Moving On in Strasbourg

How to Deal with the Russian Retreat from the European Court of Human Rights

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Russia's justified expulsion from the Council of Europe after the beginning of the full-scale military invasion in Ukraine continues to pose problems for the European Court of Human Rights and the European Convention machinery in general. Even though Russia remained bound by the Convention until 16 September 2022, a number of decisions in Moscow, but also in Strasbourg, made matters complicated. Especially processing the outstanding 17,000 cases and enforcing those judgments now require innovative solutions.

The Russian Retreat from the Court Leaves Multiple Issues Unsolved

Shortly after the expulsion, Russian authorities and, importantly, the office of the Government's Agent ceased all communications with the Court and the Committee of Ministers. No written observations are filed in the cases pending before the Court, neither are action plans or action reports to the Committee of Ministers.

On 11 June 2022 Russia adopted a law by which it won't comply with the Court's judgments given after 15 March 2022: no compensation awarded by the Court would be paid, no proceedings would be reopened. The chosen date was that of the Russian Foreign Ministry's letter of withdrawal from the Council which was filed when the decision on expulsion became imminent. In any event, the law is arbitrary in the sense that a respondent State cannot choose, under whatever criteria, the judgments of the Court it abides by and those it does not. Article 41 of the Convention is straightforward in establishing that all Court's judgments are equally binding.

After the expulsion, on 22 March 2022, the Plenary Court passed a resolution confirming that the Russian cases would proceed and that under Article 58 of the Convention Russia would remain responsible for its acts and omissions as a Contracting Party for another six months. On 16 September, the Court issued a press-release declaring that the office of the judge elected in respect of the Russian Federation ceased to exist.

Multiple questions remain open. How to process the outstanding 17,000 cases without any engagement of the respondent and without the national judge? Those cases are not only brought by Russians, but also by victims from Georgia, Ukraine, Moldova, families of MH17 passengers and crew etc. Solutions, as canvassed by Dzehtsiarou, range from 'business as usual' to '*Burmych*'-ing to freezing to dropping them altogether. Even less clear is how the enforcement of the awards, individual and general measures could be secured in view of the blanket refusal of the Russian authorities to even pay the successful applicants' damages.

What follows are the proposals from a practitioner's perspective. I have been representing hundreds of applicants in cases against Russia and way to often had to inform the Court that yet another applicant died a decade after lodging his or her application and without having seen the judgment. The current situation is likely to make this latter type of work a routine. But it should not.

Business as Usual, Freezing or 'Burmych-ing': How to Deal with Pending Applications

Firstly, the Court. 17,050 applications were pending against Russia at the end of October 2022, almost exactly the same figure as at the beginning of the year. There are also thousands of 'frozen conflict cases' that await the resolution of ten inter-state applications. While the backlog of Russian cases was growing in the

previous years, this year's statistics show that the flood of applications from Russia already started drying. And even if the applications may be lodged in respect of the events prior to 16 September for a few more years, depending on the time it takes to exhaust domestic remedies, this is definitely good news: the number of cases against Russia is, or at least will be, finite.

The option of dealing with them 'business as usual' stems from the text of Article 58 of the Convention and was reflected in the Court's Plenary Resolution of 22 March and press-release of 16 September: the consideration of cases goes on. If this implies 'business as usual', it is, unfortunately, not available to the Court, in particular, because the Court receives no submissions from the respondent State and should be cautious when deciding cases based on the submissions of only one party. Indicatively, there have been no new communications since late March, with very few exceptions. The Court, despite the general declarations, does not thus appear to adopt the 'business as usual' in practice.

Under the Convention, Chamber and Grand Chamber cases require a national judge and there's currently none. The decision to terminate Mikhail Lobov's office was, perhaps, taken on the strength of a precedent: Greece had no judge on the Court while it was out of the Council of Europe in 1970s. Yet in those years, Greece had no individual applications pending needing to be decided. In this regard 2022 presented an important difference and Judge Lobov could remain with the Court as a Russian judge in Russian cases, elected for 9 years in his personal capacity. While he was only in the first year of his office, it is far from certain that the Court would be able to dispose of all cases against Russia in 9 years. Now other solutions are needed as the decision to completely terminate Russian judge's position cannot obviously be reversed.

Freezing Russian cases until Russia returns to the Council of Europe is not a serious option though. It is based on the assumption that Russia will be back if not in a few months' then in a few years' time. There are no factual grounds whatsoever for this assumption, Russia may be out for a few decades' time. This solution will also delay and deny justice to the victims of human rights violations who may not live to see the Court's judgment, to say nothing of its execution. It will also 'forgive' the violations by the Russian Government, but such an aim is nowhere to be found in the Convention. Dropping Russian cases altogether cannot be adopted for the very same reasons.

Of all the choices, *Burmych* now seems attractive. Recalling that in this case, the Grand Chamber of the Court sent around 18,000 applications against Ukraine to the Committee of Ministers to arrange for appropriate remedies, as all the cases concerned non-execution of domestic court judgments, one of the clearest and most well-established case law (WECL) issues. To make *Burmych* not look like a denial of justice (some well-founded applications had been pending before the Court for over a decade only to be disposed of in a table), the Ukrainian Government undertook to assist the Committee of Ministers and indeed invested a lot. Such approach will definitely not be coming from from the Russian Government. And while *Burmych* could work with WECL cases, not all the applications pending against Russia are WECL.

So, some sort of differentiated approach to the Russian cases is required to dispose of them effectively. If human resources at the registry are lacking and further spending by the Council of Europe is unwelcome, a call for secondments from Member States and even civil society may be considered. This may enhance the registry's capacity of effectively filtering the applications into one of the following categories.

Inadmissible applications may and in fact are single-judged on an industrial basis. An important part of pending cases, several thousand of those, fall under WECL and do not require individual adjudication. These are conditions and length of detention cases, freedom of assembly etc. They may be dealt with summarily by committees of three (no national judge required). In order to avoid denial of justice, a *Burmych*-like table (application number, name of the applicant) should be complemented with one more column: satisfaction award. Even cases raising new issues like "military censorship" (thousands of convictions for criticism of the war in Ukraine online) may be

dealt with in this way: while domestic provisions are new, the issue under the Convention is not, it is just patently contrary to Article 10 to prosecute for "no to war" statements. The Court may rely on the fact that "military censorship" laws have already been found contrary to freedom of expression by Human Rights Committee.

Most of the cases that require individual adjudication, e.g. requiring the assessment of contradictory pieces of evidence, may be decided by committees as the case law on torture, enforced disappearances, many issues of criminal justice, freedom of expression and/or discrimination is well-established. How many cases would remain after every possible application was allocated to a committee is unclear, but that's apparently several dozen of, inevitably, Chamber cases. They raise complicated criminal justice issues, novel technologies like automated facial recognition, bioethics, environmental and climate change, among others.

Rule 29(2) Rules of Court provides for a solution when the elected national judge cannot participate in the judgment and the *ad hoc* judges nominated by the Contracting Party are not available. The President of the Chamber then appoints a sitting judge of the Court as the *ad hoc* judge, thus preventing the respondent Government from blocking the Court's consideration of the case. This has already happened in *Ecodefence and others v. Russia*, a much belated 2022 judgment on the Russian 'foreign agents' law' case brought by 75 affected NGOs in 2013. Cypriot judge Georgios A. Serghides sat as the *ad hoc* national judge.

Given that the appointment of sitting judges remains the only solution for dozens if not hundreds of cases, a pool of *ad hoc* judges may be appointed by the relevant Section Presidents. There are judges on the Court that are fluent in Russian, hold degrees from Russian universities and otherwise familiar with (what remains of) its legal system. This will allow the Court to kick-start and terminate the backlog of Russian cases. It will be cautious in deciding on the basis of information provided by one party only, but it's the Russian Government's decision not to present its case to the Court, it is in no way deprived of the right to participate. ITLOS (twice) and Arctic Sunrise arbitral tribunal could function without the cooperation from Moscow, ECHR will be able to as well.

A Novel Trust Fund or Frozen Russian Assets to Compensate: How to Enforce the Court's Judgments

Second, the execution of judgments. In early June, it was reported that Russia's debt under the ECHR was over 70 million euros and the recent judgments in the cases of Jehovah's Witnesses, NGOs persecuted under the "Foreign Agents Law" and several dozen of protesters added a few million more. Previously, ECHR awards against Russia amounted to approximately 10 million euros a year. Impressive as it is, the figure is not anyhow considerable when compared to state budgets.

In the years to come, the Court will inevitably decide on the cases arising from the conflicts on the Georgian territory (South Ossetia and Abkhazia) and, importantly, on the post-2014 cases of violations on the Ukrainian territory: Crimea, Donbas, downing of MH-17. It will then proceed with the cases concerning the 2022 invasion. The new Russian law provides for non-payment of damages under those judgments, tens of thousands of victims are likely to remain uncompensated for the harm they suffered.

Failure to enforce the judgments, even with regard to compensation, severely undermines the authority of the Court. After 16 March 2022, Russia did not even inform the Committee of Ministers of any measures taken towards the execution of judgments. The Committee has to avoid becoming a powerless bystander, merely registering the outstanding obligations that stem from the final Court judgment, as it intends to. Under the Preamble, one of the underlying ideas of the Convention is "collective enforcement" of the rights it declares. Thus, victims should not be left on their own in seeking the payment of the damage awarded by the Court. Consequently, new mechanisms should be discussed and developed to ensure that victims are compensated and the Court's authority is restored.

Ukraine has already proposed a claims commission that would adjudicate on the damage and compensate the victims of the 2022 Russian invasion

from the funds frozen under the sanctions against Russia. The frozen property is yet to be confiscated and it is not clear that it will. The recent statement by the President of the European Commission tends to reply in the affirmative, but the priority will clearly be given to the restoration of Ukraine and compensating the invasion survivors. UN General Assembly, for its part, called for an inventory of damage and a compensation mechanism be established. Non-execution of the ECHR judgments admittedly concerns wider groups of victims, but not only Russians. They include everyone affected by the Russian control over Transnistria, Abkhazia and South Ossetia, the Ukrainians who suffered from the 2014 events, the families of the MH17 passengers and crew etc. Those affected by the inter-state case of *Georgia v. Russia I* (thousands of ethnic Georgians expelled from Russia) have not yet received their shares of the €10M award. So, while the claims commission and other proposals should be further discussed and, if feasible, implemented, other options should be explored.

A novel solution may consist in establishing a Trust Fund, under the aegis and within a legal framework of the Council of Europe. The Fund may receive voluntary contributions from States and individuals and dispense funds to the applicants who were awarded compensation by the Court. There is no need for any adjudication, as the awards have been or will have been determined by the Court. The Trust Fund should then be empowered to recover the spent funds from any Russian property that may be subject to attachment and seizure. It will be better placed to do so than multiple indigent individuals scattered across the globe. If, and when, Russia applies to return to the Council of Europe, it may be required to reimburse, with all accrued interest, the amounts spent by the Trust Fund.

This proposal, however novel, is not unheard of: similar institutions created under national (*Fonds de garantie des victimes des actes terroristes et d'autres infractions* in France) and international (Trust Fund for Victims in the structure of the International Criminal Court) law. While the proposals are audacious, they institutionally fit in the Convention system which faces unprecedented challenges. They are also in line with the Preamble to the Convention: It is an instrument for the 'collective enforcement' of rights and, hopefully, will provoke debate in which further solutions may appear.

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