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LEGAL DILEMMAS OF THE EUROPEAN COURT OF HUMAN RIGHTS AFTER RUSSIA'S EXPULSION FROM THE COUNCIL OF EUROPE – SELECTED ISSUES

Abstract: The article argues that the exclusion of the Russian Federation from the Council of Europe created a legal situation which enabled the European Court of Human Rights to develop new ways of proceeding when a State *de facto* refuses to participate in the proceedings and opened for the Court a possibility to interpret the provisions of the European Convention on Human Rights in such a way as to ensure that victims of the Russia's aggression against Ukraine are afforded the broadest possible protection not only under international humanitarian law, but also under the ECHR.

Keywords: ECtHR, ECHR, Russia, Ukraine, jurisdiction

1. Introduction

The activities of the European Court of Human Rights (ECtHR) after the exclusion of the Russian Federation (RF, Russia) from the Council of Europe (CoE) are part of the activities of this organization aimed at establishing ways to ensure Russia's accountability for the violations of international law committed by Russia and its officials during the aggression against Ukraine. Due to the fact that Russia ceased to be a party to the European Convention on Human Rights (ECHR, Convention) as of 16 September 2022, the Court has to face many challenges of an organizational and material nature related both to the guarantees of the right to an individual application and to ensuring Russia's participation in the proceedings, as well as challenges

concerning the directions of the jurisprudence. Right from the very beginning of the war, the Court issued a series of interim measures concerning various situations of infringements of rights and freedoms, introduced modalities in dealing with cases concerning Ukraine and the RF and, what is the most important, did not stop adjudicating cases against Russia, including inter-state applications.¹ The article argues that the current situation enabled the Court to develop new ways of proceeding when a State *de facto* refuses to participate in the proceedings and created for the Court a possibility to interpret the provisions of the Convention in such a way as to ensure that victims of war are afforded the broadest possible protection not only under international humanitarian law, but also under the ECHR. These theses will be proved by analysis of procedural guarantees in the proceedings before the ECtHR and of the issue of jurisdiction in cases against Russia resulting from the current armed conflict.

2. Modalities of Work of the ECtHR in Cases Against Russia

2.1. Russia's Expulsion from the CoE and Termination of its Membership in the ECHR – Overview

On 15 March 2022, the Committee of Ministers adopted a resolution in which it decided – in the context of the procedure of suspending the Russian Federation's rights of representation launched under Article 8 of the Statute and in consideration of the opinion of the Assembly² – that the RF would immediately cease to be a member of the Council of Europe, ending its 26

¹ The conflict between Russia and Ukraine that started in 2014 resulted in numerous individual and inter-state applications. Currently the following inter-state applications are pending: *Ukraine v. Russia (re Crimea)*, appl. no. 20958/14 and 38334/18; *Ukraine and Netherlands v. Russia*, appl. no. 8019/16, 43800/14, 28525/20 joined recently with *Ukraine v. Russia (X)*, appl. no. 11055/22; *Ukraine v. Russia (VIII)*, appl. no. 55855/18; *Ukraine v. Russia (IX)*, appl. no. 10691/21 and *Russia v. Ukraine*, appl. no. 36958/21. In regard to some of them, the Court has already issued admissibility decisions: of 14 January 2021 in the case *Ukraine v. Russia (re Crimea)* and *Ukraine v. Russia (VII)*, and on 30 November 2022 in the case *Ukraine and the Netherlands v. Russia*, appl. no. 8019/16, 43800/14, 28525/20. The applications Ukraine against Russia are not consecutively numbered due to the fact that the original complaints were combined by the Court for joint consideration.

² Parliamentary Assembly of the Council of Europe, *Consequences of the Russian Federation's aggression against Ukraine*, Opinion 300 (2022).

years of membership.³ The legal and financial consequences of that decision are specified in Resolution CM/Res(2022)3, adopted on 23 March 2022.⁴

In that decision the CM clarified *inter alia* Russia's status as a State Party to conventions concluded within the framework of the CoE. It stated that on 16 March 2022 the RF ceased to be a Contracting Party to those conventions and protocols that are only open to Member States of the organization. This conclusion was made without prejudice to some continuing obligations for Russia resulting from its membership in the European Convention on Human Rights, the General Agreement on the Privileges and Immunities of the Council of Europe and the 6th Protocol thereto.⁵

On 15 March, under Article 58(1) of the ECHR, the government of the Russian Federation anticipating the inevitable, notified the Secretary General of its intention to renounce the Convention and two additional protocols.⁶

3 Committee of Ministers of the Council of Europe, CM/Del/Dec (2022)1428ter/2.3, *Consequences of the aggression of the Russian Federation against Ukraine. Procedure under Article 8 of the Statute*.

4 Resolution CM/Res (2022)3 on legal and financial consequences of the cessation of membership of the Russian Federation in the Council of Europe (Adopted by the Committee of Ministers on 23 March 2022 at the 1429bis meeting of the Ministers' Deputies), CM/Res(2022)3.

5 As far as the obligations following from the ECHR were concerned, the CM stated that it would continue to supervise the execution of the judgments and friendly settlements concerned and that the RF is required to implement them. The CM also clarified the scope of Russia's participation in the meetings of the CM when the latter supervises the execution of judgments, stating that the RF would no longer have the right to participate in decisions by the Committee nor the right to vote. The CM further declared that the RF will continue to be a Contracting Party to those conventions and protocols of the Council of Europe to which it has expressed its consent to be bound and which are open to non-Member States. It was decided that the modalities of the RF's participation in these instruments will be determined separately for each by the CM or, when appropriate, by the States Parties. In the view of the above developments, some commentators suggested the need to break the link between CoE membership and the Convention. In their opinion such a move could prevent states like Russia from successfully attributing their withdrawal from the ECHR to other states' alleged political misconduct in the CoE. One could support that suggestion, though in the case of Russia the authorities renounced the Convention regardless of their expulsion from the CoE (Jahn, "The Council of Europe Excludes Russia: A Setback for Human Rights").

6 Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005), Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 009) and Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 117). The Russian Federation also ceased to be a signatory to Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty (ETS No. 114) and Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177). For more information

On 22 March, the ECtHR adopted a Resolution on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights.⁷ The Court explained that in view of the fact that the RF would cease to be party to the Convention on 16 September 2022, it would remain competent to deal with applications directed against the RF in relation to acts or omissions capable of constituting a violation of the Convention, provided that they occurred prior to 16 September 2022. Anticipating the possibility of unforeseeable legal questions appearing in the future, the Court made the reservation that its decisions were without prejudice to any legal issue related to the cessation of the RF's membership in the CoE which may arise in the Court's exercise of its competence under the Convention to consider cases brought before it.

It is worth noting that the Russian Federation's position on the date and manner of the termination of its membership in the CoE is not entirely coherent. In official statements the expression 'termination of the Russian Federation's membership in the CoE, starting on March 16, 2022' is often used, though one can also find statements about 'Russia's exit from the CoE'. With regard to Russia's further actions towards the organization, it is relevant that Russia generally does not recognize its expulsion from the organization and the resulting consequences. The position of the Russian authorities is that the RF left the organization on 15 March 2022 on its own initiative, which was not related to 'what is happening in Ukraine', but was instead the result of the alleged 'practice of double standards' and 'politicizing the CoE's actions' towards Russia.⁸ Therefore, the regulations adopted in Russia regarding the termination of its membership in the CoE often indicate 15 March 2022 as the ending date. The same way of argumentation is presented in regard to the Convention.

about the only other example in the history of the CoE when a Member State withdrew from the ECHR, see Risini, Forde, "Parting paths: Russia's inevitable exit from the Council of Europe". The authors argue that the current situation is much more complicated than in the case of Greece, e.g. because there were no individual cases pending against Greece since it had not yet accepted the right of individual petition.

⁷ European Court of Human Rights, *Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights*.

⁸ "Russia's exit from Council of Europe is not directly tied to situation in Ukraine - MFA", 1 April 2022.

As early as 1 and 4 March 2022, at the request of the Ukrainian government and under Rule 39 of its Rules, the ECtHR indicated interim measures to the Russian Federation which demanded respect and guarantees of the rights to life, to personal protection and to property.⁹ The Court called on Russia to refrain from military attacks against civilians and civilian buildings and vehicles within the territory under attack or siege by Russian troops. It indicated that the Russian authorities should ensure unimpeded access of the civilian population to safe evacuation routes, health care, food and other essential supplies, rapid and unconstrained passage of humanitarian aid and movement of humanitarian workers.

At the beginning of March, due to the hostilities and the following disruption of the postal service, the Court temporarily suspended and subsequently introduced modalities for handling cases concerning Ukraine and Russia. The ECtHR decided that all new applications received by the Court against Ukraine will be registered with a view to examining them at a later date; only applications for interim measures concerning Ukraine will continue to be processed. The Court decided not to introduce a general extension of the six- or four-month time limit, but stated that it would assess in due time applications' compliance with this admissibility criterion, taking into account the exceptional circumstances. No new time limits will be fixed, and all existing time limits in pending cases will be suspended until further notice.¹⁰

On 10 March, the ECtHR decided to apply urgent individual measures in the case of *ANO RID Novaya Gazeta and Others v. Russia* concerning alleged violations of the freedom of expression and dissemination of information.¹¹ The measures were imposed after the Russian authorities placed strict limits on how the media can describe the war in Ukraine and introduced a law imposing criminal sanctions on anyone who does not follow the official

9 European Court of Human Rights, *The European Court grants urgent interim measures in application concerning Russian military operations on Ukrainian territory*, 1 March 2022, European Court of Human Rights, *Decision of the Court on requests for interim measures in individual applications concerning Russian military operations on Ukrainian territory*, 4 March 2022.

10 European Court of Human Rights, *Measures applied in respect of cases in which Ukraine is a respondent or an applicant Government following the military attack of February 2022*; European Court of Human Rights, *Measures applied in respect of all cases concerning Russia owing to disruption to the postal service*.

11 *ANO RID Novaya Gazeta and Others v. Russia* (appl. no. 11884/22). European Court of Human Rights, *European Court applies urgent interim measure in the case of the Russian daily newspaper Novaya Gazeta*.

Russian narrative on the war. The Court asked the Russian authorities to abstain until further notice from actions and decisions aimed at fully blocking and terminating the activities of *Novaya Gazeta*, and from other actions that in the current circumstances could deprive the Russian daily newspaper of its rights guaranteed by the Convention.

On 1 April 2022 the Court reaffirmed and extended the applicability of the interim measures indicated on 1 and 4 March 2022, and added that in the context of the request under consideration, the evacuation routes should allow civilians to seek refuge in safer regions of Ukraine. The Court also decided to give immediate notice of the above interim measure to the Committee of Ministers of the Council of Europe in accordance with Rule 39(2) of the ECtHR's Rules.¹²

More interim measures have been subsequently applied in cases concerning the rights of the members of Ukrainian armed forces captured by Russian troops. In *Pinner v. Russia and Ukraine* and *Aslin v. Russia and Ukraine* – both cases concerning British nationals – members of the Armed Forces of Ukraine, who after being captured by Russian forces were sentenced to death in the so-called Donetsk People's Republic, the Court in particular indicated that the Russian authorities should ensure that the death penalty was not carried out.¹³ In *Oliynichenko v. Russia and Ukraine*, a case concerning the rights of prisoners of war, the Court requested the authorities provide the applicant with adequate medical care.¹⁴ The Court also stated that these interim measures cover any requests made on behalf of Ukrainian prisoners of war in Russian custody for which sufficient evidence has been provided to show that they face a serious and imminent risk of irreparable

¹² European Court of Human Rights, *Expansion of interim measures in relation to Russian military action in Ukraine*.

¹³ The Court stipulated to the Russian government several conditions that had to be met as regards the treatment of prisoners of war: they should ensure that no death penalty was carried out on the applicants, ensure appropriate conditions of their detention and provide them with any necessary medical assistance and medication (European Court of Human Rights, *European Court grants urgent measures in cases lodged by two British prisoners of war sentenced to death in the so-called "Donetsk People's Republic"*). Interim measures in the case *Saadoune v. Russia and Ukraine* (appl. no. 28944/22) concerning a Moroccan national (European Court of Human Rights, *European Court grants urgent measures in case of prisoner of war sentenced to death in the so-called "Donetsk People's Republic"*).

¹⁴ The Court indicated that the Russian government should respect his rights under the Convention and should provide the applicant, as a prisoner of war, with medical assistance should he need it. European Court of Human Rights, *Interim measures concerning Ukrainian prisoners of war*.

harm to their bodily integrity and/or right to life. In regard to all interim measures indicated by the Court, it is worth underscoring that despite the fact that the key feature of interim measures is their urgency, the Court has consistently described its measures in this war as ‘urgent’.

Furthermore, Ukraine has brought its own inter-state case against Russia concerning human rights violations committed during the invasion: *Ukraine v. Russia (X)*.¹⁵ On 17 February 2023 the Grand Chamber decided to join that application with the inter-state applications *Ukraine and the Netherlands v. Russia*,¹⁶ which was already pending before it and which was declared partially admissible on 30 November 2022 in a decision that was delivered on 25 January 2023. This ‘combined’ inter-state case covers complaints concerning mass and gross human rights violations committed by the Russian Federation in its military operations on the territory of Ukraine since 24 February and the conflict in eastern Ukraine involving pro-Russian separatists which began in 2014, including the downing of Malaysia Airlines flight MH17.¹⁷ At present 31 third parties were granted leave to intervene in the case in support of Ukraine.¹⁸

On 16 September 2022 the Russian Federation ceased to be party to the ECHR. As of that day, there were 17,450 individual and seven inter-state applications pending against it before the Court,¹⁹ and 2,129 unexecuted

15 *Ukraine v. Russia (X)*, appl. no. 11055/22.

16 *Ukraine and the Netherlands v. Russia*, appl. nos. 8019/16, 43800/14 and 28525/20.

17 The admissibility and merits of *Ukraine v. Russia (X)* will be examined jointly under Article 29(2) of the European Convention on Human Rights and at the same time as the merits of the proceedings in the existing *Ukraine and the Netherlands v. Russia* case. European Court of Human Rights, *European Court joins inter-state case concerning Russian military operations in Ukraine to inter-state case concerning eastern Ukraine and downing of flight MH17*.

18 The third parties granted leave to intervene include 26 member States (Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom) and one non-governmental organization, the Geneva Academy of International Humanitarian Law and Human Rights. Four third parties had already previously been granted leave to intervene at the admissibility stage of the proceedings in application nos. 8019/16, 43800/14 and 28525/20 in respect of the complaints brought by the Netherlands. They are the Government of Canada; the MH17 Air Disaster Foundation; the individual applicants in four cases lodged by relatives of people who were killed in the MH17 disaster; and the Human Rights Law Centre of the University of Nottingham. European Court of Human Rights, *Update on the third-party intervention requests granted in Inter-State case Ukraine and the Netherlands v. Russia*.

19 In addition to these applications filed by Ukraine against Russia, there are two pending inter-state complaints regarding Russia: *Georgia v. Russian Federation (IV)*, no. 39611/18, and *Russia v. Ukraine*, no. 36958/21.

judgments and decisions against Russia that remained under the supervision of the Committee of Ministers.

2.2. Judicial Composition of the ECtHR in Cases Against Russia

On 16 September 2022, the Russian Federation ceased to be a party to the Convention and the office of judge with respect to this ceased to exist. As a consequence, there was no longer a valid list of *ad hoc* judges who would be eligible to take part in the consideration of cases where the Russian Federation was the respondent State. The number of complaints that remained pending at that date was significant, and therefore the issue of securing the appointment of a judge in respect of Russia was relevant. Some of the commentators emphasized that the formation of adjudicating panels could create some potential legal problems, especially with the view of the need to maintain the adversarial principle.²⁰ Referring to these doubts, first of all, it should be pointed out that it is not the presence of the national judge that ensures an adversarial character of proceedings. Secondly, it should be noted that the Court has developed certain solutions in this matter, which so far seem to ensure a relatively efficient course of proceedings.

In the period from 16 September 2022 to the end of December 2022, the ECtHR announced 7 judgments, which were adopted before 16 September with the participation of the then Russian judge Lobov. On 24 January 2023, the ECtHR issued the first two judgments, in which the judicial deliberation took place and the judgment was issued after 16 September 2022. In the cases *Kutayev v. Russia* and *Svetova and Others v. Russia*, the Court addressed the issue of the appointment of an *ad hoc* judge in Russian cases decided after 16 September 2022, given that the office of Russian judge had ceased to exist and the list of *ad hoc* Russian judges was no longer valid.

The Court stated that the parties to the proceedings were informed that the President of the Section intended to appoint one of the sitting judges of the Court to act as an *ad hoc* judge for the examination of the present case by applying by analogy Rule 29(2) of the Rules of Court. The Russian Government was informed that the same approach should be applied in respect of other applications against that State that the Court remained competent to deal with. The Government was invited to comment on that

²⁰ Dzehtsiarou, “What would Russia’s departure from the Council of Europe mean for the Strasbourg system of human rights protection?”, 11.03.2022.

arrangement by indicated date but did not submit any comments. Accordingly, the President of the Chamber decided to appoint an *ad hoc* judge from among the members of the composition, applying by analogy Rule 29(2)(b). This approach to the appointment of an *ad hoc* judge in Russian cases was confirmed in the Grand Chamber decision delivered on 25 January 2023 in the inter-state case *Ukraine and the Netherlands v. Russia*.²¹ Thus, the Court has chosen the way of procedure which in certain commentaries has been described as ‘business as usual.’²² Although it was highlighted that this tactic would be of questionable legality (due to the fact that according to Article 24(4) of the Convention an *ad hoc* judge should be appointed ‘from the list submitted in advance by that Party’ it seems, that it was the only reasonable solution.²³

2.3. Russia’s Participation in the Proceedings before ECtHR

Since 16 September 2022 until the end of July 2023, all judgments and decisions issued by the Court against Russia were issued in proceedings in which Russia had the opportunity to submit its observations, because the contentious phase of the proceedings took place about 2-3 years earlier. However, this situation will slowly change.

Since 16 September 2022, the Court has communicated to the Russian government about 130 new applications. These are communications that do not result from the current war but from events that occurred between 2018 and 2020. The applications were lodged mainly under Article 3, 5(3) and 6 of the Convention and concern degrading and inhuman treatment, excessive length of pre-trial detention, protracted length of the proceedings, freedom of assembly, thus issues subject of well-established case law of the Court.²⁴

21 *Ukraine and the Netherlands v. Russia*, nos. 8019/16, 43800/14 and 28525/20, decision of 30 November 2022, paras. 39 and 40.

22 Dzehtsiarou, “The Range of Solutions to the Russian Cases Pending before the European Court of Human Rights: Between ‘Business as Usual’ and ‘Denial of Justice’”, 16.08. 2022.

23 It was already “tested” in previous jurisprudence in the case of *Ecodefence and Others v. Russia*, appl. no. 9988/13 and 60 others, of 14.06.2022, and did not raise much doubts.

24 Some complaints filed by Russian citizens before the outbreak of full-scale war, regarding, for example, freedom of assembly, were later joined with applications filed after 24 February 2022, concerning the same kind of allegations. *Aleksey Borisovich Pantenkov v. Russia and 18 other applications*, appl. no. 884/22 includes an application of Aleksandr Sergeyeovich Boldyrev concerning his detention during Anti-war protest in Moscow on 03/03/2022 (appl. no. 45288/22).

In order to maintain equality of arms of the parties to the proceedings, ECtHR decided under Rule 54(2)(b) of the Rules of Court that notice of the above applications should be given to the Government of Russia. Thus the Russian Government has been assured the possibility to submit its observations and comments on the allegations. However, the adoption of such a solution should be viewed against Russia's complete cutting of ties with the CoE and non-participation in the work of this organization. At this point, it is difficult to predict when this attitude may change and when Russia will start participating in the proceedings. Although, in the past, there have been cases where a state has refused to participate in international proceedings, but it never concerned dozens (or hundreds) of cases before one judicial body.

Considering that there were 17,450 applications pending before the Court when Russia ceased to be a party to the Convention, it seems that resolving this issue will require the development of new working methods of the Court. At this point, it is understandable that the Court refrains from presenting solutions, but it is hard to imagine that in the coming years it will issue hundreds or thousands of rulings in the existing procedures, in which the government side will not present a position. The problem of developing appropriate solutions in this matter seems to be much more important in legal terms than doubts about the composition of the panel of judges presented above.

One possible way to partially resolve this issue would be to refer those complaints against Russia, which relate to hostilities taking place from 24 February 2022 for resolution by a future commission, which will be one of the elements of the comprehensive compensation mechanism established for settlement of damages caused as a result of aggression. However, this would be a solution for only part of the complaints.²⁵

Nevertheless, the procedure adopted by the Court guarantees – at least formally – equality of arms in the proceedings for the parties. It seems that

²⁵ The Parliamentary Assembly of the CoE suggested in its resolutions that the decision of international bodies and courts on reparation and compensation in connection with the Russian aggression, such as judgments of the European Court of Human Rights, could be in the future enforced through a new comprehensive compensation commission. Parliamentary Assembly of the Council of Europe, 'Legal and human rights aspects of the Russian Federation's aggression against Ukraine', Resolution 2482 (2023), resolution of 26 January 2023, Secretary General, Accountability for human rights violations as a result of the aggression of the Russian Federation against Ukraine: role of the international community, including the Council of Europe, SG/Inf(2023)7, 31 January 2023, par. 19.3.

in this way the fears expressed by some commentators in the first months after the aggression as to the need of guaranteeing equality of the parties in the proceedings were dispelled. As if anticipating the lack of activity of the Russian authorities in the proceedings before the ECtHR, the Court further outlined in the above- mentioned cases its approach to the Russian authorities' failure to cooperate in ongoing proceedings in cases after March 2022. It based its reasoning on the States' general obligation to cooperate with the Court and to provide all necessary facilities for the effective examination of applications (Articles 34 and 38 of the Convention and Rule 44A of the Rules of Court). The Court confirmed that the Government's failure to cooperate in the proceedings – by not submitting written observations – did not prevent the Court from examining the case, because it manifests its intention to abstain from further participating in the examination of a particular application. The Court pointed out that even though Russia had ceased to be a party to the Convention, it still has a duty to cooperate in the cases as the events had occurred before the 16 September 2022 cut-off point.²⁶

3. Questions of Jurisdiction in Cases Against Russia Resulting from the Armed Conflict

3.1. The Most Problematic Issues

The open, aggressive armed conflict between two Council of Europe States meant that the Court has been confronted with many legal questions related to the issues of jurisdiction, admissibility criteria and the interpretation of the substantive provisions of the Convention, the assessment of which in the light of the ECHR will be a new challenge for it.

There are many such issues, the most important of which are: the fulfilment of the requirement to exhaust available domestic remedies in regard to alleged violations that occurred in the consequence and during an armed conflict; issues of temporal and extraterritorial jurisdiction during an open and active military conflict; the application of ECHR in armed conflicts which triggers the assessment whether the use of lethal force was justified under Article 2 ECHR or attributability of conduct

26 *Svetova and Others v. Russia*, par. 9, 29 – 31.

of non-state actors to Russia under the rules of general international law.²⁷ The direction of the future resolution of the above issues was signaled by the Court in the decision on the admissibility of the application *Ukraine and the Netherlands v. Russia*.

Due to the limited scope of the article, the focus will only be on outlining the problems related to the Court's temporal and personal jurisdiction in cases against Russia and extraterritorial jurisdiction of a State during an armed conflict.

3.2. ECtHR Temporal Jurisdiction in Cases Against Russia

Although Russia is (as from 16 September 2022) no longer formally party to the Convention, the Court has retained at least partial jurisdiction to adjudicate cases against that State. As decided in the Courts' resolution of 22 March 2022, it remains competent to deal with cases against Russia if the alleged violation took place prior to 16 September 2022. This Court's statement was confirmed for the first time in a Grand Chamber judgment *Fedotova and Others v. Russia*²⁸ when it stated that it had jurisdiction to deal with the case, as the facts giving rise to the alleged violations of the Convention had taken place before 16 September 2022, the date on which Russia had ceased to be a party to the European Convention on Human Rights. The Court's decision was based on Article 58(2) of the European

²⁷ For more discussion on this issue of the assessment of the relation between ECHR and international humanitarian law in the context of Ukrainian conflict and on the issue of attributability Milanovic, Shah, "Ukraine and the Netherlands v. Russia, Merits Amicus Curiae Brief Submitted on behalf of the Human Rights Law Centre of the University of Nottingham"; Milanovic, "The European Court's Admissibility Decision in Ukraine and the Netherlands v Russia: The Good, the Bad and the Ugly". In addition to the above issues, which are discussed in the literature on the subject, it should be noted that some countries have made additional observations on whether the ideology of the so-called 'Ruski mir' can be considered a source of systemic - unacceptable discrimination. An important issue that could be examined by the Court is the allegation of the discriminatory nature of all alleged violations of the Convention committed by Russia during the war in Ukraine, reflecting the Russian ideology of the so-called 'Ruski mir' undermining the existence of the Ukrainian State and national affiliation of Ukrainians. Ukraine's representatives indicate that Russia's illegal invasion involves large-scale attacks on the population due to Ukrainian citizenship or ethnic origin, political views, language, as well as due to living in a sovereign Ukrainian state. It is therefore possible to show that the Russian aggression is backed by the entire ideology of the 'Ruski mir', which is in clear contradiction to the fundamental principles of international law and which should be unequivocally rejected by the ECtHR and the entire international community.

²⁸ Application no. 40792/10 and two others.

Convention, read in conjunction with §1 and 3 of that provision, as reflected in the above-mentioned Court Resolution of 22 March 2022. Article 58 applies to situations where a Council of Europe member State ceases to be a Contracting Party to the Convention by withdrawal or expulsion from the Council of Europe and/or denunciation of the European Convention. The Court went on to confirm this approach to jurisdiction on 24 January 2023 in two Chamber judgments, *Kutayev v. Russia*²⁹ and *Svetova and Others v. Russia*.³⁰

The current legal situation should be considered in view of the fact that even before the final termination of Russia's membership in the ECHR system, the Russian authorities adopted internal regulations to limit the consequences of the proceedings before the ECtHR. In accordance with the law adopted in June 2022, the RF will not implement rulings from the Court issued after 15 March 2022, i.e. the last day of Russia's membership in the CoE. Amounts of just satisfaction awarded prior to that date were to be paid only in rubles, only to accounts in Russian banks and by 1 January 2023. These regulations also removed the possibility of reopening domestic proceedings after the ECtHR's judgment is issued. To justify the regulations, representatives of the authorities pointed out that many of the ECtHR judgments issued so far were in conflict with the Russian constitution, values and traditions, and that the Russian authorities no longer intended to accept them.³¹

These new provisions are in clear contravention to Russia's obligations following from its previous membership in the CoE. However, the RF's decisions should be viewed against the background of uncertainty resulting from the lack of a clear indication of the time – limits in which applications against Russia may be submitted to the Court and the Russian authorities' will to limit the possible future effects of the ECtHR's rulings.³² At present, the only certain fact as to the period in which Russia will be subject

29 *Kutayev v. Russia*, appl. no. 17912/15, judgment of 24.01.2023.

30 *Svetova and Others v. Russia*, appl. no. 54714/17, judgment of 24.01.2023.

31 Russian News Agency, <https://tass.com/politics/1461425>.

32 The Russian authorities' limiting of the effects of ECtHR judgments likely also resulted from Russia's awareness that the CM would continue to supervise the implementation of ECtHR judgments and decisions by Russia. Due to the fact that since 3 March 2022, the Russian authorities have ceased all communication with the Secretariat of the CM, during the meeting on 8 December 2022 the CM adopted a document in which it clarified some issues regarding the supervision of the execution of cases against Russia pending before the CM. Committee of Ministers, "Strategy paper regarding the supervision of the execution of cases pending against the Russian Federation", CM/Inf/DH(2022)25.

to the temporal jurisdiction of the ECtHR is the circumstance that Russia ceased to be a State Party to the ECHR on 16 September 2022.

However, since all decisions of the Court in cases against Russia concerned complaints filed well before full-scale aggression began, the Court has not yet specified the final date until which the applications against the RF can be introduced. Early on during the aggression, the opinion was expressed that applications against Russia (individual or inter-state) introduced after 15 September 2022 would be inadmissible *ratione personae* and that the RF would no longer have the right to submit applications against any other party. However, this is only one possible interpretation. It seems that, in accordance with the general principles stemming from Articles 34 and 35 of the Convention, because the last date for which the RF can be held accountable is 15 September 2022, applications against Russia could still be brought before the Court at least within four months of that date. Moreover, since it is necessary to exhaust available domestic remedies, it would be conceivable that the time limit for submitting a complaint would be much longer. The legal situation in that regard is certainly not clear and requires a final resolution in a Court ruling.

3.2.1. *Spatial Extraterritorial Jurisdiction of a State During an Armed Conflict – Lessons Learned from the Ukraine and the Netherlands v. Russia Decision on Admissibility*

In the above-mentioned *Ukraine and the Netherlands v. Russia* decision on admissibility, the Court consolidated and clarified the existing case-law with regard to the exercise of extraterritorial jurisdiction by States in the context of armed conflicts. There, the Court clearly indicated a new possible way of interpreting the so-called ‘context of chaos’ rule, which according to previous Court’ jurisprudence precluded any finding of State’s jurisdiction in a situation of active armed confrontation.³³ At the outset it is

³³ *Georgia v. Russia (II)*, appl. no. 38263/08, judgment of 21.01.2021, paras. 330 – 333. In the jurisprudence to date, in particular in the *Georgia v. Russia (II)* case, the Court recognized that a State does not exercise jurisdiction over a given territory during the active phase of a military operation. It recognized that in the case of military operations, including armed attacks, bombings or shelling, conducted during an international armed conflict, one cannot generally speak of “effective control” over a given area. The very reality of armed confrontation and combat between hostile military forces seeking to establish control over the area in a situation of chaos meant, in the Court’s view, that control over the areas concerned could not be imputed to the States. Therefore, in the Court’s view, these situations should be assessed in the light of international

hoped that the direction of the clarification of the interpretation of Article 1 of the Convention ‘revealed’ recently by the Court in the aforementioned decision will open up the possibility of attributing extraterritorial jurisdiction to Russia in relation to actions taken during the war against Ukraine.

In the decision on the admissibility *Ukraine and the Netherlands v. Russia*, the Court pointed out firstly that most of the alleged violations submitted by Ukraine did not concern events connected to active military operations.³⁴ Such a statement means that when assessing the merits of the circumstances of most of the events, the Court will not face a dilemma related to the lack of State control due to active armed confrontations. This finding will be of great importance for the future, as it seems likely to allow for establishment of Russia’s jurisdiction in a large number of complaints. According to publicly available information, the vast majority of human rights violations in the Ukrainian conflict that have given rise to complaints to the ECtHR are not violations resulting from direct struggle between two opposing armies. In this context, also another conclusion of the Court is extremely important.

The ECtHR stated that from 11 May 2014 until at least 26 January 2022 (the date of admissibility hearing), eastern Ukraine in the hands of separatists remained under effective overall control by Russia and thus Russia exercises spatial jurisdiction over these territories for the purposes of Article 1 of the Convention.³⁵ The spatial jurisdiction covers both the land as well as airspace above it.³⁶ This conclusion was based on two arguments: the Russian Federation direct military presence and its decisive degree of influence and control over the Donetsk and Lugansk People’s Republics as regards military (influence on military strategies, supplies of weapons), political (appointment of leadership posts) and economic support.³⁷

humanitarian law. As a result, the ECtHR then rejected Georgia’s allegations of violations of the right to life as a result of bombing, strafing and shelling (Article 2). However, the Court made exceptions to the principle of lack of jurisdiction as to the active phase of hostilities, primarily in the treatment of prisoners of war and civilians through the obligation to conduct an effective investigation under Article 2 of the Convention (right to life), Article 3 (prohibition of torture), especially with regard to war crimes and other grave violations of humanitarian law committed during the active phase of hostilities.

34 *Ukraine and the Netherlands v. Russia*, paras. 373 – 382, 699.

35 *Ukraine and the Netherlands v. Russia*, par. 695.

36 *Ukraine and the Netherlands v. Russia*, par. 702.

37 *Ukraine and the Netherlands v. Russia*, par. 611, 639, 671, 689.

This Court's conclusion is crucial from different points of view. First of all, it will allow for a substantive assessment of numerous allegations of violations of the Convention that have taken place in the occupied territories since 2014. In order to find a violation of rights or freedoms, the Court will only have to conduct an assessment of individual reported cases. In addition, this conclusion can be used to confirm that the conflict in eastern Ukraine has never been of an internal character, a conclusion that may also play an important role in other domestic and international legal proceedings against Russia and its officials.³⁸ Moreover, the conclusions of the ECtHR can be used before the arbitral tribunals in order to prove control by Russia of parts of Ukrainian territory in cases where bilateral investment treaties apply to investments within a contracting party territory also understood as a *de facto* control.³⁹

The third important conclusion inserted in the Court's decision is that 'there can be no doubt that a State may have extraterritorial jurisdiction in respect of complaints concerning events that occurred while active hostilities were taking place'.⁴⁰ It may be presumed that the Court made this statement being aware of the fact that the principle formulated in the *Georgia v. Russia* (II) judgment – that jurisdiction cannot be determined in the active phase of combat, has been criticized in the literature, primarily because of its inconsistency with other principles that the Court has developed so far.⁴¹ The clear indication that the active phase of the hostilities does not entirely exclude jurisdiction allows us to expect that the Court will specify the conditions under which personal or spatial extraterritorial jurisdiction may be established. Such a jurisdiction will be certainly present with regard to detention and treatment of civilians and prisoners of war which began

38 Nuridzhanian, "Questions of Extraterritorial Jurisdiction in Ukraine and the Netherlands v. Russia", 27.01.2023.

39 Perspectives, February 01, 2023, "Future claims against Russia: Key implications of the Ukraine and the Netherlands v. Russia decision". Also judgment of the Permanent Court of Arbitration in the Hague of 12.04.2023 *Naftohaz Ukrainy, Chornomornaftohaz, Ukrtranshaz, Ukrhazwydobuwanania, Ukrtransnafta, Haz Ukrajiny v. Russia*, where the court confirmed that the term 'territory' refers both to the territory of a sovereign state and to land over which that state exercises effective control, making it responsible for the investments located therein. The court noted that in the context of an investment protection agreement, the term "territory" is closely linked to the state's ability to legislate, and currently only the Russian Federation has the ability to effectively legislate in Crimea.

40 *Ukraine and the Netherlands v. Russia*, par. 558.

41 Amicus Curiae Brief, Submitted by Professor Marko Milanovic and Professor Sangeeta Shah on behalf of the Human Rights Law Centre of the University of Nottingham, p. 2.

while active hostilities were ongoing – but this is clear from the earlier jurisprudence of the ECtHR.⁴² However, already in the decision of 24 January 2023, the Court indicated the second situation in which such jurisdiction may be established. It decided, based on the Joint Investigation Team investigation, in regard to the downing of MH-17 that the situation of chaos that may exist during fighting on the ground did not exist during the use of surface-to-air-missiles directed at specific target. This second exception from the ‘context of chaos’ rule, based on the finding that there is sufficient information about the event and, consequently, that there is no chaos, will be of great importance for the assessment of many other events that have been the source of complaints. It cannot be ruled out that such an approach will make it possible to attribute responsibility to Russia also for other acts of shelling civilian objects as part of military operations, at least in territories under its direct or indirect (through the separatists) control.

From the point of view of the future Court’s jurisprudence treated as a part of the determination of Russia’s accountability for violations of international law during the war in Ukraine, it is essential that the Court take into account Ukraine’s arguments to the extent that it seeks to assign Russia’s jurisdiction within the meaning of Article 1 of the Convention for all violations committed by Russian armed forces on its territory under Russian control. In this context, to the extent that it is possible to consider assigning spatial jurisdiction to Russia, it would be desirable to limit to a minimum the situations in which the ECtHR will apply the negative criterion of ‘context of chaos’ to the assessment of the facts covered by the Ukrainian complaint. The following arguments could serve this purpose.

First of all, it seems desirable to strive for a situation in which the jurisdiction within the meaning of Article 1 of the Convention covers all violations committed by States parties to the Convention within the legal space of the Convention, even if States commit these violations outside their own territory. This should apply to the use of armed force by one State in a manner aimed at removing the control exercised by another State party to the Convention over its sovereign territory. The opposite approach would result in the ECtHR allowing a legal vacuum to emerge in the juridical space of the Convention, it would make it possible to undermine the ability of the States’ parties to the Convention to ensure the human rights of persons

42 *Georgia v. Russia (II)*, appl. no. 38263/08, judgment of 21.01.2021, par. 239.

in their sovereign territory, and at the same time would relieve the aggressor State of responsibility.

Secondly, the ‘chaos situation’ should not apply in the case of an aggressive war, where the aggressor enters the territory of the attacked State and tries to control it, which is the goal of the aggression. As in the earlier argument, an attempt to use the ‘chaos’ rule would lead to the aggressor avoiding responsibility.

Thirdly, deciding about the admissibility of the application regarding the shooting down of MH17, the Court took into account *inter alia* the fact that the circumstances of the accident had been clarified during the investigation.⁴³ Insofar as it concerns the future Court’s decisions concerning the full scale invasion, there is a large number of investigations into the individual incidents carried out by national Ukrainian authorities, national authorities of other countries (e.g. Poland), ICC Prosecutor’s Office, Joint Investigation Team and international organizations. There are also numerous initiatives aimed at collecting extensive documentation. As a result the circumstances of most of the complained attacks are sufficiently clear to rule out the ‘context of chaos’. Thanks to the fact that modern technologies are used in the conflict, it will be possible to precisely determine where and in what direction a given missile was fired.

Thus it will be possible to conclude without any doubts that the affected person, or entity fell under Russian control or authority in a way sufficient to establish its spatial jurisdiction within the meaning of Article 1 of the Convention.

3.2.2. Personal Extraterritorial Jurisdiction of a State During Armed Conflict

In situations where it is not possible to establish spatial jurisdiction of Russia over a certain territory, the Court will be obliged to examine whether Russia exercised personal jurisdiction (understood as State agent authority and control of individuals). This will be extremely important due to the fact that some of the events constituting potential violations of the Convention took place on the territory of Ukraine not under effective Russian control, although these events were caused by the military actions of Russia. In particular, it concerns losses of persons and property caused by shelling,⁴⁴

43 *Ukraine and the Netherlands v. Russia*, par. 703.

44 *Ukraine and the Netherlands v. Russia*, par. 698 – 699.

as well as summary executions or other actions violating the rights and freedoms of civilians and members of the Ukrainian armed forces, carried out by members of the separatist forces or members of the Russian armed forces during taking over subsequent territories of Ukraine. The examination of the existence of Russia's personal jurisdiction in such situations was left by the Court to decide at the stage of assessing the merits of the complaint *Ukraine and the Netherlands v. Russia*.

In order to ensure Russia's comprehensive and coherent responsibility for all violations of the Convention committed during the war in Ukraine, the desired direction of the future settlement would be to recognize the existence of Russia's jurisdiction in all the indicated situations. However, this may be a daunting task in the light of the existing case law according to which States' jurisdiction is primarily territorial, however a number of exceptions have been identified which relied on the authority and control exercised by a State agent over a person in question.⁴⁵ From the current perspective of the Ukrainian conflict, especially troubling is the Court's judgment in the case *Georgia v. Russia (II)*, in which it found no jurisdiction of the Russian Federation during the hostilities, except for persons in physical custody.⁴⁶ This line of jurisprudence was taken up in *Carter v. Russia*, where the Court stated that the State's jurisdiction may be establish in cases of 'isolated and specific acts involving an element of proximity' in contrast to situations of 'armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos' which excludes any form of 'State agent authority and control' over individuals'.⁴⁷

In this context, a point of reference for further discussions concerning the possibilities to establish Russia's jurisdiction in that kind of situations could be the Court's statement included in the decision *Ukraine and the Netherlands v. Russia* that 'the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State which it could not perpetrate on its own territory'.⁴⁸

45 *Carter v. Russia*, appl. no. 20914/07, judgment of 21.09.2021, par. 124 – 127.

46 *Georgia v. Russia (II)*, appl. no. 38263/08, judgment of 21.01.2021, paras. 113 – 144 and 269.

47 *Carter v. Russia*, par. 129 making reference to *Georgia v. Russia*, paras. 132 – 133, 137 – 138. The judgment in the case *Carter v. Russia* was broadly interpreted as providing the first step towards wide-ranging extraterritorial obligations upon States. Halikos, "Carter v. Russia: The Birthplace of Global Obligations?", 218.

48 *Ukraine and the Netherlands v. Russia*, par. 570.

The first step towards wider recognition of the possibility of the existence of personal jurisdiction was made by the Court in par. 571 of that decision where it expressly stated that the aim of extending the State's obligations under Article 1 of the Convention beyond its territory is to secure to the individuals the Convention rights and freedoms that are relevant to his or her situation. In consequence, the Court considered that the Convention rights can be divided and tailored and thus it explicitly overruled the main line of its up-to-date jurisprudence in which it observed that the jurisdictional competence of a State is in essence territorial in nature.⁴⁹ The expression of such a position by the Court opens the way to the formulation of further arguments supporting the assertion of the existence of personal jurisdiction.

First of all, the expression of 'military operations' used by the Court must be interpreted. The Court explained that the personal jurisdiction is excluded in 'military operations' understood as 'armed confrontation and fighting between enemy forces seeking to establish control over an area in a context of chaos'. On the contrary, it may be present in cases of 'isolated and specific acts involving an element of proximity'. It seems that the juxtaposition of these two situations indicates that if it is possible to refute the presumption of 'chaos' accompanying military operations with the use of evidence and attribute certain actions to individual units or persons, it will be possible to attribute the personal jurisdiction to Russia. Overthrowing this presumption will certainly not be difficult when a particular shelling, made from long distances, easily tracked by military systems, is subject to assessment. There is no doubt that in many such situations it would be possible to differentiate 'isolated and specific acts.'

For the purpose of conducting such evidence once again (as in the case of establishing spatial jurisdiction), thorough documentation of individual military activities, unprecedented in previous conflicts, may be helpful. The current state of technological advancement in the collection of information allows for assigning specific military activities to particular military units or even to individual persons. The commentators assessed extremely positively the ECtHR's approach to the issue of collecting and evaluating evidence for the purpose of assigning Russia effective control over the territory of eastern Ukraine. The Court's use of the available evidence in the admissibility decision *Ukraine and Netherlands v. Russia* was assessed as

49 Milanovic, Part I, p. 8/12.

simultaneously ‘imperious’, yet ‘detailed and rigorous’.⁵⁰ It is worth noting that the Court used not only public data and evidence, but also open-source investigators such as Bellingcat, which it found – contrary to the Russia’s Government statements⁵¹ ‘credible and serious’.⁵²

At this point in discussions, the issue that is difficult to be resolved is how the Court might interpret the concept of ‘element of proximity’. This condition would undoubtedly be met in a situation of actions of direct use of force by military units in relation to persons on the territory of Ukraine (civilian population or members of the armed forces), including murder, rape, or torture. Insofar as shelling is concerned, a possible attempt to interpret the concept of ‘proximity’ would be to link this concept with determining the accuracy of a concrete military action. If it could be proved that a specific shelling of civilian buildings was intended, the target was chosen precisely and the strafing was accomplished, it could be claimed that this condition has been met.

If the Court decides not to declare Russia’s personal jurisdiction with regard to at least some of the (usually extremely well documented) events, it will be confronted with the need to thoroughly justify its position if it wants to gain at least partial acceptance or understanding of its audience: States, individual applicants and public opinion. At this point, a question could be raised as to what might prevent the Court from attributing personal jurisdiction over the well documented actions of armed forces, since it was able to establish jurisdiction in cases of actions of secret agents, about whose activities we will by definition never have full information.⁵³

4. Conclusions

Russia’s aggression against Ukraine has posed a number of new challenges to the ECtHR. Some of them have already been dealt with by the Court, others are waiting for their turn. What distinguishes the current conflict

50 Milanovic, “The European Court’s Admissibility Decision in Ukraine and the Netherlands v Russia: The Good, the Bad and the Ugly”, 3/12.

51 *Ukraine and the Netherlands v. Russia*, par. 409.

52 *Ukraine and the Netherlands v. Russia*, par. 472.

53 Some authors rightly claim that there are other situations of potentially attributing to States personal jurisdiction which still require thorough consideration, like targeted killing with the use of armed drones. Kelemen, “*Quo vadis* ECtHR? An assessment of Carter v. Russia before the European Court of Human Rights,” 6.

from other armed conflicts that were subjected to the Court's assessment is the extremely good, even unprecedented, documentation of most of the events. Such a brutal war has not taken place in Europe since the 1990s, i.e. since the conflict between the countries of the former Yugoslavia. The atrocities of that war led to the establishment of an *ad hoc* tribunal by the United Nations. In a situation of war in Ukraine, this is not possible due to the obvious potential veto of the aggressor – Russia. However, the currently committed crimes must be brought to justice, and the victims should be given at least some satisfaction. This historical need gives the Court an opportunity to present an innovative approach to the problematic issues indicated in the article. The Court therefore has an enormous responsibility. On the other hand, its role can be perceived not only as one of the elements of ensuring accountability for violations of international law committed by Russia in Ukraine. The judgments of the ECtHR may be a starting point for the actions of other judicial or quasi-judicial bodies. A good example may be the arbitration proceedings indicated in the article and the potential use of ECtHR judgments as the basis for the payment of compensation under the comprehensive compensatory mechanism, whose first element in the form of the Register of Damage was created in May 2023 by the resolution of the CM.⁵⁴ The Court's findings in inter-state cases will have implications on other inter-state and particularly individual applications against Russia dealing with the conflict in Ukraine. Therefore, one should not treat the future rulings issued and the supervision of their implementation effectuated by the Committee of Ministers as merely symbolic. Furthermore, it need not be without significance for Russian society and for the possible settlement of the Russian Federation's responsibility in the future. Russia's expulsion from the CoE, although a 'logical' step in view of its aggression, is detrimental to Russian society in view of providing protection for the human rights of activists, human rights' defendants and persons already persecuted by

⁵⁴ Resolution CM/Res(2023)3 establishing the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation Against Ukraine (*Adopted by the Committee of Ministers on 12 May 2023 at the 1466th meeting of the Ministers' Deputies*). It is also worth remembering that, in resolution 2482 (2023), the PACE even made a suggestion that the rulings of the ECtHR in cases related to the current war be enforced through the new mechanism. For more about the idea of the registry, Mężykowska, *Establishment of the Registry of Damage: The first element in ensuring Russia's financial accountability for the aggression against Ukraine*.

the authorities, such as political dissidents.⁵⁵ Here, future developments within the ECtHR and the CM will have to be closely monitored.

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