided by a Strasbourg-friendly reading of the Constitution which was, however, rejected by the Constitutional Court). In *Yukos*, in contrast, the Constitutional Court had some difficulties to construe the constitutional principle at stake that prevented the Strasbourg judgment from being implemented. This was all the more so as in its previous jurisprudence, the Russian Constitutional Court had required a clash between a Strasbourg judgment and ‘fundamental principles and norms of the Constitution of the Russian Federation’ to justify non-implementation.<sup>88</sup> It is highly questionable that ‘equality and justice in tax relations’<sup>89</sup> belong to this

84 For the sake of completeness, it should be noted that cost and expenses have been paid by the Russian State, amounting to EUR 300,000. The Committee of Ministers, however, criticized that this sum did not cover default interest, see CM/Del/Dec(2019)1340/H46-20, para 2.

85 Venice Commission, Opinion No 981/2020, CDL-AD(2020)009, para 59.

86 Committee of Ministers, Interim Resolution CM/ResDH(2020)204.

87 K Dzehtsiarou and F Fontanelli, ‘Unprincipled Disobedience to International Decisions: A Primer from the Russian Constitutional Court’ (2018) *European Yearbook on Human Rights* 319–41.

88 Russian Constitutional Court, Judgment N 21-II of 14 July 2015, para 2.2 *in fine* (for an English translation, see CDL-REF(2016)019). It should be noted that in the 2020 constitutional reform, this standard seems to have been relaxed, in the sense that conflicts with the Russian Constitution (and not only with fundamental principles of the Constitution) might lead to a verdict of unenforceability. Unsurprisingly, the Venice Commission was highly critical, see Opinion No 981/2020, CDL-AD(2020)009, para 49.

89 Russian Constitutional Court, Decision N 1-II of 19 January 2017, para 4.5 (translation available at <<http://www.ksrf.ru/en/>>).

category of fundamental principles.<sup>90</sup> But these doubts refer to the qualification under Russian law – in this respect, resistance may be called **unprincipled**. From an international point of view, there can be no doubt that the enduring character of the conflict, its possibly unresolvable nature in combination with reliance on the supremacy of the Russian Constitution make *Yukos* appear as a case of **principled** resistance.

### B. The Concept of *Res Interpretata*

While the concept of *res judicata* is firmly established and fairly straightforward, the principle of *res interpretata* is a mainly scholarly concept.<sup>91</sup> Judge Pinto de Albuquerque most recently opined that the ECtHR, by referring in the majority vote to the concept of ‘judicial authority’, had ‘converted the scholarly concept of the “interpretative authority” (*res interpretata*) of its judgments into a legally binding principle of Convention interpretation and application’.<sup>92</sup> It might be too early to come to definite conclusions in this regard. Still, the underlying rationale of this concept is clear.

When the ECtHR decides a case with a similar legal and factual background but with different parties (a new applicant, a different respondent State), it is highly probable that the Court will apply the legal standards established in its previous case law. The Court itself encapsulates those considerations emphasizing that it is ‘in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases’.<sup>93</sup> This assertion has two dimensions: on the one hand, it precludes the ECtHR itself from applying new standards too easily. On the other hand, it means that national courts will be expected to apply the Convention in the way the rights and freedoms were interpreted by the Strasbourg Court.

The salient point is whether beyond mere **factual** expectation, national courts are under a **legal** obligation to apply the Court’s case law. This aspect has been raised in the literature by asking whether ECtHR judgments produce an effect *erga omnes* (*partes*).<sup>94</sup> Some scholars argue that the Court’s interpretative guidelines take part in

90 See Dzehtsiarou and Fontanelli (n 87), 333 et seq; see also M Hartwig, ‘Vom Dialog zum Disput? Verfassungsrecht vs. Europäische Menschenrechtskonvention – Der Fall der Russländischen Föderation’ (2018) *Europäische Grundrechte-Zeitschrift* 1–23, at 22.

91 See A Bodnar, ‘*Res Interpretata*: Legal Effect of the European Court of Human Rights’ Judgments for other States Than Those Which Were Party to the Proceedings’ in Y Haec and E Brems (eds), *Human Rights and Civil Liberties in the 21st Century* (Springer 2014), 223–62; A Drzemczewski, ‘Quelque réflexions sur l’autorité de la chose interprétée par la Cour de Strasbourg’ (2011) *Revista da Faculdade de Direito UFMG* 85–90.

92 *GIEM Srl and Others v Italy* [GC] Appl Nos 1828/06 et al (ECtHR, 28 June 2018), para 252 on the one hand, partly concurring, partly dissenting opinion by Judge Pinto de Albuquerque, para 76, on the other hand.

93 *Vilho Eskelinen v Finland* [GC] Appl No 63235/00 (ECtHR, 19 April 2007), para 56; *Bayatyan v Armenia* [GC] Appl No 23459/03 (ECtHR, 7 July 2011), para 98.

94 See S Besson, ‘The *Erga Omnes* Effect of Judgments of the European Court of Human Rights – *What’s in a Name?*’ in S Besson (ed), *La Cour européenne des droits de l’homme après le Protocole 14 – Premier bilan et perspectives* (Schulthess 2011), 127–50; E Klein, ‘Should the Binding Effect of the Judgments of the European Court of Human Rights be Extended?’ in P Mahoney et al (eds), *Protecting Human Rights: the European Perspective. Studies in Memory of Rolv Ryssdal* (Heymann 2000), 705–13.

the binding force of the Convention.<sup>95</sup> But this proposition is difficult to reconcile with the rule that the ECtHR **itself** is ‘not formally bound to follow its previous judgments’.<sup>96</sup> Subscribing to an *erga omnes* effect for national courts would lead to the paradoxical result that one and the same Convention right would have a different legally binding content, depending on whether it is applied by the ECtHR (only the Convention ‘as such’) or a national court (Convention + ECtHR case law). This is not only difficult to defend as a matter of logic. It would also lead to a petrification of the Convention system and unnecessarily constrain the exchange of views between the national and the international level.

At this point, the contours of the dividing line between mere ‘disagreement’ and ‘principled resistance’ become visible. While it is undeniable that the Court’s interpretation of the Convention has high persuasive authority, the Court being the main interpreter of the Convention (Article 19 ECHR), national courts are not legally bound to apply ECtHR standards in cases other than the one decided in Strasbourg. This leaves room for disagreement, as far as the interpretative guidelines of the Court’s case law are concerned. In recent times, it has been acknowledged that interpreting the Convention is not the sole prerogative of the ECtHR but that the Court and the States Parties (their national courts included) have a ‘shared responsibility’ for the Convention.<sup>97</sup>

On the other hand, the possible disintegrative effect of national courts – especially the highest ones – disagreeing with their Strasbourg counterpart must not be neglected. Where disagreement becomes too frequent, the authority of the Court as a whole might be undermined. Thus, disagreement might transmute into principled resistance. The effects of disagreement will highly depend on the way in which it is formulated.<sup>98</sup> Where a national court deviates from Strasbourg engaging in a thorough analysis of the Court’s case law and offering new and compelling arguments, this respectful way of disagreeing will be acceptable. Where, in contrast, a national court directly challenges the ECtHR’s authority, diametrically opposing the Court’s interpretation with its own reading of the Convention, this might end up with principled resistance, especially if combined with the national identity argument. In this sense, the dialogical relationship between Strasbourg and the national courts might move back and forth: where the ECtHR has gone too far with its evolutive interpretation, national courts might insist on a stricter reading of the Convention, which might in turn induce the Court to fine-tune its case law. There have been examples to this effect in recent years.<sup>99</sup> Vladislav Starzhenetskiy suggested interpreting this as an adaptation of the ‘persistent objector’ rule under customary international law to

95 See Besson (n 94) 129; J Polakiewicz, *Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte* (Springer 1993), 354.

96 *Christine Goodwin v UK* [GC] Appl No 28957/95 (ECtHR, 11 July 2002), para 74; *Scoppola v Italy (No 3)* [GC] Appl No 126/05 (ECtHR, 22 May 2012), para 94.

97 See the Brussels Declaration of 27 March 2015: ‘Implementation of the European Convention on Human Rights, our Shared Responsibility’; and most recently, the Copenhagen Declaration of 13 April 2018, paras 6 et seq (‘Shared responsibility – ensuring a proper balance and enhanced protection’).

98 See Breuer (n 19) 339–41.

99 See the famous Horncastle/Al-Khawaja saga: Bates (n 44) 234; M Andenas and E Bjorge, ‘National Implementation of ECHR Rights’ in A Føllesdal, B Peters and G Ulfsein (eds), *Constituting Europe* (CUP 2013), 181–262, at 211 et seq. Judge Pinto de Albuquerque recently criticised the Court for being

the Convention context.<sup>100</sup> It must be underlined, however, that such cases of ‘persistent objection’ will be permissible only as far as the *res interpretata* effect is concerned, not concerning *res judicata*. In any event, paramount importance should be given to preserving the overall authority of the Court, even where disagreement in a particular case appears unescapable.

## 5. CONCLUSION

Principled resistance has proven useful in analysing implementation deficits under the Convention. It has been shown that enduring conflicts between national (constitutional) law and the Convention are extremely rare. Even in cases where a national constitutional court relies on the supremacy of the constitution over the Convention, this might imply nothing more but a call for the legislator to amend the constitution.

One possible scenario of principled resistance is that after a case was decided in Strasbourg, a national judge refuses to follow the ECtHR in the very same case. If combined with the argument of ‘national identity’ or ‘constitutional identity’, this might easily end up in a real deadlock situation. Under the *res judicata* principle enshrined in Article 46 § 1 ECHR, there is no room for outright refusal. The two Russian examples discussed in this article have shown that the Russian Constitutional Court endeavoured to avoid head-on collisions. While in *Anchugov and Gladkov*, the solution proposed turned out to be feasible, the *Yukos* case has far more problematic characteristics as in compensation matters, there is no way for minimalist or halfway solutions.

The second possible scenario of principled resistance relates to national judges disagreeing with Strasbourg. It must be underlined, however, that not every case of disagreement automatically leads to principled resistance. Where a national judge sits on a new case but refuses to follow a line of jurisprudence established by the ECtHR in previous case law, this will be no question of *res judicata*, but of *res interpretata*. It has been shown that under the latter principle, the national judges are under no legal obligation to follow Strasbourg but are only expected to do so as a matter of fact. In this regard, the way in which disagreement is expressed will be of paramount importance. Seen from this perspective, cases of principled resistance (or threats thereof) mainly appear as part of a power struggle between national institutions and the Court over issues of last authority.

too deferential, see *Ilseher v Germany* [GC] Appl Nos 10211/12, 27505/14 (ECtHR, 4 December 2018), dissenting opinion of Judge Pinto de Albuquerque, para 74.

100 Starzhenetskiy (n 24) 263.