ISSN 343[illegible]341.3
DOI 10.[illegible]215/naia-chasopis/2.2023.86

[RETRACTED ARTICLE] Human right breach investigation commitment in the context of the armed conflict: Jurisprudence of the European Court of human rights

Oleksandra Steshenko*
Doctor of Philosophy in Law
"WE ARE FROM UKRAINE" NGO
02100, 7 Krakivska Str., Kyiv, Ukraine
https://orcid.org/0000-0002-3886-175X

Abstract
The study examines the specifics of the obligations of states that are parties to the European Convention on Human Rights (hereinafter referred to as the "Convention") regarding investigations into violations of the Convention in the context of an armed conflict. The research relevance is predetermined by the rapid development of the practice of the European Court of Human Rights in recent years, as well as the significant burden on Ukrainian law enforcement agencies due to the urgent need to investigate massive violations of human rights committed in the context of Russian military aggression. The research aims to generalize the current practice of the European Court of Human Rights regarding the procedural obligations of the state in the context of armed conflict. The basis of the research was the analytical method, the method of specific sociological research. The issue of the jurisdictional connection between the duty to investigate and the state party to the Convention, the spectrum of violations to be investigated, the prerequisites for the duty to investigate violations, and the content of procedural obligations in the context of an armed conflict are considered. Jurisdiction of the Convention on Human Rights for Art. 1 Convention, in particular regarding procedural obligations, are primarily territorial; however, there are some exceptions to this general principle. The spectrum of violations for which the state party to the Convention has procedural obligations covers all serious violations of the Convention. The prerequisites for the obligation to investigate a violation may be a) a crime report; and/or b) the presence of signs indicating the commission of a violation, even in the absence of a report of a crime. To investigations of violations committed in the context of an armed conflict, the European Court of Human Rights applies the same criteria for the effectiveness of the investigation as under normal conditions (independence, adequacy (thoroughness), public control, and involvement of the victim), given the objective difficulties, caused by hostilities. The practical difficulties in outlining the specific obligations of Ukraine under the Convention regarding the investigation of mass violations of human rights during the war

Keywords:
investigation efficiency; European Convention on Human Rights; martial law; armed aggression of the Russian Federation; jurisdictional connection

Article's History:
Received: 28.03.2023
Revised: 21.05.2023
Accepted: 11.06.2023

Suggest Citation:
Steshenko, O. (2023). Human right breach investigation commitment in the context of the armed conflict: Jurisprudence of the European Court of human rights. *Law Journal of the National Academy of Internal Affairs*, 13(2), 86-95. doi: 10.56215/naia-chasopis/2.2023.86.

*Corresponding author

Copyright © The Author(s). This is an open access article distributed under the terms of the Creative Commons Attribution License 4.0 (https://creativecommons.org/licenses/by/4.0/)

RETRACTED ARTICLE

RETRACTED ARTICLE

Introduction

The jurisprudence of the European Court of Human Rights (hereinafter also "ECHR" or "the Court") regarding the obligations of States Parties to the European Convention on Human Rights (hereinafter also "the Convention") to investigate breaches of human rights guaranteed by the Convention is constantly developing and thus routinely scrutinized by scientists. The scientific and methodological recommendations "Principles of Effective Investigation Under the Jurisprudence of the European Court of Human Rights" by K. Buhaichuk *et al*. (2017) considered a wide range of issues related to the effectiveness of the investigation. The question of the criteria for the effectiveness of the investigation under the Convention was also covered in studies published in periodicals, both by Ukrainian authors, in particular O. Fedoriv (2021), S. Chernobai (2020), etc., and by foreign authors, such as K. Kamber (2020) and others.

When it comes to procedural obligations in the context of an armed conflict, the ECHR's case law is much less abundant. Consequently, there is less space for research and analysis of the jurisprudence. S. Wallace (2019) considered the issues of jurisdiction under extra-territorial military operations and related procedural obligations. F. Amaru (2021) analysed the ECHR judgment in the case of Hanan v. Germany in general, however, with an emphasis on domestic German issues. There are other pieces of research touching upon adjacent issues that provide a broader understanding of the subject. For example, J. Morgan (2018) considered the issue of correlation between tort and the ECHR's case law, whereas V. Stoyanova (2018) scrutinized causation between state omission and harm within the framework of positive obligations under the Convention. The book edited by L. Lavrysen & N. Mavronicola (2020) presents an interesting selection of articles on criminal law and its compliance with the practice of the ECHR, as well as some aspects of responsibility for gross human rights violations. G.M. Frisso (2018) considered procedural obligations to investigate violations of the right to life committed during armed conflicts, in the jurisprudence of the Inter-American Court of Human Rights. It is worth noting that, although the Inter-American Court of Human Rights refers to another regional human rights system and its jurisprudence has no binding power for Ukraine, the ECHR nevertheless often considers it when rendering its judgments.

The fact that Russia launched a full-scale military invasion in the territory of Ukraine with its numerous human rights breaches and ceased to be the High Contracting Party to the Convention caused a wave of scientific discussions and publications regarding the possible legal consequences of these events. As N. Wieb & A. Zimmermann (2022) rightly pointed out, international human law remains applicable during armed conflicts, and issues of compensation for victims of its violations are gaining unprecedented relevance. The European Court of Human Rights singles out the obligation of States Parties to the Convention to investigate violations of human rights guaranteed by the Convention as an independent obligation under the Convention (Klocker, 2022). This obligation may arise even when the State party to the Convention is not responsible for the material aspect of the violation. Under the martial law that continues to apply in Ukraine, law enforcement agencies are entrusted with the responsibility of investigating numerous violations committed in the context of the armed Russian aggression against Ukraine. Under these circumstances, such issues as the jurisdictional link between the duty to investigate and the State party to the Convention, the spectrum of violations that must be investigated, the moment when the duty to investigate a violation emerges, and the content of procedural obligations in the context of an armed conflict are gaining unprecedented relevance.

The investigation of tens of thousands of crimes related to the Russian armed aggression against Ukraine must meet the requirements of the European Convention on Human Rights, of which Ukraine, unlike Russia, continues to be a part. This means that the ineffectiveness of the investigation may lead to systematic violations of human rights on the part of Ukraine, even in cases where Ukraine is not responsible for the material aspect of a violation.

The research aims to theorize the practice of the ECHR as of now in terms of the state's procedural obligations regarding human rights violations committed in the context of an armed conflict. This allows to specify exactly what the Court's requirements are for investigations of human rights violations committed during wartime and will help to avoid systematic violations of the Convention by Ukraine.

Achieving the defined goal involves solving several tasks. Firstly, it is necessary to analyse the jurisprudence of the Court regarding the jurisdictional link within the meaning of Article 1 of the Convention between the State Party and the realization of procedural rights guaranteed by the Convention. Secondly, it is necessary to determine the spectrum of possible material violations of the Convention in respect of which State Parties may have procedural obligations. Thirdly, the jurisprudence of the Court should be scrutinized regarding the triggering standard for the obligation of the State Party to investigate an alleged violation. Fourth, it is necessary to determine the content of procedural obligations in the context of an armed conflict.

The dynamic development of the Court's jurisprudence on the above-mentioned issues, especially in recent years, and the unprecedented challenges currently facing Ukrainian law enforcement agencies together put the issue of procedural obligations under the Convention in a new light. The attempt to find answers to these questions determines the scientific

RETRACTED ARTICLE

...nce, ... the procedural obligations of the participati... in the context of armed conflicts, although the... have rece... been the subject of active discussions in the lega... im... ity, have not been researched by scientific ...udie...

Jurisdic...onal lin...

The Court repeated... ...hasized that the jurisdiction of the States P... ...s to the Convention under Article 1 is primarily territorial[1]. C... ...quently, the obligation of Ukraine to investigate ... ...an r...hts violations arises primarily concerning t... ...se v...olati...s that were committed within its territory, rega... ... the subject of the violation. The exception, ho... ...ver, is cases when, as a result of legal or illegal military acti... ...party to the Convention loses effective control ... ...er a part of its territory. In the cases of Ilaşku and Othe... ... Moldova and Russia[2], Catan and Others v. Moldo... ...and R... ...sia[3], as well as in Moser v. the Republic of Mold... ...and R... ...sia[4], the European Court of Human Rights c... ...sistently held that in the part of the territory tempora... ...ly not con... ...olled by the State Party, the latter neverthe... ...s continu... to exercise jurisdiction, which, however, is limit... ... obligation "to take the diplomatic, econom... ...udicial or other measures that were both in its power to take and i... ... accordance with international law". However, it is ... noting that in these cases the issue of Moldova's proc... dural obligations was not raised, therefore the Co... did not have the opportunity to clarify in more detail the scope and nature of the procedural obligations of the State party to the Convention if a violation was commit... ted within the territory temporarily out of its control.

The jurisdictional link between the violation and the State party to the Convention for Article 1 of the Convention in exceptional cases may also arise when the violation is committed outside the territory of the State party to the Convention. For this study, it is pertinent to single out the case of the use of force by State agents acting outside its territory, which may place a person under the control of the authorities of such a State, thereby creating a jurisdictional link in the meaning of the Article 1 of the Convention. In the case of Güzelyurtlu and Others v. Cyprus and Turkey, which concerned a violation of Article 2 of the Convention, the Court noted: "If the investigative or judicial authorities of a Contracting State institute their criminal investigation or proceedings concerning a death which has occurred outside the jurisdiction of that State, under their domestic law (e.g. under provisions on universal jurisdiction or the basis of the active or passive personality principle), the institution of that investigation or those proceedings is sufficient to establish a jurisdictional link for Article 1 between that State and the victim's relatives who later bring proceedings before the Court"[5].

It is worth noting, however, that in the subsequent case of Hanan v. Germany, the Court clarified that the institution of a domestic criminal investigation as a self-standing ground for establishing a jurisdictional link between a death occurring outside the territory of a State and the obligation of that State to investigate such a violation must be applied only if there are "special features" in the case[6]. In the case of Güzelyurtlu and Others v. Cyprus and Turkey, there were two such "special features": (a) the northern part of Cyprus was under the de facto effective control of Turkey for the Convention, which justified a departure from the general approach, and thus entailed a procedural obligation on the part of Turkey under Article 2; and (b) the presence of the murder suspects in Turkish-controlled territory was known to the authorities of Turkey and the "Turkish Republic of Northern Cyprus" and prevented Cyprus from fulfilling ...s obligations under the Convention[7]. In Hanan v. Germany, the Court also established the presence of "special features", which were: (a) Germany's obligation to ...gate the air strike under customary international humani...arian law; (b) the immunity of the military officials i...olved in the operation regarding the investigation ... possible criminal or disciplinary violations during their mission in Afghanistan, which rendered prosecution by the Afghan authorities impossible; (c) Germany's obligation und... its domestic criminal law to investigate ...sible ...r crime. Thus, in both cases, the Court establishe... ...isdictional link between the State's Parties to the C...vention and the corresponding extraterritorial vio...tions ...s of procedural obligations[8].

The spectru... of h... ...an rights violations for ... ...n t... States Parties have ...rocedur... obligations

Not all breaches of hu... ... rig...s guaranteed by the Convention are crime... ...r even adm...nistrative offences. Accordingly, not all human ri... ... violations can even

[1]Case of Al-Skeini and Others v. the United Kingdom No. 55721/07. (2011, July). Retrieved from https... ...udoc... ...int/fre#{%22itemid%22:[%22001-105606%22]}.
[2]Case of Ilaşku and Others v. Moldova and Russia No. 48787/99. (2004, July). Retrieved from https://hud... ...echr.coe.in... ...eng#{%22itemid%22:[%22001-61886%22]}.
[3]Case of Catan and Others v. Moldova and Russia Nos. 43370/04, 18454/06, and 8252/05. (2012, October). R... ...ieved from ht... ...s://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-114082%22]}.
[4]Case of Mozer v. the Republic of Moldova and Russia No. 11138/10. (2016, February). Retrieved from https://hudoc.ec... ...int/eng#{%22itemid%22:[%22001-161055%22]}.
[5]Güzelyurtlu and Others v. Cyprus and Turkey No. 36925/07. (2019, January). Retrieved from https://hudoc.echr.c... ...int/eng#{%22...em id%22:[%22001-189781%22]}.
[6]Hanan v. Germany No. 4871/16. (2021, February). Retrieved from https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-2... ...%22...
[7]Ibidem, 2021.
[8]Ibidem, 2021.

RETRACTED ARTICLE

…etical … be investigated. Therefore, the question arise… exactly are violations of the European Conven…on on H…an Rights that the State party to the European …nve…ion on Human Rights is obliged to investi…e?

The …ost …velo…d and clearly articulated in this context is …e Court's …risprudence under Articles 2 ("Right to life"), 3 ("…tion of torture"), and 4 ("Prohibition of slav… …nd forced labour") of the Convention. At the very least, the duty t… …vestigate arises in respect of such violations as …der… life-threatening situations[2], enforced dis…ppe…ranc…, torture[4], rape[5], other types of inhuman and de… …treatment[6], human trafficking[7], slavery, and fo…ed labour[8].

However, procedural ob… …o not only arise under Articles 2-4 of the Conv…tio… In the case of S.M. v. Croatia[9], considered by the G… Chamber, Ksenija Turkovic, a Croatian judge ther… …oldi… …osition of Vice-President of the Court, wrote a… …ncurri… …opinion, where she noted that the criteria fo… …e effect… …ness of the investigation should be the sam… for all the A…icles (not only Articles 2, 3, and 4) of the Co…vention. E…bo-rating on this, she, however, emphasized that it… …e… …s "serious" violations and noted that the Cou… …reviously established a violation of the obligation to conduct a… effective investigation under Articles 5, 8, 9, 10, 1…4, and Article 1 of Protocol 1 to the Convention[10].

When it comes to the grounds for duty to inve…gate a violation, the obligation to conduct an effective in…es-tigation arises not only when law enforcement age… cies receive a criminal complaint can be noted. Suc… an obligation also arises when there is prima facie evidence of the commission of a crime. By contrast, when law enforcement agencies receive a criminal complaint without supporting evidence, the procedural obligation to conduct an effective investigation is still present.

Indeed, in the above-mentioned concurring opinion of Judge Turkovych in the case of S.M. v. Croatia, Ksenia Turković emphasized that the triggering standard for the obligation to investigate a violation can be not only an express complaint from the victim of a violation, but also prima facie evidence, or, as the Court often puts it, "sufficiently clear indications" that there might have been a violation[11]. If we extrapolate these considerations to the current situation in Ukraine in the context of the subject of this study, then in all cases of serious human rights violations, even when the Ukrainian state is not responsible for their material aspect, Ukrainian law enforcement agencies are obliged to institute criminal proceedings even in the absence of an express criminal complaint if there are "sufficiently clear indications" of a violation. Such "sufficiently clear indications" can be, by way of illustration, reports in the media of a projectile hitting a civilian object or private property, which could constitute a violation of Article 1 of Protocol 1 to the Convention.

Contents of procedural obligations against the background of an armed conflict

The duty of a State to investigate a violation is "an obligation not of result but of means"[12]. Thus, the failure of the investigation to achieve the result desired by the applicant will not be relevant to the Court's evaluation …f the effectiveness of the investigation. The Guide on A…icle 2 of the Convention outlines that the standards of t…e investigation include independence, adequacy, …ness, public scrutiny, and the participation of the ne… …of-kin[13]. Although these criteria are interrelated and ea… …of them is not an end in itself, the Court, before …on…ing on the effectiveness of the investigation as a whole, evaluates the compliance of the investigation with each of them separately. Judge Turkovych noted in the above-men…ned concurring opinion that the criteria fo… …effec…veness of the investigation "should be the same … all the Articles of the Convention"[14]. It should be n…d, how…er, that for serious violations, in

[1]Case of Al-Skeini and Others v. the United Kingdom No. 55721/07. (2011, July). Retri… …m htt…//hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-105606%22]}.
[2]Case of Abuyeva and Others v. Russia No. 27065/05. (2010, December). Retrieved fr… …https://…doc.echr.coe.int/eng#{%22itemid%22:[%22001-101936%22]}.
[3]Varnava and Others v. Turkey Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 1… …16072/90, and 16073/90. (2009, September). Retrieved from https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-941…2]}.
[4]Ochigava v. Georgia No. 14142/15. (2023, February). Retrieved from https://hudoc.ech…e.int/eng#{%…2itemid%22:[%22001-223023%22]}.
[5]Case of S.M. v. Russia No. 75863/11. (2015, October). Retrieved from https://hudoc.echr.coe.int/eng#{%22ite… …22:[%22001-157965%22]}.
[6]Ochigava v. Georgia No. 14142/15. (2023, February). Retrieved from https://hudoc.echr.coe.i… …eng#{%… …id%22:[%22001-223023%22]}.
[7]S.M. v. Croatia No. 60561/14. (2020, June). Retrieved from https://hudoc.echr.coe.int/eng#{%22itemid%22:… …22001-203… …3%22]}.
[8]Case of Zoletic and Others v. Azerbaijan No. 20116/12. (2021, October). Retrieved from https://hud… …echr.coe.in… …ng#{%22itemid%22:[%22001-212040%22]}.
[9]S.M. v. Croatia No. 60561/14. (2020, June). Retrieved from https://hudoc.echr.coe.int/eng#{%22itemid%22:[%2… …01-203… …22]}.
[10]Ibidem, 2020.
[11]Ibidem, 2020.
[12]Guide on Article 3 of the European Convention on Human Rights. (2022, August). Retrieved from https://www.ech… …e.int/Docum… …ts/Guide_Art_3_ENG.pdf.
[13]Guide on Article 2 of the European Convention on Human Rights. (2022, August). Retrieved from https://www.echr.coe.int… …men… Guide_Art_2_ENG.pdf.
[14]S.M. v. Croatia No. 60561/14. (2020, June). Retrieved from https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-2035… …%22]}.

RETRACTED ARTICLE

ular under Articles 2, 3, and 4 of the Convention, the verification of compliance of the investigation with each of listed criteria is particularly thorough.

In the above-mentioned case of Hanan v. Germany, the governments of France, Norway, and the United Kingdom which intervened in the case as third parties, asserted that international humanitarian law should be applied as lex specialis not only to the triggering standard of the obligation to investigate violations but also to the content of this obligation. The government of the United Kingdom emphasised that Article 6 of the Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), "was essentially limited to prosecutorial discretion and independence and did not contain a broader reference to transparency requirements or the involvement of next of kin"[1].

However, the European Court of Human Rights, in assessing the effectiveness of the investigation carried out by the German government in this case did not limit itself to the criterion of independence but instead applied all its criteria for the effectiveness of the investigation. The Court noted that in this particular situation, there was no significant normative conflict between the requirements of international humanitarian law regarding the effectiveness of the investigation and such requirements under the Convention[2]. A departure from this established legal position in future cases is unlikely.

The specific content of the State's procedural obligations under each of the criteria will depend on the circumstances of the case and, in particular, may depend on the nature of the violation at issue. To generalize, the requirement for the independence of the investigation provides the obligation for the persons responsible for conducting the investigation and involved in it to be independent of the persons involved in the events. This means not only the absence of hierarchical and institutional ties but also practical independence[3]. However, it is worth noting that in a situation of hostilities, the Court realistically assesses the possibility and degree of fulfilment of this and other criteria at various stages of the investigation.

For example, in the above-mentioned case of Hanan v. Germany, the on-site reconnaissance was carried out by subordinates of the person involved in the events – the colonel who ordered the bombing. However, this shortcoming was not considered essential by the Court given the background against which the investigation was conducted, namely the ongoing hostilities in the area of the explosion. First, at the time of the on-site reconnaissance, the investigation team from the German military police, whose deployment was ordered that morning, had not yet arrived. Further waiting would lead to a slight delay in the on-site reconnaissance[4]. Second, the responsibility for the criminal investigation was assigned to the civil prosecution authorities, in particular to the Federal Prosecutor General, who could be guided by a considerable amount of investigation materials prepared by various actors and who took further investigative actions. The decision of the Federal Prosecutor General that there was no corpus delicti was based mainly on the findings of the lack of intent on the part of the colonel when ordering the air strike, which was supported by evidence that could not have been tampered with, such as audio recordings of the radio communication between the command centre and the pilots of the USAF F 15 aircraft and thermal images from the infrared cameras of the latter, which were immediately secured[5].

Adequacy of the investigation, according to Guides on Article 2 (2022)[6], Article 3 (2022)[7], and Article 4 of the Convention (2022)[8], denotes the necessity of leading the identification of those responsible and - if appropriate - their punishment. In those cases that involve the use of force by State agents or private persons, the investigation should be capable "of leading to a determination of whether the force used was or was not justified in the circumstances"[9]. In the event of a victim's death, the authorities must take all possible and reasonable steps necessary to secure the evidence, including, in particular, "eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of the clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard"[10]. The Court also held that "the investigation's conclusions must be

[1]Hanan v. Germany No. 4871/16. (2021, February). Retrieved from https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-208279%22]}.
[2]Ibidem, 2021.
[3]Case of Al-Skeini and Others v. the United Kingdom No. 55721/07. (2011, July). Retrieved from https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-105606%22]}.
[4]Hanan v. Germany No. 4871/16. (2021, February). Retrieved from https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-208279%22]}.
[5]Ibidem, 2021.
[6]Guide on Article 2 of the European Convention on Human Rights. (2022, August). Retrieved from https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf.
[7]Guide on Article 3 of the European Convention on Human Rights. (2022, August). Retrieved from https://www.echr.coe.int/Documents/Guide_Art_3_ENG.pdf.
[8]Guide on Article 4 of the European Convention on Human Rights. (2022, August). Retrieved from https://www.echr.coe.int/Documents/Guide_Art_4_ENG.pdf.
[9]Guide on Article 2 of the European Convention on Human Rights. (2022, August). Retrieved from https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf.
[10]Hanan v. Germany No. 4871/16. (2021, February). Retrieved from https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-208279%22]}.

RETRACTED ARTICLE

...based on thorough, objective, and impartial analysis of all relevant elements. Failing to follow an obvious line of inquiry undermines to a decisive extent the investigation's ability to establish the circumstances of the case and, where appropriate, the identity of those responsible"[1]. However, where death being investigated under Article 2 occurs in the context of an armed conflict, the investigation may be hampered, and specific limitations may lead to the use of less effective investigative measures or delay the investigation. Nevertheless, the obligation under Article 2 to protect life requires that, even in difficult security conditions, all reasonable steps should be taken to ensure that there is an effective independent investigation into alleged violations of the right to life[2].

Given the diversity of situations that might arise, it is hardly possible to reduce the investigative actions to a simple checklist[3]. In the case of Hanan v. Germany, for instance, the bombing caused the deaths of the applicant's two minor children, as well as many other people. From the very outset, the cause of their death and the person responsible for taking the relevant decision was already known to the investigation authorities. In this case, forensic medical examinations were not carried out as a) at the time of the investigation, the bodies of the deceased had already been removed by the local population; b) exhuming the bodies would contradict the religious customs of the victims and their families; and, most importantly, c) the cause of death was already known to the investigation authorities, and the number of dead and injured persons was not decisive for the conclusions reached by the investigation. Given that the investigation concerned an alleged war crime, it focused on the men's rea, as it was established that the colonel at the time of ordering the airstrike was convinced that no civilians were present at the scene. This element was decisive for the conclusion that there was no corpus delicti[4].

The investigation must be prompt and should proceed with a reasonable expedition[5]. However, the Court accepts that there might be issues and obstacles that impede the progress of the investigation in a particular situation. The Court nevertheless held that "a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts"[6].

Finally, an investigation must afford sufficient public scrutiny and the involvement of the victim(s) or next-of-kin, although the degree of such involvement may vary depending on the situation. For example, the Court has held that the investigative materials may involve sensitive issues, and their disclosure cannot be regarded as an immediate requirement[7]. Nevertheless, "the investigation must be accessible to the victim's family to the extent necessary to safeguard their legitimate interests" and the "outcome of the investigation must be duly brought to the attention of the next of kin"[8]. In the case of Hanan v. Germany, the applicant complained that on 12 April 2010, he has reported a crime concerning the infliction of deaths of two minor children and requested access to the investigation materials. However, the criminal proceedings were terminated in 4 days without hearing the applicant and before legal counsel was granted access to the investigation materials. The applicant thought that this constituted a serious flaw in the investigation, as relevant information could be provided, in particular regarding the victims present at the place of the explosion. However, the European Court of Human Rights established that in this particular case the failure to question the applicant before termination of the criminal proceedings did not constitute an essential flaw as the fact that two children of the applicant were killed was already beyond doubt. The applicant would not be able to provide additional information relevant to the decision on the issue of men's rea, on which the Federal Prosecutor General relied[9]. Thus, the degree and importance of the victim's involvement will depend on the specific circumstances of the case.

Description of topical issues of human rights protection in Ukraine against the background of the military aggression of the Russian Federation in the scientific literature

The Russian full-scale military aggression against Ukraine highlighted the topicality of international law's response to acts of aggression (Popescu, 2022). However, the search for adequate answers has only just begun, and little attention has been paid to the protection of victims of human rights violations in Ukraine and

[1]Mustafa Tunç and Fecire Tunç v. Turkey No. 24014/05. (2015, April). Retrieved from https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-154007%22]}.
[2]Case of Al-Skeini and Others v. the United Kingdom No. 55721/07. (2011, July). Retrieved from https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-105606%22]}.
[3]Velikova v. Bulgaria No. 41488/98. (2000, May). Retrieved from https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58021%22]}.
[4]Hanan v. Germany No. 4871/16. (2021, February). Retrieved from https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-208279%22]}.
[5]Guide on Article 3 of the European Convention on Human Rights. (2022, August). Retrieved from https://www.echr.coe.int/Documents/Guide_Art_3_ENG.pdf.
[6]Case of Al-Skeini and Others v. the United Kingdom No. 55721/07. (2011, July). Retrieved from https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-105606%22]}.
[7]Hanan v. Germany No. 4871/16. (2021, February). Retrieved from https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-208279%22]}.
[8]Ibidem, 2021.
[9]Ibidem, 2021.

RETRACTED ARTICLE

the obligations of Ukrainian authorities in these unprecedented conditions. Studies devoted to the issue of extraterritorial investigation under the Convention do not pay attention to the jurisdictional link in terms of the state's duty to investigate violations (Grignon & Roos, 2020; Mallory, 2020), likely since these studies were conducted before the Court's decision in the case of Hanan v. Germany. M. Milanovic and T. Papić (2018) investigated the applicability of the Convention in the occupied territories but did not elaborate the obligations of the High Contracting Parties to investigate human rights violations committed in the occupied territories. J. Rooney (2019) explored the issue of the legitimacy of extraterritorial jurisdiction in general and concluded that it improves the inclusiveness and representation of extraterritorial applicants.

Ukrainian researchers mainly focused on procedural obligations under Articles 2 and 3 (Shelchuk & Hlynska, 2020; Fedoriv, 2021). A. Zakharkin (2021) also mentioned Articles 5 and 13 of the Convention as the ones under which applicants complained in the context of the procedural obligations of the Ukrainian state regarding human rights violations committed as a result of Russian aggression in Donetsk and Luhansk regions. By limiting the research object to one or several articles of the Convention, researchers leave the possibility of extrapolating their conclusions to the procedural obligations of the High Contracting Parties of the Convention under other articles beyond examination and generally disregard the very existence of such obligations. However, F. Tan (2022) rightly concluded that procedural obligations relate primarily to violations of Articles 2, 3, and 4 of the Convention, although they can and do relate to other violations as well, although the practice regarding them is still developing. It is worth noting that the consideration of individual complaints of persons who suffered from Russian aggression may lead to a rapid and quite unexpected development of the Court's jurisprudence on this issue. In the dissertation by F. Tan (2022), devoted to the procedural obligations of states in situations of armed conflict, the author concluded that the obligation to investigate arises as soon as the state receives information about a possible violation, regardless of the source of the information.

Remarkably there are certain differences in the understanding of the criteria for the effectiveness of the investigation in the practice of the ECHR, articulated by the researchers. K. Buhaichuk *et al.* (2017) singled out the criteria for the effectiveness of the investigation separately for Articles 2 and 3 of the Convention: the investigation of material violations of Article 2 must be independent, effective and evidence must be ensured, while the investigation of violations of Article 3 must be thorough, independent, and impartial, evidence must be gathered promptly. S. Chernobayev (2020) singled out the following criteria for the effectiveness of the investigation: promptness and reasonable expedition; publicity (initiative of the pre-trial investigation body); legality; comprehensiveness and completeness of the application of measures aimed at the crime detection; independence and impartiality; transparency of pre-trial investigation. O. Fedoriv (2021) singled out the following criteria: independence, proper character, nature and degree of control, nature and degree of thoroughness, reasonable speed, public oversight, and involvement of relatives. T.S. Shelchuk & O.V. Hlynska (2020) agreed with previous research, according to which the criteria for the effectiveness of investigations into violations of Article 2 of the Convention include independence, impartiality, adequacy, promptness, and transparency.

F. Tan (2022) analysed the jurisprudence of the ECHR and the UN Human Rights Committee and the Inter-American Court of Human Rights altogether and concluded that the criteria for the effectiveness of the investigation are the same for all these institutions. The researcher singled out 8 such criteria: 1) the investigation must be initiated on the state's initiative; 2) the investigation must be initiated promptly and conducted with reasonable speed; 3) independence; 4) impartiality; 5) seriousness and efficiency, thoroughness, adequacy; 6) sufficient involvement of victims and their close relatives; 7) transparency; 8) persons responsible for a criminal offence must be prosecuted according to law and must be punished.

The above-listed criteria were articulated by the researchers based on the case law examined. It is worth mentioning, however, that the Court's jurisprudence is huge. Therefore, a comprehensive analysis of the case law is hardly possible for an external observer. For this reason, the Directorate of the Jurisconsult consistently generalizes the Court's jurisprudence. The research results are published online in the guides devoted to particular Articles of the Convention and other transversal themes. Such guides provide the Court's view of, in particular, criteria for the effectiveness of the investigation and which meaning is put into each of these criteria. In addition, there might be inaccuracies related to the unofficial translation in languages that are not official languages of the Council of Europe. Thus, the interpretation of the jurisprudence of the ECtHR may differ depending on the language of the study, the time of its conduct, and the source base.

Conclusions

According to the Court's jurisprudence, the jurisdiction of the High Contracting Parties to the European Convention on Human Rights for Article 1 of the Convention is primarily territorial. However, the European Court of Human Rights has established several exceptions to this general principle. In particular, in the case of the occupation of part of the territories by another state, the State retains jurisdiction over the temporarily occupied territories, but only in a limited scope. In the case of a violation committed outside the territory of the State Party,

RETRACTED ARTICLE

jurisdiction in terms of procedural obligations can be established from the very fact of the institution of criminal proceedings, but only when there are "special features" that cannot be exhaustively listed. In the presence of "special features", a jurisdictional link can be established even if criminal proceedings were not instituted.

Law enforcement agencies responding to challenges caused by massive violations of human rights during Russia's military aggression against Ukraine should be aware of the fact that the spectrum of violations for which the State Parties to the Convention has procedural obligations is not limited to Articles 2, 3 and 4 of the Convention. Such obligations also arise concerning other serious violations, in particular under Articles 5, 8, 9, 10, 11, 14, and Article 1 of Protocol No. 1 to the Convention, which the Ukrainian state is also obliged to investigate.

The duty to investigate a violation arises not only in the presence of an express criminal complaint but also when there are clear indications that a violation might have taken place, even in the absence of an express complaint from a victim. This means that the Ukrainian state is obliged to investigate all cases of which it is aware, even in the absence of a criminal complaint.

The Court applies the same criteria for the effectiveness of the investigation of violations committed in context of an armed conflict under normal conditions (independence, adequacy, expedience, public control, and involvement of the victim). However, when assessing the compliance of the investigation with these criteria, the Court considers the circumstances of the case and objective hardships caused by hostilities or other difficulties.

Considering the significant number of applications lodged with the Court in connection with Russia's military aggression against Ukraine, the jurisprudence of the Court regarding armed conflicts will continue to develop in the coming years. Given this, there is a need for further theorizing the voluminous jurisprudence of the ECHR on this issue, in particular regarding the requirements for the investigation of less serious violations compared to violations of Articles 2-4 of the Convention, the peculiarities of conducting investigations in conditions of overloaded law enforcement agencies in wartime conditions, etc.

Acknowledgements

None.

Conflict of Interest

None.

References

[1] Amaru, F.L. (2021). Criminal procedural law interaction with international criminal law and human rights in the context of military operations abroad: The European court of human rights' judgment in the case of Hanan v. Germany. *German Yearbook of International Law*, 64(1), 433-441. doi: 10.3790/gyil.64.1.433.

[2] Buhaichuk, K.L., Hladkova, Ye.O., Malynovska, T.V., Sviatotskyi, I.O., & Fedosova, O.V. (2017). *Principles of effective investigation according to the practice of the European court of human rights*. Kharkiv: Kharkiv National University of Internal Affairs.

[3] Chernobaiev, S. (2020). International standards for effective investigation. *National Law Journal: Theory and Practice*, 1(41), 147-150.

[4] Fedoriv, O.M. (2021). Criminal procedural ensuring of procedural obligations of the state under article 2 of convention for the protection of human rights and fundamental freedoms. *Juridical Scientific and Electronic Journal*, 6, 183-187. doi: 10.32782/2524-0374/2021-6/49.

[5] Frisso, G.M. (2018). The duty to investigate violations of the right to life in armed conflicts in the jurisprudence of the inter-American court of human rights. *Israel Law Review*, 51(2), 169-191. doi: 10.1017/S0021223718000055.

[6] Grignon, J., & Roos, T. (2020). The extraterritorial jurisdiction of states parties to the European convention on human rights in the context of armed conflict: Analysis of the case law of the European court of human rights. *Quebec Journal of International Law,* 33(2), 1-17. doi: 10.7202/1086439ar.

[7] Kamber, K. (2020). Substantive and procedural criminal Law protection of human rights in the law of the European convention on human rights. *Human Rights Law Review*, 20(1), 75-100. doi: 10.1093/hrlr/ngaa005.

[8] Klocker, C. (2022). Compensating victims of armed conflict: Evidence from the European court of human rights. In N. Wieb & A. Zimmermann (Eds.), *Human rights and international humanitarian law: Challenges ahead* (pp. 175-197). Northampton: Edward Elgar.

[9] Lavrysen, L., & Mavronicola, N. (Eds.). (2020). *Coercive human rights: Positive duties to mobilise the criminal law under the ECHR*. New York: Hart Publishing.

[10] Mallory, C. (2020). *Human rights imperialists: The extraterritorial application of the European convention on human rights*. London: Bloomsbury Publishing Plc.

[11] Milanović, M., & Papić, T. (2018). The applicability of the ECHR in contested territories. *International & Comparative Law Quarterly*, 67(4), 779-800. doi: 10.1017/S0020589318000234.

[12] Morgan, J. (2018). Parallel lines that never meet: Tort and the ECHR again. *The Cambridge Law Journal*, 77(2), 244-248. doi: 10.1017/S0008197318000478.

[13] Popescu, C.L. (2022). International and European law before the armed conflict in Ukraine - The first 10 days. - *Legal Forum*, 1(1), 1-10.
[14] Roone (2019). The democratic function of extraterritorial human rights adjudication. *European Human Rights Law Review*, 6, 626-642.
[15] Shelch T.S., & Hlynska, O.V. (2020). The effectiveness of the investigation in the context of Art. 2 ECHR. *Electronic Scientific Professional Magazine "Comparative and Analytical Law"*, 1, 682-684. doi: 10.32782/2524-039 /2020.1.1
[16] Stoyanova (20). Causation between state omission and harm within the framework of positive obligati under the European convention on human rights. *Human Rights Law Review*, 18(2), 309-346. doi: 10.1093/hrlr/ 04.
[17] Tan, F. (2022) *e duty to investigate in situations of armed conflict: An examination under international humanitarian law, international human rights law, and their interplay* (Doctoral dissertation, Leiden University Scholarly Publications, Leiden, Netherlands).
[18] Wallace, S. (201). *The application of the European convention on human rights to military operations*. Cambridge: Cambri iversity Press.
[19] Wieb, N., & Zimmerm an, A. (2022). Remarks on the relationship between international human rights law and internat al humanitarian law. In N. Wieb & A. Zimmermann (Eds.), *Human rights and international hum itarian law: Challenges Ahead* (pp. 1-10). Northampton: Edward Elgar. doi: 10.4337/978183910827 00006.
[20] Zakharkina, A.Yu. (2021). Ac erence to he standards of investigation in the jurisprudence of the European court of human rights in the onditions o an armed conflict (war). In *Round table, dedicated to the 72nd anniversary of adoption of the Universal D laration of Human Rights* (pp. 30-32). Kyiv: State Research Institute of the Ministry of Internal Aff of U aine.

RETRACTED ARTICLE

RETRACTED ARTICLE

[ВИДАЛЕНА СТАТТЯ] Обов'язок розслідувати порушення прав людини, вчинені у контексті збройного конфлікту: практика Європейського суду з прав людини

Олександра Стешенко
Доктор філософії з права, юрист
ГО «ВІ АР ФРЕНДС ЮКРЕЙН»
02100, вул. Краківська, 7, м. Київ, Україна
https://orcid.org/0000-0002-3886-175X

Анотація
У статті розглянуто особливості зобов'язань держав – учасниць Європейської конвенції з прав людини (надалі «Конвенція») щодо проведення розслідувань порушень Конвенції в контексті збройного конфлікту. Актуальність дослідження зумовлена стрімким розвитком практики Європейського суду з прав людини протягом останніх років, а також значним навантаженням на українські правоохоронні органи у зв'язку з нагальною потребою розслідувати масові порушення прав людини, учинені в контексті російської воєнної агресії. Метою дослідження є узагальнення поточної практики Європейського суду з прав людини щодо процесуальних зобов'язань держави в контексті збройного конфлікту. Основою дослідження слугував аналітичний метод, методи конкретно-соціологічних досліджень. Розглянуто питання юрисдикційного зв'язку між обов'язком розслідувати та державою – учасницею Конвенції, спектру порушень, що мають бути розслідувані, передумов виникнення обов'язку розслідувати порушення, а також змісту процесуальних зобов'язань в контексті збройного конфлікту. Юрисдикція Конвенції з прав людини для цілей ст. 1 Конвенції – це тема щодо процесуальних зобов'язань, є передусім територіальною; однак існує низка виключень з цього загального принципу. Спектр порушень, за якими у держави – учасниці Конвенції є процесуальні зобов'язання, охоплює всі серйозні порушення Конвенції. Передумовами виникнення обов'язку розслідувати порушення може бути: а) отримання повідомлення про злочин; та/або б) наявність ознак, які вказують на вчинення порушення, навіть за відсутності повідомлення про злочин. До розслідувань порушень, учинених у контексті збройного конфлікту, Європейський суд з прав людини застосовує такі самі критерії ефективності розслідування, як і за звичайних умов (незалежність, адекватність (ретельність), громадський контроль і залучення потерпілого), з огляду на об'єктивні труднощі, спричинені бойовими діями. Практична цінність полягає в окресленні конкретних зобов'язань України за Конвенцією щодо розслідування масових порушень прав людини під час війни

Ключові слова:
ефективність розслідування; Європейська конвенція з прав людини; воєнний стан; збройна агресія російської федерації; юрисдикційний зв'язок