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THE RUSSIAN "SPECIAL MILITARY OPERATION" IN UKRAINE BEFORE INTERNATIONAL COURTS

Abstract: *Following the so-called "special military operation", which was in fact an open aggression against Ukraine, Russia was expelled from the Council of Europe. This step has significant legal consequences, including for the jurisdiction of the European Court of Human Rights. Meanwhile, many individual applications were filed with the Court, and Ukraine brought an inter-State complaint against Russia. Ukraine has also triggered the International Court of Justice. The Court has already ordered provisional measures. The ICC Prosecutor has launched an investigation into the most serious international crimes, war crimes, crimes against humanity, and genocide in Ukraine and delivered arrest warrants against the Russian President and his Commissioner for Children's Rights. There is a serious discussion going on concerning the establishment of a special tribunal for the crime of aggression. This text deals with some aspects of the Russian "special military operation" cases before international courts. It attempts to identify what role the international courts may play in the new phase of the conflict in Ukraine and the extent and effect of their intervention, given the jurisdictional limitations and the inability to enforce judgments.*

Keywords: use of force, international courts, aggression in Ukraine, Russia and the ECHR, ECtHR, genocide, ICC investigation

INTRODUCTION

On 24 February 2022 Russia invaded Ukraine under the somewhat innocuous title of a "special military operation". However, the Russian aggression against Ukraine began much earlier. It led to the annexation of Crimea in 2014, the occupation of parts of eastern Ukraine, and the establishment of two separatist republics, Donetsk and Lugansk.

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Their independence was spectacularly, and contrary to international law, recognised by Russia (the occupying power) on 21 February 2022,[1] just days before the invasion.

The new brutal Russian armed attack provoked sharp, swift, and clear reactions from the international community.[2] Among others, on the same day the Committee of Ministers of the Council of Europe "condemned in the strongest terms the armed attack on Ukraine by the Russian Federation in violation of international law".[3] The following day, it suspended Russia from the Council of Europe (CoE)[4] and on 16 March 2022 expelled it from the organization.[5] As a consequence, six months later Russia ceased to be a party to the European Convention on Human Rights (ECHR). In the meantime, a number of individual applications have been brought to the European Court of Human Rights (ECtHR) in relation to the Russian aggression, and Ukraine has filed an inter-State complaint against Russia. Ukraine has also triggered the International Court of Justice (ICJ), under the Convention on the Prevention and Punishment of the Crime of Genocide, skilfully using one of Russia's main arguments justifying its "special military operation", i.e. alleging acts of genocide committed on Ukrainian territory. The Court has already managed to indicate provisional measures in the *Allegations of Genocide case (Ukraine v. Russian Federation)*.[6] In parallel, another court, the International Criminal Court (ICC), has become involved in the case.

However, the competence of international courts is limited by the extent to which the parties have consented to their jurisdiction. The ICJ can adjudicate in the *Allegations of genocide case* due to the compromissory clause in the Genocide Convention, to which both States are the parties. This article deals with some aspects of the "special military operation" cases already brought before the ICJ and the ECtHR and the actions taken, as well as those which could be taken by the ICC with regard to, *inter alia*, the crime of aggression. It attempts to show the challenges faced by international courts and examine what role they might play and

[1] *See e.g.* the statement of the same date by the Secretary General of the Council of Europe, available at: https://www.coe.int/en/web/portal/-/statement-by-council-of-europe-secretary-general-marija-pejcinovic-buric-on-the-recognition-of-the-so-called-people-s-republics-of-donetsk-and-luhan-1 (accessed 30 April 2023).

[2] See in particular the UNGA resolution of 2 March 2022, *Aggression against Ukraine*, Doc. A/RES/ES-11/1, based on the United for Peace mechanism, passed by a vote of 141 States for, with 5 against, and 35 abstentions); Versailles Declaration of the Heads of State or Government of EU Member States, Informal meeting, Versailles, 11 March 2022.

[3] *Situation in Ukraine*, CM/Del/Dec(2022)1426bis/2.3, 24 February 2022.

[4] *Measures to be taken, including under Article 8 of the Statute of the Council of Europe*, 25 February 2022, CM/Del/Dec(2022)1426ter/2.3.

[5] *Resolution on the cessation of the membership of the Russian Federation to the Council of Europe*, 16 March 2022, CM/Res(2022)2.

[6] ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order, 16 March 2022.

what might be the scope and effect of their intervention, given the limitations on jurisdiction and the difficulties in enforcing their decisions.

1. ICJ – *ALLEGATIONS OF GENOCIDE CASE (UKRAINE V. RUSSIAN FEDERATION)*

The ICJ is the principal judicial organ of the United Nations, resolving disputes between States relating to the application of international law. Its decisions constitute an authoritative statement of the existence of international obligations.

Ukraine has already tried, successfully, to trigger the ICJ's jurisdiction in relation to the annexation of Crimea in 2014 and the situation in Eastern Ukraine. On 16 January 2017, it brought the case against Russia for violations of the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999, and the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965. The Court was requested to determine whether the Russian Federation had an obligation to act and cooperate in preventing and combating the financing of terrorism in the context of the events in Eastern Ukraine, and whether it breached the 1965 Convention through discriminatory measures taken against Crimean Tatars and the Ukrainian community in Crimea. On 17 April 2017 the ICJ indicated provisional measures (at Ukraine's request),[7] and on 8 November 2019 delivered its judgment on preliminary objections. The Court concluded that it has jurisdiction to entertain the claims made by Ukraine under both treaties, and that Ukraine's application with regard to those claims is admissible.[8] The Court's decision on the merits is pending.[9]

Ukraine has limited prospects to initiate any proceedings against Russia, both in relation to the 2014 invasion and with respect to the current events, let alone file a complaint directly relating to Russia's aggression. Indeed, neither party made a declaration recognising the Court's compulsory jurisdiction under Art. 36(2) of the ICJ Statute. It was only possible to submit a dispute on the basis of Art. 36(1) of the Statute, indicating the relevant agreement to which both States are parties and which contains their consent to the jurisdiction of the Court. To use ICJ Judge

[7] On the Russian challenge to provisional measures, *see* the ICJ judgment of 8 November 2019, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, Preliminary Objections, ICJ Rep 2019, paras. 9-11.

[8] *Ibidem*.

[9] For more on this subject and on cases brought by Ukraine before other courts, *see, inter alia*, G. Nuridzhanian, *Ukraine v. Russia in International Courts and Tribunals*, EJIL: Talk!, 9 March 2016, available at: https://www.ejiltalk.org/ukraine-versus-russia-in-international-courts-and-tribunals/ (accessed 30 April 2023).

Greenwood's term, in such cases there is a "Cinderella problem". A State has to try forcefully, perhaps clumsily, to squeeze itself into the glass slipper of a jurisdiction clause that is really far too small for the case it wants to bring.[10]

This time however, Cinderella has rather neatly squeezed[11] the issue of the "special military operation" into the framework of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Art. IX of which provides that: "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute".

In its application of 26 February 2022 initiating the proceedings, Ukraine sought a declaration, *inter alia*, that Russia falsely claimed that acts of genocide had taken place in the Lugansk and Donetsk regions of Ukraine. Therefore, it could not take any action to prevent or punish the alleged genocide, recognise the independence of the so-called Donetsk People's Republic and the so-called Luhansk People's Republic, or initiate and conduct a "special military operation" on 24 February 2022 against Ukraine. Ukraine further demanded that full compensation be awarded for the damage caused by Russia as a consequence of it having taken actions on the basis of a false allegation of genocide.

For the time being, the Court has only decided on provisional measures requested by Ukraine. The ICJ ordered Russia to, firstly, immediately suspend the military operations launched on 24 February 2022 on the territory of Ukraine (by a vote of 13:2); secondly, to ensure that no military or irregular armed units that may be directed or supported by it, as well as any organisations or persons that may be subject to its control, direction or influence; or take any steps to support the military operations referred to above (by a vote of 13:2). Thirdly, the ICJ ordered both parties to refrain from any actions that could intensify or extend the conflict (unanimous vote).[12]

The first two measures, adopted over the objections of the Russian and Chinese judges (judges Gevorgian and Xue), essentially correspond to Ukraine's requests. The third measure was modified from the original proposal, as it was to be addressed

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[10] Quoted by Nuridzhanian (*ibidem*).

[11] *See* J. Kranz, *Ukraina ma dobre karty w sporze z Rosją przed Międzynarodowym Trybunałem Sprawiedliwości. Zarządzenie Trybunału z 16 marca 2022 r. w sprawie środków tymczasowych* [Ukraine has good cards in its dispute with Russia before the International Court of Justice. Order of the Court of 16 March 2022 on provisional measures], Monitor Konstytucyjny, 18 March 2022, available at: https://monitorkonstytucyjny.eu/archiwa/21401 (accessed 30 April 2023).

[12] ICJ, Order of 16 March 2022. *See e.g.* M. Milanovic, *ICJ Indicates Provisional Measures Against Russia, in a Near Total Win for Ukraine; Russia Expelled from the Council of Europe*, EJIL: Talk!, 16 March 2022, available at: https://bit.ly/3HdfwEa (accessed 30 April 2023).

only to Russia.[13] On the other hand, the request to impose on Russia an obligation to report on the actions taken to implement the provisional measures was rejected by the Court.

Admittedly, the decision on provisional measures does not prejudge the question of the scope of the ICJ's jurisdiction or the decision on the merits, but it does establish that the Court has *prima facie* jurisdiction. First, the ICJ rejected the Russian allegation[14] that the Genocide Convention did not apply because the formal basis for the "special military operation" was the right to self-defence (Art. 51 of the UN Charter and customary law).[15] The Court pointed to a number of statements and actions by the Russian authorities from 2014 onwards that explicitly referred to genocide on the territory of Ukraine and the need to stop it as a goal of the use of force,[16] including a published address by President Putin. Its reading leaves no doubts: "We had to stop this nightmare – a genocide against the millions of people living there who are pinning their hopes only on Russia, on us alon".. And further: "[its] purpose is to protect people who have been subjected to abuse and genocide by the Kiev regime for eight years. And to this end, we will seek the demilitarization and de-Nazification of Ukraine, as well as the prosecution of those who have committed numerous bloody crimes against civilians, including citizens of the Russian Federation".[17]

Second, the ICJ appears to have accepted Ukraine's interpretation of Arts. I and IV of the Genocide Convention, which includes the right not to be subjected to false allegations of genocide that are used to justify the use of force.[18] It is telling that the Court said that it was not presented with evidence substantiating the Russian

[13] Judge ad hoc Daudet considered that this measure should only be addressed to the Russian Federation, which has been explicitly identified by the UNGA as the perpetrator of the aggression against Ukraine, ICJ Order of 16 March 2022, Declaration of Judge ad hoc Daudet.

[14] ICJ, Order of 16 March 2022, paras. 32-34.

[15] Document (with annexes) from the Russian Federation setting out its position regarding the alleged "lack of jurisdiction" of the Court in the case, 7 March 2022, para. 15, available at: https://www.icj-cij.org/sites/default/files/case-related/182/182-20220307-OTH-01-00-EN.pdf (accessed 30 April 2023).

[16] ICJ, Order of 16 March 2022, paras. 37-41. *See also* the Separate Opinion of Judge Robinson.

[17] Annex to the letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, *Address by the President of the Russian Federation*, 24 February 2022, Doc. Security Council S/2022/154.

[18] *See* Declaration of Vice-President Gevorgian. Judge Gevorgian found the argument to be of the same nature as the rejected allegations in cases brought by Yugoslavia against several NATO States under the Genocide Convention. In his view, the present dispute concerns the use of force by the Russian Federation on Ukrainian territory. However, the Genocide Convention does not regulate the use of force, nor does the use of force of itself constitute an act of genocide. The Court was clear on this point in the 1999 *Legality of Use of Force cases (Legality of Use of Force (Yugoslavia v. Belgium)*, Provisional Measures, Order, 2 June 1999, ICJ Rep 1999, p. 138, para. 40). Similarly, *see* Declaration of Judge Xue. Differently Declaration of Judge Nolte, which indicates why the present case must be distinguished from the Legality of Use of Force cases. Judge Nolte rightly emphasises that Ukraine's request does not concern the question of whether the "special military operation" constitutes genocide, but whether a military operation to deter and punish those guilty of alleged genocide is compatible with the Convention.

accusation, and moreover that "it is doubtful that the Convention, in light of its object and purpose, authorizes a Contracting Party's unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide". Under these circumstances, the Court concluded that "Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine".[19]

The provisional measures indicated by the ICJ under Art. 41 of the Statute are binding on the party to which they are addressed.[20] However, the mechanism for enforcing them is rather weak.[21] Art. 94(2) of the UN Charter does not apply because it refers explicitly to the judgments.[22] Art. 41(2) of the ICJ Statute, on the other hand, provides only that "pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council". Nonetheless, the failure to implement provisional measures gives rise to the international responsibility of the State. This may be assessed by the ICJ in further phases of the proceedings, and the Court may award damages.[23]

Russia has manifestly failed to comply with the Court's orders. Its position was rather clear from the outset; it had already communicated to the Court on 7 March 2022 that it would not participate in the oral proceedings because it believed that the Court had no jurisdiction.[24] According to ICJ case law, the absence of a party does not constitute an obstacle to the proceedings and does not affect the validity

[19] ICJ, Order of 16 March 2022, paras. 59-60.

[20] *Ibidem*, para. 84. The Court reaffirmed the position it took in the *LaGrand case* (*Germany v. United States of America*), Judgment, ICJ Rep 2001, para. 109.

[21] *See* D.S. Borjas, *The ICJ Order in Ukraine v. Russia: Quo Vadis?*, Völkerrechtsblog, 28 March 2022, available at: https://voelkerrechtsblog.org/the-icj-order-in-ukraine-v-russia/ (accessed 30 April 2023). The author specifically considers the possibility for Ukraine to have recourse to the UN Charter to enforce the content of the Order under Chapter VI.

[22] *See* ICJ, Judgment of 24 February 1982, *Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, ICJ Rep 1982, para. 29 *in fine*. Art. 94(2) of the UN Charter reads: "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary make recommendations or decide upon measures to be taken to give effect to the judgment".

[23] *See e.g.* ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Rep 2007, para. 469.

[24] Document (with annexes) from the Russian Federation setting out its position regarding the alleged "lack of jurisdiction" of the Court in the case, *supra* note 15; *see also* ICJ, Order of 16 March 2022, paras. 12 and 15. *Kremlin Rejects Top UN Court's Order to Halt Ukraine Invasion*, The Moscow Times, 17 March 2022, available at: https://www.themoscowtimes.com/2022/03/17/kremlin-rejects-top-un-courts-order-to-halt-ukraine-invasion-a76975 (accessed 30 April 2023) – citing a statement by D. Peskov, spokesman for President Putin.

of the provisional measures ordered.[25] Consequently, the ICJ may pass judgment on the merits despite Russia's non-participation.

However, in an exchange of letters with the ICJ on setting deadlines for the submission of memoranda, Russia claims that the government is still considering the question of further participation in the proceedings. The Court set a date of 23 September 2022 for Ukraine to file its memorandum, and 23 March 2023 for the Russian Federation.[26] These deadlines have been extended. A final decision will therefore have to wait.

In the meantime, declarations for interventions (under Art. 63 of the Statute) to support the Ukrainian arguments have been submitted by thirty-three States parties[27] to the Genocide Convention, including by Poland, which maintained that "[t]he Convention's object to protect the most elementary principles of morality also prohibits any possibility of a State Party abusing its provisions by other means. It would undermine the Convention's credibility as a universal instrument to outlaw the most abhorrent crime of genocide if its authority could be abused by any State Party without giving the victim of such abuse the opportunity of having recourse to the Court".[28] In its conclusion, Poland concurred with the interpretation of the Genocide Convention that invoking a manifestly ill–founded allegation of genocide as justification for the use of force against another State is in clear contravention of Art. I of the Genocide Convention.[29]

Apart from the fact that the ICJ Order of 16 March 2022 has not yet been implemented, Ukraine has achieved its first successes in the case. The Court acknowledged that the use of force by Russia was not only brutal but also raises very serious issues of international law,[30] and took the opportunity to speak out on these matters. Moreover, Ukraine gained significant support from the countries intervening in the proceedings. Judges should not ignore this, just as fake application of the law should not be ignored.

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[25] ICJ, Order of 16 March 2022, para. 23. Pursuant to Art. 53(1) of the Statute: "Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim".

[26] *Ibidem*.

[27] Latvia (21 July 2022); Lithuania, New Zealand, United Kingdom, Germany, United States of America, Sweden, France, Romania, Italy, Poland (15 September 2022); Denmark, Ireland, Finland, Estonia, Spain, Australia, Portugal, Austria, Luxemburg, Greece, Croatia, Czechia, Bulgaria, Malta, Norway, Belgium, Canada and the Netherlands, Slovakia, Slovenia, Cyprus, Liechtenstein (15 December 2022).

[28] Declaration of intervention under Article 63 of the Statute of the Court submitted by the Republic of Poland of 15 September 2022, para. 34.

[29] *Ibidem*, para. 42.

[30] ICJ, Order, 16 March 2022, paras. 18 and 75.

Even if the ICJ's judgment on the merits is also not implemented, its findings may be relevant to international law in general and the assessment of the legal implications of Russia's "special military operation".

2. THE "SPECIAL MILITARY OPERATION" AT THE ECTHR

2.1. Early response

Cases against Russia over "the special military operation" in Ukraine have also been brought to the ECtHR by a number of private parties, and as early as 28 February 2022 by Ukraine itself (*Ukraine v. Russia (X)*[31]).

In turn, the Russian Federation announced its decision to withdraw from the Council of Europe and from the European Convention on Human Rights. The ECtHR granted urgent interim measures and the CoE made the unprecedented decision on the exclusion of the Russian Federation from the organization. Here we will look at the reaction of the CoE and the ECtHR, focusing on, *inter alia*, the developments in its jurisprudence on armed conflicts.

As has already been indicated, the early ECtHR's response to Russia's special military operation was the adoption of urgent interim measures under Rule 39 of the Court.[32] It first did so on 1 March 2022 in the case *Ukraine v. Russia (X)*, in response to the Ukrainian request of 28 February 2022 to indicate interim measures against Russia with regard to "massive human rights violations committed by Russian troops during the military aggression against the sovereign territory of Ukraine".[33] Unlike the ICJ's orders on provisional measures, the ECtHR's orders

[31] *Ukraine v. Russia* (X) (App. No. 11055/22). The Court received the completed application on 23 June 2022. Ukraine alleges, *inter alia*, that Russia has unlawfully invaded Ukraine and that its invasion and occupation of parts of Ukraine is ongoing. Russian military and/or separatist or other irregular paramilitary forces under the control of the Russian authorities at the highest levels, up to and including the President, are carrying out ruthless, inhumane, indiscriminate attacks on civilians and their property (Press Release ECHR 220 (2022), 28 June 2022). On 17 February 2023 the Grand Chamber decided to join the case to the inter-State applications in *Ukraine and the Netherlands v. Russia*, which were already pending before it and which were declared partially admissible. The joined case will be referred to further as *Ukraine and the Netherlands v. Russia* (App. Nos. 8019/16, 43800/14, 28525/20 and 11055/22).

[32] Rule 39 of the Rules of Court reads as follows: "(1) The Chamber or, where appropriate, the President of the Section or the duty judge designated in accordance with paragraph 4 of this Rule may, at the request of a party or other interested person or on his own initiative, indicate to the parties any provisional measure which, in his opinion, should be adopted in the interests of the parties or the proper conduct of the proceedings. (2) If it is considered appropriate, the Committee of Ministers [of the Council of Europe] may be informed urgently of the measure adopted in a particular case. (3) The Chamber or, where appropriate, the President of the Section or the duty judge appointed in accordance with paragraph 4 of this Rule may request information from the parties on any matter relating to the implementation of any of the interim measures indicated. (4) The President of the Tribunal may appoint the Vice-Presidents of the Section as duty judges to decide on applications for interim measures".

[33] Press Release ECHR 068 (2022), 1 March 2022, *The European Court grants urgent interim measures in application concerning Russian military operations on Ukrainian territory*.

on interim measures are not made public. The Court's Press Release announcing the decision of 1 March 2022 informed only that Russia was called upon to refrain from armed attacks on civilians and civilian facilities, including dwellings, emergency vehicles and other specially protected civilian facilities such as schools and hospitals, and to immediately ensure the safety of medical facilities, personnel and emergency vehicles in territory under attack or siege by Russian troops. The Russian government was requested to inform the Court as soon as possible of the measures taken to ensure full compliance with the (ECHR). Finally, the Court decided to give immediate notice of its decision to the Committee of Ministers of the CoE (pursuant to Rule 39 (2) of the Rules of Court).

Secondly, the ECtHR indicated interim measures in relation to a number of individual cases of persons hiding in various types of buildings, fearing for their lives due to the continuous shelling and shooting, without (or with limited) access to food, health care, water, sanitation, electricity and other related services necessary for survival, who were in need of humanitarian assistance and safe evacuation. In the decision of 4 March 2022,[34] referring to the general nature of the measures indicated on 1 March 2022 in the inter-State case, the ECtHR specified that they also cover any complaint brought by the above-mentioned persons who provide sufficient evidence showing that they face a serious and imminent threat of irreparable harm to their physical integrity and/or right to life. In addition, the Court called upon Russia to ensure unimpeded access for civilians to safe evacuation routes, health care, food and other essential supplies, and the rapid and free flow of humanitarian assistance.

The scope of the interim measures has since slightly changed, as Ukraine requested that they be extended in view of the developments in Ukraine.[35]

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[34] Press Release ECHR 073 (2022), 4 March 2022, *Decision of the Court on requests for interim measures in individual applications concerning Russian military operations on Ukrainian territory*.

[35] Press Release ECHR 116 (2022), *Expansion of interim measures in relation to Russian military action in Ukraine*, 1 April 2022. The ECtHR decided to suspend the processing of applications against Ukraine as requested by its government (Press Release ECHR 069 (2022), 2 March 2022). In that contest another decision of the Court is also worth noting, although it does not directly concern the "special military operation". On 10 March 2022 the Court imposed interim measures against Russia for its actions blocking independent media in Russia that reported on military actions in Ukraine, in *ANO RID Novaya Gazeta and Others v. Russia* (App. No. 11884/22) – Press Release ECHR 084 (2022), 10 March 2022, *European Court applies urgent interim measure in the case of the Russian daily newspaper Novaya Gazeta*. The complaint was filed by two Russian companies and two Russian citizens, including D.A. Muratov, Nobel laureate and publisher of Novaya Gazeta, who applied for interim measures.

2.2. Binding nature of interim measures imposed by the ECtHR

The ECHR does not contain any provisions on interim measures. They are referred to only in Rule 39 of the Rules of Court[36] but their binding nature has been confirmed in a number of judgments on individual applications. The Court clarified that a failure by a State which had ratified the Convention to comply with interim measures would undermine the effectiveness of the right of individual application guaranteed by Art. 34 ECHR and the State's formal undertaking in Art. 1 ECHR[37] to protect the rights and freedoms in the Convention.[38] Similar reasoning can be applied to inter-State proceedings based on Art. 33 ECHR.[39] However, this does not change the grim picture of the (in)effectiveness of the interim measures.[40]

2.3. Interim measures in proceedings concerning armed conflicts

The Court has already imposed interim measures in proceedings concerning armed conflicts, including in cases relating to the situation in Ukraine (events in Crimea, eastern Ukraine, and the Sea of Azov).

However, their effectiveness is not high, especially when they are formulated in general terms, as can be seen in the case of the Nagorno-Karabakh dispute (*Armenia v. Azerbaijan*[41]). In that case the Court urged the parties to protect the rights under the ECHR and to refrain from military action. Inasmuch as this did not result in a de-escalation of the conflict, the Court identified further measures, equally general. The ECtHR called on all States directly or indirectly involved in the Nagorno-Karabakh conflict to refrain from actions that contribute to violations of the Convention.[42] The general formulation of such measures was much criticised,

[36] First applied in the dispute *Greece v. United Kingdom,* Commission Decision of 2 June 1956, No. 176/56, at the request of Greece. The practice of the 1960s and 1970s indicated respect for provisional measures, even if they were not mentioned in the ECHR. *See* C. Burbano Herrera, Y. Haeck, *Letting States off the Hook? The Paradox of the Legal Consequences following State Non-compliance with Provisional Measures in the Inter-American and European Human Rights Systems,* 28(3) Netherlands Quarterly of Human Rights 332 (2010), pp. 336-340. On the discussion related to their binding nature, *see* pp. 345-356.

[37] Art. 1 ECHR reads: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms set forth in Chapter I of this Convention".

[38] ECtHR (GC), *Mamatkulov and Askarov v. Turkey* (App. Nos. 46827/99 46951/99), 4 February 2005.

[39] Art. 33 ECHR reads: "Any High Contracting Party may bring a complaint before the Court if it considers that another High Contracting Party has violated the provisions of this Convention or its Protocols".

[40] Provisional measures imposed in inter-State proceedings are often not implemented and for this reason are also criticised. *See e.g.* P. Leach, *Ukraine, Russia and Crimea in the European Court of Human Rights,* EJIL: Talk!, 19 March 2014, available at: https://bit.ly/3oUhpiY; V.P. Tzevelekos, *On the value of interim measures by the ECtHR on inter-state disputes*, Strasbourg Observers, 3 February 2021, available at: https://bit.ly/3n51o9j (both accessed 30 April 2023).

[41] *Armenia v. Azerbaijan* (App. No. 42521/20), Press Release ECHR 265 (2020), 30 September 2020.

[42] The Court therefore imposed further measures on 6 October 2020, in relation to the same conflict but between slightly different States, in *Armenia v. Turkey* (App. No. 43517/20), Press Release ECHR 276 (2020), 6 October 2020.

in particular because it was not clear what needed to be done to implement them and, consequently, whether they had been carried out.[43]

This seems to have been the reason why Ukraine's requests for interim measures were detailed and referred to specific features of the successive phases of the conflict.[44]

The ECtHR's response towards most of the requests may seem simplistic. In the decision communicated on 1 April 2022 the Court recalled the interim measures of 1 and 4 March 2022 and emphasised that they must be understood as covering Ukraine's current requests.[45] Although the decision takes the indirect form of listing such interim measures, it is clear what Russia should do.

It is also noteworthy that when Russia started abducting and forcibly deporting large numbers of civilians, including children, to the Russian Federation, Ukraine requested that it be indicated to the Russian Federation, also in case *Ukraine v. Russia (X)*, that it should ensure free access for civilians to safe evacuation routes approved by the Government of Ukraine, and that the said evacuation routes should allow civilians to seek safe refuge in Ukraine or third countries, excluding the Russian Federation or Belarus. The Court answered that the request is covered by the interim measures of 4 March 2022, but emphasized a novelty: the Court specifically obliged Russia to secure evacuation routes for civilians enabling them to take refuge in safer regions of Ukraine. In this way, Russia's "special military operation" resulted in the ECtHR imposing such an obligation on the State for the first time.

2.4. Confirmation of the application of the ECHR in time of armed conflict

Even if the interim measures ordered by the ECtHR in relation to the "special military operation" are not effective, they nevertheless have their importance. They unequivocally illustrate that Russia is committing grave, regular and continuing violations of human rights during an armed conflict that it has started and does not intend to end. Moreover, they augur a departure by the ECtHR from the

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[43] K. Istrefi, A. Buyse, *Strasbourg Court issues interim measures against Turkey regarding the Nagorno-Karabakh conflict*, ECHR Blog, 7 October 2020, available at: https://bit.ly/3LC3AOK (accessed 30 April 2023).

[44] In a request dated 16 March 2022, as well as in further letters to the Court, Ukraine demanded, e.g., that Russia not take any steps, whether by further attacking, interrupting the power supply or in any other way, likely to diminish the safety and security of nuclear facilities in Ukraine and to protect the fundamental rights of all workers currently detained at such sites. Ukraine also asked the Court to order Russia to cease all operations by Russian forces or agents aimed at the assassination (or abduction or disappearance) of civilian leaders of Ukraine and other Ukrainian citizens, and to immediately protect the fundamental rights of at least the chairman of the village of Nikolske (Mr. Vasyl Mitko), the Mayor of Dniprorudne (Mr. Yevhen Matveyev) and the Chairman of the Melitopol District Council (Mr. Sergei Pryym), all abducted by Russian agents between 11 and 13 March 2022.

[45] Press release ECHR 116 (2022), 1 April 2022, *Expansion of interim measures in relation to Russian military action in Ukraine*.

much-criticised[46] limitation of the ECtHR's jurisdiction in favour of humanitarian law, presented in its 2021 judgment in *Georgia v. Russia (II)*[47] concerning the 2008 war in South Ossetia and Abkhazia.

In *Georgia v. Russia (II)*, Georgia alleged that Russia had committed a number of serious, systematic violations of the ECHR. In the judgment, the ECtHR exonerated Russia of responsibility for its actions in the conflict territory during the initial, most heated period of the conflict (i.e. 8-12 August 2008) by referring to the concept of *effective control* developed earlier. The ECtHR observed that "in the event of military operations – including, for example, armed attacks, bombing or shelling – carried out during an international armed conflict, one cannot generally speak of "effective control" over an area. The very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos means that there is no control over an area".[48]

Thus, the ECtHR considered that a war zone creates a situation of chaos, in respect of which it cannot be said who has effective control over the territory. On this basis, Russia is not liable for violations of the ECHR by virtue of extraterritorial jurisdiction (for actions outside its territory). The Court noted that "having regard in particular to the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances and the fact that such situations are predominantly regulated by legal norms other than those of the Convention (specifically, international humanitarian law or the law of armed conflict), the Court considers that it is not in a position to develop its case-law beyond the understanding of the notion of "jurisdiction" as established to date".[49]

This part of the ruling marked a victory for Russia, although the ECtHR acknowledged Russia's responsibility for actions carried out in the later phase of the conflict. But the judgment gave the impression that the ECtHR would seek to refrain from deciding cases involving extensive human rights violations in armed conflicts. This, in turn, was met with a sharp reaction from three judges (Yudkivska, Wojtyczek, Chanyuria) in these proceedings. The dissenting judges specifically referred to paragraph 141 of the judgment, stating that

> [T]he role of this Court consists precisely in dealing in priority with difficult cases characterised by "the large number of alleged victims and contested incidents, the magnitude

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[46] I. Risini, *Human Rights in the Line of Fire: Georgia v. Russia (II) Before the European Court of Human Rights*, Verfassungsblog, 28 January 2021, available at: https://verfassungsblog.de/human-rights-in-the-line-of-fire/ (accessed 30 April 2023); K. Dzehtsiarou, *Georgia v. Russia II*, 115(2) American Journal of International Law 288 (2021).

[47] ECtHR, *Georgia v. Russia (II)* (App. No. 38263/08), 21 January 2021.

[48] *Ibidem*, para. 126.

[49] *Ibidem*, para. 141.

> of the evidence produced, and the difficulty in establishing the relevant circumstances". Moreover, "the fact that such situations are predominantly regulated by legal norms other than those of the Convention" should not be an obstacle for the application of the Convention. Furthermore, we are not proposing that the Court should "develop its case-law beyond the understanding of the notion of 'jurisdiction' as established to date" but rather that it should confer more consistency on the general principles established in the case-law and apply those principles in a more coherent way.[50]

The interim measures indicated by the ECtHR against Russia in the context of the "special military operation" are far-reaching and quite detailed. They certainly confirm the application of the ECHR also in the acute phase of an armed conflict. This may mark a shift in the approach to the relationship between human rights and humanitarian law.

2.5. Impact of Russia's exclusion from the Council of Europe on cases before the ECtHR

The Russian Federation was expelled from the Council of Europe for its "special military operation" in Ukraine as early as on 16 March 2022 under Art. 8 of the CoE Statute. This provision was used for the first time in its history, initially to suspend Russia from membership and, after a short time, to remove it from the organisation. It reads as following: "Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine".

The basic premise for the application of Art. 8 is a serious breach of Art. 3, which obliges Member States to uphold the principle of the rule of law; to ensure respect for human rights for all persons within their jurisdiction; and to cooperate sincerely and effectively to achieve the objectives of the CoE.[51] Thus Russia's expulsion from the CoE implied that its aggression against Ukraine constitutes a serious breach of its obligations under Art. 3 of the Statute,[52] which sets an extremely high threshold for the application of Art. 8.

[50] *Ibidem*, joined partly dissenting opinion of judges Yudkivska, Wojtyczek, Chanturia, para. 9. *See also* the Concurring opinion of Judge Keller, para. 11.

[51] Art. 3 of the Statute of the CoE of 5 May 1949 states: "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I".

[52] 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.

Several important questions arise in connection with these developments, including the definition of the threshold for a "serious violation" of Art. 3 of the Statute; the interpretation of Art. 8; and the relationship between the Art. 8 procedure and the termination of the ECHR with regard to Russia. We will only briefly address the first two issues. However, it is worth emphasising that it was only the aggression against Ukraine that prompted the Committee of Ministers to apply Art. 8 of the Statute. This marks the end of the policy pursued towards Russia from the very beginning of its membership of the CoE. Russia was admitted to the CoE in 1996 notwithstanding its serious human rights violations in Chechnya.[53] Nor was it removed despite its armed involvement in Chechnya since 1999; in Georgia in 2008; its annexation of Crimea in 2014; its actions in the Donbass in 2014; and its failure to comply with ECtHR judgments and the establishment of a special constitutional mechanism for this purpose in 2015.[54]

Legitimate questions therefore arise as to how the CoE will respond to violations of Art. 3 of the Statute, and whether it will maintain the high threshold of a "serious violation" resulting from the Russian precedent, or loosen it; as well as whether this is a turning point marking a crisis for the organisation, or rather an impulse for its increased role in the protection of the rule of law and the prevention of conflicts.[55] This first use of Art. 8 of the Statute comes at a difficult time, when systemic violations of human rights and the rule of law are taking place in several other Member States, including Poland. It makes the threat of suspension and expulsion more credible also for them, especially given that the Council of Europe has been criticised for cautious, late, and weak responses to such violations.[56]

However, let us return here to the Russian precedent. It demonstrated the inadequacy of the provisions of the Statute and the ECHR to meet the new challenges. Art. 8 of the Statute does not provide for the immediate exclusion of the State from the organisation. It specifies that the Committee of Ministers should first request a Member State to withdraw on the basis of Art. 7 of the Statute, and only after a Member State refuses to do so can it be excluded from the organisation.

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[53] P.A. Jordan, *Russia's Accession to the Council of Europe and Compliance with European Human Rights Norms*, Demokratizatsiya 2003, available at: https://demokratizatsiya.pub/archives/11-2_Jordan.PDF (accessed 30 April 2023).

[54] Venice Commission, *Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation,* Opinion No. 832/2015, CDL-REF(2016)006, Strasbourg, 20 January 2016.

[55] A. Forde, *From Grey Zones to Red Lines: Implications of the Ukraine Conflict on Europe's Human Rights System*, Völkerrechtsblog, 1 March 2022, available at: https://voelkerrechtsblog.org/from-grey-zones-to-red-lines/ (accessed 30 April 2023).

[56] 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, available at: https://voelkerrechtsblog.org/from-grey-zones-to-red-lines/ (accessed 30 April 2023).

Meanwhile, Russia had already notified its intention to withdraw from the CoE and to denounce the ECHR.[57]

It can therefore be argued that the Committee's decision to immediately expel Russia from the CoE was incompatible with the Statute.[58] Leaving aside the detailed consideration of this issue, the procedure is relevant for determining the date on which Russia ceased to be a member of the Council, and consequently a party to the ECHR. If Art. 7 of the Statute had been applied, according to its wording Russia would have remained a member of the Council until the end of the 2022 financial year,[59] although it would still be suspended.

In a resolution of 16 March 2022 the Committee of Ministers decided that, as of that date, the Russian Federation "ceases to be a member".[60] Does this mean it ceased to be bound by the ECHR on the same date? The ECHR does not contain a provision on the consequences of a State's immediate exclusion from the CoE, but Art. 58(3) ECHR stipulates that a contracting 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".

But what does the term "the same conditions" mean? Did Russia cease to be a party to the Convention on 16 March 2022? In view of these ambiguities the ECtHR adopted a resolution clarifying that the Russian Federation will remain a party to the ECHR until 16 September 2022, i.e. for another six months from the date of its exclusion.[61] The ECtHR did not give reasons for its decision, but nevertheless appears to interpret the phrase "under the same conditions" as referring to

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[57] The Resolution of the Committee of Ministers on the exclusion of the Russian Federation acknowledges that Russia "has already informed the Secretary General of its withdrawal", CM/Res(2022)2, 16 March 2022.

[58] M. Blanco, *A Backdoor Exit from the European Convention on Human Rights: Russia, the Council of Europe and Article 58(3) ECHR*, Verfassungsblog, 5 April 2022, available at: https://bit.ly/3AzEBW8 (accessed 30 April 2023).

[59] Art. 7 reads: "Any member of the Council of Europe may withdraw from it by formally notifying the Secretary-General of its intention to withdraw. The withdrawal shall take effect at the end of the financial year in which it is notified, if the notification is made within the first nine months of that financial year. If the notification is made during the last three months of the financial year, it shall take effect at the end of the following financial year".

[60] CM/Res(2022)2, 16 March 2022.

[61] 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. In paragraph 1 of the Resolution, the ECtHR declares that: "(1) the Russian Federation ceases to be a High Contracting Party to the Convention on 16 September 2022. (2) the Court shall remain competent to hear complaints against the Russian Federation in respect of acts or omissions which may constitute a violation of the Convention provided that they have occurred by 16 September 2022. (3) The suspension of the consideration of all complaints against the Russian Federation pursuant to the order of the President of the Tribunal of 16 March 2022 is lifted with immediate effect. (4) This Resolution shall be without prejudice to the consideration of any legal issues relating to the effects of the cessation of the Russian Federation's membership in the Council of Europe that may arise in the exercise by the Tribunal of its competence under the Convention to hear cases brought before it".

the conditions provided for in Art. 58(1) and (2) to the voluntary withdrawal from the Convention. Art. 58(1) ECHR reads that "a contracting party may denounce the Convention after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe"; and according to paragraph 2 – a denunciation shall not have the effect of releasing the contracting party from its obligations under the Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.

It is also possible to consider that the decision of the ECtHR is incompatible with the Statute or the ECHR.[62] However, the Court's interpretation is both possible and moreover pragmatic.

Accordingly, the ECtHR will consider applications against Russia for any violations of the ECHR occurring until 16 September 2022.[63] Recent judgments and decisions by the ECtHR in two Grand Chamber and two Chamber cases have confirmed this scope of the Court's jurisdiction.[64] In *Svetova and Others v. Russia* of 24 January 2023, the Court specifically addressed the issue of Russia's failure to cooperate in the proceedings, in this case by not submitting written observations. The Court noted that this did not prevent the Court from examining the case, and that even though Russia had ceased to be a party to the Convention, it still had a duty to cooperate and to provide all necessary facilities for the effective examination of applications (Arts. 34 and 38 and Rule 44A of the Rules of Court).

And last but not least, the Court has finally decided on the situation of the Russian judge, which so far has raised some doubts. The Russian judge still sat on the panel deciding the *Fedotova* case (judgment of 17 January 2023).[65] It was different in the two subsequent cases (*Kutayev v. Russia* and *Svetova and Others v. Russia*).

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[62] *See e.g.* Blanco, *supra* note 58.

[63] Press release ECHR 036 (2023), 3 February 2023, *Latest rulings by the European Court set out the procedure for future processing of applications against Russia*.

[64] ECtHR (GC), *Fedotova and Others v. Russia* (App. Nos. 40792/10, 30538/14 and 43439/14), 17 January 2023, paras. 68-73; *Kutayev v. Russia* (App. No. 17912/15), 24 January 2023, paras. 7-9; *Svetova and Others v. Russia* (App. No. 54714/17), 24 January 2023, paras. 10-12; *Ukraine and the Netherlands v. Russia*, 25 January 2023, paras. 34-40.

[65] The participation of Judge M. Lobov in the Fedotova case was not explained in the judgment. Art. 20 of the ECHR provides that the Court shall be composed of judges whose number shall be equal to the number of States Parties to the Convention. It can therefore be interpreted that the Russian judge should only serve until 16 September 2022. Such interpretation could be confirmed by the precedent of Greece's withdrawal from the CoE, under Art. 7 of the Statute, with effect from 31 December 1970. The ECtHR accepted that a Greek judge would also cease to hold office on that date. In its judgment in a case pending before the ECtHR at the time, the Court noted only that the Greek judge "who had participated in the oral hearings could not take part in the consideration of the present case after 31 December 1970, since Greece's withdrawal from the Council of Europe took effect from that date". ECtHR, *De Wilde Ooms and Versyp ("Vagrancy") v. Belgium* (App. Nos. 2832/66; 2835/66; 2899/66), 18 June 1971, para. 11.

They were based on the assumption that the office of the Russian judge ceased to exist after 16 September 2022, and that the list of ad hoc Russian judges ceased to apply. The Court thus decided to appoint an ad hoc judge from among the sitting judges, 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 of 25 January 2023 in the inter-State case *Ukraine and the Netherlands v. Russia*.[66]

3. INVESTIGATION INTO THE "SITUATION IN UKRAINE" AT THE ICC

Armed conflict can give rise not only to extensive violations of human rights, but also to violations of humanitarian law. These are subject to two different liability regimes – that of State responsibility, and of individual criminal responsibility.[67] One of the major achievements of international law in the 20th century was the establishment of the ICC to try the perpetrators of the most heinous international crimes – war crimes, crimes against humanity, genocide and aggression.

However, neither Russia nor Ukraine are parties to the Rome Statute establishing the ICC. Despite this, crimes committed on Ukrainian territory may fall within the cognisance of the Court. On 8 September 2015, Ukraine made a declaration recognising the ICC's jurisdiction over two types of crimes – war crimes and crimes against humanity – occurring on its territory after 20 February 2014. Not being a party to the Statute, Ukraine cannot itself bring a case to the ICC. This can be done by the UN Security Council (which should reasonably be ruled out because of the Russian veto), the ICC Prosecutor, or another State Party to the Statute.

ICC Prosecutor Karim Khan was quick to respond to the Russian "special military operation". In a statement of 25 February 2022, he announced that he would monitor the situation in Ukraine with a view to the possible launch of an ICC proceeding,[68] and few days later that he announced that he was determined to open an investigation into the situation in Ukraine as soon as possible.[69] Shortly after this statement, 43 States forwarded a request to the Prosecutor for a preliminary examination of the "Situation in Ukraine" (under Arts. 13 and 14 of the Statute).

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[66] *Ukraine and the Netherlands v. Russia*, paras. 39-40.

[67] C. Kreß, *The Ukraine War and the Prohibition of the Use of Force in International Law, TOAEP*, Occasional Paper Series No. 13 (2022), pp. 21-23.

[68] Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine, 25 February 2022, available at: https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-been-closely-following (accessed 30 April 2023).

[69] Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine, 28 February 2022, available at: https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening (accessed 30 April 2023).

This made it easier for the Prosecutor to proceed, as in the event he wished to open an investigation on his own motion, under Art. 15(3) of the Statute he would have needed the authorisation of the Pre-Trial Chamber.[70] The investigation was officially opened on 2 March 2022.[71] It covers the period from 21 November 2013 – as it takes into account the first declaration of Ukraine recognising the jurisdiction of the ICC over crimes committed on its territory – until 22 February 2014. The Ukrainian declaration of 2015 extended this period indefinitely.

The investigation is, for the time being, not against specific individuals, but into a case. While we do not go into the issues of cooperation with the ICC Prosecutor in collecting evidence in any depth here, it is worth noting the agreement of 25 April 2022 reached by the ICC Prosecutor and the Chief Prosecutors of Lithuania, Poland and Ukraine to establish a Joint Investigation Team within Eurojust.[72] This move considerably increases the chances of successfully gathering evidence and holding the perpetrators accountable before both domestic courts and/or the ICC.

It must be borne in mind that the ICC's jurisdiction is complementary in nature, which means, *inter alia*, that the Court can only act if a State fails to conduct criminal proceedings or is unable or unwilling to do so (Art. 17 of the Statute). Moreover, the ICC does not issue judgments *in absentia*. Bringing the main perpetrators of the crimes, such as Vladimir Putin, Minister Lavrov or the Russian generals, before the Court may seem unrealistic for now. No doubt they are aware of the sword of Damocles hanging over them. All the more so as things have progressed. On 17 March 2023, the ICC Pre-Trial Chamber II started, albeit limited in extent, criminal proceedings focusing on the crimes against children. It issued two arrest warrants: for Vladimir Putin and Maria Alekseyevna Lvova-Belova, Commissioner for Children's Rights in the Office of the President of the Russian Federation. Based on the Prosecutor's requests of 22 February 2023, the Pre-Trial Chamber II considered that there are reasonable grounds to believe that each suspect bears responsibility for the war crime of unlawful deportation of the population (children), and that of unlawful transfer of the population (children) from occupied areas of Ukraine to the Russian Federation, to the prejudice of Ukrainian children.[73]

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[70] Statement of ICC Prosecutor, Karim A.A. Khan QC, at the Arria-Formula meeting of the UN Security Council on Ensuring accountability for atrocities committed in Ukraine, 27 April 2022, available at: https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-arria-formula-meeting-un-security-council-ensuring (accessed 30 April 2023).

[71] ICC-01/22 Situation in Ukraine, available at: https://www.icc-cpi.int/situations/ukraine (accessed 30 April 2023).

[72] *See* https://www.eurojust.europa.eu/news/icc-participates-joint-investigation-team-supported-eurojust-alleged-core-international-crimes (accessed 30 April 2023).

[73] ICC, Press Release 17 March 2023, available at: https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and (accessed 30 April 2023).

The strategy of the Prosecutor and the Pre-trial Chamber is commendable, as it breaks the silence and points out specific individuals and acts. It has great symbolic significance.

4. SPECIAL TRIBUNAL FOR AGGRESSION AGAINST UKRAINE OR IMPROVEMENT OF THE ICC?

The ICC's jurisdiction over the situation in Ukraine is limited in scope, as it does not cover crimes against peace,[74] which today is the crime of aggression – waging a manifestly illegal war. In case of an act of aggression committed by a State which, as Russia or Belarus, has not acceded to the ICC Statute, the initiation of an investigation by the ICC Prosecutor depends on the UN Security Council referring the relevant situation to the Court pursuant to Art. 15*ter* in conjunction with Art. 13(b) of the ICC Statute. Given the Russian veto power in the UN Security Council, this is almost certainly not going to happen, at least while Putin remains in power. Furthermore, Art. 15*bis* (5) of the Statute clearly states that the ICC has no jurisdiction over third States for the crime of aggression.

Discussion is currently going on about how to fill this gap and to prosecute the Russian and the Belarus political and military leaders. The crime of aggression is, according to the Rome Statute, a "leadership crime" (Art. 8*bis*, para. 1) concerning only leaders who are "in a position to effectively exercise control over or to direct the political or military action of a State". The main problem is the immunity from prosecution that they enjoy. According to ICJ case law, the leaders may not enjoy immunity before international courts.[75] However, they are still entitled to immunity before national courts.

An international court is one based directly on international law, established through the UN Security Council, like the International Criminal Tribunals for the Former Yugoslavia and Rwanda, or created by bilateral agreement between the UN and a country (e.g. the Special Court for Sierra Leone). Another form could be a hybrid court – a national court with some international characteristics, set

[74] First prosecuted by the International Military Tribunal at Nuremberg. The court strongly emphasized that: "War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole" (Nuremberg Trial Proceedings, Vol. 22, 426, 30 September 1946, The Common Plan or Conspiracy and Aggressive War, available at: https://avalon.law.yale.edu/subject_menus/15th.asp (accessed 30 April 2023)).

[75] ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, para. 61; Special Court for Sierra Leone, *Prosecutor v. Taylor*, Decision on Immunity from Jurisdiction, paras. 38, 40; Appeals Chamber of the ICC, *Jordan Referral re Al-Bashir Appeal*, Judgment, 6 May 2019, para I. 1: "There is neither State practice nor opinio juris that would support the existence of Head of State immunity under customary international law vis-à-vis an international court. To the contrary, such immunity has never been recognised in international law as a bar to the jurisdiction of an international court".

up within the national system of a country, as was the case with the Extraordinary Chambers in the courts of Cambodia.[76] However, this raises the issue of limitations on domestic law (constitutionality) and immunities.

Three main groups of proposals are on the table:

1. A hybrid court – "integrated into Ukraine's national justice system with international elements" – the UK government proposal;[77] or the proposal of Germany's Minister of Foreign Affairs for a court "deriving its jurisdiction from Ukrainian criminal law".[78] The disadvantage of these solutions is not only the personal immunities enjoyed by heads of States, heads of government, and ministers of foreign affairs before national and hybrid courts, but also Ukrainian constitutional limitations[79] and the much weaker (or even none) authoritative weight of the courts' decisions. The same flaws are present in the US proposal for a national court but "internationalised".[80]

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[76] The Extraordinary Chambers were created in the courts of Cambodia upon the UN GA recommendation and the agreement on cooperation (GA Res. 56/169; Res. 57/228; Res. 57/228B).

[77] UK Government Press Release, 20 January 2023, available at: https://www.gov.uk/government/news/ukraine-uk-joins-core-group-dedicated-to-achieving-accountability-for-russias-aggression-against-ukraine (accessed 30 April 2023).

[78] *Strengthening International Law in Times of Crisis, speech by German Foreign Minister Annalena Baerbock in The Hague*, 16 January 2023, available at: https://www.auswaertiges-amt.de/de/newsroom/strengthening-international-law-in-times-of-crisis/25733 (accessed 30 April 2023): "So our idea with some partners is that there is a way to strengthen the International Criminal Court and not weaken it, for a court to derive its jurisdiction from Ukrainian criminal law. It would be important for me, and I believe for many others as well, that this be complemented by an international component. Of course, there must be no special way for an aggressor, but what we create must be supported by as many people in the world as possible. It is therefore important for us that we have an international component, which, for example, with a location outside of Ukraine with financial support from partners and with international prosecutors and judges, underpins the impartiality and legitimacy of this court".

[79] Art. 125 of the Ukrainian Constitution states that: "The establishment of extraordinary and special courts shall not be permitted". Similarly, Art. 3 of the Law on the Judiciary and the Status of Judges. The common understanding is that Art. 125 sets up a prohibition on creating special and extraordinary courts within the system of courts in Ukraine and does not place a limit on international judicial institutions. In the decision on the constitutionality of ratifying the Rome Statute, the Constitutional Court found that this clause does not apply as such to the ICC (case No 1-35/2001, 11 July 2001, para. 2, section 2.1). For details, *see* A. Komarow & O. Hathaway, *Ukraine's Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression, Just Security*, 6 April 2022, available at: https://www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieve-accountability-for-the-crime-of-aggression/ (accessed 30 April 2023).

[80] Ambassador Van Schaack's Remarks on the U.S. Proposal to Prosecute Russian Crimes of Aggression, 27.03.2023: "Again now, at this critical moment in history, I am pleased to announce that the United States supports the development of an internationalized tribunal dedicated to prosecuting the crime of aggression against Ukraine. Although a number of models have been under consideration, and these have been analyzed closely, we believe an internationalized court that is rooted in Ukraine's judicial system, but that also includes international elements, will provide the clearest path to establishing a new Tribunal and maximizing our chances of achieving meaningful accountability. We envision such a court having significant international elements – in the form of substantive law, personnel, information sources, and structure. It might also be located elsewhere in Europe, at least at first, to reinforce Ukraine's desired European orientation, lend gravitas to the initiative, and enable international involvement, including through Eurojust" (*see* https://

Currently, Ukraine is against the hybrid court,81 and strongly supports the idea of an international court created through the UN General Assembly.

2. Special Tribunal on the Crime of Aggression (STCoA), created by the international community as a whole.[82] This form would allow to complement the jurisdiction of the ICC and avoid immunities issues. The proposed STCoA could be created in several steps. Firstly, there must be a request by the Government of Ukraine to the UN General Assembly. Secondly, the UN General Assembly would have to recommend the creation of the tribunal and request the UN Secretary-General to initiate negotiations between the Government of Ukraine and the United Nations. Thirdly, a bilateral treaty would have to be concluded between the Government of Ukraine and the United Nations. This concept, initiated by the proposal of Philip Sands and others,[83] was later developed[84] and supported by Ukraine,[85] and, *inter alia*, by the unanimous Parliamentary Assembly of the Council of Europe resolution.[86] However, the proposal is criticized because of its selectivity. The STCoA would deal only with the situation in Ukraine, while what is needed now is to avoid selective justice and enable broader prosecution and punishment of

www.state.gov/ambassador-van-schaacks-remarks/). *See also* J. Trahan, *Don't be Fooled By U.S. Smoke and Mirrors on the Crime of Aggression, Weak Proposals Carry the Risk of Weak Results,* Just Security, 14 April 2023, available at: https://www.justsecurity.org/85986/dont-be-fooled-by-u-s-smoke-and-mirrors-on-the-crime-of-aggression/ (both accessed 30 April 2023).

[81] *President's Office opposes "hybrid tribunal" on Russia's crime of aggression*, Ukrainska Pravda, 17 February 2023, available at: https://www.pravda.com.ua/eng/news/2023/02/17/7389799/ (accessed 30 April 2023).

[82] It is proposed to create the STCoA along the lines of the Special Court for Sierra Leone, as a freestanding new institution, but not, for obvious reasons, at the request of the UN Security Council, but upon recommendation of the UN General Assembly, as in the case of Cambodia (the Extraordinary Chambers). The Special Court for Sierra Leone was created by an agreement between the UN and Sierra Leone on 16 January 2002. The UN GA could use the "Uniting for Peace" mechanism to request the GA recommendation, or directly call on the Secretary-General to negotiate an agreement with Ukraine on a Special Court.

[83] *Statement calling for the creation of a Special Tribunal for the Punishment of the crime of aggression against Ukraine*, 4 March 2022, available at: https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf (accessed 30 April 2023).

[84] *See e.g.* Proposal for a Resolution by the United Nations General Assembly and Accompanying Proposal for a Statute of a Special Tribunal for Ukraine on the Crime of Aggression, 7 September 2022, made by The Ukraine Task Force of the Global Accountability Network; O. Hathaway, *The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine, An agreement between the United Nations and Ukraine can pave the way*, Just Security, 20 September 2022, available at: https://www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine/ (accessed 30 April 2023).

[85] Speech by the President of Ukraine at the General Debate of the 77th session of the UN General Assembly, 22 September 2022, available at: https://www.legal-tools.org/doc/wh08nu/ (accessed 30 April 2023); *see also* Kreß, *supra* note 67, p. 23, fn 100.

[86] *Legal and human rights aspects of the Russian Federation's aggression against Ukraine*, Resolution 2482 (2023), 26 January 2023, available at: https://pace.coe.int/en/files/31620/html (accessed 30 April 2023).

the crime of aggression than the scope delineated in the ICC Statute. That is why it is proposed to revise the ICC Rome Statute.

3. Revise the ICC's Statute to remove the obstacle to the Court's jurisdiction over aggression against Ukraine by changing the conditions for the exercise of the ICC's jurisdiction and creating a solution for the future as well. It is proposed to revise the Statute with retroactive effect at least to 17 July 2018, the date of the activation of the Court's jurisdiction over the crime of aggression (the crime as such made part of customary international law). There are three options currently being discussed:[87]
   a) amending the Kampala amendments to align the conditions governing the Court's exercise of jurisdiction over the crime of aggression with those applicable to the other crimes under the ICC's jurisdiction (supported by the majority of African and South American States[88]);
   b) allowing the ICC to proceed with an investigation in case of an alleged act of aggression by a State Party not bound by the Kampala amendments, or by a non-State Party against a State Party bound by the Kampala amendments, or against a non-State Party that has accepted the Court's jurisdiction if the UN General Assembly so recommends;
   c) giving the ICC the power to exercise universal jurisdiction not only in case of a referral of a relevant situation by the UN Security Council, but also if the UN General Assembly makes such a referral in cases where the UN Security Council is prevented from taking action by a permanent member's veto.

The available options differ within the scope of each of the proposed changes. Each of them touches on legal issues of fundamental importance. It is not clear that even at such an unusual historical moment as the war in Ukraine enough States could be brought together to carry out modifications to the ICC Statute. Many countries would need to change their approach to global criminal justice. The option of a Special Court for aggression in Ukraine seems politically easier. However, even if such a court were to be established, it is worth making a parallel effort and using the momentum to expand the ICC's jurisdiction. The two paths are not mutually exclusive.

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[87] *See e.g.* C. Kreß, S. Hobe, A. Nußberger, *The Ukraine War and the Crime of Aggression: How to Fill the Gaps in the International Legal System*, Just Security, 23 January 2023, available at: https://www.justsecurity.org/84783/the-ukraine-war-and-the-crime-of-aggression-how-to-fill-the-gaps-in-the-international-legal-system/. *Cf e.g.* A.R. Coracini, *Is Amending the Rome Statute the Panacea Against Perceived Selectivity and Impunity for the Crime of Aggression Committed Against Ukraine?* Just Security, 21 March 2023, available at: https://bit.ly/3oI8Bwe (both accessed 30 April 2023).

[88] *See e.g.* Parliamentarians for Global Action, *Buenos Aires Plan of Action on the Universality and Effectiveness of, and political support for, the Rome Statute system against impunity*, 4–5 November 2022, available at: https://www.pgaction.org/pdf/annual-forum/2022/buenos-aires-poa-2022-en.pdf (accessed 30 April 2023).

CONCLUSIONS

Ukraine is defending itself not only by physically resisting the Russian "special military operation", but also fighting against it legally. This significantly differentiates it from Russia, which uses distorted legal arguments and fails to implement court decisions, clearly prioritising the use of force over the law.

Proceedings before international courts, which sometimes last many years, do not usually serve well to resolve armed conflicts. They can only play a complementary role by clarifying legal issues and strengthening the legal and moral position of one of the parties to the dispute, e.g. in future peace negotiations. This was probably one of the intentions behind Ukraine's applications to the ICJ and the ECtHR.

The ICJ's order, although only for provisional measures, is nevertheless significant, as Ukraine has already gained authoritative confirmation of the dubious quality of Russian arguments justifying the use of force.

Russia has challenged the ICJ's jurisdiction and stated that it would not comply with its order. We know very well from recent years behaviours of this type (and not only by Russia), characterized by disrespect for international court decisions. This not only casts a shadow over the reputation of the State, but is becoming increasingly dangerous for the whole international community.

The CoE has for quite a long time allowed Russia to disregard ECtHR rulings, including a special constitutional mechanism to reject inconvenient judgments. Russia's expulsion from the organization is an important signal that there are limits to tolerating violations of the law. For now, the threshold is set quite high, but lowering it in the future is not excluded. This may constitute a warning to a number of other States about the consequences of not respecting the rule of law.

On the other hand, expulsion does not mean that the adjudication of Russia's "special military operation" cases has come to a halt. Judgments in these cases are unlikely to be enforced, but they will nevertheless authoritatively identify the perpetrator and the extent and scale of human rights violations. The Court may also award damages to Ukraine, although even here it is difficult to expect voluntary execution of a judgment. Russia has not yet paid the €10 million that the Court awarded in the *Georgia v. Russia (I)* case.[89]

In turn, the ICC investigation will certainly provide important evidence for criminal cases that may be brought either before domestic courts or the ICC, as well as before a likely new tribunal to try the crime of aggression. The arrest warrants issued in respect of Putin and Lvova-Belova are a significant step forward.

[89] *See* Interim Resolution CM/ResDH(2022)55, *Execution of the judgments of the European Court of Human Rights Georgia v. Russia (I)*, 9 March 2022. Russia argued that Art. 41 ECHR authorises the award of reparations in individual cases, but cannot be the basis for such an award in inter-State cases.

All these proceedings and measures, however weak they may currently appear, have an important symbolic and moral function. They delegitimise "the special military operation", as well as Putin and others. At the very least, they provide an opportunity to gather evidence to create a historical record. They are a reminder that international law works and that there is still a check on compliance and an international responsibility that applies to both the State and individuals. There is no doubt that the sword of Damocles hangs over "the special military operation".

The moment is certainly historic; the only question is how it will be used. Undoubtedly, holding the main authors of "the special military operation" accountable becomes paramount. There is a chance to make accountability for the "crime of crimes", i.e. the crime of aggression, a reality by setting up a special court for the aggression in Ukraine. This does not preclude a parallel amendment of the Rome Statute.

Some hope for progress is offered by the UN General Assembly resolution of 14 November 2022. The resolution recognized that Russia must be held to account for any violations of international law, international humanitarian law, and international human rights law in or against Ukraine. The Assembly further recognized the need for the establishment of an international mechanism for reparations for damage and loss or injury arising from Russian internationally wrongful acts. The resolution was co-sponsored by 56 member States and gathered a significant support (94 votes in favor, 13 against, 74 abstaining).[90]

The international community should go further in this direction by creating workable mechanisms and institutions that send a powerful deterrent message about the unacceptability of blatantly invading a neighboring State.[91] An international court issuing charges for the crime of aggression against Russian leaders should be at the forefront. The "special military operation" has generated quasi-tectonic movements, not only with regard to international adjudication, but also with regard to NATO's actions and the enforcement of reparations. Time will tell whether this is a moment of evolution in international law, but one can assume that it is.

[90] Res. L.6/2022, *Furtherance of Remedy and Reparation for Aggression against Ukraine*.

[91] Trahan, *supra* note 80, rightly concludes that: "States should not sit back and make the mistake of thinking these issues are only ones for NATO member State or European nations, or in being complacent setting weak precedent. No State, from any region, including island nations, is safe if blatant aggression is permitted to go unchecked. Unequivocal precedent must be set, both through the creation of the STCoA and eventual amendment of the ICC's Rome Statute to broaden the Court's jurisdiction over the crime of aggression. Global stability and the rule of law demands no less".