GIBSON DUNN

May 30, 2023

RUSSIA IN THE EUROPEAN COURT OF HUMAN RIGHTS – RECENT DECISIONS MAY IMPACT RIGHTS OF INVESTORS

To Our Clients and Friends:

The European Court of Human Rights (the "**ECtHR**" or the "**Court**") has issued two decisions this year in cases concerning the Russian Federation's ("**Russia**") actions in Ukraine and Georgia which are alleged to be violations of the European Convention on Human Rights (the "**Convention**"). In this client alert, we unpack relevant aspects of the decisions.

A summary of relevant aspects is as follows:

1. Although Russia ceased being a High Contracting Party to the Convention as from 16 September 2022, under Article 58 of the Convention, the ECtHR can still examine alleged violations of the Convention committed by Russia up to that date.

2. The involvement of armed forces in extraterritorial conflict will not preclude the ECtHR from finding that a respondent State has extraterritorial jurisdiction (that is, jurisdiction outside of the State's recognised geographical borders) over the area in which the alleged violations take place.

3. These findings may have implications for investors seeking recourse against Russia in relation to the recent invasion of Ukraine, on the basis that these decisions lend support to the notion that Russia's territory may be understood to span further than its recognised geographical borders. Thus, under certain bilateral investment treaties, investors may have grounds to argue that Russia's extraterritorial actions fall within the scope of protection that would ordinarily be understood to cover only Russia's recognised territory.

4. The factual findings of the ECtHR in these decisions can have material evidentiary relevance for disputes under bilateral investment treaties pursued by investors against Russia as well as to the lack of effectiveness of local remedies in Russia for the purposes of seeking redress for breaches of property rights of investors.

I. *Ukraine and the Netherlands v. Russia*

On 25 January 2023, the ECtHR rendered its decision on the admissibility of the inter-State complaints made by Ukraine and the Netherlands against Russia in respect of alleged violations of the Convention in Donbass (eastern Ukraine), stemming from the conflict that began in Spring 2014.[1]

The ECtHR declared the applications partly admissible, and the merits of the applications will now be heard by the Grand Chamber in the near future.

a. Background

In early March 2014, pro-Russian protests began across eastern regions of Ukraine, including the Donetsk and Luhansk regions ("**Donbass**"). Armed groups formed, and the violence rapidly escalated. In mid-April, the government of Ukraine launched an "Anti-Terrorist Operation" to re-establish control over territory controlled by the separatist armed groups. On 11 May 2014, the separatists held sham "referendums" in the territory they controlled and subsequently declared the independence of the "Donetsk People's Republic" (the "**DPR**") and the "Lugansk People's Republic" (the "**LPR**").[2]

The fighting intensified and on 17 July 2014 Malaysian Airlines flight MH17 was downed near Snizhne, in the Donetsk region. All 298 civilians aboard, including 196 Dutch nationals, were killed.[3] The subsequent investigations performed by the Dutch Government and the international community into this incident concluded that a Buk missile had been fired from separatist-held territory in Ukraine and that the missile in question belonged to Russian armed forces.[4]

Between June and August 2014, three groups of children, all of whom were orphans or in care homes, were abducted by armed separatists and transferred to Russia from Donbass. All 94 children were eventually returned to Ukraine.[5]

A ceasefire agreement was reached in September 2014 and a line of separation was established. The ceasefire was subsequently broken and, over the ensuing years, further ceasefires were agreed and then breached.[6]

At the date of the admissibility hearing in the case, the conflict was ongoing. The case concerns allegations of violations of human rights in the context of these events in Donbass.

The case concerns three inter-State applications:

1. The Government of Ukraine's application, which consolidated a number of separate applications, regarding military action which allegedly put the life and health of the civilian population at risk.[7]

2. The Government of Ukraine's application regarding the alleged abduction by armed separatists of three groups of children.[8]

3. The Government of the Kingdom of the Netherlands' application regarding the downing of flight MH17.[9]

b. The ECtHR's Findings

i. Temporal Scope: Russia's Relationship with the Convention and the ECtHR

On 25 February 2022, the day after Russia's recent invasion of Ukraine, Russia was suspended from its rights of representation in the Council of Europe. In March 2022, the Committee of Ministers of the Council of Europe adopted a Resolution by which Russia ceased to be a member of the Council of

Europe as from 16 March 2022.[10] Six days later, the ECtHR adopted the *Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights*, which stated that Russia would cease to be a High Contracting Party to the Convention on 16 September 2022.[11]

As a result, Russia ceased being a High Contracting Party to the Convention as from 16 September 2022. But under Article 58 of the Convention, the ECtHR can still examine claims against Russia committed up to that date.[12]

ii. Whether the Alleged Complaints Fell Within Russia's Jurisdiction

Article 1 of the Convention provides: "*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of* [the] *Convention.*" In order for an alleged violation to fall within the ECtHR's Article 19 jurisdiction to "*ensure the observance of the engagements undertaken by the High Contracting Parties*", it must fall under the Article 1 jurisdiction of a High Contracting Party. In other words, the respondent State's jurisdiction must first be established in order to trigger the ECtHR's own jurisdiction to hear the claims.

The ECtHR explained that where an allegation of extraterritorial jurisdiction is made—which is an exception to the principle of territoriality—the ECtHR will consider two main fact-specific criteria in deciding whether there are exceptional circumstances justifying a finding that the State concerned was exercising extraterritorial jurisdiction:

1. **effective control** by the State over an area outside its national territory (the "**spatial**" concept of jurisdiction, or jurisdiction *ratione loci*), usually as a consequence of lawful or unlawful military action, including occupation or annexation of territory of another State; and

2. **State agent authority and control** over individuals (the "**personal**" concept of jurisdiction, or jurisdiction *ratione personae*).[13]

The ECtHR held that Russia had had effective control over all separatist-controlled areas from 11 May 2014 up to at least 26 January 2022—the date when the Court had held its hearing in the case—on account of Russia's military presence in Donbass and the decisive degree of influence it enjoyed over these areas as a result of its military, political and economic support to the DPR and the LPR.[14] The ECtHR found it established beyond any reasonable doubt that there had been Russian military personnel present in an active capacity in Donbass from April 2014 and that there had been a large-scale deployment of Russian troops from, at the very latest, August 2014. It further found that Russia had a significant influence on the separatists' military strategy, that it had provided weapons and other military equipment to separatists on a significant scale from the earliest days of the DPR and the LPR and over the following months and years and that it had carried out artillery attacks following requests by the separatists.[15] There was also clear evidence of political support being provided to the DPR and the LPR, and Russia had played an active role in their financing.[16]

The Ukraine complaints concerning events which had occurred wholly within the territory in separatist hands from 11 May 2014 therefore fell within the jurisdiction of Russia (i.e., its "spatial" jurisdiction).[17]

Ukraine also complained about bombing in areas outside separatist control, but the ECtHR found that this did not fall within Russia's spatial jurisdiction. The ECtHR considered whether the complaints could be within Russian "personal" jurisdiction because the attacks were carried out on Russian authority. The ECtHR held that as this issue is closely related to the merits of the case, it would be considered during the merits stage.[18] If the incidents are found to be "*military operations carried out during the active phase of hostilities*" (rather than the period that follows), they will be excluded from Russia's personal jurisdiction.[19]

As regards the complaints of the Netherlands, the ECtHR found that the downing of flight MH17 had occurred wholly within the territory in the hands of the separatists. The complaints therefore fell within Russia's spatial jurisdiction.[20]

Russia's objection to the ECtHR's subject matter jurisdiction (*ratione materiae*) over complaints concerning armed conflict was also rejected.[21] The ECtHR emphasised that the Convention's safeguards continued to apply in situations of international armed conflict. However, the Convention guarantees were to be interpreted in harmony with other rules of international law, including relevant provisions of international humanitarian law. In particular, the ECtHR will determine at the merits stage of the proceedings how Article 2 of the Convention should be interpreted, having regard to the content of international humanitarian law.

iii. Admissibility of the Complaints

1. The Exhaustion Rule

At the time of lodging of the applications, Article 35(1) of the Convention provided that "[t]*he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.*"[22] This is known as the "**exhaustion rule**"—the Court had to determine Russia's objection that domestic remedies had not been exhausted:

1. As regards the downing of flight MH17, the Court took into account (i) the blanket denial of the Russian authorities of any involvement in the downing of the flight, (ii) the fact that the events had occurred outside Russian sovereign territory by perpetrators whose identities had not been known at the time, and (iii) the political dimension of the case implicating Russian state agents in the commission of a crime condemned by the UN Security Council. On this basis, the Court found that Russia had failed to show that there was an effective remedy available in Russia in respect of the complaints.[23]

2. As regards the general military action and the abductions[24], the Court explained that where there is sufficient evidence of "administrative practices" (as here—see below), domestic

remedies would clearly be ineffective at putting an end to the violations.[25] The Court found this to be the case and so the rule on exhaustion of domestic remedies was not applicable.

2. The Administrative Practices

The Court held that where "administrative practices" are alleged, two elements must be shown: (i) the "**repetition of acts**" constituting the alleged violation of the Convention; and (ii) "**official tolerance**" of those acts by the superiors of those immediately responsible.[26]

Applying those principles to the facts, the Court found:

1. In respect of the complaints regarding the **general situation in eastern Ukraine**: there was sufficient *prima facie* evidence to declare admissible the complaints regarding:
    - Article 2, consisting of unlawful military attacks against civilians and civilian objects;
    - Article 3, consisting of the torture of civilians and Ukrainian soldiers who were prisoners of war or otherwise *hors de combat*;
    - Article 4(2), consisting of forced labour;
    - Article 5, consisting of abductions, unlawful arrests and lengthy unlawful detentions;
    - Article 9, consisting of deliberate attacks on, and intimidation of, various religious congregations not conforming to the Russian Orthodox tradition;
    - Article 10, consisting of the targeting of independent journalists and the blocking of Ukrainian broadcasters;
    - Article 1 of Protocol No. 1, consisting of the destruction of private property;
    - Article 2 of Protocol No. 1, consisting of the prohibition of education in the Ukrainian language; and
    - Article 14, taken together with the above Articles, consisting of the targeting of civilians of Ukrainian ethnicity or citizens who supported Ukrainian territorial integrity.[27]
2. In respect of the complaints regarding the **abduction and transfer to Russia of three groups of children**: there was a pattern of violations such that the complaints regarding Articles 3, 5 and 8 and Article 2 of Protocol No. 4 of the Convention were admissible.
3. In respect of the complaints regarding the **downing of flight MH17**: there was sufficient *prima facie* evidence to declare admissible the complaints regarding Articles 2, 3 and 13 of the Convention.[28]

This Decision relates to the **admissibility** of these applications. The next stage—examining the **merits** of the applications—will involve the Grand Chamber of the ECtHR considering whether there has been a violation of the Convention in respect of the admissible complaints.

II. *Georgia v. Russia (IV)*

On 20 April 2023, the ECtHR rendered its judgment on the admissibility of the inter-State complaints made by Georgia against Russia in respect of alleged violations of the Convention by Russia relating to the deterioration of the human-rights situation along the administrative boundary lines between Georgian-controlled territory and Abkhazia and South Ossetia.[29] It is the fourth *Georgia v. Russia* inter-State application before the ECtHR.

a. Background

Following the armed conflict between Georgia and Russia in August 2008, Russia recognised Abkhazia and South Ossetia as independent States. It established military bases in each of the two regions and stationed Russian soldiers there. It also set up a joint military command between Russia and Abkhazia and incorporated the South Ossetian "military" into the Russian armed forces. Russian border guards patrol the administrative boundary line between the two regions and the territory controlled by the Georgian Government.

Since 2009, physical barriers and other measures have gradually been established to block people from crossing the administrative boundary line freely. This process—referred to as "borderisation"—includes three main elements: (1) the establishment of physical infrastructure; (2) surveillance and patrols; and (3) a crossing regime requiring commuters to have specific documents and only use "official" crossing points.

Georgia and many States consider the process of "borderisation" illegal under international law. The Georgian authorities refer to the administrative boundary line as the occupation line; whereas the Russian and the *de facto* Abkhazhian and South Ossetian authorities treat the administrative boundary line as an international border on the grounds that Russia has recognised the two breakaway entities as independent States.

Against this backdrop of events, the Georgian Government contends that:

1. Russia engaged (and continues to engage) in an administrative practice of harassing, unlawfully arresting and detaining, assaulting, torturing, murdering and intimidating ethnic Georgians attempting to cross, or living next to, the administrative boundary lines that now separate Georgian-controlled territory from Abkhazia and South Ossetia;

2. Russia engaged (and continues to engage) in an administrative practice of failing to conduct Convention-compliant investigations in this connection;

3. a Georgian civilian who was abducted while trying to enter South Ossetia was unlawfully deprived of his liberty, tortured and murdered by persons for whom Russia bears responsibility; and

4. Russia failed to conduct a Convention-compliant investigation into the civilian's unlawful arrest and murder and into the unlawful arrests and murders of two other Georgians who were arrested and killed.

b. The ECtHR's Findings

i. Temporal Scope: Russia's Relationship with the Convention and the ECtHR

Similar to its findings in the *Ukraine and the Netherlands v. Russia* decision, the ECtHR considered that it had jurisdiction to consider Georgia's complaints up to 16 September 2022—the date on which Russia ceased to be a High Contracting Party to the Convention.[30]

ii. Russia's Complaints about an Alleged Lack of Genuine Application

Russia objected to the application on the basis that Georgia's application did not genuinely raise issues related to the protection of human rights under the Convention, but rather that it was brought to seek a decision on issues of general international law.[31]

The ECtHR rejected this argument, finding that although the issues raised by Georgia had "*political aspects*", they also concerned violations of human rights protected by the Convention.[32]

iii. Whether the Alleged Complaints Fell within Russia's Jurisdiction

Relying on the ECtHR's findings in the related case of *Georgia v. Russia (II)* that—in respect of Abkhazia and South Ossetia, in particular—the strong Russian presence and the dependency of the *de facto* Abkhazian and South Ossetian authorities on Russia indicated that there had been continued "effective control" over those two breakaway regions at least until 23 May 2018. In the absence of any relevant new information, the ECtHR considered that this conclusion remains valid and the alleged complaints therefore fell within Russia's jurisdiction.[33]

iv. Admissibility of the Complaints

1. The Exhaustion Rule

The ECtHR reiterated that the rule of exhaustion of domestic remedies did not apply to inter-State cases in which the applicant State complained of administrative practices of violations of the Convention and where the Court was not being asked to decide individually on each of the cases put forward as proof or illustrations of those practices. Therefore, as the Court would be examining the allegations of administrative practices only in this inter-State case, it found that the exhaustion rule did not apply.[34]

2. The Administrative Practices

The ECtHR declared the application admissible on the basis that there was sufficient *prima facie* evidence to establish an "administrative practice" of human-rights violations. The ECtHR found that the available material was sufficient to amount to evidence of the "repetition of acts" which were sufficiently numerous and interconnected to amount to a "pattern or system" in breach of Articles of the Convention.[35] Likewise, the ECtHR found that there was sufficient evidence to satisfy the Court that the "official tolerance" element at the level of direct supervisors of the relevant regions met the appropriate threshold.[36]

Accordingly, having met the admissibility criteria, the case will now proceed to a hearing on the merits.

Please do not hesitate to contact us with any questions.

---

[1] *Ukraine and the Netherlands v. Russia* [GC], nos. 8019/16, 43800/14 and 28525/20, 25 January 2023 ("***Ukraine and the Netherlands v. Russia***"), available here.

[2] *Ukraine and the Netherlands v. Russia*, paras. 43-53, 59.

[3] *Ukraine and the Netherlands v. Russia*, paras. 68-69.

[4] *Ukraine and the Netherlands v. Russia*, paras. 82, 85.

[5] *Ukraine and the Netherlands v. Russia*, paras. 94-96.

[6] *Ukraine and the Netherlands v. Russia*, paras., 74, 77-80.

[7] *Ukraine and the Netherlands v. Russia*, para. 2.

[8] *Ukraine and the Netherlands v. Russia*, para. 4.

[9] *Ukraine and the Netherlands v. Russia*, para. 6.

[10] Resolution of the Committee of Ministers of the Council of Europe (CM/Res(2022)2) on the cessation of the membership of the Russian Federation to the Council of Europe, 16 March 2022, available here; *see also Ukraine and the Netherlands v. Russia*, para. 35.

[11] Press Release from the Plenary of the European Court of Human Rights (ECHR 286 (2022)), 16 September 2022, available here; *see also Ukraine and the Netherlands v. Russia*, para. 36.

[12] Convention, Article 58; *see also Ukraine* Decision, para. 389.

[13] *Ukraine and the Netherlands v. Russia*, para. 559.

[14] *Ukraine and the Netherlands v. Russia*, paras. 690-697.

[15] *Ukraine and the Netherlands v. Russia*, paras. 628-639, 643-644, 649-654, 659-662.

[16] *Ukraine and the Netherlands v. Russia*, paras. 670-689.

[17] *Ukraine and the Netherlands v. Russia*, para. 696.

[18] *Ukraine and the Netherlands v. Russia*, paras. 698-700.

[19] *Ukraine and the Netherlands v. Russia*, para. 698, referring to *Georgia v. Russia (II)* (dec.), no. 38263/08, 13 December 2011, paras. 125-138.

[20] *Ukraine and the Netherlands v. Russia*, paras. 701-706.

[21] *Ukraine and the Netherlands v. Russia*, paras. 718-721.

[22] Article 35(1) has since been amended to reduce the six-month period to four months.

[23] *Ukraine and the Netherlands v. Russia*, paras. 800-807.

[24] The Court found that, as regards Ukraine's alternative argument that the alleged abductions amounted to **individual violations** of the Convention, Ukraine had not discharged its burden in relation to the exhaustion rule: the fact of the transfer allegation concerning the groups of children had not been met with a blanket denial by the Russian authorities and the underlying fact of the transfer of the Ukrainian children to Russia was agreed by the parties. The Court found that Ukraine could have challenged the relevant finding of Russia's investigative committee and put before the Russian authorities their own evidence, challenging the findings. This claim was therefore declared inadmissible. *Ukraine and the Netherlands v. Russia*, paras. 791-798.

[25] *Ukraine and the Netherlands v. Russia*, paras. 775, 789.

[26] *Ukraine and the Netherlands v. Russia*, paras. 450, 824.

[27] *Ukraine and the Netherlands v. Russia*, paras. 828-889. The remaining complaints of administrative practices in respect of application no. 8019/16 were declared inadmissible.

[28] *Ukraine and the Netherlands v. Russia*, paras. 904-905, 916-918, 939-942, 948-949.

[29] *Georgia v. Russia (IV)*, no. 39611/18, 20 April 2023 ("***Georgia v. Russia (IV)***"), available here.

[30] *Georgia v. Russia (IV)*, paras. 22-23.

[31] *Georgia v. Russia (IV)*, para. 24.

[32] *Georgia v. Russia (IV)*, paras. 26-29.

[33] *Georgia v. Russia (IV)*, para. 44.

[34] *Georgia v. Russia (IV)*, para. 49.

[35] *Georgia v. Russia (IV)*, paras. 61-69.

[36] *Georgia v. Russia (IV)*, para. 70.

The following Gibson Dunn lawyers assisted in the preparation of this client update: Robert Spano (former President of the ECtHR), Piers Plumptre, and Theo Tyrrell.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's International Arbitration, Judgment and Arbitral Award Enforcement or Transnational Litigation practice groups, or the authors in London:

Robert Spano (+44 (0) 20 7071 4902, RSpano@gibsondunn.com)
Piers Plumptre (+44 (0) 20 7071 4271, PPlumptre@gibsondunn.com)
Theo Tyrrell (+44 (0) 20 7071 4016, TTyrrell@gibsondunn.com)

Please also feel free to contact the following practice group leaders:

International Arbitration Group:
Cyrus Benson (+44 (0) 20 7071 4239, cbenson@gibsondunn.com)
Penny Madden KC (+44 (0) 20 7071 4226, pmadden@gibsondunn.com)

Transnational Litigation Group:
Susy Bullock (+44 (0) 20 7071 4283, sbullock@gibsondunn.com)