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UKRAINA PRZECIWKO ROSJI W ETPC: SKUTECZNA KONTROLA I JURYSDYKCJA PRZESTRZENNA

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Adnotacja. Celem artykułu jest analiza orzeczenia ETPCz dotyczącego jurysdykcji w sprawie „Ukraina i Holandia przeciwko Rosji” oraz zwrócenie uwagi na kryteria, którymi Trybunał kierował się przy ustalaniu istnienia skutecznej kontroli Federacji Rosyjskiej nad ugrupowaniami separatystycznymi „DRL” i „LPR”. Zgodnie z wynikami śledztwa w sprawie, w której rządy Ukrainy i Holandii miały na celu wykazanie, że Rosja sprawowała rzeczywistą kontrolę nad terytoriami kontrolowanymi przez ugrupowania separatystyczne „DPR” i „LPR”, ustalono, że ETPC zgodził się z taką interpretacją działań Rosji i ustalił kryteria testu skutecznej kontroli, takie jak wsparcie militarne dla separatystów, wsparcie polityczne; wsparcie gospodarcze itp. Decyzja ta otwiera możliwości pociągnięcia Rosji do odpowiedzialności za działania na wschodniej Ukrainie do 2022 roku.

Słowa kluczowe: EKPC, jurysdykcja przestrzenna, skuteczna kontrola, prawa człowieka, interwencja wojskowa.

UKRAINE V. RUSSIA IN ECTHR: EFFECTIVE CONTROL AND SPATIAL JURISDICTION

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Abstract. The aim of the work is to analyze the decision of the ECtHR regarding its jurisdiction in the case “Ukraine and Netherlands v. Russia” and to highlight the criteria that the Court uses to determine the presence of effective control of the Russian Federation over the separatist groups “DPR” and “LPR”. As a result of the study of the case “Ukraine and the Netherlands v. Russia”, in which the Ukrainian and the Dutch governments aimed to prove that Russia exercised effective control over the territories under the control of the separatist groups “DPR” and “LPR”, it was found that the ECtHR agreed with this interpretation of Russia’s actions and established the criteria for the effective control test, such as military support for separatists, political support; economic support etc. This decision opens possibilities for holding Russia accountable for its action in the east of Ukraine prior to 2022.

Key words: ECHR, spatial jurisdiction, effective control, human rights, military intervention.

УКРАЇНА ПРОТИ РОСІЇ В ЄСПЛ: ЕФЕКТИВНИЙ КОНТРОЛЬ І ПРОСТОРОВА ЮРИСДИКЦІЯ

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Анотація. Метою даної статті є аналіз рішення ЄСПЛ щодо юрисдикції у справі «Україна та Нідерланди проти Росії» та висвітлення критеріїв, які використовує Суд для визначення наявності ефективного контролю Російської Федерації над сепаратистськими угрупованнями «ДНР» і «ЛНР». За результатами дослідження справи, в якій уряди України та Нідерландів мали на меті довести, що Росія здійснювала ефективний контроль над територіями, підконтрольними сепаратистським угрупованням «ДНР» та «ЛНР», було встановлено, що ЄСПЛ погодився з таким тлумаченням дій Росії та встановив критерії тесту на ефективний контроль, такі як військова підтримка сепаратистів, політична підтримка; економічна підтримка тощо. Це рішення відкриває можливості для притягнення Росії до відповідальності за її дії на сході України до 2022 року.

Ключові слова: ЄСПЛ, просторова юрисдикція, ефективний контроль, права людини, військове втручання.

Introduction. The full-scale invasion of the Russian Federation on the territory of Ukraine posed great challenges both to the world security architecture and to the system of international law, which was established after

World War II. At the current stage of the conflict, there is no doubt about the classification of the armed conflict and the definition of its parties, because the existence of an international armed conflict in which the Russian Federation is the aggressor state is obvious.

However, it should not be forgotten that by February 24, 2022, an armed conflict in the east of Ukraine had been taking place on the territory of Ukraine for almost 8 years, participation in which the Russian Federation denied all this time. Referring to the fact that the armed conflict is taking place between Ukraine and the illegal armed formations “DPR” and “LPR”, the Russian Federation tried to avoid responsibility for violations of international law that occurred during the conflict. All this time, the Ukrainian side emphasized that Russia is a party to the conflict, taking part in the conflict both by supporting its proxies in the territories of Donetsk and Luhansk regions, and by directly carrying out military intervention.

It is in such situations that the standards of effective and overall control developed by international judicial institutions become helpful. In particular, referring to the standard of effective control, which was widely applied by the ECtHR in its precedent practice, Ukraine tried to prove the need to hold the Russian Federation accountable for human rights violations committed by the separatist groups “DPR” and “LPR” while under the control of Russia. This article examines how the ECtHR applies the standard of effective control to the situation in the east of Ukraine and what criteria it singles out for establishing the fact of the existence of such control.

The basis of this article is the study and analysis of the decision of the ECtHR regarding its jurisdiction in the case “Ukraine and Netherlands v. Russia”. The decisions of the ECtHR, which became the basis for further application of the standard of effective control, are also analyzed, in particular “*Loizidou v. Turkey*” and “*Cyprus v. Turkey*”. The theoretical basis of this article is the research of Andreychenko S., O'Brien C., Gibney M. and Ryngaert C.

The aim of the work is to analyze the decision of the ECtHR regarding its jurisdiction in the case “*Ukraine and Netherlands v. Russia*” and to highlight the criteria that the Court uses to determine the presence of effective control of the Russian Federation over the separatist groups “DPR” and “LPR”.

Review and discussion. In its cases on human rights violations, the European Court of Human Rights has faced the question of who should be found guilty of such a violation. This problem was particularly acute in cases where rights were violated in a territory that was not under the control of the state. That is why the ECtHR tried to determine under the jurisdiction of which state the territory was located, and accordingly, who should be responsible for the offense. The main aspect in such cases was the question of establishing the extraterritorial jurisdiction of the ECtHR based on the concept of effective control.

The standard of effective control, which was first applied by the International Court of Justice in the Nicaragua case, as well as the standard of overall control developed by the International Tribunal for the former Yugoslavia in the Tadic case, became the basis for the ECtHR in developing its own standard, which in various cases it calls “overall effective control” and “effective control”, however, by its legal nature, it is closer to the standard of overall control of the ICTY. As Andreychenko S. notes, “in its decisions, the ECtHR obviously proceeds from the assumption that overall control is sufficient for attributing the behavior of a private group to the state” (Andreychenko, 2015: 364).

In the case of “*Luizidou v. Turkey*”, the ECtHR concluded that “... the responsibility of a Contracting Party may also arise when, as a result of military actions – legal or illegal – it exercises effective control over territory outside its national territory. The obligation to ensure in such a situation human rights and freedoms, which are set forth in the Convention, follows from the fact of such control, regardless of whether it is carried out directly through its armed forces or through local administrations subordinate to the state” (Luizidou v. Turkey, 1996: para 62).

Later, in the “*Cyprus v. Turkey*” case, the ECtHR made an important clarification, noting that “given the effective and comprehensive control over the northern part of Cyprus, Turkey’s responsibility cannot be limited to the actions of its own soldiers or officials in the northern part of Cyprus, but has to be extended also to the actions of the local administration, which still exists thanks to the Turkish military and other types of support” (Cyprus v. Turkey, 2001: para 83).

It is also important to note that the criterion of the effectiveness of the implemented control is a key element of attribution, which, in turn, allows the court to establish jurisdiction *ratione personae*. And, although this case was subjected to a lot of criticism from both academics and even other ECtHR judges, the standard of effective control became the basis for a significant number of subsequent similar cases, including “*Georgia v. Russia (II)*”, “*Ilaşcu and others v. Moldova and Russia*”, “*Catan and others v. Moldova and Russia*”, “*Chigarov and others v. Armenia*” (Ryngaert, 2012: 58).

Considering this practice of the ECtHR, Ukraine decided to try to bring the Russian Federation to justice for human rights violations that occurred in the territories of Donetsk and Luhansk regions and were committed by illegal armed groups operating under the control of Russia. However, of course, one cannot ignore an important factor that affects the consideration of cases and the implementation of European Convention on Human Rights regarding Russia, namely the exclusion of the latter from the Council of Europe and withdrawal from the ECtHR. The day after the beginning of the full-scale invasion of the Russian Federation on the territory of Ukraine, on February 25, 2022, Russia’s membership in the Council of Europe was suspended, and on March 15, Russia was finally excluded from the organization, but the country’s obligations to implement the Convention and decisions remained for another six months of the European Court of Human Rights (Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe, 2022). This meant that complaints against Russia’s actions filed before September 16, 2022 were considered by the Court, and Russia must comply with its decisions. In this regard, the ECtHR notes that “the Court retains the competence to consider applications against the Russian Federation regarding its actions or inactions that may constitute a violation of the Convention, provided that they occurred before September 16, 2022” (The Russian Federation ceases to be a Party to the European Convention on Human Rights, 2022). The Russian Federation itself, represented by the State Duma of the Russian Federation, decided that all decisions of the ECtHR issued after March 15, 2022 cannot be enforced in Russia. Also, the fact that the position of a judge of the ECtHR from the Russian Federation was abolished from September 16, 2022 becomes

an obstacle (Drzemczewski, Lawson, 2023: 15). Nevertheless, the Court still continued to consider claims against Russia, and on one of them it issued a decision on admissibility on January 25, 2023, namely the case “Ukraine and the Kingdom of the Netherlands v. the Russian Federation”, which will be analyzed in this article.

In this case, both Ukraine and the Netherlands argue for the admissibility of the lawsuit against the Russian Federation by the fact that the violations were committed on the territory that was under the effective control of Russia. In particular, in its memorandum, the Ukrainian side indicates that “the evidence clearly demonstrated that the local administration subordinate to Russia and its paramilitary formations actually controlled the relevant parts of Donbas since the beginning of March 2014”. Ukraine confirms that the exact borders of the occupied territory have undergone certain changes from time to time, as the Anti-Terrorist Operation in the Donetsk and Luhansk regions managed to regain control over certain territories for certain periods. However, as stated in the position of the Government of Ukraine, the general picture was clear: with the support of Russia, separatist formations actually controlled the relevant territory in the Donetsk and Luhansk regions since April 2014”. In his oral explanations, the lawyer of the Ukrainian government also explained that their position is that the Russian Federation established effective control over “occupied Donbas” in April 2014 and exercised Article 1 ECHR jurisdiction over this territory no later than the end of April 2014 (Ukraine and the Netherlands v. Russia, 2023: para 521).

In its decision, the Court recognized the direct Russian military intervention in the conflict in August 2014, when the separatist groups were under the threat of a complete military defeat. However, according to the judges, the very fact of the involvement of the *de jure* Russian military in the conflict is not sufficient to undoubtedly establish the existence of effective control over the territory. That is why the Court provided criteria for recognizing the existence of such control, in particular:

- military support for separatists, including:
- impact on military strategy;
- supply of weapons and other equipment;
- training;
- artillery cover;
- building up troops on the border.
- political support for separatists;
- economic support for separatists (Ukraine and the Netherlands v. Russia, 2023: para 613–689).

First of all, the ECtHR established that there was a significant influence of the Russian Federation on the military strategy of the separatists in the east of Ukraine. As the Court itself points out, “the intercepted evidence shows that the political hierarchy in the respondent government had a significant influence on the military strategy of the separatists. There are numerous examples of references by separatists, in particular I. Girkin and O. Borodai, to the instructions and orders of “Moscow”, “FSB” or “GRU”. The intercepted material also shows that separatist entities regularly reported to Russia about the results of military operations. ... in case of conflicting instructions or differences of opinion between the Russian Federation and the separatists regarding the military strategy, the orders of “Moscow” should have been followed” (Ukraine and the Netherlands v. Russia, 2023: para 615–621).

Regarding the provision of weapons by the Russian Federation to the separatists, the Court found that “the case file contains many elements that point to the transfer of weapons from the Russian Federation to the east of Ukraine. From the number of means involved and the nature of the equipment, it is clear that the transfer of weapons was organized and coordinated, and that some of the equipment could not be obtained without the help of a state” (Ukraine and the Netherlands v. Russia, 2023: para 638). In view of this, the Court considers it established beyond any doubt that from the first days of the activity of the separatist administrations and during the following months and years, the Russian Federation supplied weapons and other military equipment to the separatists in the east of Ukraine on a significant scale (Ukraine and the Netherlands v. Russia, 2023: para 639).

Another criterion for effective control, according to the Court's position, is the training of separatists. The Ukrainian and Dutch sides provided evidence that in the spring of 2014, Russia began to create military training camps on the border with Ukraine. Russia, in turn, did not deny the existence of such camps, but could not provide a thorough explanation of their purpose and goals. However, the Court determined that the evidence is not sufficient to establish that those separatists and military personnel who later participated in hostilities on the territory of Ukraine were trained in these camps (Ukraine and the Netherlands v. Russia, 2023: para 643–644).

In addition to military aid, an important element of the test for effective control used by the ECtHR in its precedent practice is the provision of political support. In this regard, the Court recognized that there is clear evidence of political support for separatist groups, which was provided by the Russian Federation, in particular, the political leaders of these groups after the so-called “referendums on the independence of the DPR and LPR” were Russian military personnel. The Court was also provided with evidence of electronic correspondence with Vladyslav Surkov, adviser to the President of the Russian Federation V. Putin, who played a key role in political appointments in the so-called political bodies of “DPR”, and was also actively involved in the creation of the “Novorossiya” project after the “referendums”. At the international level, Russia also provided political support to separatist entities, in particular in the form of a veto of the UN Security Council's decision to create an independent criminal tribunal to prosecute those responsible for the downing of the MH17 plane. According to the judges, all this clearly indicates the political support of the separatist organizations on the part of the Russian government (Ukraine and the Netherlands v. Russia, 2023: para 670–675).

The last element of the test for effective control applied by the Court was the existence of economic support for separatist groups. The Court found that all factors indicate that the Russian Federation played an active role in financing separatist groups. In particular, no evidence was provided of the existence of other alternative sources of funding, and the Russian Federation was unable to provide corroborating evidence that the funding of the groups was provided from “tax and non-tax revenues from the main activities of individuals and legal entities” (Ukraine

and the Netherlands v. Russia, 2023: para 689).

Having analyzed all the arguments of the parties, as well as taking into account the effective control test, the Court found that “The vast body of evidence above demonstrates beyond reasonable doubt that, as a result of Russia's military presence in eastern Ukraine and the decisive degree of influence and control it enjoyed over the areas under separatist control in eastern Ukraine as a result of its military, political and economic support to the separatist entities, these areas were, from 11 May 2014 and subsequently, under the effective control of the Russian Federation” (Ukraine and the Netherlands v. Russia, 2023: para 695).

Thus, by applying the standard of effective control, the ECtHR established the spatial jurisdiction of the Russian Federation over the territories controlled by the separatist group. It follows from this that in the future all violations of the European Convention on Human Rights, which were committed in this territory, can be attributed to Russia. This also includes the downing of Malaysian aircraft MH17 over the territory that was under the effective control of the Russian Federation. In addition, the Ukrainian side aims to hold Russia accountable for violations it committed outside the territory under its control, including shelling of civilians and civilian objects. For this, it is necessary to establish the personal jurisdiction of the Russian Federation, which, at this stage of the proceedings, the Court decided to postpone pending consideration of the merits of the case.

Conclusion. The article established that the ECtHR in its practice applies the standard of effective control to establish the jurisdiction of the state over the territory, which *de jure* is not part of it, however, the significant level of economic, political and military assistance to “local administrations” makes it possible to establish that this state carried out control over the territory, and, accordingly, should be responsible for human rights violations in these territories.

After analyzing the case “Ukraine and the Netherlands v. Russia”, it was determined that the Court considers the fact of effective control of the Russian Federation over the territories under the control of the “DPR” and “LPR” to be established. In particular, the Court analyzed the following criteria for effective control: military support for separatists, political support for separatists; economic support for separatists. However, the Court established only the of spatial jurisdiction, and the issue of personal jurisdiction was postponed until the next stages of the case. Thus, it can be concluded that the ECHR is one of the most effective mechanisms for holding states accountable for violations committed within the framework of so-called proxy wars.

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