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[RETRACTED ARTICLE] Human right breach investigation commitment in the context of the armed conflict: Jurisprudence of the European Court of human rights

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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 from 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

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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 examined 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. Kasper (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 over extra-territorial military operations and related procedural obligations. F. Amaru (2021) analysed the ECHR's judgment in the case of *Hanan v. Germany* in detail, 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's of now in terms of the state's procedural obligation 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. First, 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 violation 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

...ence, the procedural obligations of the participating States in the context of armed conflicts, although they have recently been the subject of active discussions in the legal community, have not been researched by scientific studies.

Jurisdictional link

The Court repeatedly emphasized that the jurisdiction of the States Parties to the Convention under Article 1 is primarily territorial¹. Consequently, the obligation of Ukraine to investigate human rights violations arises primarily concerning those violations that were committed within its territory, regardless of the subject of the violation. The exception, however, is cases when, as a result of legal or illegal military action, a State party to the Convention loses effective control over part of its territory. In the cases of *Ilaşku and Others v. Moldova and Russia*², *Catan and Others v. Moldova and Russia*³, as well as in *Moser v. the Republic of Moldova and Russia*⁴, the European Court of Human Rights consistently held that in the part of the territory temporarily not controlled by the State Party, the latter nevertheless continues to exercise jurisdiction, which, however, is limited to the obligation “to take the diplomatic, economic, judicial or other measures that were both in its power to take and in accordance with international law”. However, it is worth noting that in these cases the issue of procedural obligations was not raised, therefore the Court 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 committed 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 case⁶. 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 its obligations under the Convention⁷. In *Hanan v. Germany*, the Court also established the presence of “special features”, which were: (a) Germany's obligation to investigate the air strike under customary international humanitarian law; (b) the immunity of the military officials involved in the operation regarding the investigation of possible criminal or disciplinary violations during their mission in Afghanistan, which rendered prosecution by the Afghan authorities impossible; (c) Germany's obligation under its domestic criminal law to investigate a possible crime. Thus, in both cases, the Court established a jurisdictional link between the State's Parties to the Convention and the corresponding extraterritorial violations, as well as of procedural obligations⁸.

The spectrum of human rights violations for which the States Parties have procedural obligations

Not all breaches of human rights guaranteed by the Convention are crimes or even administrative offences. Accordingly, not all human rights violations can even

¹Case of *Al-Skeini and Others v. the United Kingdom* No. 55721/07. (2011, July). Retrieved from <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-105606%22%5D%7D>.

²Case of *Ilaşku and Others v. Moldova and Russia* No. 48787/99. (2004, July). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-61886%22%5D%7D>.

³Case of *Catan and Others v. Moldova and Russia* Nos. 43370/04, 18454/06, and 8252/05. (2012, October). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-114082%22%5D%7D>.

⁴Case of *Moser v. the Republic of Moldova and Russia* No. 11138/10. (2016, February). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-161055%22%5D%7D>.

⁵*Güzelyurtlu and Others v. Cyprus and Turkey* No. 36925/07. (2019, January). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-189781%22%5D%7D>.

⁶*Hanan v. Germany* No. 4871/16. (2021, February). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-20000%22%5D%7D>.

⁷*Ibidem*, 2021.

⁸*Ibidem*, 2021.

ethical to be investigated. Therefore, the question arises: what exactly are violations of the European Convention on Human Rights that the State party to the European Convention on Human Rights is obliged to investigate?

The most developed and clearly articulated in this context is the Court's jurisprudence under Articles 2 ("Right to life"), 3 ("Prohibition of torture"), and 4 ("Prohibition of slavery and forced labour") of the Convention. At the very least, the duty to investigate arises in respect of such violations as enforced life-threatening situations², enforced disappearance³, torture⁴, rape⁵, other types of inhuman and degrading treatment⁶, human trafficking⁷, slavery, and forced labour⁸.

However, procedural obligations do not only arise under Articles 2-4 of the Convention. In the case of *S.M. v. Croatia*⁹, considered by the Grand Chamber, Ksenija Turkovic, a Croatian judge then holding the position of Vice-President of the Court, wrote a concurring opinion, where she noted that the criteria for the effectiveness of the investigation should be the same for all the Articles (not only Articles 2, 3, and 4) of the Convention. Elaborating on this, she, however, emphasized that it applies to "serious" violations and noted that the Court previously established a violation of the obligation to conduct an effective investigation under Articles 5, 8, 9, 10, 11, 13, and Article 1 of Protocol 1 to the Convention¹⁰.

When it comes to the grounds for duty to investigate a violation, the obligation to conduct an effective investigation arises not only when law enforcement agencies receive a criminal complaint can be noted. Such 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 violation¹¹. 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 of the effectiveness of the investigation. The Guide on Article 2 of the Convention outlines that the standards of the investigation include independence, adequacy, promptness, public scrutiny, and the participation of the next-of-kin¹³. Although these criteria are interrelated and each of them is not an end in itself, the Court, before commenting 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-mentioned concurring opinion that the criteria for the effectiveness of the investigation "should be the same across all the Articles of the Convention"¹⁴. It should be noted, however, that for serious violations, in

¹Case of *Al-Skeini and Others v. the United Kingdom* No. 55721/07. (2011, July). Retrieved from [http://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-105606%22\]}](http://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-105606%22]}).

²Case of *Abuyeva and Others v. Russia* No. 27065/05. (2010, December). Retrieved from [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-101936%22\]}](https://hudoc.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, 16071/90, 16072/90, and 16073/90. (2009, September). Retrieved from [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-94160%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-94160%22]}).

⁴*Ochigava v. Georgia* No. 14142/15. (2023, February). Retrieved from [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-223023%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-223023%22]}).

⁵Case of *S.M. v. Russia* No. 75863/11. (2015, October). Retrieved from [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-157965%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-157965%22]}).

⁶*Ochigava v. Georgia* No. 14142/15. (2023, February). Retrieved from [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-223023%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-223023%22]}).

⁷*S.M. v. Croatia* No. 60561/14. (2020, June). Retrieved from [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-203503%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-203503%22]}).

⁸Case of *Zoletic and Others v. Azerbaijan* No. 20116/12. (2021, October). Retrieved from [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-212040%22\]}](https://hudoc.echr.coe.int/eng#{%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:\[%22001-203503%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-203503%22]}).

¹⁰*Ibidem*, 2020.

¹¹*Ibidem*, 2020.

¹²Guide 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.

¹³Guide 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.

¹⁴*S.M. v. Croatia* No. 60561/14. (2020, June). Retrieved from [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-203503%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-203503%22]}).

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, when a 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 life².

Given the diversity of situations that might arise, it is hardly possible to reduce the investigative actions to a simple checklist³. 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 from 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 expedition⁵. 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 requirement⁷. 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 Public Prosecutor General relied⁹. Thus, the degree and importance of the victim's involvement will depend on the specific circumstances of the case.

Development 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

¹Mustafa Tunç and Fecire Tunç v. Turkey No. 24014/05. (2015, April). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-154007%22%5D%7D>.

²Case of *Al-Skeini and Others v. the United Kingdom* No. 55721/07. (2011, July). Retrieved from <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-105606%22%5D%7D>.

³*Velikova v. Bulgaria* No. 41488/98. (2000, May). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-55831%22%5D%7D>.

⁴*Hanan v. Germany* No. 4871/16. (2021, February). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-105606%22%5D%7D>.

⁵Guide 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.

⁶Case of *Al-Skeini and Others v. the United Kingdom* No. 55721/07. (2011, July). Retrieved from <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-105606%22%5D%7D>.

⁷*Hanan v. Germany* No. 4871/16. (2021, February). Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-105606%22%5D%7D>.

⁸*Ibidem*, 2021.

⁹*Ibidem*, 2021.

the obligations of Ukrainian authorities in these unprecedented conditions. Studies devoted to the issue of extraterritorial jurisdiction 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. Milanović and V. Papić (2018) investigated the applicability of the Convention in the occupied territories but did not elaborate on 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 of representation of extraterritorial applicants.

Ukrainian researchers mainly focused on procedural obligations under Articles 2 and 3 (Shelchuk & Hlynska, 2020; Fedoriv, 2021). A. Zakharkiv (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 devoted to transversal themes. Such guides provide the Court's view of 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 its 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,

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 13 of 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.

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None.

Conflict of Interest

None.

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ДРАГІ СТЕШЕНКО

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

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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 загальною потребою розслідувати масові порушення прав людини, учинені в контексті російської воєнної агресії. Метою дослідження є загальнення поточної практики Європейського суду з прав людини щодо процесуальних зобов'язань держави в контексті збройного конфлікту. Основою дослідження слугував аналітичний метод, метою – конкретних 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 у контексті збройного конфлікту. Юрисдикція Конвенції з прав людини для цілей ст. 1 Конвенції зобов'язана щодо процесуальних зобов'язань, є передусім територіальною; однак існує низка винятків 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