

Struggling for Europe's Soul: The Council of Europe and the European Convention on Human Rights Counter Russia's Aggression against Ukraine

Thomas Giegerich*

Table of Contents

| | |
|--|-----|
| A. Promising Start of a New Age in 1990: The "Charter of Paris for a New Europe" | 520 |
| B. European Organizations as Powers of Order in the Transformation of Central and Eastern Europe: The Council of Europe and the European Union | 521 |
| C. The Dissolutions of Yugoslavia and the Soviet Union as Aberrations from the Promises of 1990 | 523 |
| D. The Russian Federation as a Problematic Member of the CoE and the ECHR | 527 |
| E. Russian and Other Post-Soviet Cases in the European Court of Human Rights | 530 |
| I. Cases relating to Nagorny-Karabakh, Transnistria and Georgia (Abkhazia and South Ossetia) | 530 |
| II. Cases Relating to Ukraine | 533 |
| III. Overview of Russia's Compliance with the ECHR in Other Cases | 536 |
| IV. Execution of ECtHR Judgments by Russia | 540 |
| F. The Process of Russia's Expulsion from the CoE and ECHR | 542 |
| I. Course of Events: CM and PACE Join Forces | 542 |
| II. Substantive Issue: Serious Violation of Art. 3 CoE Statute | 545 |
| III. Procedural Issue: The Graduated Process of Art. 8 CoE Statute | 547 |
| IV. Consequences for Russia's ECHR Membership | 550 |
| G. Conclusion: Divorcing Russia – Victory or Defeat for the CoE and the ECHR? | 552 |

Abstract

Russia was expelled from the Council of Europe with immediate effect and also from the ECHR with a six-month delay. The expulsion was based on Russia's war of aggression against Ukraine which actually began in 2014 and only intensified in 2022. It was inevitable in view of the fact that Russia had not only distanced itself from the values of the CoE and the ECHR, but started to actively undermine them.

* Prof. Dr. Thomas Giegerich, LL.M., holds a chair for European Law, Public International Law and Public Law at Saarland University and is co-director of the Europa-Institut in Saarbrücken (Germany). Email: giegerich@europainstitut.de.

This becomes evident from an overview of the pertinent case law of the European Court of Human Rights and Russia's increasingly assertive unwillingness to comply with the Court's decisions. While the pertinent resolutions by the Committee of Ministers and the ECtHR were made in accordance with the CoE Statute and the ECHR both procedurally and substantively, they should have been better explained to the European and world public. Russia has meanwhile begun to boycott the ECtHR procedures in violation of Art. 58 ECHR.

Keywords: Council of Europe; European Convention on Human Rights; Russia; Ukraine; Aggression

“Russia’s war of aggression constitutes a tectonic shift in European history.”¹

A. Promising Start of a New Age in 1990: The “Charter of Paris for a New Europe”

The Cold War between East and West was not only a confrontation between two military blocks, but primarily a struggle between two political and economic systems – the arbitrary government of dictatorships with a command economy and the limited government of democracies with a free economy. We have long known that history did not come to an end with the termination of the Cold War in the sense that the Western political and economic system has prevailed and dominates the entire world unchallenged.² Nor does history constantly develop for the better. Rather, there are ups and downs, and currently we are passing through a deep valley in Europe. We are struggling to find our way up again toward restoration of the self-evident truths of peace and human dignity that were codified decades ago by the international community as a whole, e.g. in the UN Charter³ and the Universal Declaration of Human Rights.⁴ While expecting to complete this upward path successfully, we do not yet know how much death and destruction will pave it. What a difference to the spirit of optimism 30 years ago.

After the fall of the Iron Curtain, the Heads of State or Government of the States participating in the Conference on Security and Co-operation in Europe assembled in Paris in November 1990 “at a time of profound change and historic expectations” and adopted the Charter of Paris for a New Europe with promises for a better future together.⁵ In that political document, the chiefs heralded “a new era of democracy, peace and unity”, committed themselves to human rights, democracy, rule of

1 Versailles Declaration of the Informal Meeting of the EU Heads of State or Government, 11 March 2022, para. 6, available at: <https://www.consilium.europa.eu/media/54773/20220311-versailles-declaration-en.pdf> (1/5/2022).

2 But see *Francis Fukuyama*, *The End of History and the Last Man* (1992).

3 Of 26 June 1945, 1 UNTS XVI.

4 Of 10 December 1948. UN General Assembly Resolution 217 A (III).

5 <https://www.osce.org/files/f/documents/0/6/39516.pdf> (24/4/2022).

law and friendly relations among participating States and pledged “to refrain from the threat or use of force against the territorial integrity or political independence of any State”. They “reaffirm[ed] the equal rights of peoples and their right to self-determination in conformity with the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.” They “fully recognize[d] the freedom of States to choose their own security arrangements.” Finally, they were convinced that “[t]his common resolve and our growing interdependence will help to overcome the mistrust of decades, to increase stability and to build a united Europe” which would henceforth be “a source of peace”.

This confirmed the freedom of all sovereign States in Europe and beyond to choose their political, economic and defensive military alliances as one of the manifestations of the right of their peoples to self-determination. Invoking also the Charter of Paris, the politically binding Founding Act on Mutual Relations, Cooperation and Security between NATO and the Russian Federation of 27 May 1997 set forth that NATO and Russia would base their relations on a shared commitment to the principle of “respect for sovereignty, independence and territorial integrity of all states and their inherent right to choose the means to ensure their own security, the inviolability of borders and peoples’ right of self-determination as enshrined in the Helsinki Final Act and other OSCE documents”.⁶

The end of the Cold War terminated the bloc and system confrontation as well as the division of Europe in spheres of influence and led to the quasi-decolonization of the former Soviet empire. It initiated a period of transformation of formerly Communist dictatorships into democracies respecting human rights under the rule of law. For the first time ever, it also opened a window of opportunity to realize the dream of a truly pan-European unity from Iceland to Siberia in peace, dignity, freedom, equality and solidarity.⁷ Whether that dream could become true depended first and foremost on the credible transformation of Russia from a totalitarian hegemon into a democratic partner in a community of equal sovereigns.

B. European Organizations as Powers of Order in the Transformation of Central and Eastern Europe: The Council of Europe and the European Union

The dawning new era of European unity called the two European organizations to the scene that – in contrast to the loose CSCE – had a firm legal foundation embodying the values advocated by the Charter of Paris and were thus capable of stabilising the newly independent transformation of States of Central and Eastern Europe. They could also provide a framework for ordering and upgrading those States’

6 https://www.nato.int/cps/en/natohq/official_texts_25468.htm?selectedLocale=en (29/4/2022).

7 See the groundbreaking publication on pan-Europeanism by *Richard N. Coudenhove-Kalergi*, *Pan-Europa*, 1923 (new edition 1982). But actually *Coudenhove-Kalergi* excluded both Britain (with its global colonial empire) and Russia (with its autocratic tradition and Communist regime) from his concept of a pan-European union.

relationship with one another as well as the Western European States. These organizations were, firstly, the Council of Europe (CoE) and, secondly, the European Communities/European Union (EU). Both are based on the values of democracy, the rule of law and the protection of human rights and pursue the goal of realising these values.⁸

The following division of labour between the CoE and the EU has emerged concerning European unification, the stabilisation of pluralist democracy, the rule of law and human rights: Both the CoE and the EU pursue European unification in different – international and supranational – ways.⁹ They share the same fundamental values but take on different, albeit complementary, roles in their realisation.¹⁰ The CoE functions as an antechamber of the EU; no State will qualify for EU membership that has not been CoE member for several years.¹¹ In the Memorandum of Understanding between the CoE and the EU of 2007, the CoE is identified as “the benchmark for human rights, the rule of law and democracy in Europe” (para. 10).¹² In particular, the EU recognises the CoE “as the Europe-wide reference source for human rights” (para. 17) and promises to ensure coherence of EU law with the relevant CoE conventions (para. 19). While the human rights dimension of the CoE is far advanced and accession to the ECHR has long become a political condition for CoE membership, the “peace based upon justice” objective also mentioned in the preamble read together with Art. 1 of the CoE Statute has always remained underdeveloped. This becomes evident by the fact that only fourteen CoE Member States are parties to the European Convention for the Peaceful Settlement of Disputes¹³ that makes judicial settlement of international legal disputes by the International Court of Justice compulsory. In other words, the CoE has no institutionalised mechanism to ensure the peaceful settlement of disputes in accordance with international law.

In the paragraph on the human dimension, the Charter of Paris specifically recognized “the important contribution of the Council of Europe to the promotion of human rights and the principles of democracy and the rule of law as well as to the development of cultural co-operation.” It welcomed “moves by several participating States to join the Council of Europe and adhere to its European Convention on Human Rights.” In the paragraph on economic cooperation, the Charter recognised “the important role of the European Community in the political and economic development of Europe.” It also envisaged new structures and institutions to upgrade the CSCE process which spawned the Organization for Security and Co-operation

8 Second recital of the preamble and Art. 1, 3, 4 and 8 of the Statute of the Council of Europe of 5 May 1949 (ETS No. 1); Art. 2, 7, 49 TEU.

9 Grabenwarter, ZaöRV 2014, p. 419 ff.

10 <https://www.coe.int/en/web/portal/european-union> (29/4/2022).

11 Giegerich, in: Pechstein/Nowak/Häde (eds.), Art. 220 AEUV, margin note 56.

12 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680597b32> (29/4/2022).

13 Of 29 April 1957, ETS No. 23.

in Europe.¹⁴ As a matter of fact, the Charter was co-signed by both the President of the Council and the President of the Commission of the European Communities.

In the Warsaw Declaration of 17 May 2005, the Heads of State and Government of the 47 CoE Member States stated the following: “We look forward to the day when Belarus is ready to join the Council of Europe ... and enlarge our area of democratic security. Today, Europe is guided by a political philosophy of inclusion and complementarity and by a common commitment to multilateralism based on international law. However, we remain concerned by unresolved conflicts that still affect certain parts of the continent, putting at risk the security, unity and democratic stability of member states and threatening the populations concerned. We shall work together for reconciliation and political solutions in conformity with the norms and principles of international law.”¹⁵ The last sentence primarily referred to conflicts in the former Yugoslavia and the former Soviet Union.

C. The Dissolutions of Yugoslavia and the Soviet Union as Aberrations from the Promises of 1990

Before things changed for the better, Europe witnessed the violent explosion of Yugoslavia in 1991.¹⁶ Today, the successor States of the former Yugoslavia, after having experienced years of international and non-international armed conflicts, scores of war crimes and crimes against humanity as well as genocide in Srebrenica,¹⁷ are now all members of the Council of Europe and parties to the European Convention on Human Rights. Croatia, Montenegro, North Macedonia and Slovenia are also NATO members. Slovenia and Croatia have already joined the EU, and the others are all actual or potential accession candidates. In the Brdo Declaration of the EU-Western Balkans Summit of 6 October 2021, the EU confirmed the accession perspective of its Western Balkans partners.¹⁸ The situation in the Balkans is politically rather stable, not least because of that perspective. The Yugoslav aberration from the promises of 1990 seems to have come to an end, although there are unsolved problems, such as the status of Kosovo¹⁹ and the problematic and dysfunctional constitution of Bosnia and Hercegovina.²⁰

14 *Fastenrath/Fastenrath*, Organization for Security and Co-operation in Europe, in: Max Planck Encyclopedia of Public International Law.

15 https://www.coe.int/t/dcr/summit/20050517_decl_varsovie_EN.asp (26/5/2022).

16 *Weiß*, in: Schmahl/Breuer (eds.), para. 1.52 ff.

17 See *Oeter*, Yugoslavia, Dissolution of, in: Max Planck Encyclopedia of Public International Law; *Thienel/Zimmermann*, Yugoslavia, Cases and Proceedings before the ICJ, *ibid.*; *Fitzmaurice*, Badinter Commission (for the Former Yugoslavia), *ibid.*; *Pocar*, International Criminal Tribunal for the Former Yugoslavia (ICTY), *ibid.*

18 <https://www.consilium.europa.eu/media/52280/brdo-declaration-6-october-2021-en.pdf> (28/4/2022).

19 See *Forde*, Setting the Cat amongst the Pigeons: Kosovo's Application for Membership of the Council of Europe, EJIL Talk, 17 May 2022.

20 See ECtHR (GC), judgment of 22 December 2009, *Sejdić and Finci v. Bosnia and Herzegovina* (appl. nos. 27996/06 and 34836/06); chamber judgment of 15 July 2014, *Zorić v. Bosnia and Herzegovina* (appl. no. 3681/06).

With regard to the European continuator or successor States of the former Soviet Union,²¹ the picture is bleaker: While the dissolution of the Soviet Union was initially more peaceful than that of Yugoslavia, the post-Soviet aberration from the promises of 1990 is continuing until today.

After the dissolution of the Soviet Union, the former Soviet nuclear arsenal was spread across four independent States: Belarus, Kazakhstan, Russia and Ukraine. In the interest of non-proliferation, these four States and the United States of America concluded the Lisbon Protocol to the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms (START),²² according to which Belarus, Kazakhstan and Ukraine transferred the nuclear weapons on their territories to Russia and acceded to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT)²³ as non-nuclear-weapon States.²⁴ In this context, the United States, Russia, the United Kingdom and Ukraine on 5 December 1994 signed the (Budapest) Memorandum on Security Assurances²⁵ where the former three welcomed the latter's accession to the NPT as a non-nuclear-weapon State and reaffirmed "their commitment to Ukraine ... to respect the Independence and Sovereignty and the existing borders of Ukraine ..., ... their obligation to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine, and ... their commitment to Ukraine ... to refrain from economic coercion designed to subordinate to their own interest the exercise by Ukraine of the rights inherent in its sovereignty and thus to secure advantages of any kind." The three signatories also reaffirmed their commitment "to seek immediate United Nations Security Council action to provide assistance to Ukraine, as a non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons, if Ukraine should become a victim of an act of aggression or an object of a threat of aggression in which nuclear weapons are used." Although the Memorandum, which became applicable upon signature and invoked the CSCE Final Act several times, is only politically binding, Ukraine unilaterally registered it on 2 October 2014 with the UN Secretariat,²⁶ based on Art. 102 UN Charter, several months after Russia had violated the Memorandum by militarily intervening in Crimea and eastern Ukraine.

21 The dissolution of the Soviet Union is most aptly qualified not as dismemberment, leaving only successor States, but as a series of secessions by Ukraine and other States from a State that was continued by the legally identical Russian Federation (see *Nussberger*, Russia, in: Max Planck Encyclopedia of Public International Law, margin notes 92 ff.).

22 Of 23 May 1992, available at: <https://2009-2017.state.gov/documents/organization/27389.pdf> (26/5/2022).

23 Of 1 July 1968, UNTS vol. 729, 161.

24 *Grotto*, Non-Proliferation Treaty (1968), in: Max Planck Encyclopedia of Public International Law, margin note 55.

25 <https://treaties.un.org/doc/Publication/UNTS/Volume%203007/Part/volume-3007-I-52241.pdf> (26/5/2022). There are two similar Memoranda regarding Belarus and Kazakhstan.

26 UNTS vol. 3007, I-52241. See *Lewandowski*, From Russia Without Law: The Shredding of the Budapest Memorandum and its Significance for Future Security Guarantees, *Völkerrechtsblog*, 14 April 2022.

Whereas the Baltic States are member States of the Council of Europe, the EU and NATO and parties to the ECHR,²⁷ Belarus has remained an outsider, except for its participation in the Organization for Security and Co-operation in Europe and its observer status in the Council of Europe. Armenia, Azerbaijan, Georgia, Moldova, Russia and Ukraine have all acceded to the Council of Europe and the ECHR. While Georgia,²⁸ Moldova²⁹ and Ukraine³⁰ have concluded association agreements with the EU, there is only a comprehensive and enhanced partnership agreement with Armenia,³¹ after Armenia decided to join the Eurasian Economic Union with Belarus, Kazakhstan, Kyrgyzstan and Russia in 2014. That Union is the Russian-sponsored competitor of the EU in the post-Soviet space.³² In 2016, the EU started the process to replace the old Partnership and Cooperation Agreement with Azerbaijan³³ by an upgraded agreement.³⁴ The EU's Association Agreement with Ukraine triggered Russia's armed intervention in Crimea and the Donbas region of Eastern Ukraine in 2014 where a hybrid war has continued ever since.³⁵ Conversely, Russia's aggression against Ukraine in 2022 prompted Georgia, Moldova and Ukraine to apply for EU membership.³⁶

The political stability of the area previously colonized by the Soviet Union has never been satisfactory, not least because there are sizable Russian-speaking minorities in most successor States that Russia still considers as its "near abroad". Some of those have been naturalized *en masse* by Russia ("passportisation") and can now be

27 See *van Elswwege*, Baltic States, in: Max Planck Encyclopedia of Public International Law.

28 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, OJ 2014 L 261, p. 4.

29 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, OJ 2014 L 260, p. 4.

30 Association between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, OJ 2014 L 161, p. 3.

31 Comprehensive and enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part, OJ 2018 L 23, p. 4. *Khvorostiankina*, in: Lorenzmeier/Petrov/Vedder (eds.), p. 193 ff.

32 See *Kembayev*, Eurasian Economic Union (EAEU), in: Max Planck Encyclopedia of Public International Law; *Dragneva*, in: Lorenzmeier/Petrov/Vedder (eds.), p. 229 ff.

33 Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part, OJ 1999 L 246, p. 3.

34 [https://www.consilium.europa.eu/en/press/press-releases/2016/11/14/azerbaijan/\(28/4/2022\)](https://www.consilium.europa.eu/en/press/press-releases/2016/11/14/azerbaijan/(28/4/2022)).

35 See already *Giegerich*, ZEuS 2017, p. 410 ff.; *Van Elswwege*, in: Lorenzmeier/Petrov/Vedder (eds.), p. 95 ff.

36 See para. 4 f. of the Versailles Declaration (fn. 1). *Priebe*, EuZW 2022, p. 345 f. The European Council has meanwhile decided to grant the status of candidate country to Ukraine and Moldova, but not yet to Georgia (Conclusions adopted at the meeting of 23 and 24 June 2022, III.).

used to legitimate Russian interventions.³⁷ There have been international and non-international armed conflicts all along in the area with countless atrocities amounting at least to war crimes – in Chechnya,³⁸ between Armenia and Azerbaijan on Nagorny-Karabakh (in which Russia supported Armenia),³⁹ between Russia and Georgia on South Ossetia⁴⁰ and Abkhazia⁴¹ as well as in the context of the secession of Transnistria from Moldova with Russian military assistance.⁴² Most of these controversies have continued as frozen conflicts which the OSCE has been unable to settle and which can easily erupt into hot conflicts, as happened with the Nagorny-Karabakh conflict in 2020.⁴³

The post-Soviet conflicts have culminated in the international armed conflict between Russia and Ukraine that actually started in 2014 with Russia's quasi-annexation of Crimea and the *de facto* secession of parts of the Donbas Region (Donetsk and Luhansk) in which Russian regular and irregular military personnel was substantially involved.⁴⁴ On 21 February 2022, Russia recognized the separatist "Donetsk People's Republic" and "Luhansk People's Republic" as independent States.⁴⁵ Three days later, the conflict escalated into the war of aggression which Russia is continuing to wage on Ukraine as a whole.⁴⁶

On 15 March 2014, Russia had already used its veto power to prevent the UN Security Council from reaffirming its commitment to the sovereignty, independence, unity and territorial integrity of Ukraine within its internationally recognized borders and voicing its concern over the referendum on the status of Crimea planned on 16 March 2016 without the authorization by Ukraine.⁴⁷ On 27 March 2014, the UN General Assembly stepped into the breach by adopting Resolution 68/262 on the territorial integrity of Ukraine by 100 votes to 11 with 58 abstentions. Events at UN level repeated in 2022, when Russia on 25 February 2022 vetoed a

37 Peters, GYIL 2010, p. 623 ff.; *ibid.*, Passportisation: Risks for international law and stability (Part I and II), EJIL Talk, 9 and 10 May 2019; Hoffmann, Zur systematischen Verleihung der russischen Staatsangehörigkeit als Mittel der Destabilisierung anderer Staaten, Verfassungsblog, 3 March 2022; Bescotti/Burkhardt/Rabinovych/Wittke, Russia's „humanitarian“ tool for foreign policy, extraterritorial governance, and military intervention, *ibid.*, 23 March 2022.

38 Grant, Chechnya, in: Max Planck Encyclopedia of Public International Law; Nussberger, Russia, *ibid.*, margin notes 68 ff.

39 Melnyk, Nagorny-Karabakh, in: Max Planck Encyclopedia of Public International Law.

40 Nussberger, South Ossetia, in: Max Planck Encyclopedia of Public International Law.

41 Nussberger, Abkhazia, in: Max Planck Encyclopedia of Public International Law.

42 Belitser, in: Bebler (ed.), p. 45 ff.

43 CoE Commissioner for Human Rights, Memorandum on the humanitarian and human rights consequences following the 2020 outbreak of hostilities between Armenia and Azerbaijan over Nagorno-Karabakh, CommDH(2021)29, 8 November 2021; Mustafayev, Who Has Effective Control in Azerbaijan's Karabakh Region?, EJIL Talk, 4 July 2022.

44 Bebler, in: Bebler (ed.), p. 189 ff.

45 Weller, Russia's Recognition of the 'Separatist Republics' in Ukraine was Manifestly Unlawful, EJIL Talk, 9 March 2022.

46 Roscini, Russia Has Not Breached the Jus Contra Bellum in 2022; It Did in 2014, Völkerrechtsblog, 7 March 2022.

47 S/2014/189 of 15 March 2014, available at https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_189.pdf (28/4/2022).

UN Security Council resolution that would have deplored in the strongest terms its aggressions against Ukraine in violation of Art. 2 (4) of the UN Charter and decided (in the sense of Art. 25 of the UN Charter) that it should immediately cease its use of force against Ukraine and withdraw all its military forces from Ukrainian territory.⁴⁸ On 27 February 2022, the UN Security Council called an emergency special session of the UN General Assembly to consider the aggression against Ukraine.⁴⁹ On 2 March 2022, the General Assembly by 141 votes against 5 with 35 abstentions adopted a resolution⁵⁰ which took up and extended the determinations and demands of the vetoed Security Council resolution.

Most of these post-Soviet conflicts have occurred within the Council of Europe and area of application of the ECHR, to which Russia acceded in 1996 and 1998 respectively, and all the other aforementioned States (except Belarus) until 2002. They have accordingly occupied the organs of the Council of Europe and the European Court of Human Rights. I mention only in passing that the EU has imposed six sanctions packages against Russia over Ukraine since 2014.⁵¹

D. The Russian Federation as a Problematic Member of the CoE and the ECHR

The admission of Russia to the CoE was a difficult process dragging on for almost four years (1992 – 96) because of doubts as to whether the candidate fulfilled the requirements of Art. 4 read together with Art. 3 of the Statute: Could Russia be trusted to “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

These doubts arose not least in view of the first war in Chechnya (1994 – 1996) that led to suspension of the accession process.⁵³ Ultimately, the admission was made contingent on promises by Russia to ratify various CoE conventions.⁵⁴ Russia also entered into a commitment to withdraw its military personnel and equipment from the territory of Moldova (Transnistria) which has remained unfulfilled ever

48 S/2022/155.

49 Resolution 2623 (2022). As a decision on procedural matters, the resolution was not subject to the veto in accordance with Art. 27 (2) of the UN Charter.

50 A/ES-11/L.1. See also General Assembly Resolution A/ES-11/L.2 of 24 March 2022 (140:5:38).

51 See <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/> (2/6/2022); <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/> (2/6/2022); <https://www.consilium.europa.eu/en/press/press-releases/2022/05/31/europe-an-council-conclusions-on-ukraine-30-may-2022/> (3/6/2022).

52 Nussberger (fn. 38), margin note 28. See Bernhardt/Trechsel/Weitzel/Ermacora, Human Rights Law Journal 1994, p. 249 ff. (who came to a negative conclusion).

53 Grant (fn. 38), margin note 34.

54 Nussberger (fn. 38). See PACE Opinion 193 (1996) of 25 January 1996, para. 10.

since.⁵⁵ In reaction to the second war in Chechnya (1999 – 2000) in which Russia was again accused of using indiscriminate and disproportionate force, the voting rights of the Russian delegates in the Parliamentary Assembly of the CoE (PACE) were suspended from April 2000 until January 2001 by PACE using the process of ratification of credentials.⁵⁶

Russia's participation in the CoE and the ECHR over time presents a mixed picture,⁵⁷ although it should be emphasised that Russia was the only super-power ever to be subject to obligatory human rights supervision by an international court.⁵⁸ Five years after the entry into force of Protocol No. 11 to the ECHR,⁵⁹ which had restructured the Convention's control machinery by abolishing the European Commission of Human Rights and introducing the full-time single Court with obligatory jurisdiction, further reform was urgently needed to preserve the effectiveness of the control system in view of the enormous increase in incoming applications. For that purpose, Protocol No. 14 to the ECHR was adopted by the CM and opened for signature on 13 May 2004.⁶⁰ However, Russia delayed the entry into force of Protocol No. 14 for years by refusing to ratify it. This produced an extremely serious overload situation for the European Court of Human Rights and prompted the other Convention States to adopt an interim Protocol No. 14bis to the ECHR.⁶¹ This Protocol was intended to enable the Court to already use certain procedural simplifications to be introduced by Protocol No. 14 in cases concerning States Parties to Protocol No. 14bis. Russia ultimately ratified Protocol No. 14 in 2010 so that it could enter into force on 1 June 2010, making Protocol No. 14bis obsolete.

In April 2014, PACE again used the process of ratification of the credentials of national delegations to suspend the voting rights and other rights of the Russian delegation until the end of the session in reaction to the annexation of Crimea and the military occupation of Ukrainian territory by Russia in violation of the UN Charter which PACE qualified as follows: "These actions are also in clear contradiction with the Statute of the Council of Europe, in particular its preamble, and the obligations resulting from Article 3, as well as with the commitments undertaken by the Russian Federation upon accession and contained in Assembly Opinion 193 (1996) on Russia's request for membership of the Council of Europe."⁶² PACE reserved "the right to annul the credentials of the Russian delegation, if the Russian

55 See See PACE Opinion 193 (1996) of 25 January 1996, para. 10.9; PACE Resolution 2034 (2015) of 28 January 2015, para. 12.3.

56 *Grant* (fn. 38), margin notes 35 f.

57 *Roter*, in: Mälksoo/Benedek (eds.), p. 26 ff.

58 *Leach*, *A Time of Reckoning? Russia and the Council of Europe*, Strasbourg Observers, 17 March 2022 (citing Rick Lawson).

59 Of 11 May 1994 (ETS No. 155), entered into force on 1 November 1998.

60 CETS No. 194.

61 Of 27 May 2009 (CETS No. 204).

62 PACE Resolution 1990 (2014) of 10 April 2014, para. 4.

Federation does not de-escalate the situation and reverse the annexation of Crimea.”⁶³

In 2015, PACE resolved for now to ratify the credentials of the Russian delegation in order to foster dialogue with the Russian Federation, but as “a clear expression of its condemnation of the continuing grave violations of international law in respect of Ukraine by the Russian Federation”, suspended some rights (not including voting rights) of the Russian delegation for the duration of the 2015 session.⁶⁴ Russia contested the legality of the suspensions, stopped sending delegates to PACE in 2016 and suspended payment of its contributions to the CoE budget in 2017.⁶⁵ Since Art. 8 of the CoE Statute appears to reserve the power of suspending Member States’ rights of representation in reaction to violations of Art. 3 of the Statute to the Committee of Ministers (CM), the legality of PACE’s measures are indeed not beyond doubt.⁶⁶

In 2019, when suspension of Russian representation pursuant to Art. 9 CoE Statute was about to be triggered,⁶⁷ a compromise was brokered by France and Germany according to which Russian delegates resumed their participation in PACE and Russia its payment of contributions to the CoE budget (ca. € 33 million annually), while promising to fulfil its membership obligations in good faith.⁶⁸ In substance, Russian membership was continued on probation. It was also agreed that a new mechanism would be worked out for sanctioning violations of membership obligations in which both CM and PACE should cooperate. Although the situation in Russia concerning democracy, rule of law and human rights deteriorated further after 2019 and Crimea remained annexed, further attempts to suspend Russia from participation in PACE in 2020 and 2021 were unsuccessful.⁶⁹

Meanwhile a new “Complementary joint procedure between the Committee of Ministers and the Parliamentary Assembly in response to a serious violation by a

63 Ibid., para. 16. See Klein, in: Schmahl/Breuer (eds.), para. 3.70 ff.

64 Resolution 2034 (2015) of 28 January 2015, paras. 14 ff.

65 Drzemczewski, Europe des droits & libertés/Europe of Rights & Liberties 2020/1, p. 7–15.

66 See Polakiewicz/Kirchmayr, in: von Bogdandy et al. (eds.), p. 362. In footnote 4, the authors cite an unpublished Opinion by the CoE’s Directorate of Legal Advice and Public International Law (Role and responsibilities of the Council of Europe’s statutory organs with special emphasis on the limitation of membership rights, DLAPIL 18/2018) of 25 September 2018.

67 Art. 9 CoE Statute provides that the right of representation of a Member State on the CM and PACE may be suspended by the CM as long as it fails to fulfil its financial obligations.

68 See <https://www.auswaertiges-amt.de/en/aussenpolitik/internationale-organisationen/russia-council-of-europe/2229670> (3/5/2022). See CM Decision CM/Del/Dec(2019)129/2 of 17 May 2019 and PACE Resolution 2287 (2019) of 25 June 2019. Comprehensive overview and critique by Glas, Russia Left, Threatened and Won: Its Return to the Assembly without Sanctions, Strasbourg Observers, 2 July 2019.

69 Glas, They did it again: Russia’s continued presence in the PACE, Strasbourg Observers, 23 February 2021. See also von Gall, Warum der russischen Delegation in der Parlamentarischen Versammlung des Europarats nicht mehr das Mandat erteilt werden sollte, Verfassungsblog, 25 January 2022.

member State of its statutory obligations” was agreed which can be initiated by either of the two organs as well as the Secretary General.⁷⁰ Since “the primary aim of the complementary joint procedure is to bring a member State, through constructive dialogue and co-operation, into compliance with the obligations and principles of the Organisation, and avoid imposing sanctions”,⁷¹ it was not used in the context of the Russian aggression on Ukraine from 24 February 2022 because that massive assault on the CoE’s foundations made any constructive dialogue useless. Actually, the new complementary joint procedure was not intended to and could not “preclude the direct implementation by the Committee of Ministers of Article 8, as provided in the Statute”.⁷²

E. Russian and Other Post-Soviet Cases in the European Court of Human Rights

The dissolution of the Soviet Union and ensuing international and non-international armed conflicts have given rise to numerous important cases in the European Court of Human Rights which cannot be exhaustively discussed here. It may suffice to recall the following examples, with references to related cases of the International Court of Justice (ICJ). Russia is more or less deeply involved in all of these conflicts and accordingly party to most (but not all) of the cases which reveal gross and widespread human rights violations, usually committed by all adversaries.

I. Cases relating to Nagorny-Karabakh, Transnistria and Georgia (Abkhazia and South Ossetia)

With regard to the Nagorny-Karabakh conflict, the ECtHR found

- in *Chiragov and others v. Armenia*⁷³ that respondent was continuously violating Art. 1 of Protocol No. 1 as well as Art. 8 and 13 ECHR by preventing Azerbaijani refugees from returning to their homes in Azerbaijan territory effectively controlled by Armenia;
- in *Sargsyan v. Azerbaijan*⁷⁴ that respondent was continuously violating Art. 1 of Protocol No. 1 as well as Art. 8 and 13 ECHR by preventing an Armenian refugee from returning to his home in Azerbaijan from where he had fled during the Armenian-Azerbaijani armed conflict;⁷⁵

70 PACE Resolution 2319 (2020) of 29 January 2020; CM Decision CM/Del/Dec(2020)1366/1.7-app of 5 February 2020; PACE Resolution 2360 (2021) of 26 January 2021.

71 PACE Resolution 2319 (2020) of 29 January 2020, para. 4.1.

72 Ibid., para. 4.9.

73 GC judgment of 16 June 2015 (appl. no. 13216/05).

74 GC judgment of 16 June 2015 (appl. no. 40167/06).

75 Judgment of 26 May 2020 (appl. no. 17247/13).

- in *Makuchyan and Minasyan v. Azerbaijan and Hungary* that Azerbaijan (but not Hungary) had violated the procedural aspect of Art. 2 ECHR as well as Art. 14 read together with Art. 2 ECHR by immediately releasing, promoting and honouring an Azerbaijani military officer who had murdered an Armenian soldier out of racial hatred during joint training in Hungary where he had been convicted and sentenced to life imprisonment and later extradited to serve the rest of his sentence in Azerbaijan.
- Two inter-State cases regarding the 2020 Nagorny-Karabakh conflict that were lodged by Armenia against Azerbaijan⁷⁶ and against Turkey⁷⁷ are still pending before the ECtHR. Based on Rule 39 of the Rules of Court, the Court indicated interim measures on 29 September 2020 and 6 October 2020, calling on “all States directly or indirectly involved in the conflict ... to refrain from actions that contribute to breaches of the Convention rights of civilians, and to respect their obligations under the Convention.”⁷⁸
- Azerbaijan quickly lodged its own inter-State application against Armenia⁷⁹ which has meanwhile been referred to the GC, together with the aforementioned application by *Armenia v. Azerbaijan*.⁸⁰
- Armenia has filed three further pending applications against Azerbaijan.⁸¹

Apart from that, Armenia and Azerbaijan have instituted proceedings against one another before the ICJ in September 2021,⁸² each accusing the other of violations of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),⁸³ including during the armed conflict that re-erupted in 2020. Both parties invoke Art. 22 CERD as basis for the ICJ’s jurisdiction. While the main proceedings are still pending, the ICJ indicated provisional measures under Art. 41 of the ICJ Statute to both parties by two Orders of 7 December 2021.

With regard to the Moldova/Transnistria conflict, the ECtHR found

- in *Ilaşcu and others v. Moldova and Russia*⁸⁴ that both respondent States had jurisdiction in the sense of Art. 1 ECHR with regard to detentions in the Transnistrian region of Moldova (which was under the effective control of Russia) and that the detainees’ rights under Art. 3 and 5 ECHR had been violated by Russia

76 Appl. no. No. 42521/20.

77 Appl. no. 43517/20.

78 See the Press Release ECHR 276 (2020) of 6 October 2020.

79 Appl. no. 47319/20.

80 Press Release ECHR 145 (2021) of 12 May 2021.

81 *Armenia v. Azerbaijan (II)* (appl. no. 33412/21) and *Armenia v. Azerbaijan (III)* (appl. no. 42445/21); *Armenia v. Azerbaijan (IV)* (appl. no. 15389/22).

82 Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Armenia v. Azerbaijan*); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Azerbaijan v. Armenia*).

83 Of 21 December 1965, UNTS vol. 660, p. 195.

84 GC judgment of 8 July 2004 (appl. no. 48787/99).

for having failed to fulfil its negative obligations to respect and by Moldova for having failed to fulfil its positive obligation to protect;⁸⁵

- in *Catan and others v. Moldova and Russia*⁸⁶ that Russia (but not Moldova) had violated Art. 2 of Protocol No. 1 by the separatist regime's forced closure of Moldovan/Romanian language schools in the Transnistrian region.

With regard to the conflicts involving Georgia, the ECtHR found

- in *Georgia v. Russia (I)* that Russia's administrative practice in 2006 involving the arrest, detention and collective expulsion of Georgian nationals violated Art. 4 of Protocol No. 4 as well as Art. 3, 5 (1) and (4) and 13 ECHR⁸⁷ and decided that Russia had to pay Georgia 10 million euros in non-pecuniary damage as just satisfaction under Art. 41 ECHR⁸⁸ – which Russia refused to do because it denies the applicability of Art. 41 ECHR in inter-State cases;⁸⁹
- in *Georgia v. Russia (II)*⁹⁰ that with regard to the international armed conflict between Georgia and Russia in 2008 the latter had engaged in an administrative practice contrary to Art. 2, 3 and 8 ECHR as well as Art. 1 of Protocol No. 1. The GC also found that events occurring during the brief active phase of hostilities did not fall within Russia's jurisdiction for the purposes of Art. 1 ECHR and were thus outside the scope of application of the ECHR. This means that during active hostilities human rights protection is left entirely to international humanitarian law which lacks effective international enforcement procedures;⁹¹
- *Georgia v. Russia (IV)* relates to “the alleged recent deterioration of the human rights situation along the administrative boundary lines between Georgian-controlled territory and Abkhazia and South Ossetia” and is still pending.⁹²

In 2008, Georgia also instituted proceedings against Russia before the ICJ based on Art. 22 CERD, claiming that “the Russian Federation, through its State organs, State agents, and other persons and entities exercising governmental authority, and through the South Ossetian and Abkhaz separatist forces and other agents acting on the instructions of, and under the direction and control of the Russian Federation, is responsible for serious violations of its fundamental obligations under CERD, in-

85 See *Wenzel, Ilaşcu Case*, in: Max Planck Encyclopedia of International Law.

86 GC judgment of 19 October 2012 (appl. nos. 43370/04, 8252/05 and 18454/06).

87 GC judgment of 3 July 2014 (no. 13255/07).

88 GC judgment of 31 January 2019. The applicability of Art. 41 ECHR in inter-State cases was first affirmed by ECtHR (GC), *Cyprus v. Turkey* (appl. no. 25781/94), judgment of 12 May 2014 (just satisfaction).

89 *Risini*, Human Rights in the Line of Fire, *Verfassungsblog*, 28 January 2021.

90 GC judgment of 21 January 2021 (no. 38263/08).

91 See *Milanovic*, *Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos*, *EJIL Talk*, 25 January 2021; *Dzhehtsiarou*, The Judgement of Solomon that went wrong: *Georgia v. Russia (II)* by the European Court of Human Rights, *Völkerrechtsblog*, 26 January 2021; *Risini*, *Georgia v. Russia (II)* before the European Court of Human Rights, *Verfassungsblog*, 28 January 2021; *Gavron/Leach*, Damage control after *Georgia v. Russia (II)* – holding states responsible for human rights violations during armed conflict, *Strasbourg Observers*, 8 February 2021.

92 Appl. no. 39611/18). See Press Release ECHR 287 (2018) of 31 August 2018.

cluding Articles 2, 3, 4, 5 and 6.”⁹³ The ICJ found that it had no jurisdiction to entertain the application filed by Georgia because the requirements set forth in Art. 22 CERD (parties must have engaged in negotiations with respect to the matters in dispute concerning the interpretation or application of CERD that failed prior to referring the matter to the ICJ) had not been satisfied.⁹⁴

II. Cases Relating to Ukraine

With regard to Ukraine, these six inter-State cases are currently pending before the ECtHR:

- *Ukraine v. Russia* (re Crimea) – the application concerns an alleged pattern of human rights violations by Russia in Crimea between 27 February 2014 and 26 August 2015. The Court decided that it was for the most part admissible;⁹⁵ the judgment on the merits is still pending;
- *Ukraine and the Netherlands v. Russia* – the applications concern events in Eastern Ukraine, including the downing of Malaysia Airlines flight MH17. An interim measure is in force since 2014 calling upon both Russia and Ukraine to comply with their ECHR obligations with regard to Eastern Ukraine.⁹⁶ The GC held a hearing on 26 January 2022.⁹⁷
- *Ukraine v. Russia (VIII)* – the application concerns the naval incident in Kerch Strait in 2018 which led to the capture of three Ukrainian naval vessels and their crews;⁹⁸
- *Ukraine v. Russia (IX)* – the application concerns applicant’s allegations of an ongoing administrative practice by respondent consisting of targeted assassination operations against perceived opponents of Russia, in Russia and other States and their cover-up;⁹⁹
- *Russia v. Ukraine* – the application concerns applicant’s allegations of an administrative practice in Ukraine of killings, abductions, forced displacement, interference with the right to vote, restrictions on the use of the Russian language, attacks on Russian embassies and consulates, the interruption of the water supply

93 Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v. Russian Federation*).

94 Judgment of 1 April 2011 in the Case concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v. Russian Federation*), Preliminary Objections.

95 GC decision of 14 January 2021 (appl. nos. 20958/14 and 38334/18).

96 See Press Release ECHR 068 (2022) of 1 March 2022.

97 Appl. nos. 8019/16, 43800/14 and 28525/20. See Press Release ECHR 029 (2022) of 26 January 2022.

98 Appl. no. 55855/18.

99 Appl. no. 10691/21. See Press Release ECHR 069 (2021) of 23 February 2021. See also Akande, The Use of Nerve Agents in Salisbury: Why does it Matter Whether it Amounts to a Use of Force in International Law?, EJIL Talk, 17 March 2018.

to Crimea¹⁰⁰ as well as Ukraine's responsibility for the deaths of those on board Malaysia Airlines flight MH 17 for failing to close its airspace;¹⁰¹

- *Ukraine v. Russia (X)* – the application concerns “allegations of mass and gross human-rights violations committed by the Russian Federation in its military operations on the territory of Ukraine since 24 February 2022”.¹⁰² The ECtHR considered that the military action gave “rise to a real and continuing risk of serious violations of the Convention rights of the civilian population, in particular under Articles 2 ..., 3 ... and 8” ECHR. Based on Rule 39 of the Rules of Court, the Court thus indicated to Russia “to refrain from military attacks against civilians and civilian objects, including residential premises, emergency vehicles and other specially protected civilian objects such as schools and hospitals, and to ensure immediately the safety of the medical establishments, personnel and emergency vehicles with the territory under attack or siege by Russian troops.”¹⁰³ In its application in the main proceedings, which was lodged in completed form only on 23 June 2022, the Ukrainian Government alleges that Russia “has engaged in targeted, indiscriminate and disproportionate attacks against civilians and their property across Ukraine”. These attacks were carried out by Russian military forces and/or separatist or other irregular paramilitary forces under their control and resulted in numerous violations of Art. 2, 3, 4, 5, 8, 9, 10, 11, 13 and 14 ECHR, Art. 1 of Protocol No. 1 as well as Art. 2 and 3 of Protocol No. 4.¹⁰⁴

Moreover, thousands of individual applications are currently pending, mostly against Russia, but also against Ukraine, in connection with the armed conflict since 2014.¹⁰⁵ The ECtHR has adjourned many of them pending Grand Chamber judgments in related inter-State cases.¹⁰⁶ It also decided that individual requests for interim measures by civilians were already largely covered by the interim measure granted on 1 March 2022 in *Ukraine v. Russia (X)*. However, the Court on 4 March 2022 further indicated to Russia that it “should ensure unimpeded access of the civilian population to safe evacuation routes, healthcare, food and other essential supplies, rapid and unconstrained passage of humanitarian aid and movement of aid workers.”¹⁰⁷ On 1 April 2022 the Court expanded the last interim measure by indicating to Russia “that the said evacuation routes should allow civilians to seek refuge in

100 *Plotnikov*, The Proceedings Flow While Water Does Not: Russia's Claims Concerning the North Crimean Canal in Strasbourg, EJIL Talk, 24 August 2021.

101 Appl. no. 36958/21. See Press Release ECHR 240 (2021) of 23 July 2021.

102 Appl. no. 11055/22. See Press Release ECHR 220 (2022) of 28 June 2022.

103 Press Release ECHR 068 (2022) of 1 March 2022. See also Press Release ECHR 220 (2022) of 28 June 2022.

104 Press Release ECHR 220 (2022) of 28 June 2022.

105 Press Release ECHR 029 (2022) of 26 January 2022 mentions “over 8,500 individual applications pending before the Court concerning the events in Crimea, eastern Ukraine and the Sea of Azov”.

106 See Press Release ECHR 432 (2018) of 17 December 2018 regarding applications concerning events in Eastern Ukraine.

107 Press Release ECHR 073 (2022) of 4 March 2022.

safer regions of Ukraine” (and not Russia).¹⁰⁸ In the case of *Saadoune v. Russia and Ukraine*,¹⁰⁹ the Court granted urgent measures in favour of a Moroccan national who was member of the Ukrainian armed forces and, after having surrendered to the Russian armed forces in Mariupol (Donetsk Region), was sentenced to death by a court of the so-called “Donetsk People’s Republic”. The ECtHR indicated to the Russian Government that they should “(a) ensure that the death penalty imposed on the applicant is not carried out; (b) ensure respect for the Convention rights of Mr Brahim Saadoune ...” The Ukrainian Government was required “to ensure, in so far as it was possible to do so, respect for the Convention rights of Mr Brahim Saadoune ...”.¹¹⁰

It is uncertain whether these interim measures – which are legally binding in order to preserve the effectiveness of the right to lodge individual applications under Art. 34 ECHR (or inter-State applications under 33 ECHR)¹¹¹ – have had any positive effect on the ground. But uncertainty of compliance cannot absolve the Court from indicating those measures under Rule 39 which it considers (and which obviously are) necessary in the interests of the parties or of the proper conduct of the proceedings in a situation where there is an imminent risk of irreparable harm.¹¹² It is therefore not remarkable that the Court decided to indicate those measures in the midst of active hostilities within a matter of days. It is much more remarkable that the Court seems to have abandoned the problematic position taken by the GC in *Georgia v. Russia* (II) – that events occurring during the active phase of hostilities do not fall within the jurisdiction of respondent State for the purposes of Art. 1 ECHR.¹¹³

In parallel with the six inter-State cases pending before the ECtHR, two further cases between the same parties are currently pending before the ICJ:

108 Press Release ECHR 116 (2022) of 1 April 2022.

109 Appl. no. 28944/22.

110 Press Release ECHR 204 (2022) of 16 June 2022. On 27 June 2022, the Court granted the same interim measures in the cases of two British captives (*Pinner v. Russia and Ukraine* and *Aslin v. Russia and Ukraine* [appl. nos. 31217/22, 31233/22]) – see Press Release ECHR 222 (2022) of 30 June 2022. On 30 June 2022, the Court indicated that the Russian Government should ensure respect for the Convention rights of an alleged Ukrainian prisoner of war and provide him with medical assistance, if necessary. It also indicated that the Ukrainian Government should, in so far as possible, ensure his Convention rights (*Oliynichenko v. Russia and Ukraine* [appl. no. 31258/22], Press Release ECHR 227 [2022] of 1 July 2022).

111 The pertinent case law of the ECtHR has so far been limited to individual applications; in case of non-compliance with an interim measure the Court will find the respondent guilty of a violation of Art. 34 ECHR (see ECtHR, Press Unit, Fact Sheet – Interim measures (April 2022), p. 12 ff., https://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf (19/5/2022)).

112 See *Risini*, Interim Measures by the European Court of Human Rights in re Ukraine v Russia no. 10, Verfassungsblog, 3 March 2022; *Van Baelen*, Interim measures by the European Court of Human Rights in the Ukrainian conflict: United against Russian aggression, Strasbourg Observers, 22 March 2022.

113 See *Johann*, Kann Straßburg den Krieg zähmen?, Verfassungsblog, 3 March 2022; *Milano-novic*, Update on ECtHR interim Measures Concerning Russia and Ukraine, EJIL Talk, 1 April 2022.

- 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*) – the ICJ determined that it has jurisdiction, rejecting Russia’s preliminary objection in this regard;¹¹⁴
- *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* – upon the request of Ukraine, the Court indicated the following provisional measures pursuant to Art. 41 of its Statute: “(1) ... The Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine; ... (2) ... The Russian Federation shall ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations referred to in point (1) above; ... (3) ... Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.”¹¹⁵ Although the Court’s orders under Art. 41 of the ICJ Statute have legally binding effect,¹¹⁶ Russia has refused to comply.

III. Overview of Russia’s Compliance with the ECHR in Other Cases

Many other cases unrelated to transboundary conflicts have arisen out of Russia’s steady decline toward autocracy and ultimately dictatorship in the last two decades. This decline constitutes betrayal not only of its political promises in the Charter of Paris and but also its legal commitments under the ECHR and the global human rights treaties to which it is party, such as the International Covenant on Civil and Political Rights (ICCPR).¹¹⁷ Of the 70,150 applications that were pending before a judicial formation of the ECtHR on 31 December 2021, 24.2% were lodged against Russia.¹¹⁸ 21 % of the judgments delivered in 2021 concerned Russia (and 17.83% Ukraine).¹¹⁹ 219 of the 232 judgments against Russia found at least one violation of the ECHR, 83 of these concerned torture or inhuman or degrading treatment against Art. 3 ECHR and 32 pertinent lack of effective investigation; 19 concerned deprivation of life and 33 pertinent lack of effective investigation.¹²⁰

114 Judgment of 8 November 2019.

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

116 See Order (fn. 115), para. 84.

117 Of 16 December 1966, UNTS vol. 999, p. 171.

118 The European Court of Human Rights in Facts and Figures 2021, p. 3 (available at: https://www.echr.coe.int/Documents/Facts_Figures_2021_ENG.pdf [20/5/2022]).

119 Ibid., p. 4 f.

120 Ibid., p. 9.

The country profile of Russia by the Press Unit of the ECtHR that was last updated in May 2022 gives an overview of the most important cases against Russia.¹²¹ These include

- *Khashiyev and Akayeva v. Russia*,¹²² *Isayeva, Yusupova and Bazayeva v. Russia*¹²³ and *Isayeva v. Russia*¹²⁴ – this group of cases concerned the indiscriminate and disproportionate use of force by the authorities in Chechnya; the Court found violations of Art. 2, 3, 5, 6, 8, 13, 38 (1) lit. a ECHR and Art. 1 of the Additional Protocol in three separate judgments;
- *AO Neftyanaya kompaniya YUKOS v. Russia* – the case concerned the liquidation of the YUKOS oil company; the Court found violations of Art. 6 ECHR (right to a fair trial) and Art. 1 of the Additional Protocol;¹²⁵ it later awarded just satisfaction of more than 1.8 billion euros in respect of pecuniary damage under Art. 41 ECHR to the shareholders or their successors;¹²⁶
- *Finogenov and Others v. Russia* – the case concerned the taking of more than 900 hostages by Chechen terrorists in a Moscow theatre which was ended by security forces using gas and storming the building, leading to the death of all terrorists and 125 of the hostages; the Court decided that Art. 2 ECHR had been violated in two respects: inadequate planning and implementation of the rescue operation and failure to effectively investigate the incident;¹²⁷
- *Tagayeva and Others v. Russia* – the case concerned the terrorist attack on a school in Beslan in Russian North Ossetia in 2004 in which more than 1,000 hostages were held captive for more than two days by armed Chechen terrorists; after an armed intervention by the authorities, over 330 persons were dead and over 750 injured; the Court decided that Art. 2 ECHR had been violated in several respects (failure to take adequate preventive measures, to adequately investigate and to carefully plan and control the security operation as well as use of massive lethal force without proper legal rules);¹²⁸
- *Navalnyy v. Russia* – the GC found violations of the rights of the famous political activist under Art. 5 (1), Art. 6 (1), Art. 11 as well as Art. 18 ECHR, because Russia had abused its right to limit Navalnyy's rights in order to suppress political pluralism;¹²⁹
- *Magnitskiy and Others v. Russia* – the Court decided that the treatment of Magnitskiy, who had died in pretrial detention, amounted to violations of both the

121 Available at: https://www.echr.coe.int/Documents/CP_Russia_ENG.pdf (20/5/2022).

122 Judgment of 24 February 2005 (appl. nos. 57942/00 and 57945/00).

123 Judgment of 24 February 2005 (appl. nos. 57947/00, 57948/00 and 57949/00).

124 Judgment of 24 February 2005 (appl. no. 57950/00).

125 Judgment of 20 September 2011 (appl. no. 14902/04).

126 Judgment of 24 June 2014 (appl. no. 14902/04).

127 Judgment of 20 December 2011 (appl. nos. 18299/03 and 27311/03).

128 Judgment of 13 April 2017 (appl. nos. 26562/07, 14755/08, 49339/08, 49380/08, 51313/08, 21294/11 and 37096/11).

129 Judgment of 15 November 2018 (appl. no. 29580/12). See the similar chamber judgment of 9 April 2019 in the case *Navalnyy v. Russia* (no. 2) (appl. no. 43734/14). Numerous other applications by Navalnyy are pending before the ECtHR.

substantive and procedural aspect of Art. 2 ECHR, Art. 3, Art. 5 (3) and Art. 6 (1) and (2) ECHR;¹³⁰

- *Fedotova and Others v. Russia* – the case concerned the lack of any opportunity of same-sex couples to have their relationship formally acknowledged which the Court considered as incompatible with Art. 8 ECHR;¹³¹
- *Estemirova v. Russia* – the case concerned the abduction and murder of a well-known human rights activist and the effectiveness of the ensuing investigation; the Court decided that Russia had violated Art. 2 ECHR because of failure to demonstrate that its investigation had complied with Convention standards and also Art. 38 ECHR because of respondent's refusal to submit the full criminal case file to the Court;¹³²
- *Carter v. Russia* – the case concerned the poisoning of the former Russian secret service agent Litvinenko who had defected and been granted asylum in the UK where he was poisoned by Russians using the radioactive agent polonium 210; the Court decided that Russia had violated both the substantive and procedural aspect of Art. 2 ECHR as well as failed to comply with its obligations under Art. 38 ECHR;¹³³
- *Ecodefence and Others v. Russia* – the case concerned applications by Russian NGOs complaining of violations of Art. 10 and 11 ECHR as well as Art. 14 and 18 ECHR in conjunction with Art. 10 and 11 ECHR in view of the Foreign Agents Act and their persecution for violating that act as well as excessive State control; although some of the applications were lodged in 2013 and the case communicated to respondent in 2017, it remained pending for more than nine years, even though the act has been the prime mechanism for suppressing civil society organisations in Russia;¹³⁴ on 28 and 29 December 2021, two of the applicants, Human Rights Centre “Memorial” and International Memorial, reiterated their

130 Judgment of 27 August 2019 (appl. nos. 32631/09 and 53799/12). Two US laws are named after the applicant, which allow for the imposition of sanctions on individuals who violate the human rights of human rights defenders: Sergei Magnitsky Rule of Law Accountability Act of 2012 (Pub. L. 114-208, title IV, Dec. 14, 2012, 126 Stat. 1502 [22 US Code 5811 note]) and Global Magnitsky Human Rights Accountability Act (Publ. L. 114-328, div. A, title XII, subtitle F, sec. 1261 ff., Dec. 23, 2016, 130 Stat. 2533 [22 US Code 2656 note]).

131 Judgment of 13 July 2021 (appl. nos. 40792/10, 30538/14 and 43439/14). The judgment is not final, since the case was referred to the GC on 22 November 2021 at respondent's request. See also Human Rights Committee, *Fedotova v. Russian Federation* (CCPR/C/106/D/1932/2010), Views adopted on 31 October 2012: Author's conviction of an administrative offence for “propaganda of homosexuality among minors” amounted to a violation of her rights under Art. 19 (2), read in conjunction with Art. 26 ICCPR.

132 Judgment of 31 August 2021 (appl. no. 42705/11).

133 Judgment of 21 September 2021 (appl. no. 20914/07). See *Milanovic*, European Court Finds Russia Assassinated Alexander Litvinenko, EJIL Talk, 23 September 2021.

134 See *Gavron*, The ECtHR and the Russian Foreign Agents' Law – a devastating case of judicial passivity, Strasbourg Observers, 28 April 2022. See also CJEU, judgment of 18 June 2020 (Case C-78/18, ECLI:EU:C:2020:476) where the CJEU found that a similar Hungarian law violated Art. 63 TFEU (free movement of capital) and Art. 7, 8 and 12 of the Charter of Fundamental Rights of the EU.

request for an interim measure to prevent their forced dissolution after Russian courts had adopted judgments to this effect, and the Court on 29 December 2021 “decided to indicate to the Government of Russia, under Rule 39, that in the interests of the parties and the proper conduct of the proceedings before it, the enforcement of the decisions to dissolve the applicant organisations should be suspended for a period that would be necessary for the Court to consider the application”;¹³⁵ the ECtHR meanwhile found a violation of Art. 11 ECHR interpreted in the light of Art. 10 ECHR (because the act was so indefinite as to permit arbitrary interferences and because it was not necessary in a democratic society) as well as a violation of Art. 34 ECHR (because Russia had disregarded the Court’s interim measure in favour of Memorial);¹³⁶

- *Taganrog LRO and Others v. Russia*¹³⁷ – the case concerned numerous measures taken against Jehova’s Witnesses religious organisations; the ECtHR found violations of Art. 9, 10, 11 ECHR as well as Art. 5 ECHR and Art. 1 of the Additional Protocol;
- *ANO RID Novaya Gazeta and Others v. Russia*¹³⁸ – the application and request for interim measures under Rule 39 of the Rules of Court concerns Russia’s interference in mass media coverage of the armed conflict in the Ukraine by “blocking information items and materials containing opinions different from the official point of view of the Russian authorities”; the Court, “having regard to the exceptional context in which the request has been lodged, invited the Russian authorities ... to abstain until further notice from actions and decisions aimed at full blocking and termination of the activities of *Novaya Gazeta*, and from other actions that in the current circumstances could deprive *Novaya Gazeta* of the enjoyment of its rights guaranteed by Article 10 of the Convention”.¹³⁹

There are also pilot judgments¹⁴⁰ against Russia concerning excessive delays in the enforcement of national court decisions,¹⁴¹ inhuman and degrading conditions in re-

135 [https://www.echr.coe.int/sites/search_eng/pages/search.aspx#{%22fulltext%22:\[%22Memorial%22\]}](https://www.echr.coe.int/sites/search_eng/pages/search.aspx#{%22fulltext%22:[%22Memorial%22]}) (26/5/2022).

136 Judgment of 14 June 2022 (appl. No. 9988/13 and 60 others). The Chamber decided that it was unnecessary to rule on the complaints under Art. 14, 18 ECHR. *Kriener, Ecodefence v Russia: The ECtHR’s stance on Foreign Funding of Civil Society*, EJIL Talk, 21 June 2022.

137 Judgment of 7 June 2022 (appl. nos. 32401/10 and others).

138 Appl. no. 11884/22.

139 Press Release ECHR 084 (2022) of 10 March 2022. See *Milanovic*, The Legal Death of Free Speech in Russia, EJIL Talk, 8 March 2022. See conversely *Popović*, The EU Ban of RT and Sputnik: Concerns Regarding Freedom of Expression, EJIL Talk, 30 March 2022; General Court of the EU, Order of the President of 30 March 2022 in Case T-125/22 R (*RT France v. Council*).

140 See Art. 61 of the Rules of Court.

141 ECtHR, judgment of 15 January 2009, *Burdov v. Russia* (No. 2) (appl. no. 33509/04); judgment of 1 July 2014, *Gerasimov and Others v. Russia* (appl. nos. 9920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11).

mand centres where detainees await trial¹⁴² and most recently domestic violence.¹⁴³ With regard to the North Caucasus (Chechnya and Ingushetsia), the ECtHR handed down a quasi-pilot judgment in the case of *Aslakhanova and Others v. Russia*¹⁴⁴ which concerned unresolved disappearances of eight persons. It determined the existence of a “systemic practice incompatible with the Convention”, without applying “any adjournment in respect of similar cases pending before it, in view of the serious and continuing nature of the violations alleged.”¹⁴⁵ The Court found that it had rendered more than 120 judgments regarding disappearances in the North Caucasus since 1999 which revealed a systemic problem of non-investigation of such crimes, for which there was no effective domestic remedy. Since core human rights were affected, the prompt implementation of comprehensive and complex measures was required.¹⁴⁶ Based on Art. 46 ECHR, the Court therefore ordered general measures to be taken by Russia to remedy the situation, under the supervision of the CM.

IV. Execution of ECtHR Judgments by Russia

The execution of ECtHR judgments by Russia has been sluggish, despite its pertinent obligation under Art. 46 (1) ECHR. Currently, the CM’s supervision pursuant to Art. 46 (2) ECHR extends to 220 leading cases and 1,764 repetitive cases.¹⁴⁷ Some of the judgments were handed down more than 15 years ago.¹⁴⁸ One of the problems certainly is intervening Constitutional Court decisions, legislation and constitutional amendments in Russia that deliberately impede the domestic implementation of such judgments.

In 2015 already, the Russian Constitutional Court decided that judgments of the ECtHR that were incompatible with the Constitution could not be implemented in Russia.¹⁴⁹ The Russian legislature thereupon enacted amendments to the Federal Constitutional Law on the Constitutional Court empowering that Court to determine upon the petition of the Ministry of Justice whether findings by international bodies on protection of human rights and freedoms (including those of the European Court of Human Rights) could be executed or not because of unconstitution-

142 ECtHR, judgment of 10 January 2012, *Ananyev and Others v. Russia* (appl. nos. 42525/07 and 60800/08).

143 ECtHR, judgment of 14 December 2021, *Tunikova and Others v. Russia* (appl. nos. 55974/16 and others).

144 Judgment of 18 December 2012 (appl. nos. 2944/06, 8300/07, 50184/07, 332/08 and 42509/10).

145 Ibid., para. 212, 239.

146 Ibid., para. 216 f.

147 <https://www.coe.int/en/web/execution/russian-federation> (25/5/2022).

148 For the main issues before the CM in the ongoing standard and enhanced supervision of Russia, see <https://rm.coe.int/mi-russian-federation-eng/1680a23ca5> (25/5/2022).

149 *Mälksoo*, in: *Mälksoo/Benedek* (eds.), p. 9. See also *Pomeranz*, *Uneasy Partners: Russia and the European Court of Human Rights*, Human Rights Brief 19, no. 3 (2012), p. 17 ff.; *Padskocimaite*, *ZaöRV* 2017, p. 673 ff.

ality.¹⁵⁰ On that new basis, the Russian Constitutional Court determined on 19 April 2016 that it was constitutionally impossible to execute the judgment of the ECtHR in the case of *Anchugov and Gladkov v. Russia*,¹⁵¹ in which the ECtHR had decided that the automatic and indiscriminate ban on Russian prisoners' voting rights was disproportionate and thus violated Art. 3 of Protocol No. 1.¹⁵² In evaluating that legislative amendment and its application by the Constitutional Court, the European Commission for Democracy through Law (Venice Commission) stressed "that the execution of the judgments of the European Court of Human Rights is an unequivocal, imperative legal obligation, whose respect is vital for preserving and fostering the community of principles and values of the European continent. The Commission attaches the greatest importance to it. ... The provision that no execution measure may be taken if the Constitutional Court finds that a judgment is non-enforceable is in direct conflict with Russia's international obligations under the Vienna Convention on the Law of Treaties and Article 46 ECHR and should be removed."¹⁵³

Russia did not remove the provision. Rather, the Russian Ministry of Justice and the Constitutional Court continued to apply it. On 19 January 2017, the Court was requested by the Ministry of Justice to examine whether the ECtHR judgment on just satisfaction in the case *OAO Neftyanaya kompaniya YUKOS v. Russia*¹⁵⁴ could be executed. The Court decided that it could not be executed, because that would violate the Russian Constitution.¹⁵⁵

In 2020, the Constitution itself was amended to the effect that "decisions of interstate bodies adopted on the basis of provisions of international treaties of the Russian Federation which collide with the Constitution may not be executed in the Russian Federation". Moreover, the aforementioned competence of the Constitutional Court was raised to the constitutional level.¹⁵⁶ These amendments effectively constitutionalised the legislation of 2015, making it almost impossible to change.¹⁵⁷ Although the Venice Commission criticised the draft amendments as incompatible with Russia's obligations under the ECHR, they were put into effect anyway.

In view of the fact that all the high-level conferences on reform of the Convention system since 2010 have recognised that the execution of ECtHR judgments is of fundamental importance and a key obligation of States parties and that accord-

150 See European Commission for Democracy through Law (Venice Commission), Russian Federation – Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court, Opinion No. 832/2015, CDL-AD(2016)016 of 13 June 2016.

151 Judgment of 4 July 2013 (appl. no. 11157/04).

152 See Venice Commission (fn. 150), para. 9 ff.

153 Ibid., para. 38, 42.

154 See fn. 124.

155 European Commission for Democracy through Law (Venice Commission), Russian Federation – Opinion on the Draft Amendments to the Constitution ... related to the Execution of Decisions of the European Court of Human Rights, Opinion No. 981/2020, CDL-AD(2020)009 of 18 June 2020, para. 23 ff.

156 Ibid., para. 10, 47 ff.

157 Ibid., para. 20.

ingly non-execution needs to be confronted with determination,¹⁵⁸ these pieces of Russian legislation and constitutional amendments could only be interpreted as signs of a process of separation of Russia from the Convention system.

F. The Process of Russia's Expulsion from the CoE and ECHR

The above account of Russia's CoE and ECHR membership shows that Russia has always been a difficult cohabitant of the common European house and that its slide into autocracy and neo-imperialist aberrations made it increasingly recalcitrant. The other member States' patience had thus already worn thin before Russia started to wage full-scale aggressive war on the Ukrainian cohabitant of that house in 2022. They considered the compromise of 2019¹⁵⁹ as the litmus test for Russia's willingness to abide by the rules of the CoE and ECHR in good faith instead of undermining them from within like a Trojan horse.¹⁶⁰ It is therefore not surprising that the final divorce process was initiated on the very same day of Russia's armed attack on Ukraine. Quick action was actually urgently needed in order to restore the CoE's credibility.¹⁶¹

The expulsion procedure of Art. 8 CoE Statute had never been carried out before. When it was about to be initiated in 1969 against Greece, where gross and systematic human rights violations were taking place after the military coup of 1967, Greece pre-empted the vote in the CM by its own withdrawal pursuant to Art. 7 CoE Statute.¹⁶² This means that the action taken by the CoE against Russia led into legally uncharted territory, requiring the application of provisions that are anything but clear.¹⁶³

I. Course of Events: CM and PACE Join Forces

On 24 February 2022, the CM in an extraordinary meeting "condemned in the strongest terms the armed attack on Ukraine by the Russian Federation in violation of international law; ... decided to examine without delay, and in close co-ordination with the Parliamentary Assembly and the Secretary General, the measures to be taken in response to the serious violation by the Russian Federation of its statutory obligations as a Council of Europe member State; ... urged the Russian Federation to immediately and unconditionally cease its military operations in Ukraine; ...

158 Ibid., para. 53.

159 See fn. 68.

160 See *Mälksoo*, in: *Mälksoo/Benedek* (eds.), p. 5.

161 See *von Gall*, *Der Europarat muss Russland jetzt suspendieren*, *Verfassungsblog*, 24 February 2022.

162 *Klein*, in: *Schmahl/Breuer* (eds.) para. 3.59. *Benedek*, *Austrian Law Journal* 2020, p. 1 ff. (available at: <http://alj.uni-graz.at/index.php/alj/article/view/152> [24/5/2022]).

163 See the remarks by *Jörg Polakiewicz* to the 62nd meeting of the Committee of Legal Advisers on Public International Law (CAHDI) on 24 March 2022, available at: <https://www.coe.int/en/web/dlapil/-/62nd-meeting-of-the-committee-of-legal-advisers-on-public-international-law-cahdi-> (30/5/2022).

condemned the recognition by the Russian Federation of the Ukrainian oblasts of Donetsk and Luhansk as independent entities". They agreed to hold another extraordinary meeting on the following day "with a view to considering measures to be taken, including under Article 8 of the Statute of the Council of Europe."¹⁶⁴

On 25 February 2022, the CM, following an exchange of views with PACE, "agreed to suspend the Russian Federation from its rights of representation in the Council of Europe in accordance with Article 8 of the Statute of the Council of Europe".¹⁶⁵ The CM invoked the "serious violation by the Russian Federation of its obligations under Article 3 of the Statute of the Council of Europe" and agreed that the suspension would take "immediate effect in respect of the rights of representation of the Russian Federation in the Committee of Ministers and in the Parliamentary Assembly of the Council of Europe".

On 2 March 2022, the CM adopted Resolution CM/Res(2022)1 on legal and financial consequences of the suspension of the Russian Federation from its rights of representation in the Council of Europe. Para. 7 of this Resolution provided that Russia remained subject to its ECHR obligations, that the Russian judge remained a member of the ECtHR and that any current and future applications introduced against or by Russia would continue to be examined and decided by the Court. Russia might also continue to participate in CM meetings when the CM exercised its functions in respect of the supervision of the execution of judgments under Art. 46 ECHR "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".

On 10 March 2022, the CM qualified the Russian aggression as "a breach of the peace of unprecedented magnitude on the European continent since the creation of the Council of Europe", strongly urged Russia to implement the interim measures indicated by the ECtHR on 1 and 4 March 2022 and decided to consult PACE on potential further use of Art. 8 CoE Statute,¹⁶⁶ in accordance with Statutory Resolution (51) 30 A.¹⁶⁷ On 15 March 2022, PACE – in the absence of the suspended Russian representatives – unanimously adopted Opinion 300 (2022), with three abstentions. It determined that the recent escalation of the aggression against Ukraine that Russia had been waging since 2014, "causing thousands of civilian casualties, displacing millions of people and devastating the country", showed disregard for the very essence of the CoE, as enshrined in its Statute, "which is the conviction that the pursuit of peace based upon justice and international co-operation is vital for the preservation of human society and civilisation." It qualified the aggression as a serious breach of Art. 3 CoE Statute "and a violation of the obligations and commitments that the Russian Federation accepted upon becoming a member of the Organisation, including the commitments to settle international and internal disputes

164 CM/Del/Dec(2022)1426bis/2.3.

165 CM/Del/Dec(2022) 1426ter/2.3.

166 CM/Del/Dec(2022)1428bis/2.3, para 9.

167 Adopted on 3 May 1951 by the CM (available at: <https://rm.coe.int/revision-of-the-statute/168074f0c5> [24/5/2022]).

by peaceful means, rejecting resolutely any threats of force against its neighbours, and to denounce the concept of treating neighbouring States as a zone of special influence called the “near abroad”.

PACE put the war against Ukraine in a row with Russia’s other military aggressions against Moldova (occupation of Transnistria), Georgia (occupation of Abkhazia and South Ossetia), the illegal annexation of Crimea and Russia’s role in eastern Ukraine, culminating in the illegal recognition of the self-proclaimed republics of Donetsk and Luhansk as independent States. It was “deeply disturbed by evidence of serious violations of human rights and international humanitarian law by the Russian Federation”. The Assembly regretted Russia’s failure to implement numerous decisions of the ECtHR, including its interim measures, and encouraged the Court “to consider giving priority to applications brought by Ukrainian citizens against the Russian Federation for acts committed in the temporarily occupied areas of Ukraine, taking into account the fact that these persons have no access to effective remedies against such acts at national level.” PACE underlined “the relevance and continuing need of the Council of Europe as a value-based intergovernmental organisation working to promote democracy, human rights and the rule of law.” It was ultimately convinced that the gravity of the actions committed by Russia and the profound breach of trust caused by it fully justified the further recourse to Art. 8 CoE Statute and that Russia could no longer be a Member State: “The Assembly, therefore, is of the opinion that the Committee of Ministers should request the Russian Federation to immediately withdraw from the Council of Europe. If the Russian Federation does not comply with the request, the Assembly suggests that the Committee of Ministers determine the immediate possible date from which the Russian Federation would cease to be a member of the Council of Europe.”

On that same day (15 March 2022), Russia informed the Secretary General of its withdrawal from the CoE and of its intention to denounce the ECHR. While noting this communication, the CM on 16 March 2022 decided, in the context of the procedure launched under Art. 8 CoE Statute, “that the Russian Federation ceases to be a member of the Council of Europe as from 16 March 2022.”¹⁶⁸ On 17 March, the CM condemned the active participation of Belarus in the Russian aggression against Ukraine and decided “to suspend the rights of Belarus to participate as observer or in any other capacity in meetings and activities of the Committee of Ministers ...”.¹⁶⁹

On 23 March 2022, the CM determined the legal and financial consequences of the cessation of Russia’s membership in the CoE.¹⁷⁰ For example, it made clear that Russia ceased on 16 March 2022 to be a Contracting Party to those conventions and

168 CM/Res(2022)2.

169 CM/Del/Dec(2022) 1429/2.5.

170 CM/Res(2022)3. See Art. 28 clause 2 of the CM Rules of Procedure (available at: <https://rm.coe.int/09000016804e393a> [27/5/2022]).

protocols concluded in the CoE framework that were only open to CoE members,¹⁷¹ but that it continued to be a Contracting Party to those conventions and protocols that were open to accession by non-member States.¹⁷² It also decided that Russia was bound to fulfil its full financial obligations arising out of its CoE membership up to 16 March 2022, including its contributions for 2022 on a *pro rata tempore* basis.¹⁷³

On 5 April 2022, the CM decided to amend Art. 26 CoE Statute pursuant to Art. 41 lit. d CoE Statute by “deleting the reference to the Russian Federation and its representatives in the Parliamentary Assembly.”¹⁷⁴

II. Substantive Issue: Serious Violation of Art. 3 CoE Statute

The only substantive condition for expulsion pursuant to Art. 8 CoE Statute is a serious violation of Art. 3 CoE Statute, according to which “[e]very 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.” The membership requirements of Art. 3 CoE Statute were concretised with regard to the process of accession of new members pursuant to Art. 4 CoE Statute, when the transformation States of Central and Eastern Europe began pushing into the CoE after 1989.¹⁷⁵

Art. 3 CoE Statute is closely intertwined, and must be interpreted in conformity, with the second and third paragraphs of the preamble setting forth that “the pursuit of peace based upon justice and international co-operation is vital for the preservation of human society and civilisation” and that “individual freedom, political liberty and the rule of law [are] principles which form the basis of all genuine democracy”.¹⁷⁶ This results in the following accession criteria which a candidate country must accept and which also define the conditions for continued CoE membership in the sense that their serious violation may lead to expulsion pursuant to Art. 8 CoE Statute:¹⁷⁷

171 Such as the Revised European Social Charter. See the pertinent Note verbale of 25 March 2022, available at: <https://rm.coe.int/1680a5f461> (31/5/2022). See also Consequences of the aggression of the Russian Federation against Ukraine – Memorandum prepared by the Secretariat, CM(2022)70, 15 March 2022, para. 44 f.

172 CM/Res(2022)3, para. 8. See also CM(2022)70 (fn. 171), para. 47 ff.

173 CM/Res(2022)3, para. 9. On the consequences for Russia's ECHR membership, see below IV.

174 CM/Res(2022)5. See CM(2022)70 (fn. 171), para. 4.

175 Klein, in: Schmahl/Breuer (eds.), para. 3.05; Weiß, in: Schmahl/Breuer (eds.), para. 1.49 ff. At the same time, the European Council formulated the “Copenhagen criteria” clarifying the requirements for accession to the European Communities – see European Council in Copenhagen, 21–22 June 1993, Conclusions of the Presidency, para. 7.A. iii. (available at: <https://www.consilium.europa.eu/media/21225/72921.pdf> [27/5/2022]).

176 Klein, in: Schmahl/Breuer (eds.), para. 3.11., 3.15.

177 Ibid., para. 3.11 ff., 3.62.

- Principles of the rule of law (constitutionalism, pre-eminence of the law, separation of powers with an independent and impartial judiciary that is also competent to protect the fundamental rights of individuals from disproportionate interferences; one important aspect is the international rule of law requiring strict observance of international law)¹⁷⁸
- Enjoyment of human rights and fundamental freedoms of all persons within the country's jurisdiction (in essence, accession to the ECHR and observance of the decisions of the ECtHR)
- Pluralist democracy (periodic, general, free, equal, secret and fair elections at all governmental levels, democratic political party system and civil society fostering democratic spirit, respect for political rights [freedoms of communication, assembly, association and right of active and passive suffrage])
- Peaceful resolution of international conflicts (as required by Art. 2 (3), (4) of the UN Charter and jus cogens norms of customary international law) – there is no conflict with Art. 1 lit. d CoE Statute that excludes matters relating to national defence from the scope of the CoE but does not rule out “political engagement by the CoE on matters of peace and security”¹⁷⁹ in order to prevent action that may give rise to the right of individual and collective self-defence in accordance with Art. 51 of the UN Charter
- Sincere and effective collaboration in the realisation of the CoE aim set forth in Art. 1 CoE Statute (achievement of greater unity, safeguarding and realising common ideals and principles, facilitating economic and social progress)

As demonstrated above, Russia has for many years consistently violated all these membership obligations and actively undermined the object and purpose of the CoE Statute and the ECHR. This definitely amounts to a serious violation of Art. 3 CoE Statute, if one uses the “material breach” standard of Art. 60 (3) of the Vienna Convention on the Law of Treaties (VCLT)¹⁸⁰ as a yardstick.¹⁸¹ While both PACE and the CM also referred to the serious violations of human rights and international humanitarian law by Russia¹⁸² in the course of its armed attack against Ukraine as well as the human suffering it has produced, the attack as such is identified as the

178 See *Chesterman*, Rule of Law, in: Max Planck Encyclopedia of International Law, margin notes 37 ff.; *Beinlich/Peters*, An International Rule of Law (Oxford Bibliographies), available at: <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0222.xml> (24/6/2022).

179 *Forde*, Council of Europe at 72: Defusing the Defence Clause, Engaging the Acquis, Strasbourg Observers, 15 June 2021.

180 Of 23 May 1969, UNTS vol. 1155, p. 331.

181 See *Klein*, in: Schmahl/Breuer (eds.), para. 3.63.

182 See *Benedek/Bilková/Sassóli*, Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes against Humanity Committed in Ukraine since 24 February 2022 (OSCE Office for Democratic Institutions and Human Rights, ODIHR.GAL/26/22/Rev.1, 13 April 2022, <https://www.osce.org/files/f/documents/f/a/515868.pdf> [16/6/2022]); *Bilková/Guercio/Sancin*, Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes against Humanity Committed in Ukraine (1 April – 25 June 2022), ODIHR.GAL/36/22/Corr.1, 14 July 2022., <https://www.osce.org/files/f/documents/3/e/522616.pdf> (22/7/2022). The reports

serious violation of Art. 3 CoE Statute justifying Russia's expulsion. In the relevant CM-Resolution,

[t]he Committee of Ministers,

Reaffirming that the aggression of the Russian Federation against Ukraine constitutes a serious violation by the Russian Federation of its obligations under Article 3 of the Statute of the Council of Europe ...

Decides, in the context of the procedure launched under Article 8 of the Statute of the Council of Europe, that the Russian Federation ceases to be a member of the Council of Europe as from 16 March 2022.¹⁸³

This approach is in accordance with the precedent set by PACE in regard of the military occupation and subsequent annexation of Crimea by Russia in 2014 which it qualified as a clear violation of Art. 3 CoE Statute and used as justification for the suspension of the voting rights of the Russian delegation in PACE.¹⁸⁴ It can easily be squared with Art. 3 CoE Statute, if one interprets the rule of law as including the international rule of law that first and foremost requires compliance with the prohibition of the use of force, taking into consideration the second paragraph of the preamble which identifies the pursuit of peace as an important goal of the CoE.¹⁸⁵ It also accords with the approach of the Human Rights Committee in its General Comment No. 36 on Art. 6 ICCPR (right to life): "States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant."¹⁸⁶ Leaving aside the problems whether that statement can be squared with international humanitarian law (which permits the killing of enemy combatants) and whether Russian jurisdiction extends to Ukrainian territory and inhabitants affected by its armed attack, Russia's act of aggression against Ukraine amounts to a massive violation of the right to life, utterly disrespecting the human rights of the Ukrainian war dead.

III. Procedural Issue: The Graduated Process of Art. 8 CoE Statute

Events did not permit conduct of the new complementary joint procedure agreed between PACE and CM – any constructive dialogue to convince Russia to terminate its military aggression would have obviously been useless. The CM is anyhow not required to exhaust that procedure before initiating the process under Art. 8 CoE Statute.

were submitted in the framework of the Moscow Mechanism of the OSCE (invoked by 45 OSCE participating States). The reports also identified some violations and problematic practices by Ukraine.

183 CM/Res(2022)2 of 16 March 2022.

184 PACE Resolution 1990 (2014) of 10 April 2014.

185 See the *chapeau* of Art. 31 (2) VCLT.

186 CCPR/C/GC/36 of 3 September 2019. *Haque*, AJIL Unbound 2022, p. 155.

Art. 8 CoE Statute puts the initiation of the suspension and expulsion procedure at the discretion of the CM.¹⁸⁷ According to Art. 20 lit. d CoE Statute, the exercise of that discretion requires “a two-thirds majority of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee”,¹⁸⁸ which was obviously achieved in the case at hand.¹⁸⁹

Art. 8 CoE Statute envisages a three-step reaction to serious violations of Art. 3 CoE Statute by a member: First, suspension from the rights of representation as a kind of warning shot, secondly, request to withdraw under Art. 7 CoE Statute, if the warning was not heeded,¹⁹⁰ and thirdly, in case of non-compliance with that request, expulsion with effect from a date determined by the CM. The second step, which is missing in the parallel provisions in Art. 5, 6 of the UN Charter, is intended to permit the Member State a face-saving exit on its own decision, unless it is ready to find a compromise with the CM inducing the latter to terminate the expulsion process.¹⁹¹

There is some debate about whether suspension is a necessary first step to be unsuccessfully exhausted before the CM may resort to expulsion.¹⁹² In the present case, the CM, after an exchange of views with PACE, did first suspend Russia. But the CM then skipped the second step and nineteen days after suspension proceeded to expulsion with immediate effect, one day after Russia had, without prior CM request, notified the Secretary General of its intention to withdraw, pursuant to Art. 7 CoE Statute,¹⁹³ not unlike Greece in 1969. Obviously, the CM wanted to retain control over the process and in particular the date on which Russian membership would come to an end. Pursuant to Art. 7 CoE Statute, that would have been at the end of 2022, while the CM intended to terminate Russian membership with immediate effect in order to send a clear message to Russia as well as the European and world public. The CM also obviously felt that allowing Russia a face-saving exit on its own initiative was completely misplaced in view of its outrageous aggression brazenly committed and fiercely continued, all the more since Russian membership after 2019 was practically on probation. Moreover, the second step of the Art. 8 process is intended to enable the search for a compromise that would permit the CM to

187 See *Klein*, in: Schmahl/Breuer (eds.), para. 3.61 with footnote 222: Limits of discretion may be overstepped if violations are so devastating for CoE functions that doing nothing would destroy the organisation.

188 *Klein*, in: Schmahl/Breuer (eds.), para. 3.64 with footnote 235.

189 The voting result was not communicated. According to *Kanstantsin Dzehtsiarou*, 42 Member States voted to suspend Russia’s right to representation (The Closing Door in Strasbourg, Völkerrechtsblog, 26 February 2022).

190 Art. 8 CoE Statute could also be interpreted in the sense that the suspension would always have to be connected with the request to withdraw, which would leave only be a two-step procedure. But that interpretation would unnecessarily limit the CM’s political options and has therefore not been adopted by the CM.

191 *Klein*, in: Schmahl/Breuer (eds.), para. 3.67 f.

192 *Klein*, in: Schmahl/Breuer (eds.), para. 3.64 with footnote 239. Art. 6 of the UN Charter does not provide for such a face-saving alternative to expulsion.

193 https://mid.ru/ru/foreign_policy/news/1804379/?lang=en (2/6/2022).

terminate the expulsion process and lift the suspension.¹⁹⁴ Yet, any compromise on the Russian aggression was absolutely no option. If one interprets the sequence of steps provided in Art. 8 CoE Statute in light of its object and purpose, the CM is permitted to skip the second step in the case of a particularly serious continuing violation of the essence of the membership obligations under Art. 3 CoE Statute that shakes the organization to its foundations and excludes any possibility of compromise.¹⁹⁵

It has been argued that the expulsion process raises an issue concerning Russia's right to defence in view of the fact that no formal hearing of the Member State to be expelled is provided for.¹⁹⁶ Yet, after its suspension Russia had nineteen days for initiating a constructive dialogue with the CM in order to avert further steps. The only available option would obviously have been for Russia to fulfil its clear and indisputable international legal obligation "to immediately and unconditionally cease its military operations in Ukraine",¹⁹⁷ which would have included immediate, complete and unconditional withdrawal of all its military forces from Ukraine. Instead, Russia expanded and intensified its armed attack on Ukraine, thus aggravating its *jus cogens* violation and at the same time reinforcing the obligation under general international law of all the other CoE Member States to cooperate to bring to an end Russia's gross violation of the prohibition of the use of force to the detriment of a fellow member, arising from a peremptory norm of general international law.¹⁹⁸

While the CoE Statute is based on the rule of law and the pursuit of peace based upon justice, it does not include any dispute settlement procedure which would enable Russia to challenge its expulsion on procedural or substantive grounds and lead to a definite answer on questions of interpretation of Art. 8 CoE Statute. Like other founding treaties of intergovernmental organisations, the Statute is a political constitution whose content is determined by political decisions of its organs. In any event, there is no indication of Russia's readiness to have its rights under Art. 8 CoE Statute determined in an international dispute resolution procedure.

Ultimately, the CM's application of Art. 8 CoE Statute in the concrete case can be justified in view of the provision's object and purpose. But the CM, as an organ of an organisation based on and devoted to the rule of law, should have come up with

194 See Art. 27 of the CM Rules of Procedure.

195 *Schmahl*, NVwZ 2022, p. 596. But see *Mantilla Blanco*, A Backdoor Exit from the European Convention on Human Rights, *Verfassungsblog*, 5 April 2022.

196 *Magliveras*, The Question of Expelling Recalcitrant Member States, *Völkerrechtsblog*, 3 May 2022.

197 CM/Del/Dec(2022)1426bis/2.3 of 24 February 2022, para. 3; CM/Del/Dec(2022)1426ter/2.3, second recital of the preamble; CM/Res(2022)1 of 2 March 2022, second recital of the preamble. See also UN General Assembly Resolution A/ES-11/L.1 of 1 March 2022, para. 3 and 4; ICJ, Order of 16 March 2022 in the case concerning Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (*Ukraine v. Russian Federation*), para. 1.

198 See Art. 41 (1) of the Articles on Responsibility of States for Internationally Wrongful Acts in the Annex of UN General Assembly Resolution 56/83 of 12 December 2001. But see *Zhang*, Summoning Solidarity Through Sanctions: Time For More Business and Less Rhetoric, *Völkerrechtsblog*, 8 June 2022.

an explicit and thorough justification.¹⁹⁹ Although Russia's behaviour resembles that of an outlaw, we Europeans deserve that the CM justifies the actions it takes in defence of the values which are our common heritage.

IV. Consequences for Russia's ECHR Membership

The ECtHR reacted immediately to CM Resolution (2022) 2 on the expulsion of Russia from the CoE by deciding to suspend the examination of all applications against Russia pending its consideration of the legal consequences of that resolution for the work of the Court.²⁰⁰ On 22 March 2022, the plenary of the ECtHR adopted a resolution on the consequences of the cessation of Russia's CoE membership in light of Art. 58 ECHR.²⁰¹

According to Art. 59 ECHR, the Convention is only open to CoE Member States (with the exception of the EU) because PACE, the CM and the Secretary General of the CoE are all involved in its implementation.²⁰² Art. 58 (3) ECHR provides that any party which ceases to be a member of the CoE shall also automatically cease to be a party to the ECHR "under the same conditions".²⁰³ The last part of that paragraph apparently refers to the conditions mentioned in the preceding two paragraphs of Art. 58 ECHR that regulate denunciation of the ECHR. According to Art. 58 (1) ECHR, such a denunciation will take effect only after six months. According to Art. 58 (2) ECHR, it will have no retroactive effect – it will thus not release the party concerned from its obligations under the Convention in respect of any act performed before the denunciation becomes effective.

Based on the consideration that "the object and purpose of the Convention, as an instrument of human rights protection, call for an interpretation and application of its provisions so as to ensure practical and effective protection to those subject to the High Contracting Parties' jurisdiction", the Court decided that Russia would cease to be a party to the ECHR on 16 September 2022, six months after cessation of its membership in the CoE.²⁰⁴ This means that it interpreted Art. 58 (3) ECHR so as to include the six months' notice condition of Art. 58 (1) ECHR, assimilating the effect of an expulsion from the CoE on ECHR membership to that of a voluntary denunciation of the Convention. Otherwise the violator of Art. 3 CoE Statute would have been privileged by obtaining immediate release from its Convention obligations. While the Court's approach is plausible,²⁰⁵ it should – like the CM –

199 *Schmahl*, NVwZ 2022, p. 598.

200 Press Release ECHR 092 (2022) of 16 March 2022.

201 https://echr.coe.int/Documents/Resolution_ECHR_cessation_membership_Russia_CoE_ENG.pdf (30/5/2022).

202 See Art. 22 and Art. 46 – 52 ECHR.

203 For a critique of that automatism, see *Mantilla Blanco* (fn. 195). Such an automatism does not exist in the inter-American system (see IACtHR, Advisory Opinion OC-26/20 of 9 November 2020, as paraphrased by *Morales Antoniazzi*, AJIL 2022, p. 409 ff).

204 Para. 1 of the Resolution of the Plenary of 22 March 2022 (fn. 201).

205 For a critique of the Court's approach, see *Mantilla Blanco* (fn. 195).

have given us Europeans a more explicit and thorough justification for its first ever application of Art. 58 ECHR.²⁰⁶

In the concrete case, Russia will remain obliged to respect the ECHR during its military operations in Ukraine for at least a number of additional months which is certainly in accordance with the object and purpose of the Convention. This will provide the ECtHR with the opportunity to revisit the GC's problematic decision in *Georgia v. Russia (II)* that events occurring during the active phase of hostilities do not fall within the jurisdiction of any party to the armed conflict for the purposes of Art. 1 ECHR and are thus altogether outside the scope of application of the ECHR.²⁰⁷ It will also probably lead to a large influx of individual applications against Russia, exacerbating the chronic overload of the Court.²⁰⁸ Whether the temporary continuation of Russia's Convention obligations will make any difference on the ground and if and to what extent Russia will henceforth participate in proceedings and abide by decisions of the ECtHR is another matter.²⁰⁹ If it boycotts proceedings, not submitting observations and answering questions, the ECtHR will experience serious evidentiary challenges.²¹⁰ According to Art. 20 ECHR, the Russian judge will in any event continue to sit on the Court until 16 September 2022.

The ECtHR also declared that it remained "competent to deal with applications directed against the Russian Federation in relation to acts and omissions capable of constituting a violation of the Convention provided that they occurred until 16 September 2022."²¹¹ The Court thus also applied Art. 58 (2) ECHR to the expulsion. Pursuant to Art. 46 ECHR, Russia will moreover continue to be bound by decisions of the ECtHR that have already been made against it or will be made in future cases for years to come, provided that they concern potential violations of the ECHR until 16 September 2022.²¹² The Court also lifted the suspension of the examination of applications against Russia with immediate effect.²¹³ Finally, it declared that the present Resolution was "without prejudice to the consideration of any legal issue, related to the consequences of the cessation of the Russian Federation's membership to the Council of Europe, which may arise in the exercise by the Court of its competence under the Convention to consider cases brought before it."²¹⁴ The judicial formations of the Court thus remain free to decide on concrete legal issues, in accordance with Art. 32 ECHR. One such issue concerns the partici-

206 See *Schmahl*, NVwZ 2022, p. 598.

207 See above fn. 90 f.

208 See *Schmahl*, NVwZ 2022, p. 598.

209 CM(2022)70 (fn. 171), para. 41.

210 *Speck*, Russia and the Strasbourg Court: evidentiary challenges arising from Russia's expulsion from the Council of Europe, Strasbourg Observers, 2 June 2022.

211 Resolution of the Plenary of 22 March 2022 (fn. 199), para. 2.

212 See CM(2022)70 (fn. 171), para. 37.

213 Resolution of the Plenary of 22 March 2022 (fn. 201), para. 3. In contrast, the examination of all applications against Ukraine remains suspended because of the war, except for applications for interim measures – ECtHR, Press Releases 069 (2022) of 2 March 2022 and 115 (2022) of 31 March 2022.

214 *Ibid.*, para. 4.

pation of a Russian judge in cases against Russia after 16 September 2022, pursuant to Art. 26 (4) ECHR.²¹⁵

In its Resolution CM/Res(2022)3 of 23 March 2022, the CM adopted the decision of the ECtHR concerning Russia's ECHR membership until 16 September 2022. It added that the CM would continue to supervise the execution of the judgments and friendly settlements concerned and Russia was required to implement them.²¹⁶ That obligation will last for years to come, provided that the judgments and settlements concern acts or omissions by Russia until 16 September 2022. The CM also decided that Russia would continue to participate in CM meetings when the latter supervised the execution of judgments with a view to providing and receiving information concerning judgments where it was the respondent or applicant State, but "without the right to participate in the adoption of decisions by the Committee nor to vote".²¹⁷

In Russia, two laws have meanwhile been enacted that remove the country from the jurisdiction of the ECtHR and provide that decisions of that Court against Russia made after 15 March 2022 will not be implemented.²¹⁸ There is no way to reconcile these laws with Russia's continuing obligations under the ECHR. But Russia has apparently started to boycott the ECtHR since their entry into force. The Russian judge participated in and dissented from the judgment in *Taganrog LRO and Others v. Russia*.²¹⁹ But he withdrew from sitting, and none of three persons designated by the Government as eligible to serve as ad hoc judges made themselves available to the Court in *Ecodefence and Others v. Russia*, so that the President of the Chamber was compelled to appoint one judge of the ECtHR as an ad hoc judge.²²⁰

G. Conclusion: Divorcing Russia – Victory or Defeat for the CoE and the ECHR?

With regard to European unity from Reykjavik to Vladivostok, we are back at square 1989: The international and supranational variants of European integration – the CoE and the EU – were retransformed in 2022 into institutionalised mechanisms for smaller European States to bundle forces against Russia, just as they had originally also been intended to counter threats emanating from the Soviet Union. Thus, the preamble of its Statute demonstrates that the establishment of the CoE in the Stalinist era was founded on the conviction "that the pursuit of peace based upon justice and international co-operation is vital for the preservation of human soci-

215 *Leach* (fn. 58).

216 CM/Res(2022)3, para. 7.

217 *Ibid.*

218 <https://www.reuters.com/world/europe/russian-parliament-votes-exit-european-court-human-rights-2022-06-07/> (16/6/2022).

219 Judgment of 7 June 2022 (appl. nos. 32401/10 and others).

220 ECtHR, judgment of 14 June 2022, *Ecodefence and Others v. Russia* (appl. nos. 9988/13 and others), sixth paragraph of the preamble.

ety and civilisation". It was founded on the devotion of the Member States "to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy" and on the belief "that, for the maintenance and further realisation of these ideals ..., there is a need of a closer unity between all like-minded countries of Europe". The initial spark of supranational integration, the Schuman Declaration of 9 May 1950, made clear in its first two sentences that the newly to be organised Europe was necessary for the preservation of world peace.²²¹ The next abortive French initiative less than six months later actually proposed the establishment of a European Defence Community.²²² And in laying "the foundations of an ever closer union among the peoples of Europe", the European Economic Community was established by the Member States during the Cold War not least for "pooling their resources to preserve and strengthen peace and liberty".²²³

The expulsion of Russia from the CoE can be considered as a defeat for the CoE because its largest Member State is branded as a denier of its basic values after 25 years of membership. But it is a defeat in the formal sense only, since Russia abandoned those values in substance long ago and began to actively undermine them within and outside its own borders. The Russian war of aggression against its fellow CoE member Ukraine amounts to a fundamental change of circumstances regarding Russia's CoE membership, but it is only the tip of the iceberg. It is part of an epochal confrontation between the open society and its enemies²²⁴ – a confrontation that is also taking place within the EU and in every single one of its Member States. Russia has long supported the enemies of our open societies including neo-Nazis – the very forces it claims to be fighting in Ukraine. Russia was excluded from the CoE in order to preserve the integrity of CoE values and the credibility of an organisation that had precisely been established for protecting and promoting them. By demonstrating their determination to defend these values, the other Member States have given them a victory in the substantive sense. All in all, Russia's expulsion was the necessary evil that enabled the CoE to remain true to itself.

There is indeed collateral damage for the ECHR: The right of inter-State applications and individual application against Russia will be lost, leaving Russians alone in their fight to enforce the values embodied in the ECHR.²²⁵ It is certainly true that Russia's ECHR membership and participation in ECtHR proceedings has had a positive impact on the human rights situation in the country, although with declin-

221 https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_fr (17/6/2022).

222 Mayer/Thies, European Union, Historical Evolution, in: Max Planck Encyclopedia of Public International Law, margin note 2.

223 See the preamble of the Treaty establishing the European Economic Community of 25 March 1957.

224 See Karl Popper, *The Open Society and Its Enemies*, 2 volumes, 5th rev. ed. London 1966.

225 Jahn, *The Council of Europe Excludes Russia: A Setback for Human Rights*, EJIL Talk, 23 March 2022.

ing effect.²²⁶ But the influence which ECtHR decisions could exert on the current Russian dictatorship in and after the war against Ukraine would have tended to zero, damaging the Court's international reputation and perhaps producing imitation effects.²²⁷ Accordingly, also from the human rights perspective, Russia's expulsion from the ECHR was a necessary evil. It is somewhat mitigated by the fact that Russia remains party to the global human rights treaties which it ratified, first and foremost the ICCPR and the Optional Protocol on the individual communications procedure so that it will remain internationally answerable for human rights violations.²²⁸

The attempt by the signatories of the Charter of Paris to build a united Europe, together with a transforming Russia, on the basis of human rights, democracy and the rule of law has unfortunately failed, because Russia left the common ground of values. Instead it returned to 19th century imperialist policies of power, violence and territorial conquest that were outlawed first by the Briand-Kellogg Pact²²⁹ and then for good by the UN Charter. We must not let it and its brothers in spirit succeed in distorting the international legal order of human dignity and self-determination built around the UN Charter and the CoE Statute into "authoritarian international law"²³⁰ or outright legal nihilism. Yet, while facing the unpleasant truths of today we should not stop in our efforts to promote transformation in both Russia and Belarus so that we can tomorrow resume construction work on our common European house, firmly founded on the ideals of the Charter of Paris for a New Europe, the CoE Statute as well as the ECHR and Protocols. The dream of 1990 lives on and its time will come.

Bibliography

- BEBLER, ANTON, *Crimea and the Ukrainian-Russian conflict*, in: Bebler, Anton (ed.), "Frozen conflicts" in Europe, Opladen/Berlin/Toronto, 2015, p. 189–208
- BEINLICH, LEANDER; PETERS, ANNE, *An International Rule of Law*, Oxford Bibliographies in International Law, 2021, DOI: 10.1093/OBO/9780199796953-0222
- BELITSER, NATALYA, *The Transnistrian conflict*, in: BEBLER, ANTON (ed.), "Frozen conflicts" in Europe, Opladen/Berlin/Toronto, 2015, p. 45–56

226 See the critical overview by several authors in: *Mälksoo/Benedek* (eds.).

227 See *Demir-Gürsel*, Russia's Expulsion and its Possible Implications for Other Member States, *Verfassungsblog*, 25 March 2022 (mentioning Turkey).

228 Russia's suspension from the UN Human Rights Council by the UN General Assembly on 7 April 2022 (see *Freedman*, Russia and the UN Human Rights Council: A Step in the Right Direction, *EJIL Talk*, 8 April 2022) has not had any consequences concerning Russia's human rights obligations at UN level or its submission to pertinent implementation procedures.

229 General Treaty for Renunciation of War as an Instrument of National Policy of 27 August 1928, LNTS vol. XCIV 1929, No. 2137, p. 57.

230 *Ginsburg*, *AJIL* 2020, p. 221 ff.; *Ginsburg*, *AJIL Unbound* 2022, p. 130 ff.

- BENEDEK, WOLFGANG, *The Effectiveness of the Tools of the Council of Europe Against Democratic Backsliding; What Lessons Can be Learned from the 'Greek Case'?*, Austrian Law Journal, 2020, Vol. 17(1), p. 1–21
- BERNHARD, RUDOLF; TRECHSEL, STEFAN; WEITZEL, ALBERT; ERMACORA, FELIX, *Report on the conformity of the legal order of the Russian Federation with Council of Europe standards*, Human Rights Law Journal, 1994, Vol. 15, p. 249–300
- CHESTERMAN, SIMON, *Rule of Law*, in: Max Planck Encyclopedia of Public International Law (OUP online edition)
- DRAGNEVA, RILKA, *Pork, Peace and Principles: The Relations Between the EU and the Eurasian Economic Union*, in: Lorenzmeister, Stefan; Petrov, Roman; Vedder, Christoph (eds.), *EU External Relations Law: Shared Competences and Shared Values in Agreements Between the EU and its Eastern Neighbourhood*, Cham, 2021, p. 229–252
- DRZEMCZEWSKI, ANDREW, *The (Non-) Participation of Russian Parliamentarians in the Parliamentary Assembly of the Council of Europe: An Overview of Recent Developments*, Europe des droits & libertés/Europe of Rights & Liberties, 2020 (1), p. 7–15
- FASTENRATH, ULRICH; FASTENRATH, CHRISTIAN, *Organization for Security and Co-operation in Europe*, in: Max Planck Encyclopedia of Public International Law (OUP online edition)
- FITZMAURICE, MALGOSIA, *Badinter Commission (for the Former Yugoslavia)*, in: Max Planck Encyclopedia of Public International Law (OUP online edition)
- GIEGERICH, THOMAS, *What Kind of Global Actor Will the Member States Permit the EU to Be?*, ZEuS, 2017, Vol. 17, p. 397–420
- GIEGERICH, THOMAS, *Art. 220 AEUV*, in: Pechstein, Matthias; Nowak, Carsten; Häde, Ulrich (eds.), *Frankfurter Kommentar zu EUV, GRC und AEUV*, Tübingen, 2017, Vol. IV, p. 225–254
- GINSBURG, TOM, *Article 2(4) and Authoritarian International Law*, AJIL Unbound, 2022, Vol. 116, p. 130–134
- GINSBURG, TOM, *Authoritarian International Law?*, American Journal of International Law, 2020, Vol. 114(2), p. 221–260
- GRABENWARTER, CHRISTOPH, *Rechtliche Rahmenbedingungen des Verhältnisses zwischen EU und Europarat aus der Perspektive des Europarates und die Rolle der Mitgliedstaaten*, ZaöRV, 2014, Vol. 74(3), p. 419–444
- GRANT, THOMAS D., *Chechnya*, in: Max Planck Encyclopedia of Public International Law (OUP online edition)
- GROTTO, ANDREW J., *Non-Proliferation Treaty (1968)*, in: Max Planck Encyclopedia of Public International Law (OUP online edition)

- HAQUE, ADIL AHMAD, *An Unlawful War*, AJIL Unbound, 2022, Vol. 116, p. 155–159
- KHVOROSTIANKINA, ANNA, *The EU-Armenia Comprehensive and Enhanced Partnership Agreement: A New Instrument of Promoting EU's Values and the General Principles of EU Law*, in: Lorenzmeister, Stefan; Petrov, Roman; Vedder, Christoph (eds.), *EU External Relations Law: Shared Competences and Shared Values in Agreements Between the EU and its Eastern Neighbourhood*, Cham, 2021, p. 193–227
- KLEIN, ECKART, *Membership and Observer Status*, in: Schmahl, Stefanie; Breuer, Marten (eds.), *The Council of Europe: Its Law and Policies*, Oxford, 2017, p. 40–92
- MAYER, FRANZ C.; THIES, SIMON P., *European Union, Historical Evolution*, in: Max Planck Encyclopedia of Public International Law (OUP online edition)
- MÄLKSOO, LAURI, *Introduction*, in: Mälksoo, Lauri; Benedek, Wolfgang (eds.), *Russia and the European Court of Human Rights*, Cambridge, 2017, p. 3–25
- MELNYK, ANDRIY Y., *Nagorny-Karabakh*, in: Max Planck Encyclopedia of Public International Law (OUP online edition)
- MORALES ANTONIAZZI, MARIELA, *Advisory Opinion OC-26/20, Denunciation of the American Convention on Human Rights and the Charter of the Organization of American States and the Consequences for State Human Rights Obligations*, AJIL, 2022, Vol. 116(2), p. 409–416
- NUSSBERGER, ANGELIKA, *Russia; South Ossetia; Abkhazia*, in: Max Planck Encyclopedia of Public International Law (OUP online edition)
- OETER, STEFAN, *Yugoslavia, Dissolution of*, in: Max Planck Encyclopedia of Public International Law (OUP online edition)
- PADSKOCIMAITTE, AUSRA, *Constitutional Courts and (Non)execution of Judgments of the European Court of Human Rights: A Comparison of Cases from Russia and Lithuania*, ZaöRV, 2017, Vol. 77, p. 651–684
- PETERS, ANNE, *Extraterritorial Naturalizations: Between the Human Right to Nationality, State Sovereignty and Fair Principles of Jurisdiction*, German Yearbook of International Law, 2010, Vol. 53, p. 623–726
- POCAR, FAUSTO, *International Criminal Tribunal for the Former Yugoslavia (ICTY)*, in: Max Planck Encyclopedia of Public International Law (OUP online edition)
- POLAKIEWICZ, JÖRG; KIRCHMAYR, JULIA KATHARINA, *Sounding the Alarm: The Council of Europe as the Guardian of the Rule of Law in Contemporary Europe*, in: von Bogdandy, Armin et al (eds.), *Defending Checks and Balances in EU Member States*, Berlin, 2021, p. 361–384
- PRIEBE, REINHARD, *Drei neue Beitrittsanträge – Was tun?*, EuZW, 2022, Vol. 33(8), p. 345–346

- ROTER, PETRA, *Russia in the Council of Europe: Participation à la carte*, Mälksoo, Lauri; Benedek, Wolfgang (eds.), *Russia and the European Court of Human Rights*, Cambridge, 2017, p. 26–56
- SCHMAHL, STEFANIE, *Der ungleichzeitige Ausschluss Russlands aus Europarat und EMRK*, NVwZ, 2022, p. 595–598
- THIENEL, TOBIAS; ZIMMERMANN, ANDREAS, *Yugoslavia, Cases and Proceedings before the ICJ*, in: Max Planck Encyclopedia of Public International Law (OUP online edition)
- VAN ELSUWEGE, PETER, *Baltic States*, in: Max Planck Encyclopedia of Public International Law (OUP online edition)
- VAN ELSUWEGE, PETER, *The Ratification Saga of the EU-Ukraine Association Agreement: Some Lessons for Mixed Agreements*, in: Lorenzmeister, Stefan; Petrov, Roman; Vedder, Christoph (eds.), *EU External Relations Law: Shared Competences and Shared Values in Agreements Between the EU and its Eastern Neighbourhood*, Cham, 2021, p. 95–105
- WEIß, NORMAN, *Origin and Further Development*, in: Schmahl, Stefanie; Breuer, Marten (eds.), *The Council of Europe*, Oxford, 2017, p. 3–22
- WENZEL, NICOLA, *Ilaşcu Case*, in: Max Planck Encyclopedia of Public International Law (OUP online edition)

