

RUSSIA'S EXCLUSION FROM THE REGIONAL HUMAN RIGHTS MECHANISM OR HOW HUMAN RIGHTS ARE ENDANGERED IN A SENSITIVE INTERNATIONAL CONTEXT?!

Corneliu BÎRSAN*

Laura-Cristiana SPĂTARU-NEGURĂ**

Abstract

The Russian Federation and the ECtHR have never had a very „friendly” relationship; on the contrary, in some periods the relationship between them has even been tense.

By joining the Council of Europe in 1996, the Russian Federation also accepted the compulsory jurisdiction of the ECtHR after ratifying the Convention in 1998. After a tumultuous relationship of more than 20 years characterised by non-compliance and rhetorical attacks, in the context of the „military operation on Ukraine” which began in February 2022, the Russian Federation notified the Secretary General on 15.03.2022 of its withdrawal from the Council of Europe and its intention to denounce the ECtHR.

Moreover, as of 16.03.2022, the Russian Federation was excluded from the Council of Europe as a result of its aggression against a member state of the organisation - Ukraine, for which reason the Russian state ceased to be a High Contracting Party to the ECHR as of 16.09.2022.

This study will attempt to analyse the legal consequences of this exclusion. After all, who „loses” and who „gains” from this exclusion?

Keywords: *exclusion, ECHR, ECtHR, human rights, Russia, Ukraine.*

1. Introductory remarks

The European Court of Human Rights (hereinafter „**the Court**” or „**ECtHR**”) is the international jurisdiction created within the Council of Europe, specialising in human rights litigation, and is recognised as the most highly regarded regional court in the world in this field.

With subject-matter jurisdiction to examine individual applications and inter-State applications concerning violations of the provisions of the European Convention on Human Rights and the additional protocols to the Convention (hereinafter „**ECHR**”¹), the Court is entrusted each year with the adjudication of an impressive number of applications.

Thus, according to the most recent general statistics communicated by the Court², **in 2022, 45,500 applications** were assigned to a judicial formation, and as of 28.02.2023 there were **77,400 applications pending** before the Court's judicial formations, including **16,700 applications against the Russian Federation**³.

In addition to the fact that the Court's judgments sentencing Member States require the payment of sums of money by way of **just satisfaction**, in some cases the Court also orders **the change of the applicable domestic law** to comply with the provisions of the Convention or its protocols (*e.g.*, through the pilot judgment procedure

* Professor PhD, Faculty of Law, „Nicolae Titulescu” University of Bucharest; Attorney at Law, Bucharest Bar Association, former judge at the ECtHR (e-mail: corneliu.birsan@hotmail.com).

** Lecturer PhD, Faculty of Law, „Nicolae Titulescu” University of Bucharest; Attorney at Law, Bucharest Bar Association (e-mail: negura_laura@yahoo.com).

¹ Please see, for instance, C. Bîrsan, *Convenția europeană a drepturilor omului: comentariu pe articole (European Convention on Human Rights: Commentary per Articles)*, C.H. Beck Publishing House, Bucharest, 2010, L.-C. Spătaru-Negură, *Protecția internațională a drepturilor omului. Note de curs (International Protection on Human Rights. Course Notes)*, Hamangiu Publishing House, Bucharest, 2019, p. 116 et seq.

² Please see the statistics available at https://www.echr.coe.int/Documents/Stats_annual_2022_ENG.pdf.

³ Please see the statistics available at https://www.echr.coe.int/Documents/Stats_pending_month_2023_BIL.PDF.

- see the *Maria Atanasiu and others v. Romania*⁴, *Rezmiveş and others v. Romania*⁵, *Burdov v. Russia (no. 2)*⁶, *Gerasimov and Others v. Russia*⁷.

The Russian Federation and the ECtHR **have never had a very „friendly” relationship**, but, on the contrary, they have even had a tense relationship at times.

Having joined the Council of Europe in 1996, under art. 59 para. (1) of the Convention, the Russian Federation also accepted the compulsory jurisdiction of the Court after it ratified the Convention in 1998.

To get an idea of the extent of **the Court's burden with regard to the Russian Federation**, it should be noted that as regards the year **2022**, the Court:

- examined **6,183 applications**⁸ - of which 4,424 were declared inadmissible or struck out;
- rendered **384 judgments** on 1,759 applications of which **374 found at least one violation** of the Convention⁹.

After a **tumultuous relationship** of more than 20 years characterised by non-compliance and rhetorical attacks, in the context of the „military operation on Ukraine” which started in February 2022, **the Russian Federation notified the Secretary General on 15.03.2022 of its withdrawal from the Council of Europe and its intention to denounce the Convention.**

On **15.03.2022**, at an emergency session, the Parliamentary Assembly of the Council of Europe adopted Opinion no. 300¹⁰ stating that **the Russian Federation should be suspended from the Council of Europe** because of the „aggression against Ukraine”.

Considering that the action of the Russian Federation is **(i)** a violation of the UN Charter, **(ii)** „a crime against peace” under the Charter of the Nuremberg Tribunal, **(iii)** an „aggression” under the UN General Assembly Resolution 3314 (XXIX) adopted in 1974 and **(iv)** a serious violation of art. 3 of the Statute of the Council of Europe, **the Parliamentary Assembly condemned in the strongest terms the Russian state's aggression against Ukraine.**

The Parliamentary Assembly underlined **the very sensitive context of this situation**, stating that: *„The Assembly deplores that, despite the many appeals to cease the hostilities and to comply with international law, the Russian leadership has persisted in its aggression, escalating the violence in Ukraine and making threats should other States interfere. Through its attitude and actions, the leadership of the Russian Federation poses a blatant menace to security in Europe, following a path which also includes the act of military aggression against the Republic of Moldova and in particular the occupation of its Transnistrian region, the act of military aggression against Georgia and the subsequent occupation of two of its regions in 2008, the illegal annexation of Crimea and the Russian Federation's role in eastern Ukraine, which culminated in the illegal recognition of the self-proclaimed republics of Donetsk and Luhansk as „independent States.”*¹¹.

It was obvious that, in the context of aggression against Ukraine, **the Russian Federation could no longer be tolerated within the Council of Europe**, as its actions¹² **violated fundamental values and even the spirit of this organisation and of the Convention.**

We can say that the „farce” of representing a democratic society that respects human rights had gone too far.

On **16.03.2022**, by Resolution CM/Res (2022)2, **the Committee of Ministers decided that the Russian Federation should cease to be a member state.** Thus, as of **16.03.2022**, as a result of its aggression against

⁴ ECtHR, Grand Chamber, Judgment of 12.10.2010, app. no. 30767/05 and no. 33800/06, available at <https://hudoc.echr.coe.int/fre?i=001-100989>.

⁵ ECtHR, Fourth Section, Judgment of 25.04.2017, app. no. 61467/12, no. 39516/13, no. 48231/13 and no. 68191/13, available at <https://hudoc.echr.coe.int/fre?i=001-173105>.

⁶ ECtHR, First Section, Judgment of 15.01.2009, app. no. 33509/04, available at <https://hudoc.echr.coe.int/eng?i=001-90671> – the first judgment in the pilot procedure against Russia concerning non-execution or delayed execution of final domestic judgments.

⁷ ECtHR, First Section, Judgment of 01.07.2014, app. no. 29920/05, no. 3553/06, no. 18876/10, no. 61186/10, no. 21176/11, no. 36112/11, no. 36426/11, no. 40841/11, no. 45381/11, no. 55929/11 and no. 60822/11, available at <https://hudoc.echr.coe.int/eng?i=001-145212>.

⁸ The number for 2020 was even more significant – 10,163 applications were examined of which 6,509 have been declared inadmissible or struck out. Only in 570 cases judgments were given.

⁹ Please see https://www.echr.coe.int/documents/cp_russia_eng.pdf.

¹⁰ Please see <https://pace.coe.int/en/files/29885/html>.

¹¹ Please see <https://pace.coe.int/en/files/29885/html>.

¹² For example, attacks against civilians, indiscriminate use of artillery, rockets and bombs, attacks on humanitarian corridors intended to allow civilians to escape from besieged areas or towns, hostage taking, reckless attacks by Russian armed forces on Ukrainian nuclear facilities.

another member state of the organisation - Ukraine, **the Russian Federation was excluded from the Council of Europe**, which is why the Russian state ceased to be a High Contracting Party to the ECHR as of **16.09.2022**.

On **22.03.2022**, the ECtHR adopted a resolution¹³ on the **consequences of the termination of the Russian Federation's membership of the Council of Europe**.

2. What are the legal consequences of this exclusion? Who wins and who loses from such a duel?

We think **the answer** to these questions is **predictable**. Thus, it is indisputable that, first and foremost, **the victims of human rights violations by the Russian Federation lose out** – the victims in the present or in the near past - who could have referred the matter to the Court, so that they have lost the chance of an effective remedy in an international jurisdiction to examine a complaint against the Russian State for violation of a right guaranteed by the Convention.

Therefore, some **140 million Russian citizens will be deprived of the legal protection offered by the Convention**.

From a statistical point of view, the Court's figures on the Russian Federation **for the period 1998-2022**¹⁴ could be summarised as follows:

- 3,500 judgments;
- 3,317 judgments finding at least one violation out of which:
 - 363 judgments on right to life – deprivation of life;
 - 419 judgments on lack of effective investigation under Article 2 of the Convention;
 - 89 judgments on prohibition of torture;
 - 1,190 judgments on inhuman or degrading treatment;
 - 291 judgments on lack of effective investigation under Article 3 of the Convention;
 - 45 judgments on conditional violations;
 - 1 judgment on prohibition of slavery and forced labour;
 - 1,494 on judgments on right to liberty and security;
 - 1,076 judgments on right to a fair trial
 - 209 judgments on lengths of proceedings;
 - 170 judgments on non-enforcement;
 - 4 judgments on no punishment without law;
 - 395 judgments on right to respect for private and family life;
 - 20 judgments on freedom of thought, conscience and religion;
 - 139 judgments on freedom of expression;
 - 128 judgments on freedom of assembly and association;
 - 820 judgments on right to an effective remedy;
 - 33 judgments on prohibition of discrimination;
 - 700 judgments on protection of property;
 - 3 judgments on right to education;
 - 9 judgments on right to free elections;
 - 10 judgments on right not to be tried or punished twice;
 - 180 judgments on other articles of the ECHR;
- 121 judgments finding no violation;
- 16 friendly settlements/striking-out judgments;
- 44 other judgments (just satisfaction, revision, preliminary objections, lack of jurisdiction).

Also from a statistical point of view, the Court's figures on the Russian Federation **for 2022**¹⁵ could be summarised as follows:

- 384 judgments;
- 374 judgments finding at least one violation out of which:
 - 14 judgments on right to life – deprivation of life;

¹³ Please see https://echr.coe.int/Documents/Resolution_ECHR_cessation_membership_Russia_CoE_ENG.pdf.

¹⁴ Available at https://www.echr.coe.int/Documents/Stats_violation_1959_2022_ENG.pdf.

¹⁵ Available at https://www.echr.coe.int/Documents/Stats_violation_2022_ENG.pdf.

- 13 judgments on lack of effective investigation under art. 2 ECHR;
- 6 judgments on prohibition of torture;
- 198 judgments on inhuman or degrading treatment;
- 18 judgments on lack of effective investigation under art. 3 ECHR;
- 2 judgments on conditional violations;
- 195 on judgments on right to liberty and security;
- 88 judgments on right to a fair trial
- 2 judgments on lengths of proceedings;
- 4 judgments on non-enforcement;
- 1 judgment on no punishment without law;
- 98 judgments on right to respect for private and family life;
- 6 judgments on freedom of thought, conscience and religion;
- 25 judgments on freedom of expression;
- 49 judgments on freedom of assembly and association;
- 119 judgments on right to an effective remedy;
- 6 judgments on prohibition of discrimination;
- 12 judgments on protection of property;
- 2 judgments on right to free elections;
- 3 judgments on right not to be tried or punished twice;
- 17 judgments on other articles of the ECHR;
- 6 judgments finding no violation;
- 2 friendly settlements/striking-out judgments;
- 2 other judgments (just satisfaction, revision, preliminary objections, lack of jurisdiction).

And **the Court loses**, because in this geo-political crisis it can no longer prevail over the Russian Federation in the field of human rights protection. Secondly, in practice, European jurisdiction itself can no longer defend the „**conscience of Europe**” in the field of human rights protection in a state such as the **Russian Federation, as the founders of the Council of Europe saw it, with Russia increasingly isolating itself from the democratic world. The Court is thus threatened in terms of its authority and legitimacy** (like other international jurisdictions). Thus, the victims of the Russian Federation of the rights and freedoms guaranteed by the Convention are, on the one hand, Ukrainian or foreign citizens on Ukrainian territory and, on the other, Russian or foreign citizens on Russian territory.

Ukraine also loses, leaving it only with the possibility of bringing an action before the International Court of Justice, which it has done.

So who wins, obviously on a pejorative level in the public international law? Certainly the Russian Federation, which has not been thwarted in its plans by any international sanctions imposed since the beginning of the „aggression against Ukraine”. Indeed, neither the Council of Europe nor the Court has been able to stop the Russian Federation in its aggression or to protect its victims in Ukraine, in the Russian Federation or elsewhere. What has been achieved, however, is that at the plenary session on 22.03.2022, a ruling was adopted emphasising that the ECtHR will have jurisdiction over all applications against the Russian Federation lodged before 16.09.2022 (the official date of withdrawal¹⁶ according to a poorly reasoned ECtHR ruling), as well as applications already pending and current at that time.

Thus, **the ECHR prevented withdrawal with immediate effect** (which the Russian Federation would have wanted) **and extended its temporal jurisdiction**.

What is **sad and unfair** is that, even if the ECtHR condemns Russia, it is **extremely unlikely that the Russian Federation will comply with the Court's rulings in the period ahead**. We believe, however, that those judgments could at least represent recognition of the violated rights of the victims of the Russian Federation, which would represent „just satisfaction” from a moral point of view. It is unimaginable how in the years 2022-2023 there can still be **flagrant violations of public international law**, as there are strong indications that **war crimes and serious human rights violations may have been committed in Ukraine**. For people who are dying or whose lives are endangered on a daily basis, **the exclusion of the Russian Federation is a lost opportunity to have the possibility to defend their Convention rights before the Court**.

¹⁶ Even on the Court's website there is this information that on 16.09.2022 the Russian Federation ceased to be a party to the ECHR.

The basis for the termination of the Russian Federation's membership is art. 58 para. (3) ECHR which provides that a state which leaves the Council of Europe loses its status as a party to the Convention. In our view, art. 58 para. (3) ECHR is *lex specialis*, a „dormant” provision.

And in 2014, after the annexation of Crimea, the voting rights of the Russian Federation in the Parliamentary Assembly of the Council of Europe were suspended. In July 2017, in protest, the Russian Federation stopped paying its full contribution, threatening to withdraw from the Council of Europe if its voting rights were not restored. In return, Ukraine, which had lost control over a considerable part of its territory, also threatened to withdraw from the organisation if the Russian Federation's rights were restored.

The Russian Federation's bad faith could also be deduced from the late ratification of Protocol 14 to the Convention in 2010, which allowed for the simplification of the procedure before the ECtHR and the resolution of delays in the examination of certain categories of cases before the Court. The Russian Federation has also paid the small amounts imposed by the ECtHR, but has not proceeded to change the legislation as required.

The *Yukos*¹⁷ case was an important precedent for the Russian Federation as it was ordered by the Court to pay €1.9 billion in compensation but refused to pay it in 2017.

The justification for the non-payment (*i.e.*, non-compliance) was the Duma's amendment to the Constitution, allowing the Russian Constitutional Court to decide not to implement rulings of the international human rights jurisdiction if they are deemed unconstitutional.

Despite vehement criticism from the Venice Commission that this amendment was incompatible with the obligation in art. 46 ECHR, nothing has changed internally within the Russian constitutional system.

3. Final remarks

Although the Russian Federation ceased to be a member of the Council of Europe as of 16.03.2022 [by Resolution CM/Res(2022)2], and a party to the Convention as of 16.09.2022, in light of its continuing obligation to implement the Court's judgments, the Department for the Execution of Judgments of the European Court of Human Rights has continued to write to the Russian authorities to request information on cases, action plans, reports and to direct communications received under Rule 9.

On the other hand, as of 03.03.2022, **the Russian Federation ceased all communication with the Secretariat**. Despite the fact that according to para. 7 of Resolution CM/Res(2022): *„The Russian Federation is to continue to participate in the meetings of the Committee of Ministers when the latter supervises the execution of judgments with a view to providing and receiving information concerning the judgments where it is the respondent or applicant State, without the right to participate in the adoption of decisions by the Committee nor to vote.”*³, **there was no participation of the Russian Federation in the human rights meetings of the Committee of Ministers**.

On the other hand, we point out that **on 11.06.2022, the Russian authorities enacted a new law on the execution of the ECtHR judgments**.

As the Committee of Ministers pointed out, this law: *„because of the „procedurally incorrect exclusion” of the Russian Federation from the Council of Europe, the Committee of Ministers cannot insist upon the obligations on Russia flowing from the Council of Europe’s legal instruments, with the consequence that judgments of the European Court which became final after 15 March 2022 shall not be enforced, nor shall they serve as a ground for the reopening of proceedings. Just satisfaction awarded may be paid until 1 January 2023 for judgments which became final before 15 March 2022. However, payment will be made in roubles and only to bank accounts in Russia.”*¹⁸.

Even at the press conference held by the President of the Court at the opening of the judicial year 2023, the Russian Federation was the first topic addressed by **the President of the European Court of Human Rights Siofra O’Leary**, who stressed that the extremely serious events in Europe, such as the invasion of Ukraine, Russia's expulsion from the Council of Europe and the termination of its status as a High Contracting Party to the Convention, had produced considerable legal repercussions for the Court¹⁹.

¹⁷ Please see ECtHR, Former First Section, Judgment of 31.07.2014 in the app. no. 14902/04 *Oao Neftyanaya Kompaniya Yukos v. Russia*, available at <https://hudoc.echr.coe.int/fre?i=001-145730>.

¹⁸ Please see the Strategy paper regarding the supervision of the execution of cases pending against the Russian Federation available at <https://rm.coe.int/0900001680a91beb>.

¹⁹ Please see also the Court's press release of 26.01.2023 on the press conference held by the President of the Court - <https://hudoc.echr.coe.int/eng-press?i=003-7551718-10375614>.

The Russian Federation has repeatedly accused the ECtHR of having an **anti-Russian bias**, one argument being the use of the large number of applications filed with the Court each year²⁰.

What the Russian Federation does not want to admit is that **this very large number of applications stems from the systematic failure of the Russian state to respect the human rights** laid down in the Convention and the additional protocols, and to implement viable legislative or administrative solutions that would effectively and beneficially²¹ change domestic legal provisions declared contrary to the ECHR by the Court. An analysis of the Court's case-law shows that the European Court has found systematic or repeated violations of human rights in the territory of the Russian Federation.

Not even **the Kremlin's defiant attitude** each time the Russian Federation was condemned by the European Court of Human Rights did not help either and did not fit in with the fair play required by membership of such a human rights protection mechanism, but, on the contrary, supported the anti-ECtHR campaign it waged.

But although the Russian Federation was very vocal when it was in the ECtHR system, although it was a critical voice of this system of protection, although it too often violated the principles that govern the whole architectural system of the Council of Europe, **we believe that exclusion from the ECtHR (and from the Council of Europe) is now a loss for the effective protection of human rights at the regional level.**

On the principle of „**better with evil than without evil**”, when it was under the European human rights protection system, there was, however, a certain „abstention” (not total) on the part of the Russian authorities, in order not to be sanctioned even on a „conveyor belt”, which no longer exists today.

Thus, **for the millions of people in the Russian Federation, in Ukraine and even in neighbouring states, this reality is very sad**, and the words of the Secretary General of the Council of Europe are true: *„Russia's aggression against Ukraine continues to bring pain and suffering to millions of people in Ukraine and all over Europe. We once again urge the Russian leadership to immediately stop the war in Ukraine and to put an end to the ongoing repression of its own people.”*²².

Moreover, the official underlined that: *„Under the terms of the Convention, the Russian Federation has a binding legal obligation to implement all judgments and decisions from the European Court of Human Rights concerning its actions or omissions occurring up until 16 September 2022. The Council of Europe will continue to do its utmost to ensure justice and accountability for the people involved.”*²³.

Although the Russian authorities no longer communicate with the Committee of Ministers of the Council of Europe, information on the situation in the Russian Federation is communicated by non-governmental organisations present there. This information „remains a vital resource to enable the Committee to keep up to date with the situation in the Russian Federation.”²⁴.

At the same time, despite the „departure” of the Russian Federation from the Council of Europe, on the one hand, **the Russian Federation remains a member state of the UN and**, on the other hand, **a contracting state to several conventional human rights instruments** adopted within the framework of the UN, which have their own protection mechanism.

We emphasise that **certain of these mechanisms are already seised** of issues which have been raised in cases considered by the Court and which are pending before it.

Thus, we exemplify with the following situations concerning the Russian Federation:

- group of cases *Khashiev*²⁵ - enforced disappearances in Chechnya and the failure of the Russian authorities to investigate or search for missing persons => some of these issues fall within the competence of the United Nations Working Group on Enforced or Involuntary Disappearances²⁶;
- group of cases *Volodina*²⁷ - shortcomings in the protection of women against domestic violence => some

²⁰ According to official statistics, the Russian Federation ranked first in the number of applications per State Party to the Convention in 2021 - there were about 17,000 pending applications, but now, due to its exclusion from the European mechanism, it has been overtaken by Turkey – please see https://www.echr.coe.int/Documents/Stats_pending_month_2023_BIL.PDF.

²¹ A fact recognised by the Court, please see for example <https://hudoc.exec.coe.int/eng?i=004-47097>.

²² Please see https://www.coe.int/ca/web/portal/full-news/-/asset_publisher/y5xQt7QdunzT/content/secretary-general-millions-of-russians-no-longer-protected-by-the-european-convention-on-human-rights.

²³ *Ibidem*.

²⁴ Please see the Strategy paper regarding the supervision of the execution of cases pending against the Russian Federation available at <https://rm.coe.int/0900001680a91beb>.

²⁵ Please see <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-4436591-5335890&filename=003-4436591-5335890.pdf>.

²⁶ Please see www.ohchr.org.

²⁷ Please see <https://hudoc.echr.coe.int/eng?i=001-194321> and <https://hudoc.echr.coe.int/fre?i=001-211794>.

of these issues fall within the competence of the United Nations Committee on the Elimination of Discrimination against Women²⁸.

Despite these realities, **our sincere hope is that one day** (not far from the time of writing), **(i)** the Russian Federation will once again respect the sovereignty, independence and territorial integrity of its neighbouring states, **(ii)** it will return to democracy and respect human rights, and that **(iii)** Russian citizens or persons under its jurisdiction will once again be protected by the ECHR and its protocols and be able to exercise their fundamental rights.

In a modern world such as the one we live in, **actions such as those of the Russian Federation only set us back from the path of normal and healthy social development, seriously violating both individual rights** such as the right to life, the right not to be subjected to torture and ill-treatment, the right to a healthy environment, the right to privacy, **and collective rights** such as the right to development, the right to peace and the right to the common heritage of humanity.

Only one state has withdrawn from the Council of Europe in the past: in 1969, Greece, during the colonial regime, but in 1974 it was readmitted, as the Council of Europe's values had returned to normal.

Thus, although the future looks pessimistic, we believe that we must remain optimistic.

From this point of view, we can only wait and see **how and when the Russian Federation will stop the path it started** on 24 February 2022... or **who and when will succeed in stopping it and help (determine) it to return to the path of democracy?!**

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²⁸ Please see www.ohchr.org.