

Human rights and the war in Ukraine.

LYONS, C.

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Carole Lyons (RGU), posted on the RGU Law School Blog, 19 April 2023

In April 1940, a series of massacres took place in the forests of western USSR. Collectively known as the [Katyn Massacre](#), it involved the mass murder of around 22,000 Polish army officers and intellectuals. Responsibility for these murders was denied until 1990 when, during [glasnost](#), it was acknowledged that the USSR had ordered the killings. Decades later, after Poland and Russia had both become member states of the Council of Europe, the Katyn murders were the subject of a 2013 judgment from the European Court of Human Rights (ECtHR), in [Janowiec v Russia](#). The Russian Federation was pursued by the relatives of some of those killed in Katyn, alleging breaches of the European Convention on Human Rights (ECHR). The ECtHR found that the *Janowiec* claim was time barred and that it had no temporal jurisdiction to examine the complaints. However, as some of the dissenting judges stated, this was “a case of most hideous human rights violations, which turn[s] the applicants’ long history of justice delayed into a permanent case of justice denied.”

The 1940 Katyn massacre, and its unexpected confluence with contemporary European human rights standards, is evoked here so as to give some context to an overview of the human rights consequences of Russia’s invasion of Ukraine in February 2022. While Europe had no human rights institutions in 1940, the Council of Europe (CoE) was established a mere 9 years after Katyn, and has become the arena for the working through of both past and present day human rights breaches.

The war in Ukraine has elicited wide-ranging responses in several international judicial fora. These include the International Court of Justice case, [Ukraine v Russian Federation](#), where Ukraine alleges false allegations of genocide by Russia seeking to justify the invasion, and the International Criminal Court, which has issued [two arrest warrants](#), including one for President Putin. Negotiations are also [underway](#) for the establishment of a new, special tribunal to deal with the crime of aggression. However, it is the CoE which has evidenced the most extensive responses to the Russian invasion.

The [Council of Europe](#) was established in 1949 under the Treaty of London as an organisation dedicated to the promotion of human rights in Europe. Its main institutions are the [Parliamentary Assembly](#), the [Committee of Ministers](#) and the [European Court of Human Rights](#). The [European Convention on Human Rights](#) (ECHR) was drafted under the aegis of the Council of Europe in 1950, and the rights in the Convention are protected and enforced by its institutions. Two types of human rights cases may be brought before the Court; individual complaints against a State under Art 34 of the ECHR or, more rarely, Inter-State cases under Art 33. There are currently 46 State member States of the CoE, all bound by the provisions of the ECHR.

The Russian Federation began a large scale military invasion of Ukraine on 24 February 2022. This aggression represents a continuation of Russian and Ukraine tensions ongoing the Russian [annexation](#) of Crimea in 2014. The war continues to date, and has resulted in many thousands of military casualties, significant numbers of civilian [casualties](#), millions [displaced](#), [abductions](#) and [war crimes](#).

The 2022 invasion resulted in an immediate escalation of the role of the CoE. Just one day after the start of the conflict, the [Committee of Ministers](#) of the CoE condemned the armed attack and called on the Russian Federation to cease its operations in Ukraine. They also agreed to suspend Russia's CoE membership, using as a legal basis to do so Art 8 of the [1949 Statute](#) of the CoE. Article 8 provides for suspension if a State party engages in a serious violation of the fundamental values of the CoE. The [Parliamentary Assembly](#) of the Council of Europe subsequently, on 15 March, passed a resolution requesting the Committee of Ministers to go further than suspension and to expel Russia. On the same day, Russian representatives formally announced Russia's withdrawal from the CoE. However, this could not be formally accepted as the expulsion mechanism was already underway. On 16 March, the Committee of Ministers, [passed a resolution](#) ceasing Russian Federation membership the CoE as from that date. This is the first time in the history of the CoE that Art 8 has been used, and that a member state has been expelled.

One of the main consequences of the cessation of Russian membership of the CoE was that the Russian Federation could no longer be a party to the ECHR. This fact called into play the terms of Art 58 of the ECHR, which provides for a six month notice period after withdrawal or cessation. Questions arose as to the consequences for the then pending Russian cases before the ECtHR. The Court itself issued a [Resolution](#) clarifying this as follows; the Russian Federation would cease to be a contracting party to the ECHR on 16 September 2022 and the Court would continue to deal with cases against Russia relating to alleged violations occurring before that date.

What is now the current position of Russia before the ECtHR since expulsion from the CoE? The Russian Federation ceased all communication and cooperation with the Court in March 2022 and, in June 2022, passed legislation providing for non-compliance with ECtHR judgments after 15 March (the date it had indicated its withdrawal from the CoE). The Court meanwhile indicated that as of 16 September 2022, there would no longer be a sitting Russian judge. This raised uncertainties as to how the Court would deal with the 17,000 cases then pending against Russia, given lack of engagement with the respondent state and no national judge. The response of the Court has, effectively, been a semblance of business as usual for Russian cases.

For example, in January 2023, the Court [ruled](#) on issues of admissibility and jurisdiction in the MH17 case (*Ukraine and the Netherlands v Russia*), finding that Russia had effective control, and therefore jurisdiction,

over Eastern Ukraine in 2014. As an indication of how the Court will now proceed, given lack of Russian collaboration and the lack of a Russian judge, the Court informed the Russian government that it had competence to rule and also that an *ad hoc* judge from one of the 46 judges at the court would be appointed. No response was received from the Russian Federation.

The Court could have selected to proceed only with such high profile cases against Russia, or indeed to suspend all cases against the state. But neither approach has been adopted by the Court; it is proceeding routinely with Russian cases as if there has been no major disruption. The basis for this stance is outlined in [Svetova and Others v Russia](#) where the Court made clear that after cessation of membership, a state “is not released from its obligations under the Convention in respect of any act performed by that State before the date on which it ceases to be a Party to the Convention”.

It also addressed the question of the absence of Russian engagement with the Court since March 2022, pointing to the rule of the Court which states that a respondent state’s absence from proceedings shall be considered as a waiver of their right to participate. In short, the Court has clearly asserted its continuing jurisdiction over Russia Federation human rights violations occurring until 16 September 2022. This may well lead to claims of lack of impartiality in the future, and perhaps to a devaluing of such one-sided judgments in terms of precedential significance. Questions may also be raised as to the utility of dealing with Russian cases when there is, for now, minimal likelihood of compliance with any judgments, rendering the latter of symbolic value only.

As an indication of the Court’s rationalising – or rushing? – of the mass of [Russian cases](#), it has decided to join together two significant inter-state cases; *Ukraine v Russia (X)*, which concerns Ukraine’s claim of gross human rights violations by Russia since its military operations began in February 2022, has now been formally joined with the MH17 case. This has been done in the interests of the “efficient administration of justice” according to the Court. It will certainly be important not to witness long delays in relation to the Ukraine war related hearings but, given that these cases concern two factually different scenarios, it might be questioned how appropriate it is for them to be corralled together by the Court.

To sum up, the Russian invasion of Ukraine has seen a series of unprecedented responses by Europe’s human rights institutions. These institutions have shown themselves capable of rapid and robust response to gross human rights violations. This marks a change from what might be called the “[complacent disinterest](#)” which previous Russian conflicts (Chechnya, Crimea) elicited. Some major questions arise however. How likely or possible is it that the Russian Federation will re-join the CoE? While it would be possible for the Russian Federation to be invited to be a member state under the Art 4 of the CoE Statute, that would be dependent on the acceptance of principles of the rule of law and human rights. At this current time it is not obvious that

this will be forthcoming. Finally, and importantly, what will be the impact of Russian Federation expulsion on the 140 million people now deprived of human rights court protection? To recall the words in the Katyn case, will the exit of Russia see a long history of justice delayed turned into a permanent case of justice denied?