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The Occupation of Crimea and the Aspects of Religious Freedom: Reflections Starting from the Judgement of the ECtHR Grand Chamber in the Case Ukraine v. Russia

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ABSTRACT

The war between Russia and Ukraine raises numerous questions about the causes that provoked it, respect for human rights before and during war operations, on the implications that the armed conflict will have in the Eurasian geopolitical order. Among the profiles that deserve in-depth study is that pertaining to the regulation of the phenomenon of religious, taken as a pivot of the cultural identity of the countries involved. The purpose of this contribution is to evaluate through the lens of law the measures limiting of religious freedom and its exercise, which have been carried out in Crimea, a nerve center of the conquest. In the analysis a central role is played by the judgment of the Grand Chamber of the Court of Strasbourg on 25th June 2024, which found a violation of Article 9 of the EDU Convention by the Russian Federation against Ukraine, its citizens and confessional institutions in the period following the annexation of the Crimean Peninsula.

KEYWORDS

Russo-Ukrainian conflict; Crimea; ECtHR; religious freedom; European Convention on Human Rights

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1. A new piece in the Russian-Ukrainian conflict. Introduction to the Grand Chamber's judgment of 25th June 2024

The war that has now been ravaging Ukraine for three years has brutally aroused in the Western conscience the nightmares that seemed shrouded in the mists of history. violence between

states is no longer an affair that concerns places identified by the mind as distant in distance and culture, but is a terrifying guest of the common European home[1].

The daily news from the front, the deployment of forces, the terror of nuclear threats, the hitherto unheeded appeals and mediations of religious and political leaders, but, above all, the anxiety of a future "personal involvement" have meant that opinions chase each other relentlessly, facilitated by the use of the media and social networks. Everything has been said about every single aspect of the conflict, naturally with different degrees of authority, in order to bring back to a discursive rationality the impulses that arise from the irrational sense of prevarication, from ancient hatreds, from wounds of history that have never healed.

What else can be added? It would seem nothing, if it were not for the fact that, from the legal point of view, a new piece contributes to outlining the intricate *puzzle*: on 25th June 2024, the Grand Chamber of the European Court of Human Rights pronounced the judgment in the Ukraine *v. Russia case*[2]. It was a long-awaited decision, which responds to two applications, one in 2014 and the other in 2018, introduced by the attacked State pursuant to Article 33 ECHR[3], in an extreme attempt to use the instrument of law to turn the spotlight on a crisis that had already been announced and which would have exploded with unprecedented violence in February 2022.

The subject of the dispute concerns the measures adopted by the Russian Federation on the occasion of the occupation and annexation of Crimea[4], which took place between 20th February[5]

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[1] Cf. PIER PAOLO SIMONINI, *Quando la guerra aggredisce gli uomini e la loro casa comune*, in *Re-Blog*, 12th March 2022, https://re-blog.it/2022/03/12/quando-la-guerra-aggredisce-gli-uomini-e-la-loro-casa-comune/. A useful timeline of the crisis from 2014 to 2022 has been prepared by NIGEL WALKER, *CONFLICT in Ukraine: A timeline (2014-eve of 2022 invasion)*, House of Commons Library, 22nd August 2023, https://researchbriefings.files.parliament.uk/documents/CBP-9476/CBP-9476.pdf.

[2] Cf. EUROPEAN COURT OF HUMAN RIGHTS, Grand Chamber, *Ukraine v. Russia (Crimea),* 25th June 2024, applications nos. 20958/14 and 38334/18, https://hudoc.echr.coe.int/?i=001-235139.

[3] For further information on the inter-State remedies provided for by the ECtHR, please refer to ISABELLA RISINI, *The Inter-State Application under the European Convention on Human Rights. Between Collective Enforcement of Human Rights and International Dispute Settlement*, Brill, Leiden, 2018, pp. 1-12 and 63-66, to ELENA CARPANELLI, *Il rapporto tra ricorsi interstatali e individuali dinnanzi alla Corte europea dei diritti umani*, in *Diritti umani e diritto internazionale*, 15, 2, 2021, pp. 389-411 (above all, pp. 389-392), and to ANDREA CANNONE, *Ricorsi individuali e casi interstatali nella pratica passata e recente della Corte Europea dei Diritti dell'Uomo*, in *Ordine internazionale e diritti umani*, 3, 2022, pp. 581-687.

[4] On the occupation of Crimea and its antecedents, cf. OLEKSANDR MEREZHKO, *Crimea's Annexation by Russia – Contradictions of the New Russian Doctrine of International Law*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 75, 2015, pp. 167–194; THOMAS D. GRANT, *Annexation of Crimea*, in *American Journal of International Law*, 109, 1, 2015, pp. 68-95; ANGELA VILLANI, *Alle origini del conflitto russo-ucraino: la politica estera della Federazione Russa (1991-2014)*, in *Ordine internazionale e diritti umani*, 4, 2023, pp. 906-916.

[5] The date of 20th February 2014 is significant because the first Russian troops had illegally crossed the borders of Crimea.

and 18th March 2014 in response to the fall of the pro-Russian Ukrainian executive led by Viktor Yanukovich[6].

The violations denounced were many and ranged from the violation of the right to life (Article 2 ECHR) to the perpetration of torture and inhuman and degrading treatment (Article 3 ECHR); from arbitrary arrests to the retroactive application of criminal sanctions (Articles 5 and 7 ECHR); from the illegality of the established courts to the lack of respect for private and family life (Article 8 ECHR), without forgetting the compression of the freedoms of religion (Article 9 ECHR), communication (Article 10 ECHR), association (Article 11 ECHR), and discrimination committed (Article 14 ECHR). Moreover, the right to property (Art. 1 Additional Protocol), the right to education (Art. 2 Additional Protocol), and freedom of movement (Art. 2 Additional Protocol IV) were seriously affected.

On 16th December 2020 the Court had made known its decision on the admissibility of the questions; in particular, that judgement had held that the Autonomous Republic of Crimea and the Autonomous City of Sevastopol – which had proclaimed themselves independent and were annexed to Russia by the referendum of 16th March 2014 and by the accession treaty signed two days later – had been under the effective control of the respondent State since 27th February 2014, the date on which the pro-Russian militias, with the support of the Kremlin, had taken possession of the premises of the political institutions of the region. This geopolitical fact was considered sufficient for the ECtHR Convention to be in force also in the annexed territory, since any question on the legitimacy and legal nature of the change of borders was irrelevant[7].

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[6] The political story of the conflict between pro-Europeans and pro-Russians in Ukraine is well outlined by SERENA GIUSTI, TOMISLAVA PENKOVA, *Quali scenari per la crisi in Ucraina?*, in *Osservatorio di politica internazionale*, 95, May 2014, pp. 1-25, and CELESTE BEESLEY, *Euromaidan and the Role of Protest in Democracy*, in *PS: Political Science and Politics*, 49, 2, 2016, pp. 244-249; on the European intervention for the approach of Ukraine in the Western orbit, see CRISEIDE NOVI, *Il ruolo dell'Unione Europea nella crisi ucraina. I limiti al sistema di rappresentanza esterna dell'Unione e l'azione di supplenza svolta dagli Stati: gestione coerente o in contrasto con i Trattati istitutivi?*, in *Ordine internazionale e diritti umani*, 5, 2015, pp. 934-957; for an analysis of the Russian intervention to sanction Kiev's pro-Western turn and the resonance that the aggression has had in the international community, cf. ELENA SCISO, *La crisi ucraina e l'intervento russo: profili di diritto internazionale*, in *Rivista di diritto internazionale*, 97, 4, 2014, pp. 992-1031; on the political developments following the Maidan Square riots, see MAREK DABROWSKI, MARTA DOMÍNGUEZ-JIMÉNEZ, GEORG ZACHMANN, *Six years after Ukraine's Euromaidan: reforms and challenges ahead*, in *Policy Contribution*, 14, 2020, pp. 1-24, and to JAMES KRAPFL, ELIAS KÜHN VON BURGSDORFF, *Ukraine's Euromaidan and Revolution of Dignity, ten years later*, in *Canadian Slavonic Papers*, 65, 3-4, 2023, pp. 325-334.

[7] Cf. EUROPEAN COURT OF HUMAN RIGHTS, Grand Chamber, *Ukraine v. Russia (Crimea),* 16th December 2020, applications nos. 20958/14 and 38334/18, https://hudoc.echr.coe.int/eng?i=001-207622. The arguments developed in §§303-352 are highlighted. On this point, which is outside the scope of this discussion, see the reflections of RICCARDO PISILLO MAZZESCHI, *Il contenzioso tra Ucraina e Federazione Russa davanti alla Corte Europea dei Diritti dell'Uomo*, in *Freedom, Security & Justice: European Legal Studies*, 2, 2022, pp. 88-100 (above

Also, as a preliminary point, the Court stated that the rule of prior exhaustion of domestic actions does not apply where the applicant State asks the Court to ascertain a number of injuries in their supra-individual dimension. In such a case, the request would no longer relate to individual incidents of failure to comply with one or more provisions of the Treaty. rather, to use the terminology of the judgment, it would have as its object a *pattern*, a model of violations that are intended to be stopped cumulatively[8]. Finally, on the basis of the evidence submitted by Ukraine, the Court carried out an admissibility scrutiny on the basis of *a prima facie case*.

As far as this contribution is concerned, attention will be paid only to those events that have been subsumed in the paradigm of religious freedom and have been rubricated under the heading[9]:

> alleged existence of an administrative practice on account of the harassment and intimidation of religious leaders not conforming to the Russian Orthodox faith, arbitrary raids of places of worship and confiscation of religious property, in violation of Article 9 of the Convention.

Leaving to the following paragraphs the in-depth analysis of the Court's finding, I will limit myself here to observing that the Russian government did not present any specific counter-argument regarding the objections raised by Ukraine. The attitude of lack of cooperation and the substantial disinterest in the judicial affair was the anticipation of what would happen at the outbreak of the actual war, i.e. the cessation of his status as a member of the Council of Europe,

all, pp. 89-94), by CARMELO DANISI, *L'applicazione della CEDU nel contesto del conflitto russo-ucraino*, in *Rivista di diritto internazionale*, 106, 1, 2023, pp. 77-115, and by MARKO MILANVIC, *ECtHR Grand Chamber Declares Admissible the Case of Ukraine v. Russia re Crimea*, in *EJIL: Talk!*, 15th January 2021, https://www.ejiltalk.org/ecthr-grand-chamber-declares-admissible-the-case-of-ukraine-v-russia-re-crimea/. More generally, on the jurisprudence of the Strasbourg Court on the extraterritorial application of the Convention, cf. IŞIL KARAKAŞ, HASAN BAKIRCI, *Extraterritorial Application of the European Convention on Human Rights: Evolution of the Court's Jurisprudence on the Notions of Extraterritorial Jurisdiction and State Responsibility*, in ANNE VAN AAKEN, IULIA MOTOC (eds.), *The European Convention on Human Rights and General International Law*, Oxford University Press, Oxford, 2018, pp. 112-134.

[8] Cf. EUROPEAN COURT OF HUMAN RIGHTS, Grand Chamber, *Ukraine v. Russia (Crimea),* 16th December 2020, cit., §§363-365. Reference to ADRIANA DI STEFANO, *Convenzione Europea dei Diritti dell'Uomo e principio di sussidiarietà. Contributo ad una lettura sistematica degli articoli 13 e 35*, ED.IT, Catania, 2009, pp. 178-180, and to GEIR ULFSTEIN, ISABELLA RISINI, *Inter-State Applications under the European Convention on Human Rights: Strengths and Challenges*, in *EJIL: Talk!*, 24th January 2020, https://www.ejiltalk.org/inter-state-applications-under-the-european-convention-on-human-rights-strengths-and-challenges/.

[9] The wording is contained in THE EUROPEAN COURT OF HUMAN RIGHTS, Grand Chamber, *Ukraine v. Russia (Crimea),* 16th December 2020, cit., operative part, no. 5, letter g).

ordered by the Committee of Ministers, but at the same time requested by the Russian Federation itself with a communication of 15th March 2022[10].

In fact, the procedural behavior of the defendant State is not accidental if one keeps in mind the narrative that traces the roots of the clash in a program of cultural protection of Great Russia from contamination coming from a decadent and immoral West, which would have denied its Christian origins[11]. A stylish defense, which does not respond to the accusations, nor does it propose different reconstructions of the facts, is functional to mark the conceptual distance between its own universe of principles and that of the countries of the European bloc, towards which Ukraine is converging. In other words, Russia has not challenged, because it has not recognized the judging authority, first on the political level, then, with the denunciation of the Convention, legal.

If this was the attitude prior to February 2022, with the definitive break of relations there was the complete inertia of procedural activity on the part of the defendant State, made manifest by

[10] See *Resolution CM/Res(2022)2*, adopted by the Committee of Ministers of the Council of Europe on 16th March 2022, available on https://search.coe.int/cm?i=0900001680a5da51. That Russia was a *sui generis* member for its conduct completely opposed to the inspiring values of the international organization was a fact acquired for some time. KLAUS BRUMMER, *The Council of Europe, Russia, and the future of European cooperation: any lessons to be learned from the past?*, in *International Politics*, 61, 2024, pp. 258–278.

[11] I am referring to the numerous appeals of the Orthodox Patriarch of Moscow Kirill in support of the expansive policy of Russian President Vladimir Putin, culminating in the document of the XXV World Council of the Russian People's Party of 27th March 2024 (available in Russian on page http://www.patriarchia.ru/db/text/6116189.html). The act, entitled *The present and future of the Russian world*, calls the aggression against Ukraine a "holy war" against the assaults of Satanism and globalism. In apocalyptic terms, which recall 2Thess 2:7, "Russianness" – which does not coincide with the borders of the Russian Federation – would be the *katéchon*, the obstacle to revealing the mystery of iniquity in all its power. For an examination of the involvement of the Russian Orthodox Church in issues related to the crisis, see STEFANO CAPRIO, *Lo zar di vetro. La Russia di Putin*, Jaca Book, 2020, pp. 125-151; GIOVANNI CIMBALO, *Il ruolo sottaciuto delle Chiese nel conflitto russo-ucraino*, in *Diritto e Religioni*, 16, 2, 2021, pp. 485-510; ANNA GIANFREDA, *Stato, Chiese e libertà religiosa nella Russia post-sovietica: una lettura politico-ecclesiastica nello scenario di guerra*, in *Anuario de Derecho Eclesiástico del Estado*, 39, 2023, pp. 103-127; SIMONE BENVENUTI, *Autocrazia, Ortodossia, Nazionalità. Le radici imperiali della Costituzione di Putin*, in *Democrazia e Sicurezza – Democracy and Security Review*, 13, 1, 2023, pp. 27-54 (especially, pp. 38-45); GIOVANNI CODEVILLA, *Alle origini dell'idea del "Russkij mir"*, in *Stato, Chiese e pluralismo confessionale*, Rivista telematica (www.statoechiese.it), 17, 2023, pp. 39-54 (above all, pp. 45-51); ALESSIA RICCIOLI, *La guerra russo-ucraina come guerra identitaria*, in *DPCE online*, Special Issue 1, 2024, pp. 711-726. The commonality of views between Patriarch Kirill and President Putin is well illustrated by ELIZABETH A. CLARK, *Civil religion and religious freedom in the Russian-Ukrainian conflict*, in ELIZABETH A. CLARK; DMYTRO VOVK (eds.), *Religion During the Russian Ukrainian Conflict*, Routledge, Abingdon, Oxon, 2020, pp. 14-31 (especially, pp. 22-23). For the analysis of the ambiguous relations between civil and religious power in Russian history, I point out GIOVANNI CODEVILLA, *Lo zar e il patriarca. I rapporti tra trono e altare in Russia dalle origini ai giorni nostri*, La Casa di Matriona, Milan, 2008, and ID *Storia della Russia e dei Paesi limitrofi. Chiesa e Impero*, vol. 4, *La nuova Russia (1990-2015)*, Jaca Book, Milan, 2017.

the failure to file briefs and the absence of its representatives at the hearing on 13 December 2023[12].

2. The compression of religious freedom in the occupied zone: personal and institutional profiles

The transgressions of Article 9 ECHR show the design of ethnic and religious oppression that Russia is perpetrating against Ukraine. In fact, the numerous censored episodes had in common the purpose of creating a cultural and social homogeneity dependent on Moscow, considered in its capacity as the propeller of a morality and a civilization anchored to traditions.

Clearly, the primary purpose is not religious, nor can the Russian-Ukrainian conflict be considered a battle to defend the "true faith"; rather, religion is the means to hide other, far less noble interests. Ecclesiastical questions are an *instrumentum regni*, useful to the Moscow regime to cement propaganda and to remove unwelcome subjects, identified in ministers of worship who were not aligned with the wishes of the invader.

Before moving on to the exposition, two clarifications seem appropriate to me. The first concerns the difficulty in tracing the legal sources that have guided the Russian and Crimean bureaucratic apparatuses in putting in place the restrictive measures: the opacity of the administration and the excitement linked to the continuing state of war are an obstacle to an objective and clear reconstruction of the phenomena. The second is the need to distinguish between personal and institutional profiles of religious freedom: although these are firmly intertwined dimensions, the interventions of the new government authorities have directly targeted confessional structures and only mediately the individual faithful[13].

That said, the main aspect on which Russian efforts have been concentrated has been the attraction of Ukrainian Orthodoxy into the orbit of the Moscow Patriarchate. Since the beginning of the occupation of Crimea a privileged position has been granted to the *Ukrainian Orthodox*

[12]The Court, despite the failure of the representatives of Russia to appear, proceeded with the discussion of the case because it considered that this was in accordance with the correct administration of justice, as provided for by Article 65 of the Rules of Court.

[13] A reconstruction of the attitude held by the Commission of the Council of Europe, first, and then by the Strasbourg Court, in distinguishing between institutional profiles and individual profiles of freedom of thought, conscience and religion is carried out by DAVID DURISOTTO, *Istituzioni europee e libertà religiosa. CEDU e UE tra processi di integrazione europea e rispetto delle specificità nazionali*, Edizioni Scientifiche Italiane, Naples, 2016, pp. 206-208, and by MARCELLO TOSCANO, *Il fattore religioso nella Convenzione Europea dei Diritti dell'Uomo. Itinerari giurisprudenziali*, Edizioni ETS, Pisa, 2018, pp. 117-129.

Church of the Moscow Patriarchate, to the detriment of the *Ukrainian Orthodox Church of the Kiev Patriarchate* and the *Orthodox Church of Ukraine*. Only the ecclesiastical jurisdiction dependent on Russia obtained the immediate recognition of its prerogatives in the Autonomous Republic of Crimea, with immediate registration in the appropriate civil registers, while the other entities found themselves faced with inexplicable measures of denial of legal personality[14]. In the event of non-registration and failure to comply with the requirements of Federal Law 125-FZ of 1997 on religious entities, the organization was considered foreign and unable to exercise any act of worship or proselytism[15].

Moreover, confirming the instrumentality of the policy of standardization of the Orthodox denominations with respect to the plan of conquest, President Putin himself expressed his opinion absolutely against autonomy of the other groups gravitating in Orthodoxy: for him, the concession

[14]The registration was requested under Federal Law 124-FZ of 5th May 2014, which extended the Russian Civil Code to the Republic of Crimea and the city of Sevastopol. The text of the law can be found on http://graph.garant.ru:8080/document?id=70548870.

[15] Among the requirements provided for by articles 11 and 12 of Federal Law 125-FZ of 1997, it is worth mentioning the non-contravention of the social purposes with the Constitution and Russian legislation, the recognition of the association as religious, the legitimacy of the founder to submit the application for registration according to the statute of the entity. The impossibility of foreign denominations to exercise their rights is established by Article 13 of the same law. For the updated text of Federal Law 125-FZ of 1997, cf. The website http://graph.garant.ru:8080/document?id=71640&byPara=1&sub=20608. For an examination of the changes made by the laws against extremism, see GIOVANNI CODEVILLA, *La riforma della Costituzione*, in STEFANO CAPRIO, *op. cit.*, pp. 235-256 (in particular, pp. 246-254) and MARIA CRISTINA IVALDI, *Diritto e religione nella Federazione Russa. Emblematici esempi di discriminazione*, in *Diritto e Religioni*, Monographic Issue 2, *Libertà religiosa ed uguaglianza. Casi di discriminazione in Europa e nel contesto internazionale* 15, 1, 2020, pp. 297-321. DAVID KAYE, MAINA KIAI, HEINER BIELEFELDT, *Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on freedom of religion or belief*, OL RUS 7/2016, 28th July 2016, https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=3261, with reply from the PERMANENT MISSION OF THE RUSSIAN FEDERATION TO THE UNITED NATIONS OFFICE AND OTHER INTERNATIONAL ORGANIZATIONS IN GENEVA, *Information provided by the Russian Federation in response to the request from the Special Rapporteurs of the United Nations Human Rights Council on the promotion and protection of the right to freedom of opinion and expression, on the rights to freedom of peaceful assembly and of association, and on freedom of religion or belief for information on the adoption of amendments to the Criminal Code and other legislative acts*, 12th October 2016, https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=33249. On the limitation of missionary activities introduced by the package of laws proposed by Duma deputy Yarovaya in 2016, I point out ELIZABETH A. CLARK, *Russia's New Anti-Missionary Law in Context*, 30th August 2016, https://religiousfreedominstitute.org/2016-8-30-russias-new-anti-missionary-law-in-context/; *The Yarovaya Law: One Year After*, in *Digital Report Analytica*, April 2017, https://analytica.digital.report/wp-content/uploads/2017/07/The-Yarovaya-Law.pdf; US COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM (USCIRF), *Annual Report 2018 – Tier1 Russia*, in https://www.uscirf.gov/sites/default/files/Tier1_RUSSIA.pdf; JEREMY W. LAMOREAUX, LINCOLN FLAKE, *The Russian Orthodox Church, the Kremlin, and religious (il)liberalism in Russia*, in *Palgrave Communications*, 4, 115, 2018, pp. 1-4. The Strasbourg Court had the opportunity to rule on the Yarovaya law in the judgment Ossewaarde v. Russia, 7th May 2023, appeal no. 27227/2017, https://hudoc.echr.coe.int/fre?i=001-223365, which was reported in CRISTIANA PETTINATO, *Attività di proselitismo in Russia*, in *Diritto e Religioni*, *News*, 12th March 2023.

of autocephaly by the Ecumenical Patriarch of Constantinople[16] to the Orthodox Church of Ukraine would have been the result of US interference in affairs internal not so much of a confession, but of the State which sees in that particular confession its own branch[17].

Similar considerations apply to the Islamic community: the Religious Administration of the Muslims of Crimea and Sevastopol, which shared Russian expansionism, was able to continue its spiritual mission without hindrance, while the other muftis were pressured to leave office.

Intimidation against religious leaders also included the indiscriminate use of investigative and precautionary measures ordered by the police in the absence of judicial measures; connivance, sometimes even explicit, with regard to damage or outright looting of places of worship; the non-renewal of leases of buildings intended for the liturgies of the Orthodox Church in communion with Constantinople; the seizure of Muslim publications; under the pretext of blocking the spread of extremist ideas[18].

Now, placing itself in the perspective assumed as the cornerstone of the Kremlin's imperialist doctrine, the compression of freedoms in the peninsula would have an eminently anti-terrorist and anti-extremist purpose[19]: preventive and repressive actions would thus find a general justification

[16] In Orthodox canon law, autocephaly means the status of a local Church that enjoys significant prerogatives in the organizational, normative and administrative spheres, including the election of its primate, who does not need any confirmation to take possession of the office of government. There are no bonds of jurisdiction between autocephalous Churches, but only bonds of sacramental communion. The autocephaly is sealed by the delivery of the *tomos*. Cf. VLASSIOS I. PHIDAS, *Droit canon. Une perspective orthodoxe, Centre Orthodoxe du Patriarcat Oecumenique, Chambesy*, Genève 1998, pp. 113-138; LEWIS J. PATSAVOS, *Unity and Autocephaly: Mutually Exclusive?, in Greek Orthodox Archidiocese of America*, (https://www.goarch.org/it/church-structure/-/asset_publisher/Le8YlyN21ysF/content/unity-and-autocephaly-mutually-exclusive). Finally, I would like to point out that the works *The Church and the Churches – Autonomy and Autocephaly*, 2 vols. (Kanon IV-V), Verlag des Verbandes der wissenschaftlichen Gesellschaften Österreichs, Wien, 1980-1981, and EDWARD G. FARRUGIA, ŽELJKO PAŠA (eds.), *Autocephaly. Coming of Age in Communion*, 2 vols., Pontificio Istituto Orientale, Rome, 2023.

[17] Cf. ROSSELLA BOTTONI, *La questione dell'autocefalia della Chiesa ucraina: dimensioni religiose e geopolitiche del conflitto intra-ortodosso*, in *Quaderni di diritto e politica ecclesiastica*, 2, 2019, pp. 281-316; GIOVANNI CIMBALO, *L'evoluzione dei rapporti tra Stato e Chiese nella Nuova Ucraina. Alla ricerca dell'Autocefalia*, in *Diritto e Religioni*, 15, 2, 2020, pp. 262-304; DMYTRO VOVK, *Dynamics of church-state relations in Ukraine and the military conflict with Russia. Political and legal aspects*, in ELIZABETH A. CLARK; DMYTRO VOVK (eds.), *op. cit.*, pp. 32-53 (especially, pp. 36-39); ANDRIY MYKHALEYKO, *The New Independent Orthodox Church in Ukraine*, in *Südosteuropa*, 67, 4, 2019, pp. 476-499; ALEXANDER PONOMARIOV, *International Implications of Ukrainian Autocephaly (2019-2020)*, in *Russian Analytical Digest*, 252, 2020, pp. 10-15.

[18] See, also for information sources, consisting mainly of reports by non-governmental organizations and the press, EUROPEAN COURT OF HUMAN RIGHTS, Grand Chamber, *Ukraine v. Russia (Crimea)*, 25th June 2024, cit., §87-101. I also refer to the study by ROMAN LUNKIN, *Changes to religious life in Crimea since 2014*, in ELIZABETH A. CLARK; DMYTRO VOVK (eds.), *op. cit.*, pp. 144–154.

[19] For a problematic definition of extremism, cf. ALESSANDRO BLACKS, *Radicalizzazione religiosa e de-radicalizzazione laica. Sfide giuridiche per l'ordinamento democratico*, Carocci, Rome, 2022, pp. 22-30.

in Federal Law 114-FZ of 2002, amended several times in terms of restriction of democratic rights and guarantees.

The fight against terrorism – real or alleged – has also meant that the federal law on religious freedom of 1997 was amended in such a way as to make the exercise of worship and, above all, propaganda more difficult. In this way, only those formally authorized by religious organizations can carry out missionary activities and exclusively in places of worship in the region where the confessional entity is registered. Vague clauses, such as violation of public order, immorality, promotion of extremist ideologies or incitement to violate civic duties, constitute offenses that can lead to sanctions against individuals and confessional institutions.

3. The ascertainment of violations of Article 9 of the ECtHR: the Court's arguments

The mere enunciation of the events and the legal "bases" that allowed them make us perceive the seriousness of the misdeeds committed in Crimean territory.

Thus, appears in its disconcerting evidence the systematic design of annihilation of the cultural and religious specificities that constituted the substratum of the pluralism of the peninsula.

The reasons of the Strasbourg Court would seem to be only "words", which can do nothing in the face of sinister violence; yet, the arguments presented by the panel in support of the condemnation of Russia show that rule, order, reasonableness are able to throw a flash of light into the darkness of war and also to orient the use of international force in support of the attacked country according to "humanly sustainable" paradigms.

The sentence opens with the formula, coined in the case *of Kokkinakis v. Greece* and never abandoned[20], that freedom of thought, conscience and religion is one of the foundations of democratic society. The collective and individual dimensions of this principle are interconnected because it is from the orientation of the values of the subject and his conceptions of life that the cultural identity of the group originates.

Of course, this is achieved only if pluralism is guaranteed: in fact, it is from the interaction between the various perspectives that civilization is shaped. The task of the State is not to favor one

[20] Cf. EUROPEAN COURT OF HUMAN RIGHTS, *Kokkinakis v. Greece*, 25th May 1993, application no. 14307/1988, https://hudoc.echr.coe.int/eng?i=001-57827, §31. As DAVID DURISOTTO, *op. cit.*, p. 101, footnote 23, is the first case in which the ECtHR has condemned a State for failure to comply with Article 9 ECHR. I limit myself to citing, for the reconstruction of the story underlying the judgment, JILIA PASQUALI CERIOLI, *Propaganda religiosa: la libertà silente*, Giappichelli, Turin, 2018, pp. 91-95.

creed over another, interfering in the dialectic of positions, because, in the secular perspective, the ultimate decision between believing and not believing, adhering or abjuring, belongs to the individual, responsible before his or her own conscience[21].

Neither player nor referee, the legal system must rather limit itself to acting as a linesman, so that the actions take place in the field of the lawful and do not go beyond the limits that are placed to protect all associates[22]. Of course, the definition of the line is not an operation immune to cultural conditioning and power games: although there are no definitive solutions to the problem, the criteria of legality, necessity and proportionality offer general parameters, at least for *ex post* control.

To define the role of the State, the expression "neutral and impartial organizer of the exercise of various religions, faiths and believes" is used in the ruling[23]. The expression "organizer", if it has the merit of underlining the proactive nature of the task, in my opinion has the disadvantage, not always balanced by the constraints of impartiality and neutrality, of giving excessive weight to religious policy choices, which could well take on a broadly "dirigiste" character in matters of faith.

Nor does the reference to public order, religious harmony and "tolerance"[24] seem sufficient to dispel the fear of a weak defense of the right recognized in Article 9 ECHR.

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[21] EUROPEAN COURT OF HUMAN RIGHTS, Grand Chamber, *Ukraine v. Russia (Crimea),* 25th June 2024, cit., §1064. Although the discourse concerns the Italian constitutional experience, the reflections made by FRANCESCO FINOCCHIARO, *Confessioni religiose e libertà religiosa nella Costituzione. Art. 7-8 – 19-20*, Nicola Zanichelli Editore, Società Editrice del Foro Italiano, Bologna, Rome, 1980, excerpt from GIUSEPPE BRANCA (ed.), *Commentario della Costituzione*, voll. *Fundamental Principles, Art. 1-12*, and *Civil Relations, Art. 13-28*, Nicola Zanichelli Editore, Società Editrice del Foro Italiano, Bologna, Rome, 1976, p. 445, can be transposed here: "The Republican Constitution, by guaranteeing religious freedom to 'all', intended to protect, in the first place, ordinary men. To these, the constitutional norm in question, and those that accompany it, guarantee – modestly, but concretely – not only the right to choose, but also the right not to make any choice, to lead a life not illuminated by the light of grace, nor tormented by the doubt of unbelief, nor exalted by the moral tension of any civil commitment".

[22] The tension between openness of values and the risks of disintegration of the social fabric by "anti-system" religious forces is well summarized by MARIO FERRANTE, *Diritto, religione, cultura: verso una laicità inclusiva*, in *Stato, Chiese e pluralismo confessionale*, Rivista telematica (www.statoechiese.it), 35, 2017, pp. 1-21 (above all, pp. 14-19).

[23] EUROPEAN COURT OF HUMAN RIGHTS, Grand Chamber, *Ukraine v. Russia (Crimea),* 25th June 2024, cit., §1066. On the commitment required by the Court of States to guarantee pluralism, cf. MARCELLO TOSCANO, *op. cit.*, pp. 132–137. On the risks deriving from state interventions for promotional purposes, which would be able to distort the free dialectic between religious positions, instead of facilitating it, see FRANCESCO FINOCCHIARO, *op. cit.*, pp. 446-447.

[24] Tolerance is recalled having as a paradigm the decision of the EUROPEAN COURT OF HUMAN RIGHTS, Grand Chamber, *S.A.S. v. France*, 1st July 2014, application no. 43835/2011, https://hudoc.echr.coe.int/eng?i=001-145466. The Court, by a majority, held that the prohibition of wearing the *burqa* and *niqab* in public did not constitute a violation of Article 9 ECHR, since the prohibition was aimed at maintaining public security, an objective that was achieved by means of a limitation provided for by law and in a proportionate manner. In the majority opinion, tolerance has been considered an aim that the State must pursue, as a value contiguous to the peaceful coexistence between different social groups and the open-mindedness of their members. Understood in this way, tolerance would risk

To take a different view, the defendant government could have defended itself by asserting that the measures prepared were aimed at guaranteeing social peace in an area already torn apart by discord between the various sections of the population. Not only that, precisely by virtue of tolerance, equality of treatment would be vulnerable for any reason abstractly attributable to the already too wide meshes of public order or security[25].

After the definitive premise, the Court assesses the evidence of what Ukraine claims, i.e. the numerous reports by international organizations and the information collected from the press; moreover, it acknowledges that the Russian Federation limited itself in the case files to recalling a generic internal investigation which would not have ascertained any of the contested charges, with the exception of the assault on the Church dedicated to the Mother of God in the village of Perevalne[26]. In practice, Russia has not deduced anything about the incidents involving the faithful of non-aligned confessions, a sign of the culture of impunity that hovers in the conflict. Since the evidence is multiple, unambiguous and not specifically disavowed by the other party, the judges easily deduce its reliability.

The consequential question is whether there was any justification for the restriction of religious freedom, in the light of the second paragraph of Article 9 of the ECHR. The answer, absolutely negative, is already provided in terms of the lack of a legal prescription at the basis of the deteriorating treatment. In the step-by-step process, it is an absorbing verification compared to the

becoming a form of religious paternalism which, in the name of promoting the open-mindedness of associates, can lead to interference in matters that pertain to the internal forum of individuals. Some of these concerns were raised in the dissenting opinion of Justices Nussberger and Jäderblom (§§13-14, entitled *Different approaches to pluralism, tolerance and broadmindedness*). On this point, cf. ANGELO LICASTRO, *I mille splendidi volti della giurisprudenza della Corte di Strasburgo: "guardarsi in faccia" è condizione minima del "vivere insieme"*, in *Stato, Chiese e pluralismo confessionale*, Rivista telematica (www.statoechiese.it), 28, 2014, pp. 1-38, and SILVIA ANGELETTI, *Il divieto francese al velo integrale, tra valori, diritti, laicité e fraternité*, in *Federalismi. Focus Human Rights*, 1, 2016, pp. 1-30.

[25] I refer to FRANCESCO RUFFINI, *La libertà religiosa. Storia dell'idea*, Fratelli Bocca Editori, Turin, 1901, p. 10: «tolerance, which is an admirable private virtue, has a hateful sound in public relations; the last cause of which is certainly the technical significance, which it retains to this day in Catholic ecclesiastical law, as a forced and opportunistic recognition of what is absolutely not intended to be approved." The same A., in *La libertà religiosa come diritto pubblico subiettivo*, edited by SILVIO FERRARI, Il Mulino, Bologna, 1992 (originally, *Corso di diritto ecclesiastico italiano. La libertà religiosa come diritto pubblico subiettivo*, Fratelli Bocca Editori, Turin, 1924), pp. 95-104, traced the lines of civil tolerance in its historical development, reconnecting the juridical principle to the rupture of medieval spiritual unity and the need to overcome the bloody wars of religion. It must be said, however, that MARIA D'ARIENZO, *Attualità della tolleranza*, in *Il Diritto Ecclesiastico*, 115, 2, 2004, pp. 498-509, proposes a positive reinterpretation of the concept of tolerance, which would take on the meaning of "affirmation of cultural diversification against any claim to homologation of values" (p. 508).

[26] Cf. ANDRII IVANETS, IRYNA KRASNODEMSKA, *A Situation of the Crimeans Diocese of the Orthodox Church of Ukraine in Russian Occupied Crimea (2014-2022)*, in *Occasional Papers on Religion in Eastern Europe*, 42, 6, 2022, pp. 36-63.

other steps, relating to the verification of the existence of a legitimate aim and the necessity and proportionality of the measure in a democratic society, as the Court acts as the guardian of the rule of law for the countries adhering to the Convention[27].

Now, according to the briefs filed by Russia, the discipline applied would have been that provided for by federal laws and by the acts of the Republic of Crimea. For the Court, the deduction is not sufficient, because the wording of the provisions would not infer any authorization to carry out the violence reported, nor would all the detrimental effects suffered by the Ukrainian population have descended from the implementation of that legislation.

The real "source" of the liberticidal activity would be the "official tolerance" of the authorities controlling the area directly or through mercenary militias.

But for the Grand Chamber there is another aspect, which does not refer only to the profiles of freedom of thought, conscience and religion, but is immanent to the entire judgment: the parameter of legality of the administrative practices is not that of the legal system of the invading country, but that of the attacked country, as established, among other things, by Article 43 of the Regulation annexed to the Fourth Hague Convention of 1907. It enshrines the occupant's obligation to maintain, unless absolutely prevented, the legislation of the occupier[28].

The scrutiny of legitimacy involved an investigation into the effective fulfilment of this commitment under the international law of war and the presence of any obstacles that made it impracticable. Both questions were answered in the negative: the extension of Russian legislation to Crimea was carried out automatically and with measures not motivated by any need to protect public order, internal or external security, and the integrity of the institutional apparatus[29].

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[27] Cf. MARCELLO TOSCANO, *op. cit.*, pp. 166–180.

[28] On the Article 43 annexed to the IV Hague Convention, I mention EJAL BENVENISTI, *The International Law of Occupation*, Princeton University Press, Princeton, 2004, pp. 7-31; ALESSANDRA ANNONI, *L'occupazione "ostile" nel diritto internazionale contemporaneo*, Giappichelli, Turin, 2012, pp. 150-155; YORAM DINSTEIN, *The International Law of Belligerent Occupation*, Cambridge University Press, 2019, pp. 99-118; EDMUND SCHWENK, *Legislative Power of the Military Occupant under Article 43, Hague Regulations*, in *The Yale Law Journal*, 54, 2, 1945, pp. 393-416; MARCO SASSÒLI, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, in *The European Journal of International Law*, 16, 4, 2005, pp. 661-694 (soprattutto, pp. 668-682). For an overview of international humanitarian law, cf. PAOLA GAETA, JORGE E. VIÑUALES, SALVATORE ZAPPALÀ (eds.), *Cassese's International Law*, III ed., Oxford University Press, Oxford, 2020, pp. 366-380.

[29] See the observations of the EUROPEAN COURT OF HUMAN RIGHTS, Grand Chamber, *Ukraine v. Russia (Crimea)*, 25th June 2024, cit., §§938-946: in particular, §943 states that Russia has never mentioned international humanitarian law in its defences, not even for the purpose of asserting exceptions to the duties provided for therein towards the population settled in Crimea. But it is §944 that certifies the absolutely illegitimate scope of the extension of Russian legislation to Crimea: «A further element to be taken into consideration relates to the fact that what occurred in Crimea, certainly after 18th March 2014, was a general and wholesale replacement of Ukrainian law irrespective of

In fact, according to the speech given on 18th March 2014 by President Putin in front of the members of the Federal Assembly[30], the annexation of Crimea would have been nothing more than a *rei vindicatio*, to protect the same population crushed under the Ukrainian "yoke". Russia should not have respected the provisions of international humanitarian law, because this is placed to safeguard the self-determination of peoples against foreign military interference. Instead, the aggression of February-March 2014 would have re-established the true political-legal identity of the Crimeans, subjecting them to the sovereignty and laws of their "spiritual homeland":

> In people's hearts and minds, Crimea has always been an inseparable part of Russia. This firm conviction is based on truth and justice and was passed from generation to generation, over time, under any circumstances, despite all the dramatic changes our country went through during the entire 20th century. After the revolution, the Bolsheviks, for a number of reasons – may God judge them – added large sections of the historical South of Russia to the Republic of Ukraine. This was done with no consideration for the ethnic make-up of the population, and today these areas form the southeast of Ukraine. [...] Naturally, in a totalitarian state nobody bothered to ask the citizens of Crimea and Sevastopol. They were faced with the fact. People, of course, wondered why all of a sudden Crimea became part of Ukraine. But on the whole – and we must state this clearly, we all know it – this decision was treated as a formality of sorts because the territory was transferred within the boundaries of a single state. Back then, it was impossible to imagine that Ukraine and Russia may split up and become two separate states. However, this has happened.[31]

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the individual circumstances and potential needs of the existing population in Crimea, or the property, security forces or administration of the Russian Federation, or of the need to maintain the orderly government of the territory. Equally important are the fact that the respondent State applied Russian law immediately after signing the "Accession Treaty", and also Crimea's admission, as a matter of Russian law, as a constituent part of the Russian Federation».

[30]The speech was published on the official website of the Presidency of the Russian Federation and can be found in English on http://en.kremlin.ru/events/president/news/20603.

[31] For an analysis of Putin's speech of March 18, 2014 and, more generally, of Russian propaganda in favor of the annexation of Crimea and the invasion of Ukraine, cf. EDWIN BACON, *Putin's Crimea Speech, 18 March 2014: Russia's Changing Public Political Narrative*, in *Journal of Soviet and Post-Soviet Politics and Society*, 1, 1, 2015, pp. 13-36; FIONA HILL, *How Vladimir Putin's World View Shapes Russian Foreign Policy*, in DAVID CADIER, MARGOT LIGHT (eds.), *Russia's Foreign Policy. Ideas, Domestic Politics and External Relations*, Palgrave Macmillan, London, 2015, pp. 42-61; OKSANA VOYTYUK, *Russian Disinformation and Propaganda Campaign Justifying the Annexing of Crimea in 2014*, in *Nowa Polityka Wschodnia*, 2, 37, 2023, pp. 125-145; BJÖRN ALEXANDER DÜBEN, *Revising*

Although "suggestive" in the political sphere, the theory of the return of Crimea to Great Mother Russia has no legal relevance: once the normative substrate detrimental to religious freedom has been considered "non-law", the logical consequence is the declaration of responsibility of the defendant State in the disputed administrative practice, in violation of Article 9 ECHR.

4. A missed opportunity or a prudent silence?

The Grand Chamber's ruling has a historic significance both in the ongoing conflict and in the future configuration of international law in times of war. The Council of Europe's judicial body, in fact, has not only carried out a careful examination of the premises of the Russian-Ukrainian crisis, but has taken it upon itself to draw up some guidelines that may guide towards the protection of the fundamental rights of the individual in the event of hostilities.

The massive amount of the ruling would require an interdisciplinary approach, since it involves all sectors of legal science, through the reference to multiple profiles of non-compliance with the ECtHR: the claim of this contribution is much more limited, because it focuses only on religious freedom, which, in the economy of the measure, occupies a very small part.

From a quick glance, it is easy to see that the argument on the violations of Article 9 ECHR is concentrated in about twenty paragraphs, built according to a "formulaic style", which did not take into account the multiple elements raised by Ukraine. For example, in the face of the censures made in the 2018 application on specific episodes of religious persecution against Tatar Muslims, the panel of judges was almost silent or, rather, merged the position of the latter with that of the Orthodox not aligned with the Patriarchate of Moscow.

In addition, a number of questions submitted to the courts were closed by acknowledging that the Russian Government had not raised anything against the applicant's allegations. In my opinion, the technique, although correct, ended up reducing – at least for the facts of interest here – the view to what was presented by the States in question: in other words, the exercise of the investigative powers provided for in the annex to the Court's Rules of Procedure has not been activated. Instead of weakening the prosecution's structure, the conduct of an investigation or at

History and 'Gathering the Russian Lands': Vladimir Putin and Ukrainian Nationhood, in *LSE Public Policy Review*, 3, 1, 2023, pp. 1-12.

least the taking of testimony or, again, the request for clarification from independent experts[32], would have brought to light many more atrocities and many more prejudicial events to the detriment of individuals, who, being probably prevented by emergency contingencies from personally appealing, would have benefited from the outcomes of the main interstate proceedings.

Finally, having focused the focus of the illegitimacy of the practice on the lack of a legal basis leaves numerous question marks open. It is true that the consolidated process provides for a phased scanning, in which the lack of an antecedent requirement makes the examination of the subsequent steps superfluous: nevertheless, given the seriousness of the interests, at least in the form of *obiter dictum*, some further clarification was politically necessary and legally necessary.

The Court had the opportunity to offer a clear and precise framework to distinguish the measures of lawful limitation of the freedom in question, which can be adopted in time of fighting, from acts of unlawful persecution, not allowed even in an emergency, because they fundamentally contradict the idea of the rule of law.

That this is not a purely theoretical diatribe is confirmed by the doubts raised by the recent countermeasures taken by Ukraine against the pro-Russian Orthodox.

On 20th August 2024, the *Verkhovna Rada* approved bill no. 8371, which prohibits all activities of religious communities affiliated with Moscow[33], with the declared aim of preventing

[32] Pursuant to *Rule A1*, §§2-3, of the *Annex to the Rules of Court (concerning investigations)*, for the comment of which I refer to WILLIAM A. SCHABAS, *The European Convention of Human Rights. A Commentary*, Oxford University Press, Oxford, 2015, pp. 807-810. A. highlights how the Court's investigative activity is frequent precisely in interstate appeals.

[33] President Zelens'kyj promulgated the law on 24th August 2024. The news was reported by: RELIGIOUS INFORMATION SERVICE OF UKRAINE, *The religious scholar explained what Bill 8371 adopted by the Rada provides for*, 20th August 2024, https://risu.ua/en/the-religious-scholar-explained-what-bill-8371-adopted-by-the-rada-provides-for_n150362; GIACOMO GAMBASSI, *Ukraine. Kiev Parliament bans Orthodox Church "linked to Moscow"*, in *Avvenire*, 20th August 2024, https://www.avvenire.it/mondo/pagine/ucraina-il-parlamento-di-kiev-mette-al-bando-la-chiesa-ortodossa-legata-a-mosca; YULIIA DYSA, OLENA HARMASH, *Ukraine adopts 'historic' law to ban Russia-linked minority church*, in *Reuters*, 20th August 2024, https://www.reuters.com/world/europe/ukraine-adopts-law-paving-way-ban-russia-linked-minority-church-2024-08-20/. A calm analysis of the consequences of the Ukrainian law is offered by KONSTANTIN SKORKIN, *Ukraine's Ban on Moscow-Linked Church Will Have Far-Reaching Consequences*, in *Carnegie Politika*, 4th September 2024, https://carnegieendowment.org/russia-eurasia/politika/2024/08/zapret-upc-v-ukraine?lang=en. Despite the fact that the major archbishop of the Ukrainian Greek-Catholic Church Sviatoslav Shevchuk has given his favorable opinion to the legislation, which is considered necessary and proportionate to the dangerous militaristic propaganda of the pro-Russian Orthodox (cf. RELIGIOUS INFORMATION SERVICE OF UKRAINE, *The head of the UGCC: Law 8371 is a protection of religion from militarization, not a ban on the Church*, 21st August 2024, https://risu.ua/en/the-head-of-the-ugcc-law-8371-is-a-protection-of-religion-from-militarization-not-a-ban-on-the-church_n150388), Pope Francis launched an appeal during the *Angelus* prayer for no Church to be prevented from exercising worship. See FRANCIS, *Angelus of 25th August 2024*, https://www.vatican.va/content/francesco/it/angelus/2024/documents/20240825-angelus.html. Similar concerns were expressed by the Office of the High Commissioner for Human Rights at the press conference on 3rd

religion from supporting the occupier's extremist policy. It would seem to revise, in reverse parts, the plot set out here in §2.

The hope is that the Council of Europe will ensure that Article 15 ECHR, invoked by Kiev, is applied according to strict proportionality[34] and without the legitimate needs of national security and protection of sovereignty becoming the pretext for the perpetuation of blind violence.

With these observations, of course, I do not mean to say that the decision is formally and legally incorrect, but that the Court did not consider it a priority to resolve the confessional dilemma, in order to concentrate its efforts on other administrative practices contrary to the Convention. The opportunity was not seized: perhaps the judges preferred a diplomatic silence to "praetorian interventionism" with a view to vigilant waiting for negotiations and the cessation of hostilities, when legality and harmony between the two peoples will be restored.

September 2024 (https://www.unognewsroom.org/story/en/2321/un-geneva-press-briefing-03-september-2024).

[34] As required by the jurisprudence of the Strasbourg Court, summarized in THE EUROPEAN COURT OF HUMAN RIGHTS, *Guide on Article 15 of the European Convention on Human Rights*, last update 31st August 2023, pp. 8-11.