

**Milena Ingelevič-Citak**

Jagiellonian University (Poland)

ORCID: 0000-0003-2585-4814

e-mail: milena.ingelevic-citak@uj.edu.pl

## Russia Against Ukraine Before the European Court of Human Rights. The Empire Strikes Back?

**Abstract:** In July 2021, Russia submitted its first inter-state complaint against Ukraine to the European Court of Human Rights. It was an unexpected and intriguing step of the Russian government, especially since many of the presented allegations are linked to the events that initiated the Russian-Ukrainian conflict. Referring to the hostilities that began in 2014, the international community was, in principle, unanimous in assessing who the aggressor was. The focus of this research is the strategy of the Russian Federation in its recently initiated legal battle before the Strasbourg Court. This paper presents an attempt to outline the possible motives for taking such a step. Moscow's position on this case is particularly puzzling, as some of the allegations concern the Crimean Peninsula, widely recognized under international law as territory occupied by Russia. In spite of that, doubt arises about the strategic objectives of the Russian authorities in the conflict with Ukraine; the question is whether the actions taken by Russia fall within the scope of its previous strategy or if there has been a new turn in the matter. The first part of this paper outlines the background of the given conflict, the second details Russian policy after the annexation of Crimea, and the third, which is crucial for the formulating of conclusions, presents considerations on Russia's possible motivation and goals in filing a complaint to the European Court of Human Rights. The research was conducted mainly based on the merits of the complaint, the statements of the representatives of Russia and Ukraine in the matter, the author's observations, and practitioners' considerations.

**Keywords:** *Russian-Ukrainian conflict, European Court of Human Rights, inter-state case, the annexation of the Crimean Peninsula, the policy of the Russian Federation, lawfare*

### Introduction

The conflict between Russia and Ukraine has been ongoing since 2014. It has taken various forms – starting with the use of force, ending with the whole range of non-military means within the hybrid warfare, for example, cyber operations and aggressive information warfare.

The struggle between the Kremlin and Kyiv also moved to the legal battlefield before the European Court of Human Rights (hereinafter, the ECtHR). It is neither accidental nor ill-considered, as the Court, outside of its judiciary function, is also perceived as an important international opinion-making body (Lester, 2011).

Since 2014, Ukraine has brought five inter-state cases accusing Russia of severe human rights violations, with the latest proceeding initiated in February 2021<sup>1</sup>. In a somewhat unexpected step, on July 22, 2021, the Russian Federation, under Article 33 of the European Convention on Human Rights (hereinafter, the ECHR)<sup>2</sup>, lodged an application against Ukraine. Noteworthy is that this is the first inter-state case initiated by Russia before the Strasbourg Court.

The struggle between Russia and Ukraine deserves special attention, as this conflict represents an exceptional case in modern times. First, considering the size of the annexed territory, it is the first such large illegal land-grab in Europe since World War II. Second, the Crimean conflict is classified as the 'frozen conflict'; it poses a severe threat to contemporary international security. Notably, the frozen conflict can last for decades (e.g., the Turkey-Cyprus conflict over Northern Cyprus) and can be compared to a dormant volcano – violence can erupt at any time in a completely unexpected manner. The most recent example is the escalation of the armed conflict between Azerbaijanis and Armenians over Nagorno-Karabakh in 2020, where hostilities, civilian casualties, and severe violations of international humanitarian law have occurred.

Today, despite the international community's efforts, there is no prospect of ending the struggle between Russia and Ukraine; no effective measures have been developed to settle the dispute. Isolating Russia and imposing sanctions proved to be of limited effectiveness, as it deepened the problem and in no way brought us closer to breaking the impasse and forging the consensus<sup>3</sup>. It should also be remembered that there are still hot zones in the Donbas region of south-eastern Ukraine<sup>4</sup>. As was emphasized by the International Crisis Group in its commentary on the peace prospects in Ukraine: 'A ceasefire Kyiv and Moscow agreed to in July 2020 has broken down. Negotiations between Kyiv and Moscow are deadlocked. [...] Absent changes, the coming year could bring new problems and new dangers of further outbreaks of violence' (International Crisis Group, 2021, May 26).

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<sup>1</sup> ECtHR Cases: *Ukraine and the Netherlands v. Russia*, App. No. 8019/16, 43800/14 and 28525/20; *Ukraine v. Russia (IV)*, App. No. 42410/15; *Ukraine v. Russia (re Crimea)*, App. No. 20958/14; *Ukraine v. Russia (VI)*, App. No. 70856/16; *Ukraine v. Russia*, App. No. 10691/21.

<sup>2</sup> Article 33 provides the possibility of challenging violations of the Convention at the inter-state level (Council of Europe, 1950).

<sup>3</sup> For the broader and more comprehensive analysis and assessment of isolating and imposing sanctions strategy in relations with Russia (Gould-Davies, 2020, pp. 7–28).

<sup>4</sup> For the information on the recent developments of the conflict, number of civilian casualties, etc.: (Global Conflict Tracker, n.d.).

That leads to the conclusion that restoring Europe's security order and drawing up a sustainable peace plan require a closer look at Russia's strategy regarding the conflict with Ukraine to achieve a certain level of comprehension of Russia's motives and goals. Harsh lessons from the past indicate that a deeper analysis of the strategy employed, particularly the tactics of security (and military) operations, leads to greater effectiveness in identifying, understanding, and combating future threats to regional stability and international security. For example, the Russia-Georgia conflict in 2008 is considered by some experts a foreshadowing of what was to come in Ukraine in 2014 and beyond (Beehner et al., 2018).

The focus of this study is outlining Russia's strategy and presumed motives in its lawfare against Ukraine before the European Court of Human Rights. The case is intriguing and deserving of special attention as several factors indicate that Russia's actions do not fit into a simple and transparent pattern.

The first concern refers to the tense relations between Russia and the Council of Europe (Bowring, 2020; Roter, 2017). Russia has repeatedly refused to implement the Court's judgments<sup>5</sup>. Furthermore, Russia has raised accusations regarding the Court's politicization and bias (AG Lawyer Newspaper, 2017, July 14)<sup>6</sup>. Because of this, approaching the Court seems incompatible with Russia's attitude and raises justified speculation as to its real purpose.

The second concern involves the content of the Russian application to the ECtHR. Namely, the extensive scope of the complaint<sup>7</sup> and the merits of the numerous allegations brought forward by the Russian authorities can hardly be regarded as an effort to win the case. It raises the reasonable question of whether Russia is trying to divert attention from a critical issue by burying it under many other allegations.

Finally, the submission of the application was accompanied by numerous loud statements by Russian representatives about Russia's role in defending European values and upholding the European legal order. Additionally, they expressed expectations of a fair, objective, and non-politicized examination of the case. Russian representatives also stressed that Russia would not back down from the fight to protect human rights.

Based on that, the following hypothesis can be formulated: by bringing the application to the ECtHR, Russia pursues diverse objectives that have a much broader scope than just resolving the dispute through legal proceedings, and the complaint is only a small element of the entire scheme.

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<sup>5</sup> In particular: (ECtHR Judgement, 2013, July 4; ECtHR Judgement, 2011, September 20).

<sup>6</sup> Russian representatives have repeatedly accused the ECtHR of applying double standards: (*Internet-conference of the Russian Federation...*, 2015, April 18).

<sup>7</sup> As of November 30, 2021, its full text has not yet been made public. Nevertheless, we know about the content of the complaint from the Court's statement and the statement of the Prosecutor's Office of the Russian Federation. The details are discussed later in this paper.

## I. Outlining the Conflict Between Russia and Ukraine

Considering that most of Russia's charges concern or are directly connected to alleged human rights violations on the territory of Ukraine starting in the fall of 2013 and continuing into 2014, the proper assessment of the Russian policy in this matter requires a brief outline of this conflict's background.

An important role in the initiation of the Russian-Ukrainian conflict played the aggravation of the political crisis in Ukraine in late 2013–early 2014 when pro-European and anti-government demonstrations against the policies of President Yanukovich were held at Independence Square in Kyiv (the so-called Maidan). The crisis resulted in the armed repression of protests and fatalities, which led to the dismissal of the President and the transformation of governing bodies. President Yanukovich fled Ukraine.

The newly appointed Ukrainian government was immediately recognized by the European Union member states and the United States. However, Russia declared the seizure of power unconstitutional and consequently refused to recognize the new authorities as to the legitimate government of Ukraine (Putin, 2014, March 4).

At this point, Russian authorities launched an undercover military operation in Crimea. Additional troops were deployed to permanent bases, and unidentified armed soldiers without any military insignia on their uniforms (nicknamed 'the little green men') took control over strategic points on the Crimean Peninsula<sup>8</sup>. President Putin initially denied, but later admitted that Russian soldiers were sent to 'guarantee the appropriate conditions for expressing the free will by residents of Crimea' (Putin, 2014, March 4).

In March 2014, the Crimean authorities issued a request to the Russian Federation to ensure order and peace in Crimea. The Russian parliament promptly passed a resolution on sending the troops, justifying the decision with the threat posed to the health and lives of Russian citizens, particularly soldiers stationed on the territory of Ukraine (Federation Council, 2021, March 1). In a short time, Russian troops seized key strategic facilities of the Crimean Peninsula, took control of airports and transport routes, and began a blockade of Ukrainian military garrisons.

Despite the resistance of Ukraine and the EU, the Crimean autonomous authorities held an independence referendum (Supreme Council, 2014, March 11). Invoking the official results, according to which 96.77% of voters expressed support for joining the Russian Federation (Commission of the Autonomous Republic of Crimea, 2014), Crimea promptly declared independence (Supreme Council, 2014, March 11). Barely a day later, after signing the accession agreement with the Russian Federation (*Agreement*, 2014, March 18), Crimea was consequently officially merged with it<sup>9</sup>.

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<sup>8</sup> Information about unidentified military personnel who took control over the peninsula was provided by the OSCE on March 6, 2014 (OSCE, 2014, March 7).

<sup>9</sup> For more details on the events in Ukraine and Russia that preceded the annexation of Crimea: (Marxsen, 2014, pp. 367–391; Ingelevič-Citak, 2015, pp. 23–45).

An exhaustive and comprehensive analysis of the mentioned events is beyond the scope of this paper. Nevertheless, a brief examination of Russia's actions in Crimea seems necessary in light of international law. Basic factors that influence the assessment of this case and should be concisely addressed are as follows: the Russian armed intervention on the peninsula, Crimea's right to self-determination, the legality of the all-Crimean independence referendum, and, consequently, the legality of the unilateral secession.

While examining the issues raised, it is also worth referring to the arguments provided by Russia to authorize its actions. In particular, the Russian authorities claim that:

- 1) the peninsula's cession to Ukrainian SSR in 1954 was carried out in violation of USSR law;
- 2) the Ukrainian-Russian border was not reconciled between the states after Ukraine seceded from the Soviet Union in 1991;
- 3) the change of the Ukrainian government and overthrow of the head of the state was conducted unconstitutionally and unlawfully;
- 4) the intervention in Crimea was undertaken on the invitation of President Yanukovich and the Crimean autonomous authorities;
- 5) Russia has the right to protect its nationals abroad; and
- 6) the referendum results revealed the will of the Crimean people to reunite with Russia.

Addressing the argumentation on the legality of actions taken in 1954, it should be noted that there were, indeed, certain inconsistencies with the applicable law. The decree adopted by the Presidium of the USSR Supreme Council on February 19, 1954 on the cession of Crimea to Ukrainian SSR had violated constitutional norms and could be considered as having no legal effect. Nevertheless, on April 26, 1954, the USSR Supreme Council passed a bill and authorized the transfer of Crimea under the procedure and requirements prescribed by constitutional norms. The second argument concerning the lack of a proper delimitation has no legal basis, as, in 2003, Russia had signed a bilateral delimitation agreement with Ukraine (*Agreement*, 2003, January 28) and, in 2010, the demarcation agreement was also signed<sup>10</sup>.

Regarding Russia's statement on the unconstitutional change of Ukrainian authorities, it must be admitted that the impeachment procedure violated the Ukrainian constitutional norms (Marxsen, 2014)<sup>11</sup>. However, it is worth noting that these actions were triggered by the

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<sup>10</sup> On the process of establishing the Ukrainian-Russian border: (Tass.ru, 2014, June 19).

<sup>11</sup> First, according to the Ukrainian Constitution, the initiation of impeachment procedure requires the 75 % majority of constitutional number of parliament members, and only 73% have voted in favor. Second, an investigation commission has to be established to examine the case, and the results of investigation should be presented to the parliament, which votes on bringing up the charges. Its decision had to be confirmed by 3/4 of members of the Ukrainian Constitutional Court. Neither of these provisions were respected.

emergency in the country and the severe human rights violations that occurred as a result of decisions taken by the President and the government of Ukraine.

When assessing the legality of Russia's military intervention on the territory of Crimea and the possibility of the peninsula's secession, it is important to emphasize that changing the legal status of a particular territory through the use of armed force against the territorial integrity of a sovereign state is a breach of the fundamental norms of international law. This situation cannot be remedied by holding a referendum where the territory's population expresses its will to secede from the mother state and join the state that militarily supports such actions.

At the same time, it must be acknowledged that the issue of unilateral secession has always been part of both legal and political discourse. One example is the case of Kosovo, which remains a partially recognized state, as the dispute over the legality of its secession from Serbia continues. While international law generally supports the stability of existing state borders, it also does not prohibit the unilateral alteration of the existing territorial status quo and the unilateral declaration of independence, as was confirmed in particular by the ICJ in its advisory opinion on Kosovo (ICJ, 2010, July 22). However, in the case of Crimea, the determining factor in assessing the legality of the secession is the fact that the unlawful intervention of the Russian armed troops was the catalyst for the events that followed. Consequently, a territorial change carried out with the use of force by a third party is regarded as illegal under international law.

According to Russia's position, the use of armed force was justified by the invitation of President Yanukovich and the Crimean autonomous authorities. However, the intervention upon invitation requires a consent that simultaneously satisfies three criteria: 1) is explicit; 2) expressed without the external pressure; and 3) granted by the highest state authorities, recognized by the international community as the legitimate representatives of the state (Fox, 2015). The Crimean government was not entitled to give its consent to the Russian intervention, as it was not the highest state authority of Ukraine. Regarding the invitation allegedly provided by Yanukovich, it is impossible to examine whether it met the mentioned conditions, and there is no evidence that it was made. Moreover, Yanukovich cannot be considered a state representative entitled to issue such an invitation. Despite the incompatibility of Yanukovich's dismissal with Ukraine's Constitution, new Ukrainian authorities, recognized by the international community, were appointed at the time of the Russian intervention.

Another argument given by Russia to justify the military intervention in Crimea was the right to protect its nationals abroad, as there was a grave risk to the life and health of Russian citizens and ethnic Russians in Crimea (Putin, 2014, March 1). However, under international law, this is permissible solely in the case of a real, serious threat to the life and health of nationals, severe violations of population rights by the state of residence, and when all peaceful means have been exhausted. Such premises did not occur in Crimea. There is no reliable evidence supporting the Russian thesis on the violations, and no independent

international observers reported that. Moreover, the right to use armed force to protect nationals as an act of self-defense provided for in Article 51 of the UN Charter does not extend to protecting ethnic minorities on the territory of another state.

It is noteworthy that the Crimean independence referendum and its outcomes remain Moscow's key argument presented by Russian representatives at every convenient opportunity within the dispute on the legality of the peninsula's 'incorporation'<sup>12</sup>. They emphasize that the Crimean people have the right to self-determination, and their will to secede from Ukraine and 'reunite' with Russia was expressed freely during the referendum<sup>13</sup>. However, it is essential to point out that referendum results cannot be considered as bearing legal consequences due to 1) the illegality of the procedure of initiating and holding the Crimean referendum under Ukrainian law (which, admittedly, is irrelevant for the legality assessment under international law); 2) the very content of the questions submitted to the vote significantly restricting the choice of voters<sup>14</sup>; and 3) the presence of foreign armed forces which undermines the credibility of the referendum process. At the same time, it cannot be excluded that a considerable part of the Crimean population, 58% of whom are of Russian origin (UNPA, 2017), may support 'integration' with Russia. However, due to the illegal military intervention on the peninsula, a credible assessment of the will of the local population no longer seems possible.

Summarizing, actions of the Russian Federation in Crimea in 2014 find no legal basis in international law<sup>15</sup> and, according to the 1974 UN General Assembly Resolution No. 3314, constitute an act of aggression against Ukraine.

As a consequence of the annexation of Crimea, it was recognized as a temporarily occupied territory with Russia as the occupying power. Both international organizations and individual states have attempted to apply various methods of pressure on Russia, particularly

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<sup>12</sup> E.g., Dmitry Medvedev (2015, May 22), Russian prime minister at the time, claimed that the Crimean authorities had exercised their right to determine the region's social, economic, and political status through a referendum. Thus, the 'secession' of Crimea was in full compliance with international law. Remarkably, the preamble of the agreement on the accession of the Republic of Crimea to the Russian Federation invoked the principle of equality of all nations, and a right to self-determination, according to which every nation has the right to determine its political status, social, cultural and economic development while other states are obliged to respect its decisions.

<sup>13</sup> On the subject of the referendum and the boundaries of expressing the will of the people: (Vidmar, 2015).

<sup>14</sup> Two following questions were asked: 1) are you in favour of unifying Crimea with Russia as a part of the Russian Federation?; 2) are you in favour of restoring the 1992 Constitution and the status of Crimea as a part of Ukraine? Consequently, there was no option to express approval of the status quo.

<sup>15</sup> It is worth noting that, in addition to breaching its multilateral international obligations, Russia has also seriously violated its bilateral agreements with Ukraine. In particular, agreements signed in 1997, under which Ukraine agreed to the stationing of Russian armed forces on the territory of Crimea, provided that they will respect its sovereignty, territorial integrity and will not interfere in Ukraine's internal affairs.

the personal, economic, and sectoral sanctions resulting in the international isolation of Russia. The imposition of sanctions failed to bring the expected results, as the Russian government has not changed its policy toward Ukraine and the Crimean Peninsula. On the contrary, Moscow has retaliated by banning imports of agricultural and food products and raw materials originating from certain EU member states and the USA (European Commission, n.d.).

## **II. Russia's Post-Annexation Strategy**

The events of 2014 established a boundary in the political reality and external relations of the Russian Federation, dividing them into pre-annexation and post-annexation eras. Given the fact that we can observe the particular evolution of Russia's foreign policy after the annexation of Crimea, the following section will provide insights into the strategy of the Russian authorities, considering the circumstances influencing the mentioned developments.

Several internal and external factors determined the change in Russia's policy. First, Moscow's approach and strategy in the conflict with Ukraine was significantly influenced by the confrontation with the Western countries and the United States and their attempts to isolate Russia. In response to such a strategy, Russia adopted an attitude of complete disregard for the criticism and even condemnation of Russian foreign policy. There was a particularly active mockery of the sanctions that began on state-run television and radio stations and in the pages of Russian magazines (Kozenko & Kuryanova, 2014, April 15). Having demonstrated its superpower position, Russia could take no other approach.

Another essential factor influencing Russia's post-annexation strategy was the internal situation. The annexation of the Crimean Peninsula brought President Putin the most significant popularity growth among Russians for the entire period of his political career. Russians felt pride in their supposedly regained greatness, and as a result, an effect similar to inebriation appeared in Russian society; the mass media called this phenomenon 'the Crimea effect' (Barysheva & Goncharenko, 2019). However, as in the case of inebriation, this effect began to fade gradually. Moreover, the consequences of sanctions and other restrictions imposed on Russia were becoming more and more perceptible for the Russian population and economy. As a result, Putin's popularity declined, and Russians actively began to express their dissatisfaction.

Economic and social problems, changes in legislation unfavorable to the population (e.g., raising the retirement age), and the problematic situation on the drought-stricken Crimean Peninsula did not improve the situation. It became increasingly evident that there was a need to either change the adopted strategy or take new steps to bring the Russian government back into the electorate's good graces. In such circumstances, lawfare tactics may be desirable since they offer no significant actual losses compared to military actions while providing ample alternative opportunities to 'harm' the opponent. The question, therefore,



arises as to whether Russia's actions regarding litigation with Ukraine before the ECtHR fit the lawfare labeling<sup>16</sup>.

The concept of lawfare constitutes a way of instrumentalizing legal systems, both national and international. It is not a novelty in interstate relations, as tackling an adversary employing legal and economic pressure is a tactic that has been used for years. Nevertheless, in the last decade, it has evolved into a developed and wide-ranging tool for achieving strategic military and political goals exploited to an extent not witnessed before.

In attempting to define lawfare, we are confronted with the large number and variety of contexts in which the concept appears. The broad conceptual scope of lawfare makes it impossible to provide a uniform definition. However, a common denominator can be found in this diversity of concepts since the essence of each of them is that using legal means to achieve a goal (Tiefenbrun, 2010). Not aspiring to formulate a universal definition, we can define lawfare as a way of operating legal arguments and institutions in order to achieve public support, tactical advantage, or other actions aimed at harming or blocking an opponent. Views differ as to the moral assessment and, therefore, the acceptability of such activities. Some authors perceive lawfare as a preferable non-bloody, variant' of warfare, while others treat it as an unacceptable abuse of the law (Kittrie, 2016; Kowalczywska, 2014).

Assessing Russia's recent strategy, February 2021 can be identified as a turning point in changing the Kremlin's approach to lawfare tactics. It is worth recalling that this was when the subsequent inter-state complaint was logged to the ECtHR by Ukraine against Russia. The first Moscow-initiated change relocated the competencies of state bodies entitled to represent Russia before international judicial bodies. On June 1, 2021, President Putin submitted draft amendments to the Law on the Prosecutor's Office, granting it the right to represent and protect the interests of the Russian Federation before inter-state bodies, foreign and international courts, and foreign and international arbitration courts. From the moment the President submitted the draft law to the moment the legislative procedure was completed, the whole process took just one month<sup>17</sup>. The amendments entered into force on July 1, 2021 (Federal Law, 2021, July 1). It is worth recalling that Russia filed its first inter-state application to the ECtHR merely three weeks later.

The Kremlin's second step may indicate a plan for a long-term lawfare strategy. It included the creation of a foreign office within the General Prosecutor's Office as a structural unit ensuring the representation and protection of the interests of the Russian Federation before international courts, which was provided by the amendment to article 14 of the Law on the Prosecutor's Office.

It is important to underline that there are currently five inter-state cases between Russia and Ukraine pending before the European Court of Human Rights, excluding the application

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<sup>16</sup> More on the subject of lawfare definition and terminological issues in its understanding: (Newton, 2010).

<sup>17</sup> The chronology of the legislative procedure: (Russian Federation Legislative Supportive System, n.d.).

lodged by Russia discussed here. In these circumstances, taking appropriate steps by the Russian authorities to increase their capacity for legal actions falls within the general pattern of lawfare. Moreover, such efforts should not be assessed as activities of a negative nature.

However, it should also not be overlooked that one of Russia's tactics in its lawfare strategy is to prolong the proceedings before the Strasbourg Court by delaying the public hearings. Russia had already taken such actions in 2019 when it managed to postpone public hearings in the Crimea case lodged by Ukraine by more than six months (Chernohorenko, 2021, July 30).

Recently, Russia has resorted to such tactics again. Namely, using available legal instruments caused a postponement of the public hearings scheduled for November 24, 2021 on the inter-state applications of the Netherlands and Ukraine against Russia. As ECtHR informed in a press release: 'The postponement is the consequence of the recent withdrawal from the case of the ad hoc judge appointed in respect of the Russian Federation'<sup>18</sup>.

Concluding, both supporters and opponents of the lawfare concept, to a certain extent, are right – lawfare is a bloodless struggle, but it also has its 'dark sides'. As we can observe, Russia uses various lawfare aspects as part of its strategy.

### **III. The Allegations Raised by Russia Against Ukraine or What Russia is Aiming For**

It can be assumed that Russia's application against Ukraine falls within the lawfare tactic. However, to reach conclusions, it may be beneficial to take a closer look at the intriguing content of this complaint.

The full text of the application has not yet been made public. Thus, information about the allegations made by Russia has been inferred from the ECtHR's communiqué about the registration of the complaint (ECtHR, Press Release, 2021, July 23) and from the appendix to the Russian Federation's General Prosecutor's Office statement on the approaching THE Strasbourg Court (General Prosecutor's Office, 2021, July 22). The latter document does not constitute the literal content of the application to the ECtHR. It can be classified as explanations aimed at persuading the Russian audience since it comprises mainly of propaganda instead of legal argumentation.

#### ***a. The Scope and Content of the Russian Application to the ECtHR***

The application lodged by Russia to the Strasbourg Court is one of the more extensive inter-state complaints submitted to the body. It deals with a wide range of allegations: starting with human rights violations during the Maidan protests, forced displacements, kidnappings, torture, as well as shelling of civilians during military operations against separatists,

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<sup>18</sup> Hearing on admissibility postponed (ECtHR, 2021, November 15).

discrimination of the Russian-speaking population, and ending with responsibility for the Malaysian airliner's downing and the 'water blockade' of the Crimean Peninsula. Unlike Ukraine, which gradually filed complaints against Russia to the ECtHR, the Kremlin decided to hit with a 'cluster gun', submitting a single application containing dozens of separate allegations. It remains unclear what the Court should do with such a stream of accusations.

Before proceeding with an attempt to outline Russia's presumed motives and goals in its lawfare against Ukraine, a brief presentation of the complaint's key points may be helpful. Inferring from the information provided by the ECtHR and the Russian General Prosecutor's Office, the allegations raised in the application can be divided into the following main groups:

- 1) systematic grave human rights violations as a consequence of events related to the illegal, violent seizure of power in Ukraine;
- 2) serious crimes committed by armed and security forces in 'anti-terrorist' operations, particularly those conducted in the Donbas region;
- 3) discrimination and restriction of the rights of Russian-speaking persons;
- 4) responsibility for the death of the crew and passengers of Malaysia Airlines flight MH17;
- 5) the blockade of the North Crimean Canal;
- 6) supporting anti-Russian outbursts, including attacks on the diplomatic missions of the Russian Federation (ECHR Case Law, 2021, August 28).

At this point, it is worth mentioning that the allegations are so numerous that it is difficult to group them accurately. Despite that, there are also charges of oppression of Russian business in Ukraine, persecution and limiting the freedom of speech of political opponents and journalists, enforced disappearances and kidnappings<sup>19</sup>, depriving the population of the opportunity to participate in presidential and parliamentary elections in the separatists' controlled territories, refusal to provide legal assistance in proceedings conducted by Russian law enforcement and the judicial bodies, and the refugee crisis that affected Russia. It is noteworthy that some of the allegations are serious (e.g., the blocking of the North Crimean Canal was considered an attempted genocide) (Nesterov, 2021, July 23). In addition to the allegations of committing crimes, Russia accuses Ukrainian law enforcement agencies of inaction in prosecuting the given violations of human rights (e.g., not investigating the cases of killing, unlawful imprisonment and cruel treatment of people, enforced disappearances and kidnappings, crimes against civilians in areas of armed hostilities, etc.).

It should also be pointed out that Russia submitted the urgent request to impose interim measures under Rule 39 of the Rules of Court of the ECtHR (European Court of Human

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<sup>19</sup> Enforced disappearance is defined as '[the] deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State', while 'kidnapping' refers to depriving liberty by persons or groups not acting with the support or acquiescence of the State (United Nations, 2006, December 20).

Rights, 2021, October 18), namely, demanding that the Court oblige Ukraine to cease its blockade of the North Crimean Canal and stop violating the rights of the Russian-speaking population. The Strasbourg Court rejected the request since it has not found a serious risk of irreparable harm to fundamental human rights protected under the Convention (ECtHR Press Release, 2021, July 23).

As mentioned, the Russian application is undoubtedly an interesting subject for analysis, but this is a topic for a separate and quite extensive study. Given the scope of this paper, it is necessary to indicate a few essential remarks of a general nature.

### ***b. Why Did Russia Resort to the ECtHR Inter-State Complaint Method?***

First and foremost, there is a need to consider why Russia has resorted to a legal battle before the European Court of Human Rights. Within this question, two issues can be distinguished: 1) Russia's attitude toward the Council of Europe and the system of human rights protection created within the organization, and more generally 2) what is underlying the choice of an inter-state type of complaint.

Considering the first issue, it is worth emphasizing that Russia is the largest of the CoE member states, and its membership in the organization is deemed important for the regional human rights protection system. Meanwhile, tensions between the Council of Europe and Russia have escalated for several years. The attitude of the Russian authorities and their disregard for the Court's rulings were sometimes perceived by the international community as discrediting the organization and raising serious doubts about its effectiveness and the ability to protect the values underlying the functioning of the Council of Europe. Nevertheless, it is considered that Russia's exit from the CoE would be detrimental to the European system of human rights protection and would have negative consequences for citizens and residents of the Russian Federation who would be deprived of the possibility to protect their rights before the Court (Mälksoo, 2017).

After the annexation of Crimea in 2014, the Russian delegation's voting rights and the right of participation in the Parliamentary Assembly of the CoE, its subsidiary bodies, and election monitoring missions were suspended. In response to this, Russia demanded the restoration of full voting rights and substantially limited its cooperation with the organization; that is, it stopped appointing its delegates to the Parliamentary Assembly and stopped paying its contributions to the CoE budget. Finally, Russia's financial blackmail (in 2018, the CoE budget had a 53 million euros funding hole) proved effective, and its full membership was restored in 2019, which incidentally caused outrage among the Central and Eastern European states (Rankin, 2019).

A significant event that considerably worsened relations between Russia and the Council of Europe was the adoption of the amendment to the Russian federal law 'On the Constitutional Court of the Russian Federation' in 2015 (Federal Law, 2015, December 14), which legitimized the possibility of refusing to implement individual judgments of the ECtHR in

cases of their incompatibility with the Constitution of the Russian Federation. The Russian authorities justified such amendments by the need to protect the interests of the state and the need to ensure the primacy and direct applicability of constitutional norms.

To summarize, Russia accuses the Strasbourg Court of violating Russian sovereignty and claims that the Court forgets about the necessity of considering the social, cultural, and legal context in which the judgments will be implemented. At the same time, to ensure the implementation's effectiveness, it requires harmoniously combining the imposed solutions with the Russian legal system (Zorkin, 2010). Another of Russia's accusations against the CoE is its lack of objectivity and its use of double standards.

Bearing in mind Russia's approach and its lack of trust in the Council of Europe system repeatedly expressed in official statements by Russian representatives (Lebedeva-Romanova & Skomorovskaya, 2017, July 14)<sup>20</sup>, a reasonable doubt arises as to Russia's motives in submitting the complaint. Namely, if the ECtHR proceedings are as flawed as claimed, then why did the Russian authorities rely on this legal instrument in their dispute with Ukraine. Furthermore, it is worth considering what political goals Russia seeks to achieve by using such lawfare tactics. Against this background, it becomes apparent that it is not merely a matter of substantive case adjudication and defeating the opponent in the Court. Therefore, it may be assumed there are additional political motivations behind the choice of proceeding before the ECtHR. Given this, we should consider whether the intention may be attempting to challenge and discredit the European human rights protection system.

Moving on to the second issue, the role of the inter-state application to the ECtHR, it should be noted that it is a relatively uncommon legal 'weapon' rarely used by states. So far, only 28 such complaints have been filed in the six-plus decades of practice of the European Court of Human Rights<sup>21</sup> (by contrast, in 1959-2020, the Court has decided on the examination of over 920,000 individual complaints) (Public Relations Unit ECHR, 2021). Russian authorities first resorted to the inter-state complaint only in the current case against Ukraine.

A detailed assessment of the role of the inter-state complaint is beyond the scope of this paper. However, it is worth making a few general remarks here. First, there has been a noticeable increase in inter-state cases initiated recently. Since 2020, seven such complaints

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<sup>20</sup> As an example of the Russian criticism and objections to the Strasbourg Court and the Council of Europe system, we can quote a member of the Federation Council, Alexei Pushkov, who, referring to one of the ECtHR judgments in the individual case against Russia, said: 'The ECtHR often acts as a political rather than legal institution, promoting the political attitudes and values of European liberal elites. This once again demonstrates the primacy of politics over the law in contemporary Europe'. Original statement: 'ЕСПЧ часто выступает как политический, а не правовой институт, продвигающий политические установки и ценности европейской либеральной элиты. Что еще раз говорит о приоритете политики по отношению к праву в современной Европе' (Pushkov, 2021).

<sup>21</sup> In the scope of this number, the cases merged by the Court into a single proceeding are not counted separately (European Court of Human Rights, 2021, July 23).

have been filed, indicating a significant growth, reflecting the total number of inter-state applications ever submitted to the ECtHR. Nonetheless, considering the foregoing in Part II of this article, states' use of lawfare tactics has increased significantly in recent years, which may also be precisely confirmed by the growth in the number of inter-state complaints that constitute a convenient space for lawfare strategies. Another intriguing general observation concerning this legal tool is that of the 28 inter-state cases ever brought before the Strasbourg Court, ten were against Russia.

In the discussed case, the choice of the inter-state complaint method was presumably dictated by the intent of the Russian authorities to include in a single complaint all possible allegations against Ukraine, which would not be possible in an individual application. Moreover, inter-state disputes before the Court generally have more resonance in public opinion because, as emphasized, these are relatively uncommon proceedings. At the same time, certain indicators may suggest that Russia seeks to widely publicize the present case. Moreover, Moscow's possible motivations may include a desire to use against its opponents the same legal weapon they are widely using against Russia.

### *c. Possible Legal and Political Consequences of Filing a Complaint to the ECtHR*

Russia justifies its decision to submit the complaint by a range of factors. The Russian Ministry of Foreign Affairs, in its statement of July 22, 2021, emphasized that the international community is ignoring the human rights violations in Ukraine, which is breaking its international and constitutional obligations and is unable to investigate the violations properly; therefore, Russia had to take this legal step. According to the Ministry, as a CoE member, Russia has all legal grounds to initiate proceedings before the ECtHR because it defends the European legal order underlying the CoE's value system. Thus, Russia's application to the ECtHR is aimed at, among other things, providing the Court with complete information about the atrocities committed by the Ukrainian authorities or with their connivance, leading to numerous violations of human rights guaranteed by the ECHR (Foreign Ministry, 2021, July 22). The General Prosecutor's Office of the Russian Federation adds that international organizations and individual states allocate funds to Ukraine for the establishment of democracy and the adoption of laws that meet European standards. However, there is no improvement; efforts are made, and resources are spent, but the UN, the CoE, the Venice Commission for Democracy through Law, and other international organizations do not notice any positive changes in the human rights situation in Ukraine. As expressed in the given statement, Russia espouses the ideals of democracy and respect for human rights and freedoms. Therefore, it was forced to file an inter-state complaint to stop Ukraine's systematic and massive violations of the rights guaranteed by the ECHR and its protocols (General Prosecutor's Office, 2021, July 22).

Addressing briefly the argumentation presented by Russian representatives, it is worth remembering that Russia's accession to the CoE in 1996 was not based on the full compliance of Russian legislation with the European standards or even a satisfactory human rights

protection level; however, Russia was granted the credit of political trust. Today, we can observe the self-positioning of Russia as the primary defender of European values<sup>22</sup>. At the same time, Russia refuses to implement individual ECtHR judgments if they are not in line with its state interests. Thus, the question of whether the given trust has been appropriately allocated may arise.

Referring to the political consequences of Russia's complaint, it should be mentioned that this step caused outrage on the Ukrainian side. Experts called Russia's complaint, 'trolling on an international scale' (INFOX.ru, 2021), while a representative of the Ukrainian President's Office described it as, 'the etalon of political cynicism', adding that, 'the RF lawsuit has no legal prospect and no practical sense, except pure propaganda' (Vlasenko, 2021). Nonetheless, it is difficult to agree that the Russian application lacks sense and will have no consequences in any sphere.

In attempting to examine the legal impact of the complaint, let us begin with the admissibility issue. The assessment by the Court of the formal admissibility of the Russian lawsuit is still pending. However, considering the substantive scope of the application, Russia presumably anticipates that some or even all the allegations may be declared inadmissible, and certain factors may indicate this. Namely, the extensive scope of the complaint gives rise to several assumptions. First, it cannot be excluded that the Russian authorities might still hope that some of the numerous allegations will be examined by the Court. Another point is the possible rejection of the application. While presenting such a vast number of claims, Russia cannot be unaware that this may reduce its chances before the Court. Therefore, the question arises as to whether it is in Russia's interest to have the case heard on its merits or whether its dismissal could be more beneficial for the Kremlin. Suppose the Court declares the complaint inadmissible and finds no violation of the Convention. In that case, Russia will have the basis to say that the Court is biased, highly politicized, and, thus, is not fair and independent in its proceedings. Additionally, it will be an influential argument for suppressing public discontent with Russia's foreign policy and may help win the favor of public sentiment. In the eyes of the Russian community, Russia will appear as if it makes every effort to defend democracy and human rights while the evil and biased West turns a blind eye to severe and systematic violations by Ukraine. In that context, it seems Russia could gain much more from the rejection of the complaint than from its acceptance. Therefore,

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<sup>22</sup> It is worth noting that regarding allegations of human rights violations against other states, Russia considers itself a guardian of European values. Meanwhile, in cases involving Russia as a state violating rights guaranteed by the ECHR, Russia repeatedly claims that the ECtHR is imposing alien values. For example, see the statement of Russia's representative commenting on one of the Court's recent judgments. It required Russia to make appropriate legal changes regarding recognizing same-sex relationships' rights: Володин: Россия не будет исполнять решение ЕСПЧ по однополым бракам. 16.07.2021. <https://www.kommersant.ru/doc/4907506>

it cannot be ignored that this circumstance may have influenced the extensive scope and content of the allegations.

Proceeding to the admissibility conditions, it is worth noting that the formal criteria for an inter-state application vary regarding the requirements for an individual complaint. In the admissibility stage of the inter-state case, the role of the Court is limited to assessing the *ratione materiae, personae, temporis*, and *loci* jurisdictional grounds<sup>23</sup> and examining the compliance with the prerequisites established in Article 35 § 1 of the ECHR, that is, the six-month time-limit<sup>24</sup> for lodging the complaint and the exhaustion of all available domestic remedies.

The assessment of these criteria will be crucial to the Court's decision on the admissibility of the Russian complaint. Ukrainian authorities are already claiming that the Russian application should be rejected because of non-compliance with the time-limit condition and the non-exhaustion of domestic remedies.

At this point, it is important to note that Russia has formulated some of the allegations within its complaint so that their admissibility seems highly questionable from the very beginning. One of the most noticeable examples is the accusation of closing the North Crimean Canal. Thus, the question of how Russia justifies the jurisdiction of Ukraine in this matter seems particularly intriguing, for we have here a critical dilemma: two lines of reasoning are possible, neither of which might be satisfactory to Russia.

Article 1 of the ECHR refers to the responsibility of contracting parties to guarantee human rights within their jurisdiction. In principle, this article reflects a territorial understanding of jurisdiction but does not exclude other grounds for exercising jurisdiction; however, in line with ECtHR case-law (e.g., ECtHR Decision, 2001, December 12; ECtHR Judgement, 2004, July 8), this is possible only in exceptional situations and requires a specific justification, which may be the open control of the territory or the exercise of indirect extraterritorial control (for example, through the local administration) (Garlicki, 2014).

The key issue for Russia is to persist in its position that Crimea is Russian territory. Many of the Russian allegations may be considered by the Court without reference to the Russian-Ukrainian dispute, although this is unavoidable in Crimea's water blockade issue. Notably, the Canal water supply was blocked on the mainland part of Ukraine, while the human rights violations alleged by Russia took place on the Crimean Peninsula. Consequently, a dilemma arises for Russia: the choice between a) recognizing Crimea as a part of Ukraine

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<sup>23</sup> This means the Court examines: 1) whether the case falls within its subject-matter jurisdiction; 2) whether the claimant has *locus standi*, i.e., the right to refer the dispute to the Court; 3) whether the case was launched within the prescribed time limitations, and finally, 4) whether the ECHR violations alleged in the complaint have occurred within the territorial jurisdiction of the Member State.

<sup>24</sup> The currently binding time-limit for submitting the complaint to the ECtHR will change from 6 months to 4 months after Protocol 15 to the Convention will become effective on February 1, 2022. See: Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms. *Council of Europe Treaty Series – No. 123*.



and on that basis holding Ukraine responsible for human rights violations on the peninsula or b) attempting to prove that the blocking of the Canal had an extraterritorial effect for which Ukraine is to blame. The first solution is unacceptable for Russia; consequently, the second option remains.

Nonetheless, a relevant legal basis can be found under international law for the first solution. Namely, according to the IV Geneva Convention (United Nations, 1949, August 12), to which Russia is a party, the occupying power has to ensure and maintain public health and hygiene on the occupied territory, which is impossible without access to water. Meanwhile, Ukraine is obliged by international human rights treaties to ensure its population and, therefore, the inhabitants of Crimea a decent living standard.

The second solution, recognizing Crimea as part of Russia, to impose obligations on Ukraine under Article 1 of the ECHR, requires Ukraine to be found exercising extraterritorial jurisdiction on Russian territory. However, in terms of evidentiary proceedings, this seems unattainable.

At the same time, the second option assumes that Ukraine is obliged to supply water beyond its borders, that is, to the Crimean Peninsula, which Russia considers its territory. It seems highly doubtful that such a justification can be based on the norms of international law, especially noting that the North Crimean Canal is an artificial construction supplying water on a commercial basis. Moreover, the Ukrainian authorities claim that, after the annexation of Crimea, Russians deported the operating personnel, leaving the Canal without maintenance on their side. Furthermore, Ukraine states that Russia refused to pay the debt of fees for the water supply, which was the reason for closing the Canal (Plotnikov, 2021).

Thus, as we can see, the first solution is unacceptable for Russia, while the second solution is unacceptable for the Court and also seems unfeasible in terms of evidence. Hence, in one of the key allegations, Russia may not have a strong position. Meanwhile, the urgent need to unblock the Canal may have been the entire reason for bringing the case to the ECtHR. The other allegations presumably may have been submitted as a distraction<sup>25</sup>.

Concluding the foregoing, we should note that the case lodged by Russia against Ukraine will have extensive resonance in public opinion since it has already provoked many disputes in the international arena. Moreover, bearing in mind the statement that lawfare is currently one of the Russian strategy's primary tools against Ukraine, the inter-state application to the ECtHR fits perfectly into this concept.

Concerning the broad scope of the Russian complaint, the specifics of the presented allegations, and the question of whether the admissibility criteria were met, it is impossible to judge at this point how the Court proceedings might end. Nevertheless, too many cited

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<sup>25</sup> It is worth remembering the factory „Crimean TITAN”, the largest manufacturer of titanium dioxide in Europe, is located in Crimea. Its operation and prosperity significantly depend on access to water (Plotnikov, 2021). Therefore, the Russian authorities, among other motivations, may be concerned about the efficient work of the factory.

doubts make Russia's victory in this legal battle seem unlikely. Of course, it cannot be ignored that some of the very numerous allegations against Ukraine may have a factual and legal basis. For example, concerning the charge of restricting the rights of the Russian-speaking people, certain doubts have been raised by the new Ukrainian Education Act provisions adopted in 2017. Namely, the question arises whether the need to protect and promote the Ukrainian language justifies the significant restrictions of the national minorities' rights regarding their education language (Herkele, 2017).

Without prejudging the merits of Russia's allegations, it is worth outlining the possible political implications. As mentioned, it seems that the Kremlin's primary goal is not merely a legal victory over its opponent in the ECtHR litigation but also putting the European human rights protection system to a difficult test. Presumably, the Russian authorities are counting on the possibility of discrediting the European Court of Human Rights and the whole Council of Europe, presenting them unfavorably as highly politicized, biased structures that treat states unequally. As Russia maintains, it has repeatedly been found in violation of human rights, while Ukraine is getting away with it.

## Concluding Considerations

The conclusion attempts to sort out the considerations on the Russian strategy and the possible legal and political consequences of the Russian complaint to the Strasbourg Court. Here, admittedly, we can only speculate about the motives of the Russian authorities. Nevertheless, certain factors seem to justify the given speculations.

Russia claims that submission of the complaint to the Court is an attempt to convey its approach to the *coup d'état* in Ukraine and its consequences resulting in severe and systematic human rights violations to the international community as objectively as possible. At the same time, the Russian authorities emphasize that they expect an unbiased and non-politicized attitude of the ECtHR to the Russian complaint, as well as a thorough examination by the Court of the materials and evidence submitted by the plaintiff State' (Foreign Ministry, 2021). They also state that 'Russia will not stop advocating for protecting the rights of the people who suffered as a result of the seizure of power' (Lezhneva, 2021).

The scope of the allegations presented by Russia in its application against Ukraine is impressive, but the risk of partial or even full rejection of the complaint is relatively high. At the same time, the failure of the application will be beneficial for Russian propaganda portraying the Russian Federation as a victim of the anti-Russian policies of Western states. There is no doubt that Russia will use its potential failure to discredit the Council of Europe and the Court itself. First, the Kremlin will attempt to prove that this system is politicized and applying double standards, as certain states are not prosecuted for numerous grave violations, while Russia is constantly being held responsible for alleged breaches of the ECHR. Furthermore, the possible case rejection might also be used as a tool of pressure to achieve certain geopolitical goals of the Russian Federation. Finally, Russia's complaint may

also serve as a blackmail tool, as the quoted statements of Russian representatives make clear: Russia allegedly attempts to resolve disputes by peaceful means and aims to protect European values. However, if the West deprives Russia of such an opportunity, it leaves it no choice but to resort to non-peaceful methods.

Consequently, it is possible to conclude that lodging the application with the Strasbourg Court is merely a new element within the unchanging strategy attempting to gain an advantage over the opponents of Russia and winning public attention. The lawfare strategy becomes one of the tools of this struggle. It allows the use of existing legal mechanisms and, with their help, achieves wide-ranging goals not limited to legal ones. However, we cannot say that current Russia's strategy against Ukraine is limited to lawfare. It has become only an additional element of a complex scheme, consisting of several tactics, particularly exceptionally skillfully conducted information warfare and propaganda, discrediting the opponent using its own weapon. Analyzing Russia's actions that preceded the filing of the inter-state complaint against Ukraine, one can see that the Russian authorities made thorough preparations for lawfare tactics.

Noteworthy is the political event from July 2021, preceding Russia's complaint to the ECtHR. Namely, President Putin published an article entitled 'On the Historical Unity of Russians and Ukrainians' (Putin, 2021, July 12). It is an intriguing piece of propaganda, the essence of which boils down to the statement that the West and the United States are to blame for the breakdown of Russian and Ukrainian unity and that this breakdown itself has caused a significant weakening of Ukraine, which has become the poorest European country. Such statements can be interpreted as Russia's specific concern for the fate of Ukraine. But, importantly, they emphasize that formerly brotherly states have become adversaries because of the actions of third parties.

As can be observed, the complaint's timing does not appear to be accidental. Several events occurred at a similar time: 1) Ukraine lodged another inter-state complaint against Russia; 2) the Prosecutor's Office of the Russian Federation was granted with important competences to represent Russia before international judicial bodies and a foreign office within the Prosecutor's Office as a structural unit ensuring the representation and protection of state interests before international courts was formed; 3) the propaganda activities of the Russian authorities increased enormously (see the article by President Putin), and 4) the need to win the favor of public sentiment became so urgent that immediate action was necessary. In such circumstances, submitting a complaint to the ECtHR, initiating a legal battle on an important international forum may become the missing piece of this political puzzle.

The mentioned considerations lead us to conclude that the main directions of the Russian strategy and foreign policy have not changed in principle. Although Russia has reached for a new tool within the lawfare tactics – the inter-state complaint to the ECtHR – it invariably applies it under the political goals it adopted years ago. Russia may not gain significant direct profits in the proceedings before the European Court of Human Rights, but possible indirect benefits make it worth fighting for.

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