

# A Time of Reckoning? Russia and the Council of Europe

Philip Leach

## Introduction

The brutal, unprovoked and illegal Russian invasion of Ukraine, which started on 24 February 2022, has resulted in the swift utilisation of the machinery of international law. Ukraine itself instigated proceedings at the International Court of Justice<sup>1</sup> and the European Court of Human Rights.<sup>2</sup> On 28 February, Karim Khan QC, the Prosecutor at the International Criminal Court (ICC), announced the opening of an investigation into the situation in Ukraine,<sup>3</sup> and by 2 March his office had received referrals from 39 States Parties to the Rome Statute of the ICC, allowing active investigations to proceed.<sup>4</sup> In addition, there have been calls for the establishment of a separate criminal tribunal to investigate the crime of aggression,<sup>5</sup> which the ICC does not have the remit to do, in the context of Ukraine (or a hybrid tribunal established with Council of Europe support).<sup>6</sup>

For Elvira Dominguez-Redondo, such engagement represents a ‘remarkable and a revealing testimony of the centrality of international law in the means used to address the conflict’.<sup>7</sup> As Oona Hathaway has cogently argued, ‘the unified and sustained legal condemnation of the invasion is essential not only to sustaining hope for a future in which Ukraine is free and independent but also to maintaining an international legal order founded on the principle that might cannot make right’.<sup>8</sup>

This post focuses on the particular role of the Council of Europe: Russia’s membership of it, its departure from it, what some of the consequences of that will be (without of course being comprehensive), and what lessons should be learned. Russia’s quarter of a century within the Council of Europe has undoubtedly been tumultuous. Its accession (in 1996) was highly contested, because of the ongoing conflict in Chechnya, and for those reasons, in 2000, PACE suspended the right of the Russian delegation to vote in plenary. Following Russia’s annexation of Crimea in 2014, the Russian delegation to PACE was deprived of particular

---

<sup>1</sup> Application, Instituting Proceedings filed in the Registry of the Court on 26 February 2022, DISPUTE RELATING TO ALLEGATIONS OF GENOCIDE (UKRAINE v. RUSSIAN FEDERATION). Available at: <https://www.icj-cij.org/public/files/case-related/182/182-20220227-APP-01-00-EN.pdf> [Accessed 1 April 2022]

<sup>2</sup> European Court of Human Rights, Press Release, Measures applied in respect of cases in which Ukraine is a respondent or an applicant Government following the military attack of February 2022, 2 March 2022.

<sup>3</sup> International Criminal Court, Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: “I have decided to proceed with opening an investigation”, 28 February 2022.

<sup>4</sup> International Criminal Court, Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation, 2 March 2022.

<sup>5</sup> Statement Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression against Ukraine. Available at: <https://justice-for-ukraine.com/the-declaration/> [Accessed 1 April 2022]. See also the list of signatories at: <https://justice-for-ukraine.com/signatories/> [Accessed 1 April 2022].

<sup>6</sup> K. J. Heller, “The Best Option: An Extraordinary Ukrainian Chamber for Aggression”, *Opinio Juris*, 16 March 2022. See also: C. McDougall, “Why Creating A Special Tribunal for Aggression against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics”, *Opinio Juris*, 15 March 2022.

<sup>7</sup> E. Dominguez-Redondo, “Russian misuse of international law is final nail in coffin of post WW2 order”, MDX Minds, 9 March 2022. Available at: <https://mdxminds.com/2022/03/09/ukraine-russia-war-security-council/> [Accessed 1 April 2022]

<sup>8</sup> O. Hathaway, “International Law Goes to War in Ukraine - The Legal Pushback to Russia’s Invasion”, *Foreign Affairs*, 15 March 2022. See also see also Noëlle Quénivet’s extremely useful curation of international law commentaries at: <https://padlet.com/noellequénivet/6nitzzw3i1ttgpt5>.

rights.<sup>9</sup> In 2015 the Russian Constitutional Court held, in effect, that European Court judgments which conflict with the Russian Constitution could not be enforced,<sup>10</sup> and in response to Constitutional amendments proposed in 2020, the Venice Commission felt obliged to underscore that ‘there is no choice to execute or not to execute’ a Strasbourg court judgment.<sup>11</sup> Be that as it may, as Rick Lawson notes, for 25 years Russia was ‘the only super-power to be subjected to supranational supervision in the field of human rights’.<sup>12</sup>

### **Russia’s exit from the Council of Europe**

As a direct consequence of its war of aggression in Ukraine, Russia ceased to be a member of the Council of Europe (CoE), with effect from 16 March, as confirmed by a resolution of the Committee of Ministers (CM).<sup>13</sup> This represents uncharted territory – until now, no state had ever been expelled from the organisation, and the only instance of state withdrawal was carried out by a military junta in Greece in 1969 (before it could be expelled).

However, there was much uncertainty in the days leading up to the CM resolution. The CoE statute prescribes two routes for a state’s departure: withdrawal (Article 7) and expulsion (Article 8). On 25 February, the CM had taken the decision to suspend Russia from its rights of representation in the CM and in the Parliamentary Assembly of the Council of Europe (PACE) with immediate effect (under Article 8 of the Statute),<sup>14</sup> but the Ministers’ Deputies took pains to clarify that Russia was still subject to the European Convention on Human Rights (ECHR) and its additional obligations.<sup>15</sup>

A statement from the Russian Ministry of Foreign Affairs on 10 March suggested that withdrawal was likely:

‘Russia will not participate in the transformation by NATO and the EU obediently following them of the oldest European organisation into another platform for incantations about Western superiority and narcissism. Let them enjoy communicating with each other, without Russia’.<sup>16</sup>

---

<sup>9</sup> A. Drzemczewski, “The (Non-) Participation of Russian Parliamentarians in the Parliamentary Assembly of the Council of Europe: Recent Developments”, *Europe of Rights & Liberties/Europe des droits & libertés*, 2020.

<sup>10</sup> See further: 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”, *European Journal of International Law*, Volume 30, Issue 3, August 2019, 933–959, <https://doi.org/10.1093/ejil/chz049>.

<sup>11</sup> Venice Commission, “Russian Federation - Opinion on draft amendments to the Constitution (as signed by the President of the Russian Federation on 14 March 2020) related to the execution in the Russian Federation of decisions by the European Court of Human Rights, adopted by the Venice Commission on 18 June 2020 by a written procedure replacing the 123rd Plenary Session”, CDL-AD(2020)009-e, 18 June 2020.

<sup>12</sup> R. Lawson, “They can destroy our houses. But they cannot destroy our values”, *Leiden Law Blog*, 17 March 2022.

<sup>13</sup> Ministers’ Deputies, Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe (Adopted by the Committee of Ministers on 16 March 2022 at the 1428th meeting of the Ministers’ Deputies).

<sup>14</sup> Ministers’ Deputies, Decisions, CM/Del/Dec(2022)1426ter/2.3, 2.3 Situation in Ukraine – Measures to be taken, including under Article 8 of the Statute of the Council of Europe, 1426th meeting, 25 February 2022.

<sup>15</sup> Ministers’ Deputies, Resolutions, CM/Res(2022)1 on legal and financial consequences of the suspension of the Russian Federation from its rights of representation in the Council of Europe (Adopted by the Committee of Ministers on 2 March 2022 at the 1427th meeting of the Ministers’ Deputies).

<sup>16</sup> Interfax, Россия отказалась участвовать в работе Совета Европы, 10 March 2022.

This led some media organisations to announce Russia's departure from the CoE, in a bid to avoid being kicked out.<sup>17</sup> However, that was not yet the case. Also on 10 March, the Ministers' Deputies decided to consult PACE about further steps to be taken under Article 8.<sup>18</sup> At an extraordinary plenary session on 14 and 15 March, PACE described the Russian invasion of Ukraine as a 'serious breach' of Article 3 of the CoE Statute, which was contrary to 'the obligations and commitments which the Russian Federation undertook upon accession'. As a result, it adopted an opinion to the effect that the CM should request the Russian Federation to immediately withdraw from the CoE, and that if Russia did not do so, the CM should decide 'the immediate possible date' when Russia would cease to be a CoE member.<sup>19</sup> Also on 15 March, the Russian Foreign Minister Sergey Lavrov wrote to inform the CoE Secretary General, Marija Pejčinović Burić, of its withdrawal from the CoE and of its intention to denounce the ECHR (under Article 58). On the following day, the CM passed a resolution which noted Russia's withdrawal and which decided, 'in the context of the procedure launched under Article 8 of the Statute of the Council of Europe, that the Russian Federation ceases to be a member of the Council of Europe as from 16 March 2022'.<sup>20</sup>

The CM resolution therefore uses the wording of Article 8 of the CoE Statute, which in effect means expulsion. The Article 8 procedure can only be invoked where the state in question has not complied with the request to withdraw, pursuant to Article 7. This would appear to mean that Russia's communication to the Secretary General on 15 March was not considered to effect Russia's withdrawal (although it is not clear why).

It is important to clarify which 'route' was used, not least because separate timings apply to the withdrawal and expulsion processes. Article 7 would allow a state's (voluntary) withdrawal to take effect at the end of the financial year (December) in which it is notified (where notification is given during the first nine months of the financial year). If notification is given in the last three months of the financial year, it will take effect at the end of the next financial year. If Russia had been permitted to use the Article 7 withdrawal route, then in theory at least, it could have delayed matters, for quite a considerable period. Instead, the CM has applied the Article 8 procedure, allowing it to decide that Russia ceased to be a member from 16 March.

### **Some consequences of Russia's expulsion**

There are of course myriad consequences of Russia's expulsion from the CoE, not least its disengagement from mechanisms which are only open to CoE states, including various partial agreements and enlarged agreements, such as the European Commission for Democracy through Law (the Venice Commission).<sup>21</sup> The European Commission against Racism and

---

<sup>17</sup> See, for example: EURACTIV, Russia leaves Council of Europe, avoiding being kicked out, 10 March 2022.

<sup>18</sup> Ministers' Deputies, Decisions, CM/Del/Dec(2022)1428bis/2.3, Consequences of the aggression of the Russian Federation against Ukraine, 10 March 2022.

<sup>19</sup> Parliamentary Assembly of the Council of Europe, Opinion 300, Consequences of the Russian Federation's aggression against Ukraine, 15 March 2022.

<sup>20</sup> Ministers' Deputies, Resolutions, CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe (Adopted by the Committee of Ministers on 16 March 2022 at the 1428ter meeting of the Ministers' Deputies).

<sup>21</sup> Ministers' Deputies, 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).

Intolerance (ECRI) has now ended its monitoring work in Russia.<sup>22</sup> Decisions will still need to be made as regards Russia's continuing involvement in treaties which are open to accession by non-member states, such as the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.<sup>23</sup> There are also significant financial reverberations for the organisation. The Russian contribution to the CoE in 2022 was €34 million<sup>24</sup> – a gap which will now need to be plugged by other member states. Very disturbingly, former President Dmitry Medvedev has recently mooted the possibility of the reintroduction of the death penalty.<sup>25</sup> However, this post will focus on some of the consequences for potential applicants to the European Court.

The Court's immediate response to these developments was to suspend its examination of all Russian cases on 16 March.<sup>26</sup> However, there was some uncertainty as to when the Court's jurisdiction would cease as regards Russia – on 16 March or at a subsequent date? This was resolved on 22 March when the Court adopted a plenary resolution declaring that the Russian Federation would remain a party to the ECHR until 16 September 2022 (six months after Russia left the CoE), and that the Court would remain competent to deal with complaints of violations against Russia which occur up to 16 September.<sup>27</sup> Its basis for reaching these decisions is not entirely clear. In its resolution the Court refers to Article 58 ECHR and reaffirms that 'the object and purpose of the Convention, as an instrument of human rights protection, call for an interpretation and application of its provisions so as to ensure practical and effective protection to those subject to the High Contracting Parties' jurisdiction'. Article 58 deals with the process of the denunciation of the Convention – a process which the Russian Foreign Minister had referred to, in his letter to the CoE Secretary General of 15 March, but which was not in fact instigated. Nevertheless, Article 58(1) requires any state which denounces the ECHR to provide six months' notice. Article 58(3) stipulates that any

---

<sup>22</sup> Statement of the European Commission against Racism and Intolerance (ECRI) on the consequences of the aggression of the Russian Federation against Ukraine, 5 April 2022. Available at: <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/-/statement-of-the-european-commission-against-racism-and-intolerance-ecri-on-the-consequences-of-the-aggression-of-the-russian-federation-against-ukrai> [Accessed 5 April 2022].

<sup>23</sup> On 31 March 2022, the President of the European Committee for the Prevention of Torture, Alan Mitchell said: "In the current situation, I wish to recall that the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment is a convention which is open to accession by non-member States of the Council of Europe and that the Russian Federation thus remains a State Party to this Convention. As such, the Russian authorities must take effective steps to prevent torture and other forms of ill-treatment (contrary to Article 3 of the European Convention on Human Rights) of persons deprived of their liberty in law enforcement establishments, prisons, military detention facilities, psychiatric hospitals, social care institutions and other places of deprivation of liberty, whether within the territory of the Russian Federation or in areas within the territory of Ukraine of which the Russian Federation exercises effective control". See: Statement from the CPT President, 31 March 2022. Available at: <https://www.coe.int/en/web/cpt/-/1> [Accessed 5 April 2022].

<sup>24</sup> See: <https://www.coe.int/en/web/portal/russian-federation>.

<sup>25</sup> The Moscow Times, Russia Quits Europe's Rule of Law Body, Sparking Questions Over Death Penalty, 10 March 2022.

<sup>26</sup> European Court of Human Rights, Press Release, The European Court of Human Rights decides to suspend the examination of all applications against the Russian Federation, 16 March 2022.

<sup>27</sup> 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, 22 March 2022. See also: Ministers' Deputies, 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).

state party ‘which shall cease to be a member of the Council of Europe shall cease to be a party to this Convention under the same conditions.’ Accordingly, this provision applies to any situation when a state leaves the CoE, and not just where the ECHR is denounced. The question raised by this text, in the current situation, is whether the wording ‘under the same conditions’ means that where a state is expelled from the CoE (under Article 8 of the CoE Statute, as discussed above), there is an equivalent six months period during which the ECHR continues to apply. In view of the terms of its 22 March resolution, the Court has taken the position that Russia should also be subject to a further six months of Court supervision, without explicitly explaining how it came to such a decision.

### *The Court’s oversight of the current conflict*

The European Court of Human Rights will accordingly continue to have jurisdiction over ECHR violations allegedly committed by Russia up to 16 September 2022, which will enable the Court to adjudicate on cases relating to Russia’s invasion of Ukraine. An inter-state case was lodged by the Ukrainian Government on 28 February, as a result of which the Court ordered interim measures (under Rule 39 of the Court Rules) on 1 March, requiring Russia

‘to refrain from military attacks against civilians and civilian objects, including residential premises, emergency vehicles and other specially protected civilian objects such as schools and hospitals, and to ensure immediately the safety of the medical establishments, personnel and emergency vehicles within the territory under attack or siege by Russian troops’.<sup>28</sup>

There has been no evidence of Russia complying with this binding court order, indeed there is mounting evidence of the concerted targeting of civilians and civilian objects in Ukraine, such as the maternity and children’s hospital in Mariupol, which was subject to an air strike on 9 March.<sup>29</sup> As Russian troops have been leaving previously-occupied areas of Ukraine in late March and early April, further evidence of grave atrocities has come to light, including in Bucha, where cases of summary execution and the rape of civilians have been reported.<sup>30</sup> On 1 April, the Court issued further interim measures ordering Russia to ensure that ‘evacuation routes should allow civilians to seek refuge in safer regions of Ukraine’, and confirmed that its 1 March order included a ban on ‘the use of any form of prohibited weapons’.<sup>31</sup>

The Court has a reasonably well-established practice of ordering interim measures in the context of armed conflict or occupation. It has done so in order to protect the Convention rights of detainees such as Ukrainian film director, Oleg Sentsov,<sup>32</sup> Ukrainian air force pilot

---

<sup>28</sup> European Court of Human Rights, Press Release, The European Court grants urgent interim measures in application concerning Russian military operations on Ukrainian territory, 1 March 2022. See also: European Court of Human Rights, Press Release, Decision of the Court on requests for interim measures in individual applications concerning Russian military operations on Ukrainian territory, 4 March 2022.

<sup>29</sup> BBC News, Ukraine war: Three dead as maternity hospital hit by Russian air strike, 10 March 2022. Available at: <https://www.bbc.co.uk/news/world-europe-60675599> [Accessed 5 April 2022].

<sup>30</sup> See, for example: Human Rights Watch, Ukraine: Apparent War Crimes in Russia-Controlled Areas, 3 April 2022. Available at: <https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas> [Accessed 5 April 2022].

<sup>31</sup> European Court of Human Rights, Press Release, Expansion of interim measures in relation to Russian military action in Ukraine, 1 April 2022.

<sup>32</sup> European Court of Human Rights, Press Release, Court decides on medical care interim measure for Oleg Sentsov, calls on him to end hunger strike, 25 July 2018.

Nadia Savchenko,<sup>33</sup> and 24 captured Ukrainian sailors.<sup>34</sup> Following the Russian occupation of Crimea in 2014, and events in eastern Ukraine, the Court made interim measures orders on behalf of detainees in more than 150 cases,<sup>35</sup> and similar orders were made following the outbreak of renewed hostilities over Nagorno-Karabakh in September 2020.<sup>36</sup>

Aside from the protection of detainees, the Court has also issued much more broadly focused interim measures orders calling on state parties to conflict to refrain from breaching the ECHR, notably the right to life and prohibition of torture. It did so during the South Ossetia conflict in 2008,<sup>37</sup> in respect of Ukraine in 2014<sup>38</sup> and Nagorno-Karabakh in 2020.<sup>39</sup> Commentators have debated the efficacy of the Court's issuing such generalised directions.<sup>40</sup> Certainly, greater specificity ought to lead to higher levels of compliance, but the significant symbolism of such calls by the Court should not be discounted. Furthermore, it is not just the parties who can seek interim measures: rule 39 of the Court's rules allows 'any other person concerned' to apply (as has been noted elsewhere<sup>41</sup>). In the current context, this provision could enable, for example, any state or NGO (or the Commissioner for Human Rights) to apply for interim measures from the Court to order an end to the use of illegal munitions, such as cluster bombs.<sup>42</sup>

A very significant barrier to the Court's consideration of the merits of any cases arising out of the current conflict is the Court's very restrictive and retrograde interpretation of its jurisdiction where states take action beyond their borders during armed conflict. In the 2021 Grand Chamber judgment in the case of *Georgia v Russia (II)*,<sup>43</sup> concerning the eight day war between Georgia and Russia in South Ossetia in August 2008, the Court decided that it did not have jurisdiction in respect of extra-territorial acts during the 'active phase of hostilities', on the basis that there was no 'effective control' of territory in such circumstances. Much has been written which is highly critical of this judicial policy of arch pragmatism,<sup>44</sup> but suffice

---

<sup>33</sup> European Court of Human Rights, Press Release, ECHR calls on captured Ukrainian pilot to end her hunger strike, 13 February 2015.

<sup>34</sup> European Court of Human Rights, Press Release, ECHR grants interim measure in new inter-State case brought by Ukraine against Russia concerning events in the Kerch Strait, 4 December 2018.

<sup>35</sup> European Court of Human Rights, Press Release, European Court of Human Rights communicates to Russia new inter-State case concerning events in Crimea and Eastern Ukraine, 1 October 2015.

<sup>36</sup> European Court of Human Rights, Press Release, The Court makes a statement on requests for interim measures concerning the conflict in and around Nagorno-Karabakh, 4 November 2020.

<sup>37</sup> European Court of Human Rights, Press Release, European Court of Human Rights grants request for interim measures, 12 August 2008.

<sup>38</sup> European Court of Human Rights, Press Release, Interim measure granted in inter-State case brought by Ukraine against Russia, 13 March 2014.

<sup>39</sup> European Court of Human Rights, Press Release, The Court makes a statement on requests for interim measures concerning the conflict in and around Nagorno-Karabakh, 4 November 2020.

<sup>40</sup> K. Dzehtsiarou, "Can the European Court of Human Rights Prevent War? Interim Measures in Inter-State Cases", Public Law (2016), 254-271; J. Koch, "The Efficacy and Impact of Interim Measures: Ukraine's Inter-State Application Against Russia", 39 B.C. Int'l & Comp. L. Rev. 163 (2016).

<sup>41</sup> P. Leach, "On inter-state litigation and armed conflict cases in Strasbourg", European Convention on Human Rights Law Review, 2 (1) (2021) 27-74.

<sup>42</sup> See, for example: Human Rights Watch, Ukraine: Cluster Munitions Launched Into Kharkiv Neighborhoods, 4 March 2022.

<sup>43</sup> *Georgia v Russia (II)* (App. No. 38263/08) [GC], judgment of 21 January 2021.

<sup>44</sup> See, for example: M. Milanovic, "Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos", EJIL:Talk!, 25 January 2021; I. Risini, "Human Rights in the Line of Fire - Georgia v Russia (II) before the European Court of Human Rights", *Verfassungsblog*, 28 January 2021; H. Duffy, "Georgia v. Russia: Jurisdiction, Chaos and Conflict at the European Court of Human Rights", Just Security, 2

to say briefly here that, in the context of the current conflict, the Court would have to decide whether particular attacks or incidents occurred during ‘active hostilities’, or whether Russia had effective control of the Ukrainian territory in question, or control over individuals (such as POWs). One could also question whether the Court’s 1 and 4 March interim measures orders (see above) contradict the Grand Chamber decision, by appearing to confirm the Court’s jurisdiction over ‘military attacks against civilians and civilian objects’ – in other words, attacks conducted during the active phase of hostilities. Indeed, Marko Milanovic has argued that the Court’s interim measures orders are ‘completely at odds with’ *Georgia v Russia (II)*.<sup>45</sup>

### *Other cases at the European Court*

Russia’s departure from the CoE does not prevent the Court from adjudicating on all pending cases (both individual applications and inter-state cases) and any future cases which relate to violations committed on or before 16 September 2022, and its findings will continue to be legally binding on Russia. This is no mean feat, as there were 18,000 cases pending against Russia at the end of February 2022, including several inter-state cases (brought by Ukraine, Georgia and the Netherlands).<sup>46</sup> The domestic remedies rule will continue to apply, meaning that cases may be lodged in Strasbourg a considerable time after 16 September (depending on which domestic remedies apply, and how long they take). As Kanstantsin Dzehtsiarou has suggested,<sup>47</sup> it remains to be seen to what extent Russia will engage with the Court’s litigation processes now that it has left the CoE (which may well raise questions about legitimacy), and how it will respond to any findings of ECHR violations by the Court. Previous experience does not augur well: the European Implementation Networks has reported that 90% of the leading judgments against Russia from the last ten years are still yet to be implemented.<sup>48</sup> As regards the interim measures applications issued by the Court in March and April 2022, Russia stopped responding to the Court’s requests after 16 March.<sup>49</sup>

ECHR violations committed by Russia after 16 September 2022 cannot be challenged at the European Court. This is nothing short of a tragedy, given victims’ loss of protection by the ECHR. Róisín Pillay of the International Commission of Jurists has said: ‘Nowhere has the ECtHR been more of a lifeline than in Russia. Victims of the most brutal human rights violations, failed by their national systems, found some hope of vindication there’.<sup>50</sup> Karinna Moskalenko, a Russian lawyer and one of the founders of the CURE campaign (Campaign to Uphold Rights in Europe),<sup>51</sup> has suggested that the inability to petition the European Court is

---

February 2021; J. Gavron and P. Leach, “Damage control after *Georgia v Russia (II)* – holding states responsible for human rights violations during armed conflict”, *Strasbourg Observers*, 8 February 2021.

<sup>45</sup> M. Milanovic, “Update on ECtHR Interim Measures Concerning Russia and Ukraine”, *EJIL:Talk!*, 1 April 2022.

<sup>46</sup> European Court of Human Rights, Pending applications allocated to a judicial formation, 28 February 2022. Available at: [https://www.echr.coe.int/Documents/Stats\\_pending\\_month\\_2022\\_BIL.PDF](https://www.echr.coe.int/Documents/Stats_pending_month_2022_BIL.PDF) [Accessed 5 April 2022].

<sup>47</sup> K. Dzehtsiarou, “What Would Russia’s Departure from the Council of Europe Mean for the Strasbourg System of Human Rights Protection?”, *ECHR Blog*, 11 March 2022.

<sup>48</sup> European Implementation Network, Country Report: Russia, 2020. Available at: <https://www.einnetwork.org/ein-publications> [Accessed 5 April 2022].

<sup>49</sup> European Court of Human Rights, Press Release, Expansion of interim measures in relation to Russian military action in Ukraine, 1 April 2022.

<sup>50</sup> Tweet by Róisín Pillay (International Commission of Jurists), @RoisinPillay, 15 March 2022.

<sup>51</sup> See: <https://cure-campaign.org/home#home> [Accessed 5 April 2022].

‘a punishment for ordinary people, not for the government’.<sup>52</sup> This was also the view of leading Russian human rights defenders, discussing the risk of Russia’s expulsion or withdrawal from the CoE back in 2018:

‘Those who wish to punish the Kremlin miss the target: it is not the Russian government, but the Russian public who would suffer the most. For millions of people residing in Russia ... the ECtHR has been an ultimate hope for justice, which in many cases they cannot find in Russia. Thousands of its judgments have had a significant positive impact on Russian laws and judicial practice’.<sup>53</sup>

### *A judge from Russia*

There will no longer be a Russian judge on the Court after 16 September 2022, as Article 20 ECHR provides that the Court ‘shall consist of a number of judges equal to that of the High Contracting Parties’ (and there is currently an elected judge in respect of each of the other 46 states). The most recent incumbent, Mikhail Lobov, was only elected on to the Court on 2 January 2022. He had more than 15 years’ experience within the Council of Europe – within the Court Registry, the Department for the Execution of Judgments and the Human Rights Policy and Co-operation Department of the Human Rights and Rule of Law Directorate General. There is some uncertainty as to the formation of the Court when handling the remaining Russian cases. Article 26 ECHR requires the Russian judge to sit as an *ex-officio* member of any chamber or grand chamber which hears a case relating to Russia, but where there is no such judge, Article 26 could be read to permit the President of the Court to select a judge from the list of ad hoc judges previously submitted by Russia.<sup>54</sup>

### **Conclusion: lessons to learn?**

A situation unprecedented in Europe since World War II has seemingly led to a robust and principled response which has sought to underline the fundamental importance of the international rule of law. The decision of the CoE to expel Russia could indeed enhance its legitimacy in the eyes of many, as a necessary response to the invasion of Ukraine. However, Murray Hunt has rightly pointed out that in recent years there has been a steady erosion of the rules-based international order, caused by the actions of many democratic states which have chosen to violate international rules, spuriously citing the primacy of national laws.<sup>55</sup> The CoE has certainly not been immune to such pressure, exerted by various states, including the UK which has itself flirted with withdrawal, as has been documented.<sup>56</sup> States such as Turkey and Azerbaijan have been in frequent, flagrant violation of the ECHR, over many years,

---

<sup>52</sup> Campaign to Uphold Rights in Europe, Minutes - Meeting of 4 March 2022 from 15:00 to 16:40 CET (on file with the author).

<sup>53</sup> Addressing the Crisis in Relations between the Council of Europe and Russia: Uphold the Values and Fulfil and Mission to Protect Rights across all of Europe, Memorandum by Russian human rights defenders, November 2018. Available at: <https://mhg.ru/addressing-crisis-relations-between-council-europe-and-russia-uphold-values-and-fulfil-mission> [Accessed 5 April 2022].

<sup>54</sup> Another possibility would be to interpret the phrase ‘High Contracting Party’ in Article 26(4) ECHR to mean a High Contracting Party at the time when the case is considered (which would not include Russia, after 16 September 2022).

<sup>55</sup> M. Hunt, “A Special Tribunal for Putin”, Project Syndicate, 11 March 2022. Available at: <https://www.project-syndicate.org/onpoint/special-tribunal-putin-crime-of-aggression-by-murray-hunt-2022-03> [Accessed 5 April 2022].

<sup>56</sup> See, for example: P. Leach and A. Donald, “Hostility to the European Court and the risks of contagion”, UK Human Rights Blog, 21 November 2013.



without any decisive response from the CoE. Esra Demir-Gürsel has questioned whether Russia's expulsion has now set a very high threshold for the assessment of other such states.<sup>57</sup>

Twenty-two years ago, the Russian armed forces were bombing their own people, in the village of Katyr-Yurt in Chechnya (population: 18,000-25,000). When this attack was scrutinised by the European Court of Human Rights (in the 2005 judgment in *Isayeva v Russia*), it found that fighter jets had been deployed with bombs which had a damage radius exceeding 1,000 metres (representing a 'massive use of indiscriminate weapons'), that there was no evidence that 'any serious calculations were made about the evacuation of civilians', and that amidst confusion over safe passage for the village inhabitants, for a period they were 'prevented from leaving the scene of fighting on the order of the operation's commanders'.<sup>58</sup> The *Isayeva* decision was one of the first of several hundred judgments from the European Court finding very serious breaches of the ECHR committed by the Russian armed or security forces in Chechnya and the wider north Caucasus region.<sup>59</sup>

Those cases have remained on the CoE agenda (and CM docket) for the past 15 or so years, however, CoE states have not seriously attempted to enforce these judgments or ensure that the victims are redressed. My colleagues and I at the European Human Rights Advocacy Centre (EHRAC)<sup>60</sup> and at the Russian NGO Memorial<sup>61</sup> have spent much of this time speaking to state representatives, trying to persuade them to take up these cases properly, to exert real pressure on the Russian authorities and use the legal or diplomatic tools available to them. However, in spite of personal interest from some individual diplomats, the overwhelming state response has been that of complacent disinterest – as the states were not directly affected, it was seen to be too 'difficult' (or even too 'political') to take action, and much else besides was far more pressing. This reflects a much wider problem about CoE states' inadequate backing for the Court and their failure to take the trouble to work diligently to ensure that its judgments (against all states) are properly implemented, within a reasonable time period. For the Russian people, this has also meant a disastrous failure to double down on judgments highlighting the state authorities' alarmingly increasingly repressive measures, allowing unregulated surveillance of mobile phones by the security services,<sup>62</sup> the widespread suppression of peaceful protest,<sup>63</sup> the repeated detention and prosecution of opposition politicians,<sup>64</sup> the poisoning of dissidents<sup>65</sup> and the death of 330 people in the aftermath of the Beslan school siege in 2004.<sup>66</sup>

---

<sup>57</sup> E. Demir-Gürsel, "The Council of Europe's Sharp Turn: Russia's Expulsion and its Possible Implications for Other Member States", *Verfassungsblog*, 25 March 2022.

<sup>58</sup> *Isayeva v Russia* (App. No. 57950/00), judgment of 24 February 2005, paras. 189-194.

<sup>59</sup> As has been documented by both the European Human Rights Advocacy Centre (EHRAC) (see: [https://ehrac.org.uk/en\\_gb/country/russia/](https://ehrac.org.uk/en_gb/country/russia/)) and the Stichting Justice Initiative (see: <https://www.srji.org/en/legal/cases/>) (Accessed 5 April 2022).

<sup>60</sup> See: [https://ehrac.org.uk/en\\_gb/](https://ehrac.org.uk/en_gb/)

<sup>61</sup> See: <https://memohrc.org/en>

<sup>62</sup> *Roman Zakharov v Russia* (App. No. 47143/06), [GC] judgment of 4 December 2015.

<sup>63</sup> See: Interim Resolution CM/ResDH(2022)54, Execution of the judgments of the European Court of Human Rights, Lashmankin group against Russian Federation (Adopted by the Committee of Ministers on 9 March 2022 at the 1428th meeting of the Ministers' Deputies).

<sup>64</sup> *Navalnyy v Russia* (App. No. 29580/12) [GC], judgment of 15 November 2018.

<sup>65</sup> *Carter v Russia* (App. No. 20914/07), judgment of 21 September 2021.

<sup>66</sup> *Tagayeva and Others v Russia* (App. No. 26562/07), judgment of 13 April 2017.

This is the moment to learn lessons - to really learn them in light of recent events – and to instigate a careful reflection and strategic re-think. Andrew Forde has called for a summit of heads of state and government in order to do so (which would only be the fourth in the history of the CoE) – ‘to salvage, revitalise and reinforce Europe’s human rights protection architecture’.<sup>67</sup> Clear-sighted thinking is certainly needed, but it must not of course be confined to state parties. It is absolutely essential that civil society in all its many facets must be fully included in the conversation, not least so that the voices of victims of human rights violations are heard.

In any event, we must surely give full-hearted support to the existing multi-lateral legal systems and machinery, and use the full range of tools which are already at our disposal. In Strasbourg, this should mean inter-state cases instigated in order to police member states acting out of line, or the use of infringement proceedings and other measures (such as the complementary joint procedure,<sup>68</sup> as discussed by Silvia Steininger)<sup>69</sup> to actively persuade, cajole and arm-twist governments into taking seriously their obligations to comply with European Court judgments. At Rome in 1950, CoE states acknowledged the need for the collective enforcement of human rights – there is no more important time than now to reassess what that means.

[note]

Professor of Human Rights Law at the University of Middlesex, and former Director of EHRAC. Email: [p.leach@mdx.ac.uk](mailto:p.leach@mdx.ac.uk)

This article is a revised and updated version of the author’s blogpost published by Strasbourg Observers on 17 March 2022: <https://strasbourgobservers.com/2022/03/17/a-time-of-reckoning-russia-and-the-council-of-europe/>

The author is very grateful to Dr Alice Donald, Andrew Drzemczewski, Jess Gavron and Murray Hunt for their wise comments on an earlier draft.

---

<sup>67</sup> A. Forde, “Political Salvation of Europe’s Human Rights System? The Case for a Fourth Council of Europe Summit”, ECHR Blog, 21 March 2022.

<sup>68</sup> Parliamentary Assembly of the Council of Europe, Resolution 2319 (2020), Complementary joint procedure between the Committee of Ministers and the Parliamentary Assembly in response to a serious violation by a member State of its statutory obligations, 29 January 2020.

<sup>69</sup> S. Steininger, “With or Without You: Suspension, Expulsion, and the Limits of Membership Sanctions in Regional Human Rights Regimes”, Heidelberg Journal of International Law, Volume 81 (2021) Issue 2, 533 – 566.