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The issue of the application to the European Court of Human Rights in the context of the Russian invasion of Ukraine

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Abstract

The aim of this study was to analyze the practical aspects involved in filing applications to the European Court of Human Rights in the context of armed aggression against Ukraine. The achievement of the objective also involves the resolution of the following tasks: the analysis of the works of scientists who studied various aspects of human rights protection; international legal acts, as well as the legislation of Ukraine; the determination of the problems that exist at the present stage in the mechanism of human rights protection at the international level, and; the determination of the level of its effectiveness and the possibility of its application in Ukraine in the conditions of a military conflict. Specifically, the subject of the study is the prospect of implementation of the mechanism of appeal of citizens to the European Court for the Protection of Human Rights. The methodological basis of the research consisted in the dialectical combination of general scientific and special legal methods. It is concluded that, in view of the new socio-economic and political realities emerging in the modern world, it is

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necessary to update the whole system of human rights protection at the international level.

Keywords: human rights; human rights protection mechanism; armed conflict; international legal responsibility; principles of international law.

La cuestión de la solicitud al Tribunal Europeo de Derechos Humanos en el contexto de la invasión rusa de Ucrania

Resumen

El objetivo de este estudio fue analizar los aspectos prácticos que implica la presentación de solicitudes ante el Tribunal Europeo de Derechos Humanos en el contexto de la agresión armada contra Ucrania. La consecución del objetivo involucra además la resolución de las siguientes tareas: el análisis de los trabajos de los científicos que estudiaron diversos aspectos de la protección de los derechos humanos; los actos jurídicos internacionales, así como la legislación de Ucrania; la determinación de los problemas que existen en la etapa actual en el mecanismo de protección de los derechos humanos a nivel internacional, y; la determinación del nivel de su eficacia y la posibilidad de aplicación en Ucrania en las condiciones de un conflicto militar. Concretamente, el tema del estudio es la perspectiva de la aplicación del mecanismo de recurso de los ciudadanos ante el Tribunal Europeo de Protección de los Derechos Humanos. La base metodológica de la investigación consistió en la combinación dialéctica de métodos científicos generales y jurídicos especiales. Se concluye que, en atención con las nuevas realidades socioeconómicas y políticas que surgen en el mundo moderno, es necesario actualizar todo el sistema de protección de los derechos humanos a nivel internacional.

Palabras clave: derechos humanos; mecanismo de protección de los derechos humanos; conflicto armado; responsabilidad jurídica internacional; principios del derecho internacional.

Introduction

At the present stage of the development of human civilization, the protection of human rights is not an exclusive internal competence

of a certain state, there are additionally international institutions and mechanisms controlling the fulfillment by the state of its international legal obligations in the circumscribed sphere. One of such institutions is the European Court of Human Rights, established in accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms, whose competence includes consideration of complaints of citizens against those participating States that violate the rights and freedoms outlined in the said Convention.

The relevance of this study is that there is a war in Ukraine, there are numerous violations of the rights of citizens of our state. The study focuses on the fact that under such conditions there are problems of fixation on both war crimes and human rights violations on the territories where active hostilities are taking place or are under temporary occupation.

1. Theoretical Framework or Literature Review

It is necessary to note the fact that the issue of appeal to the European Court of Human Rights is relevant not only for Ukraine, but it also attracts the attention of the world scientific community, primarily due to the importance of man as the main social value in any democratic. state governed by the rule of law, as well as the protection of his fundamental rights and freedoms.

For example, (Paparinskis, 2020) explores the responsibility of states for violations of the Convention for the Protection of Human Rights and Fundamental Freedoms, compensation for material and moral damages caused by their wrongful acts, as a fundamental principle of international law (Paparinskis, 2020). Paparinskis (2020) also draws attention in his scholarly work to the fact that when a state's responsibility is exercised before international courts and tribunals, compensation damages the responsible state or its people (Paparinskis, 2020).

Halewood analyzes the scholarly work of St. Wallace and examines the relationship between military operations conducted by states during armed conflicts and human rights violations. The scholar also focuses on the recent developments in the European Court of Human Rights, which have expanded the application of the European Convention on Human Rights to protect the fundamental rights and freedoms of victims of military operations around the world.

Relevant for the analysis of the problems of human rights violations and their correlation with war crimes in the context of armed aggression against Ukraine is a scientific study by O. Cherviakova and Mekheda (2021) who paid attention to the fact of the criminalization of war crimes, which are

compared at the international and domestic legislative level in accordance with military law (Cherviakova and Mekheda, 2021).

Sosnina, who in her research work investigated the international aspects of the protection of the rights of victims of the armed conflict in eastern Ukraine, draws attention to the fact that in almost all regions where armed conflicts take place, laws are violated, and prohibited means and methods of war are used against civilians (Sosnina *et al.*, 2021).

2. Methodology

The methodological basis of the study consists of general scientific methods (synthesis, generalization, induction, deduction) and special legal methods (state-legal regulation, comparative legal method).

3. Results

Resolutions adopted by the UN General Assembly and other international humanitarian law instruments provide for three fundamental principles whose observance is mandatory for states taking part in a military conflict, and for the state itself if its regional internal conflict is involved. These principles are the foundation of humanitarian law, and, in this case, we point to the right to choose methods and means of war, which is limited; the prohibition of aggression and attacks on civilians; the need to distinguish them from military and other paramilitary forces.

Violation of fundamental principles entails the need to protect individuals during a military conflict and responsibility for harm caused to the civilian population at the end of that conflict.

According to the results of the study, we can conclude that one of the urgent needs for Ukraine, both scientists-theorists and practitioners, is to develop an effective mechanism for the protection of the violated rights of citizens as a result of armed aggression against Ukraine.

Problems arising in this sphere are related both to the insufficient efficiency of Ukrainian national legislation under martial law and the imperfection of the international human rights protection system. In particular, the European Court of Human Rights has a limited period for appealing to it, a complicated procedure for receiving and considering complaints, as well as a long period for their consideration.

It is also necessary to note the fact that in Ukraine under the conditions of military conflict, not all citizens have the possibility to record their violated rights and timely appeal to the European Court of Human Rights.

No less important factor influencing the efficiency of such protection is the low level of awareness of the Ukrainian population about the possibility to apply to the European Court of Human Rights for protection of their violated rights.

We may also conclude that not only the mechanism of human rights protection at the European Court of Justice requires renovation and adaptation to new social, political, and economic requirements of the world community, but also the entire system of such protection at the international level.

4. Discussion

The armed aggression against Ukraine will provoke an increase of cases of appeal to the European Court of Human Rights by the citizens who suffered from it to receive material and moral compensation. “The obligation of States to provide full reparation for internationally wrongful acts, including by full compensation, is one of the bedrock principles of international law” (Paparinskis, 2020: 1255). “The peculiarity of a war crime is its predominant multi-object nature: the crime causes damage to several direct objects at the same time” (Cherviakova and Mekheda, 2021: 256), as for human rights violation, it can be both a separate type of crime and a war crime.

In the latter case we are talking about the disappearance or death of a loved one, fixation on facts of torture, torture, being in captivity, destruction or damage to property, restriction of a person’s right to education or to movement, if the person, for example, is in temporarily occupied territory.

War crimes by their nature are the most dangerous for each individual society and humanity as a whole, they do not have a limitation period, but, unlike them, the period granted for the appeal to the European Court of Human Rights for protection of violated rights is limited. According to the above-mentioned, the question arises whether this term will be renewed if the person was in the temporarily occupied territory and had no possibility to apply for the protection of his rights in time.

Also, during active combat operations on the territory of our state a person does not always have an opportunity to record that his rights were violated, so additionally there is a problem of evidentiary basis of the unlawful act committed against a person.

This issue is relevant both for Ukraine, because “soon after its independence was declared, Ukraine chose the course towards ensuring the fundamental principles of protecting human rights and freedoms, firmly established in the international community” (Kononenko *et al.*,

2022: 355), and for all civilized states of the world. “Recent years have seen developments at the European Court of Human Rights (the Court) which have expanded the application of the European Convention on Human Rights (the Convention) to military operations throughout the world” (Halewood, 2019: 150).

However, it is debatable whether the international mechanism for the protection of human rights that exists today is sufficient, given the fact that most normative acts of similar content were developed and adopted at the end of the two world wars, during the period of peace coexistence of most states. Thus:

Despite the international community’s ratification of various conventions on international humanitarian law and the fight against their violations, as well as their partial implementation and the enshrined at the national level criminal liability for war crimes, almost all wars, and armed conflicts are accompanied by a commitment of serious war crimes (Sosnina *et al.*, 2021: 125).

Accordingly, it can be concluded that the above-mentioned normative legal acts for the protection of human rights are effective and sufficient in peacetime, but in the context of armed aggression against Ukraine, as well as any other military conflict, which may take place in another state, their content and implementation seems not to be able to fully ensure the protection of human rights.

This view can be justified by two decisive factors concerning the role of the European Court of Human Rights. Firstly, it is: “...an international court that considers cases pertaining to violations of the European Convention on Human Rights” (Saintano and Jewell, 2015: 25), rather than a political body like most institutions that provide this function.

The European Court of Human Rights is a judicial body, which considers disputes based on cases referred to it, so, secondly, those legal procedures provided by both the Convention for the Protection of Human Rights and Fundamental Freedoms and the Rules of Court can significantly complicate the recourse to it, taking into account the circumstances and conditions of martial law.

Besides, the majority of Ukrainian citizens are not aware of the legal aspects of the very possibility to apply to the European Court of Human Rights, which indirectly violates the provisions of article 6 of the Convention, guaranteeing the right to a fair and public hearing within a reasonable time by an independent and impartial court, established by law, when determining the civil rights and obligations of a person or when considering any criminal charges brought against a person, at that:

...on (i) how general interpretative techniques that have been developed by the Strasbourg Court were applied by the Court in its jurisprudence concerning the said provision; (ii) on the interplay between the overall fairness of the trial and Article 6(3)(e) ECHR; and (iii) on Article 6(3)(e) ECHR and the relationship between legal assistance/legal aid and the right to interpretation (Vogiatzis, 2021: 29).

At the same time, as a result of the limited possibility of implementation under martial law, an appeal to the European Court of Human Rights for some citizens of our state may be, “... engaging with the law produces frustration and exclusion” (Greenberg, 2020: 405).

In addition, “it can further be concluded that the Court provides both indirect and direct access to justice and therefore both individual and general justice, albeit only to supplement domestic remedies” (Gerards and Glas, 2017: 25), and, given the precisely subsidiary nature of this mechanism, it cannot act as the only means of protecting the fundamental rights and freedoms of citizens affected by the armed aggression against Ukraine.

On June 23, 2022, our state filed a complaint to the European Court of Human Rights against the Russian Federation for unlawful acts committed by the aggressor state, and crimes committed against the Ukrainian people. Regarding the similar experience of Georgia, “although the Court did not establish Russia’s jurisdiction over the disputed territory during the hostilities, this did not absolve Russia from all human rights violations stemming from the events taking place between August 8–12, 2008” (Dzehtsiarou, 2021: 293), it should be noted that there was no unanimity among the judges in reaching this decision.

Consequently, “throughout its history, the rule of law has been the lodestar guiding the development of the case-law of the European Court of Human Rights” (Spano, 2021), and the decisions made by the European Court are a necessary guide for state authorities in the process of bringing national legislation in the field of human rights and the practice of its application.

It is advisable: “... the need for critical appraisal of the construction, function, and evolution of this protection regime as well as its multi-scalar social and political effects, both intended and unintended” (Quintavalla and Heine, 2019: 138). “If genocide is occurring in Ukraine, the use of force is not necessary as other measures available under Genocide Convention to achieve the goals sought, i.e., to stop the genocide” (Dananjaya and Dhananjaya, 2022: 34), because Ukraine and its people, is the commission of an illegal act by an aggressor country that threatens the continued existence of all humanity.

There is also a clear need to eliminate the political dimension in the implementation of European assistance to end the military conflict on the territory of our state, because while armed conflict is ultimately about violent interaction between combatant groups, a variety of policies are pursued in conjunction with violence that contributes to the course of the conflict and its outcomes (Loyle and Binningsbø, 2016).

Avoidance of such a subjective attitude is extremely necessary for the future when considering complaints of Ukrainian citizens about violations of their fundamental rights and freedoms committed by the aggressor state against them.

“In fact, while the lexical field of human rights revolves around terms like ‘absolute’ and ‘inviolable’, the Court has relentlessly sought to soften the clout of the rights entailed in the European Convention it is supposed to enforce” (Manco, 2015; 527), which is inadmissible in the consideration of this category of complaints.

At the same time, there is a question of delineating the responsibility of the state itself, which has initiated a military conflict, and must bear responsibility in accordance with the fundamental principles of international law, as well as individuals belonging to its armed forces, as well as its other paramilitary formations, representatives of which commit unlawful acts.

Against citizens of Ukraine. If we analyze the provisions of the Criminal Code of Ukraine, it is clear that the identified problem goes beyond the limits of national criminal procedural legislation or granting legal effect within the legal system of Ukraine to international treaties in the manner prescribed by the Constitution of Ukraine (Constitution of Ukraine, 1996).

Any democracy in the world cannot exist in political isolation; crisis phenomena in one provoke negative tendencies in others. “Austerity measures have led to the denial of social rights and widespread socio-economic malaise across Europe” (Salomon, 2015: 530), the military conflict taking place in Ukraine has deepened the destructive processes in Europe and testified to the need to revise those international normative legal acts that regulate the protection of human rights but were not adapted to their implementation in conditions of martial law.

Given the close connection between international and humanitarian law, it is also necessary to change the very mechanism of human rights protection in order to avoid the situation that occurred in post-war Kosovo, which became: “... ‘black hole state’ reveals how the legal bureaucracies established to usher in human rights serve to perpetuate the state of suspension rather than realizing their utopian goals” (Mora, 2020: 90).

It is expected that changes in international law to regulate human rights protection will be a long and contentious process, because conservative

values and Conservative Party politicians helped to shape the Universal Declaration of Human Rights (UDHR) 1948 and the European Convention on Human rights (ECHR) 1950 (Tugendhat, 2019), and at the present stage, conservatism remains the leading ideological concept.

However, despite this fact, “...the significant role the UDHR has played in giving individuals a voice to hold states accountable”, which is undoubtedly important for the full functioning and implementation of the human rights protection mechanism at the international level.

Conclusions

Based on our research, we can conclude that:

1. in connection with the new socio-economic, and political realities emerging in the modern world, it is necessary to update the entire system of human rights protection at the international level, as well as the mechanism for its implementation;
2. it is urgent for Ukraine to update the current legislation in accordance with the world standards of human rights protection, to bring it in line with the requirements that the society faces during martial law and after its termination;
3. territories, where there are active hostilities or those under temporary occupation, are particularly difficult to document war crimes and human rights violations;
4. the possibility of exercising the right to appeal to the European Court of Human Rights is limited, in the first place, for that part of the population of Ukraine living in the temporarily occupied territory.

The above indicates the relevance, importance, and timeliness of the chosen topic of research.

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