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RUSSIAN LAW JOURNAL (RLJ)

An independent, professional peer-reviewed academic legal journal.

Aims and Scope

The *Russian Law Journal* is designed to encourage research especially in Russian law and legal systems of the countries of Eurasia. It covers recent legal developments in this region, but also those on an international and comparative level.

The RLJ is not sponsored or affiliated with any university, it is an independent All-Russian interuniversity platform, initiated privately without any support from government authorities.

The RLJ is published in English and appears four times per year. All articles are subject to professional editing by native English-speaking legal scholars. The RLJ is indexed by Scopus and ESCI Web of Science.

Notes for Contributors

The RLJ encourages comparative research by those who are interested in Russian law, but also seeks to encourage interest in all matters relating to international public and private law, civil and criminal law, constitutional law, civil rights, the theory and history of law, and the relationships between law and culture and other disciplines. A special emphasis is placed on interdisciplinary legal research.

Manuscripts must be the result of original research, not published elsewhere. Articles should be prepared and must be submitted in English. The RLJ does not accept translations of original articles prepared in other languages. The RLJ welcomes qualified scholars, but also accepts serious works by Ph.D. students and practicing lawyers.

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Citations in footnotes must conform to *The Bluebook: A Uniform System of Citation*. A References section is required: entries must conform to the author-title system, such as that described in the *Oxford Style Manual*.

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THE RUSSIAN LAW JOURNAL AS A CHALLENGE FOR RUSSIA'S LEGAL ACADEMIA – A FEW REMARKS BY THE CHIEF EDITOR ON THE 5TH ANNIVERSARY OF THE JOURNAL

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The year 2018 marks an important anniversary for the *Russian Law Journal*. Five years ago, the journal was launched as an important project of Russia's legal academia to create a platform where legal scholars could discuss the many different aspects of Russian law. The scope of the project was and remains designed to encourage research especially in Russian law and the legal systems of the countries of Eurasia. The journal covers recent legal developments in this region, but also those on an international and comparative level. It is a platform for all scholars – it does not matter what university or country a scholar is from. The journal's main interest is a comparative approach towards Russian legal developments.

The *Russian Law Journal* is an independent, all-Russian inter-university platform initiated privately without support from governmental authorities. It was launched by a group of scholars from leading Russian universities: Moscow State Lomonosov University, Saint Petersburg State University, Moscow State Law University and the Higher School of Economics. Its International Editorial Council is composed of distinguished international scholars focused on comparative law. The idea was to create an English-language journal that would be a main source on Russian law abroad. This idea is not new. It has been put into practice in many countries where English is not the native language. Examples include the *German Law Journal*, *Israel Law Journal*, *Italian Law Journal*, *Mexican Law Journal* and *China Law Review*. All of these journals share the same idea – to represent their national law in a globalized world. In November 2013,

during the launching period, we organized a round table on the pivotal topic "Russian Law Journal: Discovering Russian Law" to discuss different strategies for the journal.

Several journals now work in the field of Russian law: the *Review of Central and East European Law*, the *Journal of Eurasian Law* and *Russian Politics and Law*. The *Review of Socialist Law* was the leading journal in the field during the Soviet period. It is difficult to say which is the leading journal in the field today, but all of our efforts aim at that goal. There are many methods of ranking legal journals: by reputation, prominence of authors, citations, etc. SCImago Journal & Country Rank gives the *Russian Law Journal* the ranking of the number 2 law journal in Eastern Europe in 2018.[1] This is a remarkable result for a journal with only five years of publication history.

The main problem the journal faces is the misunderstanding of the journal's mission by the majority of Russia's legal academia. The mission of "Discovering Russian Law" via English is not supported by all Russian scholars. Many of them retain an isolated perspective and do not want to change their mind. For most of Russia's legal academia, there is simply no need to write and publish in English, and they feel little motivation to do so. But the localization or anti-internationalization of legal science is an unfortunate condition for Russia's legal academia to favour. I am keenly aware that isolation is a strategy that goes nowhere. For it is a mistaken opinion that legal science is more national than international. Of course, each country has its own national legislation that is unique and which is not replicated exactly elsewhere in the world. But when we speak about law, we do not speak about legislation alone. Legal views, opinions and theories can be critically evaluated only if they face discussion and argument with counterparts on the international level. Otherwise they are doomed to be ineffective. Hence, legislation is national, but law is multinational. The *Russian Law Journal* is a platform for just this kind of international discussion, argument and collaboration. That the majority of Russia's legal academia does not appreciate this is a serious matter, as revealed by a number of other problems the journal has faced over the course of its first five years in publication.

First, language. Writing and publishing in English is a challenge for any non-English-speaking person. Overcoming this challenge for Russian scholars is an integral part of the mission of the *Russian Law Journal*. Our task is not only to make Russian law accessible to foreign readers, but also to defend Russian law on the international stage. The only language that can be used in this endeavour today is English. There is an earnest discussion in the world concerning the importance given to English as the universal language of law. There are proponents and opponents of the situation, but all recognize one obvious thing: law follows business and governmental activities with cross-border transactions and interests. Therefore, there is no serious argument against using the English language as a tool to protect national interests in the field of law. Otherwise, a country's – Russia's – national position will not be heard on the international level. If we want to show the advantages of a domestic legal system and

[1] Available at https://www.scimagojr.com/.

ARTICLES

APPLYING THE EUROPEAN CONVENTION ON HUMAN RIGHTS TO THE CONFLICT IN UKRAINE

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The "annexation" of Crimea by the Russian Federation and the ongoing conflict in Eastern Ukraine have resulted in widespread human rights abuses. Both Ukraine and the Russian Federation are signatories to the European Convention on Human Rights and the Convention should apply within the territory and to the conflict. However, recent applications to the European Court of Human Rights reveal a great deal of confusion over which State bears responsibility for protecting human rights in different parts of Ukraine. This article seeks to shine a light on this problem presenting a deep analysis of the European Court of Human Rights' jurisprudence and discussing how it applies to both the conflict in Eastern Ukraine and "annexed" Crimea. It addresses salient issues such as responsibility for the actions of non-state actors and armed groups in Eastern Ukraine and whether the legality of the "annexation" has any bearing on the human rights obligations of each State. The article presents a detailed critique of recent judgments from the European Court of Human Rights arguing that the jurisprudence of the Court has created a bewildering degree of complexity and uncertainty as to the obligations of each State and discussing the practical implications of this uncertainty.

Keywords: Ukraine; Russia; armed conflict; European Convention on Human Rights; Crimea; jurisdiction; state responsibility; territory; control; belligerent occupation.

Recommended citation: Stuart Wallace & Conall Mallory, *Applying the European Convention on Human Rights to the Conflict in Ukraine*, 6(3) Russian Law Journal 8–78 (2018).

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Introduction

In November 2013, protests broke out in the Ukraine when the president, Viktor Yanukovych, refused to sign an association agreement with the European Union.[1] This was a defining moment in the country's history as it exacerbated long-standing tensions between citizens favouring closer ties with Europe and others who

[1] Ukraine Protests After Yanukovych EU Deal Rejection, BBC News, 30 November 2013 (Aug. 2, 2018), available at http://www.bbc.co.uk/news/world-europe-25162563.

favoured a closer relationship with Russia.[2] The protests against Yanukovych gathered in intensity and turned increasingly violent. Yanukovych eventually fled office in February 2014. His government was replaced by an interim administration and the security situation, particularly in the east of the country, continued to worsen.[3] In late February 2014 pro-Russian groups began to take control of public buildings on the Crimean peninsula and the by the end of spring parts of the Donetsk and Luhansk Oblasts were under the control of similar pro-Russian units.[4] In May 2015 Ukrainian authorities filed derogations with respect to its human rights obligations under both the European Convention on Human Rights 1950 (hereinafter ECHR) and International Convention on Civil and Political Rights 1966.[5]

In the five years since the conflict began there has been a significant deterioration in the protection of human rights within Ukraine. The Office of the United Nations High Commissioner for Human Rights has stated that the death toll from the conflict now exceeds 2,700, with a further 9,000 individuals injured.[6] An estimated 1.6 million people have been displaced by the violence.[7] Human Rights Watch has reported further human rights abuses, including a high number of enforced disappearances, the intimidation of pro-Ukrainian activists and widespread persecution of minority groups, such as the Tatars.[8] The UN has further reported on instances of alleged

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[2] For some historical context on the origins of the conflict in Ukraine *see* Julia Koch, *The Efficacy and Impact of Interim Measures: Ukraine's Inter-State Application Against Russia*, 39(1) Boston College International and Comparative Law Review 163, 165–170 (2016).

[3] Shaun Walker, *Ukraine's Former PM Rallies Protesters After Yanukovych Flees Kiev*, The Guardian, 23 February 2014 (Aug. 2, 2018), available at http://www.theguardian.com/world/2014/feb/22/ukraine-president-yanukovych-flees-kiev.

[4] Ukraine Crisis: Timeline, BBC News, 13 November 2014 (Aug. 2, 2018), available at https://www.bbc.co.uk/news/world-middle-east-26248275.

[5] Ukrainian Government, Resolution of the Verkhovna Rada of Ukraine on Declaration on Derogation from Certain Obligations Under the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms, 21 May 2015 (Aug. 2, 2018), available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680304c47#search=ukraine%20derogate.

[6] United Nations Office for the Coordination of Humanitarian Affairs, Ukraine Humanitarian Bulletin, Issue 25, 1 March – 30 April 2018 (Aug. 2, 2018), available at https://reliefweb.int/sites/reliefweb.int/files/resources/ukraine_-_humanitarian_bulletin_issue_25_-_mar-apr_2018.pdf. *See also* UN Calls for "New Political Energy" to End the Conflict in Eastern Ukraine, UN News, 29 May 2018 (Aug. 2, 2018), available at https://news.un.org/en/story/2018/05/1010911. The Council on Foreign Relations places the death-toll significantly higher at over 10,000 – Council on Foreign Relations, Global Conflict Tracker, 19 June 2018 (Aug. 2, 2018), available at https://www.cfr.org/interactives/global-conflict-tracker#!/conflict/conflict-in-ukraine.

[7] UN Calls for "New Political Energy," *supra* note 6.

[8] Crimea: Disappeared Man Found Killed, Human Rights Watch, 18 March 2014 (Aug. 2, 2018), available at https://www.hrw.org/news/2014/03/18/crimea-disappeared-man-found-killed; Crimea: Enforced Disappearances, Human Rights Watch, 7 October 2014 (Aug. 2, 2018), available at https://www.hrw.org/news/2014/10/07/crimea-enforced-disappearances.

torture,[9] sexual violence,[10] threats to commit ethnic cleansing[11] and forced conscription.[12]

The on-going unrest has created considerable uncertainty as to who is ultimately responsible for guaranteeing human rights protection within the different parts of Ukraine. The violence has clearly reached the threshold of an armed conflict at different times, although the exact categorisation of the hostilities under international law in different parts of the country is open to debate.[13] There remain ongoing arguments in the international legal forum over whether human rights law applies to armed conflicts or whether it should be superseded by international humanitarian law (hereinafter IHL).[14] Indeed Russia has already argued that human rights law should not be applied to its armed conflict with Georgia in 2008 in an inter-state case before the European Court of Human Rights (hereinafter ECtHR).[15] Given the similarities between that situation and the Ukraine crisis, it seems likely that Russia will raise a similar argument in cases related to the Ukrainian conflict. While there is some continued merit to these

[9] Office of the United Nations High Commissioner for Human Rights, Report on the Human Rights Situation in Ukraine – 16 February to 15 May 2016, 3 June 2016, at 15 (Aug. 2, 2018), available at https://www.ohchr.org/Documents/Countries/UA/Ukraine_14th_HRMMU_Report.pdf.

[10] Office of the United Nations High Commissioner for Human Rights, Conflict-Related Sexual Violence in Ukraine – 14 March 2014 to 31 January 2017, 16 February 2017 (Aug. 2, 2018), available at https://www.ohchr.org/Documents/Countries/UA/ReportCRSV_EN.pdf.

[11] Andrew Korybko, *Ethnic and Cultural Cleansing in Ukraine*, Global Research, 18 June 2014 (Aug. 2, 2018), available at http://www.globalresearch.ca/ethnic-and-cultural-cleansing-inukraine/5387539.

[12] Office of the United Nations High Commissioner for Human Rights, Report on the Human Rights Situation in Ukraine – 16 November 2017 to 15 February 2018, 19 March 2018, at 13 (Aug. 2, 2018), available at https://www.ohchr.org/Documents/Countries/UA/ReportUkraineNov2017-Feb2018_EN.pdf.

[13] On the application of the Law of Armed Conflict to Ukraine *see* Reeves and Wallace who contend that the situation in the Crimea would amount to an international armed conflict, while – due to the challenges in ascertaining Russian influence – the unrest in Eastern Ukraine would only amount to a non-international armed conflict at present. Shane R. Reeves & David Wallace, *The Combatant Status of the "Little Green Men" and Other Participants in the Ukraine Conflict*, 91 International Law Student Series US Naval War Collection 361, 382 (2015).

[14] Barbara Miltner, *Revisiting Extraterritoriality After Al-Skeini: The ECHR and Its Lessons*, 33(4) Michigan Journal of International Law 693, 748 (2012); Michelle A. Hansen, *Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict*, 194 Military Law Review 1, 65 (2007); Natasha Balendra, *Defining Armed Conflict*, 29(6) Cardozo Law Review 2461, 2516 (2008); Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking All Around*, 12(2) ILSA Journal of International & Comparative Law 459, 480 (2006); Heike Krieger, *A Conflict of Norms the Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study*, 11(2) Journal of Conflict & Security Law 265, 291 (2006); W. Hays Parks, *Part IX of the ICRC Direct Participation in Hostilities Study: No Mandate, No Expertise, and Legally Incorrect*, 42 New York University Journal of International Law and Politics 769, 830 (2010); Rick Lawson, *Really Out of Sight? Issues of Jurisdiction and Control in Situations of Armed Conflict under the ECHR* in *Margins of Conflict: The ECHR and Transitions to and from Armed Conflict* 57 (A. Buyse (ed.), Antwerp: Intersentia, 2011). For discussion on this subject specifically at the ECtHR *see Hassan v. United Kingdom*, Application No. 29750/09, Judgment (Grand Chamber), 16 September 2014, paras. 96–107.

[15] *Georgia v. Russia (II)*, Application No. 38263/08, Decision (Section V), 13 December 2011.

discussions, the reality is that international human rights law is currently being applied to a variety of military operations including international armed conflicts,[16] particularly by the ECtHR. The past decades have seen the ECtHR apply the ECHR to a variety of military operations, including international armed conflicts,[17] foreign belligerent occupations,[18] peace-support operations,[19] domestic counter-insurgency operations,[20] and non-international armed conflicts.[21] This has prompted calls for a shift in focus toward considering the practicalities of how IHRL can actually be applied in day-to-day military operations at home and abroad.[22] In the words of one academic, it is time to "stop debating the theory and start defining the pragmatic."[23] This article therefore works from the assumption that the ECHR applies to the conflict(s) in Ukraine.

At it's the core, the issue of responsibility for human rights protection in Ukraine is a question of jurisdiction and State responsibility, refracted through the unique lens of the European Convention on Human Rights. Section 1 of the Article therefore introduces the issues of jurisdiction and State responsibility arising under the ECHR. The ECtHR has placed *de facto* control over territory or persons at the centre of its assessments of jurisdiction. However, it is argued throughout this article that the ECtHR has failed to apply its tests for *de facto* control consistently. This has led to considerable uncertainty over the scope and content of the obligations owed by different States. The following section begins to analyse this issue in the context of Crimea, asking to what extent does Russia, which claims to have annexed Crimea, have responsibility for human rights obligations within that territory? Would the

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[16] The ICJ has ruled on a number of occasions that international human rights law applies to armed conflict – *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 2005 I.C.J. 116, 231. *See also Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 178.

[17] *Cyprus v. Turkey*, Applications No. 6780/74 and 6950/75, Decision, 26 May 1975; *Georgia v. Russia (II)*, *supra* note 15.

[18] The occupation of Iraq in *Al-Skeini and Others v. United Kingdom*, Application No. 55721/07, Judgment (Grand Chamber), 7 July 2011.

[19] Kosovo in *Behrami v. France*, Application No. 71412/01, Decision (Grand Chamber), 31 May 2007.

[20] Counter-insurgency in South-East Turkey in *Ergi v. Turkey*, Case No. 66/1997/850/1057, Judgment, 28 July 1998.

[21] Russian operations in Chechnya in *Isayeva v. Russia*, Application No. 57950/00, Decision (Section I), 24 February 2005.

[22] Naz K. Modirzadeh, *The Dark Sides of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict*, 86 International Law Student Series US Naval War Collection 349, 368 (2010); Iain Scobbie, *Principle of Pragmatics – The Relationship Between Human Rights Law and the Law of Armed Conflict*, 14(3) Journal of Conflict and Security Law 449, 458 (2009); Daniel Bethlehem, *The Relationship Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 2(2) Cambridge Journal of International and Comparative Law 180, 195 (2013).

[23] Geoffrey Corn, *Mixing Apples and Hand Grenades The Logical Limits of Applying Human Rights Norms to Armed Conflict*, 1(1) Journal of International Humanitarian Legal Studies 52, 90 (2010).

answer to this question be different if annexation has not occurred and the invading state is instead in belligerent occupation of that territory? The third part of the article examines the situation in Eastern Ukraine. It applies the ECtHR's jurisprudence to various facets of the conflict asking to what extent is Ukraine's jurisdiction displaced by the ongoing conflict? To what extent could Russia be held responsible for the activities of armed groups in Eastern Ukraine?

1. Jurisdiction Under the ECHR

According to Article 1, a State's obligations under the ECHR only extend to individuals "within their jurisdiction."[24] The State's jurisdiction is therefore a threshold criterion, which must be met before the treaty obligations begin to apply.[25] The term jurisdiction can describe many different things. It can, for example, refer to geographical boundaries or to the limits of a court's authority.[26] When one refers to a State's jurisdiction under general international law, one is referring to a manifestation of its sovereignty. A State manifests its sovereignty over territory by exercising legislative, judicial and executive jurisdiction over it,[27] although this is different from the type of jurisdiction contemplated in Article 1 ECHR. Many of the terms used here, sovereignty, jurisdiction, authority are synonymous with control and control is the key factor. Territory can be viewed as the medium, the spatial realm, in which the State exercises its control. Thus, when the ECtHR speaks of jurisdiction under Article 1 being primarily territorial, as it often does,[28] it should be understood

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[24] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, E.T.S. 5, Art. 1. Michael O'Boyle, *The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on "Life After Bankovic"* in *Extraterritorial Application of Human Rights Treaties* 125 (F. Coomans & M.T. Kamminga (eds.), Antwerp: Intersentia, 2004); Marko Milanovic & Tatjana Papic, *As Bad as It Gets: The European Court of Human Rights's "Behrami and Saramati" Decision and General International Law*, 58(2) International & Comparative Law Quarterly 267, 272 (2009); Ralph Wilde, *Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26(3) Michigan Journal of International Law 739, 797–798 (2005).

[25] *Ilascu and Others v. Moldova and Russia*, Application No. 48787/99, Judgment (Grand Chamber), 8 July 2004, para. 312; Marko Milanovic, *From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties*, 8 Human Rights Law Review 411, 415 (2008).

[26] Peter Malanczuk, *Akehurst's Modern Introduction to International Law* 109 (7th ed., New York: Routledge, 1997).

[27] Lassa Oppenheim et al., *Oppenheim's International Law. Vol. 1: Peace. Parts 2–4* 458 (Harlow: Longman, 1992); Ian Brownlie, *Principles of Public International Law* 299 (Oxford: Oxford University Press, 2008); Antonio Cassese, *International Law* 50 (Oxford: Oxford University Press, 2005); For a full explanation of what each type of jurisdiction entails *see* Malcolm Shaw, *International Law* 649–651 (Cambridge: Cambridge University Press, 2008).

[28] *See, for example*, *Banković and Others v. Belgium and Others*, Application No. 52207/99, Decision (Grand Chamber), 12 December 2001, para. 61; *Hirsi Jamaa v. Italy*, Application No. 27765/09, Judgment (Grand Chamber), 23 February 2012, para. 71; *Ilaşcu and Others v. Moldova and Russia*, *supra* note 25, para. 312; *Al-Skeini and Others v. United Kingdom*, *supra* note 18, para. 131.

that possession of territory is a natural condition of Statehood and territory is the spatial realm in which the State's jurisdiction/control is principally manifested.

Using *de facto* control as an indicator of the exercise of jurisdiction has been a consistent characteristic of the European Court, and its forebear the European Commission on Human Rights, for decades. Conceptualising jurisdiction in this manner is both consistent with the practice of other international human rights bodies and is potentially the most human rights-friendly approach available to the ECtHR. For instance, the UN Convention Against Torture has been interpreted to apply to "all areas where the state party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control."[29] Similarly, obligations arising from the ICCPR have been interpreted to extend to all individuals "within the power or effective control" of a state.[30] In theory at least, such an approach recognises individuals within the Convention's protection at times when they are most vulnerable to the power of the State, as that State, through its agents, is exercising control over either them or the territory in which they are located.

Loizidou v. Turkey[31] is an example of the ECtHR's approach to *de facto* control over territory. In this landmark case, the applicant owned property in Northern Cyprus and was prevented from accessing it following the Turkish invasion of Cyprus and the *de facto* partition of the island. She alleged that Turkey was responsible for denying her peaceful enjoyment of her property. The ECtHR had to decide whether territory in Northern Cyprus, which was occupied by Turkey since the 1970s, came within the jurisdiction of Turkey for the purposes of Article 1. When deciding the issue of jurisdiction, the ECtHR outlined its approach to what has been widely referred to as spatial jurisdiction.[32] It stated that

> the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from

[29] UN Committee Against Torture (CAT), General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, CAT/C/GC/2, para. 16.

[30] UN Human Rights Committee (HRC), General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 10.

[31] *Loizidou v. Turkey (Preliminary Objections)*, Application No. 15318/89, Judgment (Grand Chamber), 23 March 1995.

[32] *See, for example*, Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, 23(1) European Journal of International Law 121, 122 (2012); Ralph Wilde, *The Extraterritorial Application of International Human Rights Law on Civil and Political Rights* in *Routledge Handbook of International Human Rights Law* 635, 641 (S. Sheeran & N. Rodley (eds.), Abingdon, UK: Routledge, 2013); Lea Raible, *The Extraterritoriality of the ECHR: Why Jaloud and Pisari Should Be Read as Game Changers*, 2 European Human Rights Law Review 161, 163 (2016).

> the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[33]

There are several noteworthy elements in this statement. Firstly, the ECtHR refers to effective control of "an area" e.g. piece of territory as opposed to individual people. Secondly, the ECtHR does not specify that the State's obligation is only to secure certain rights, it refers to the rights and freedoms in general, implying that the State must guarantee all of the rights and freedoms in the Convention.[34] The ECtHR later confirms this in the case of *Cyprus v. Turkey* when it states

> Having effective overall control over Northern Cyprus […] Turkey's "jurisdiction" must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified.[35]

Interestingly the ECtHR makes no direct mention of the procedural obligations here. However, it has since applied the procedural obligations in Article 2, which demand investigation of suspicious deaths, extra-territorially in the cases of *Jaloud v. Netherlands*[36] and *Al-Skeini v. UK*,[37] so one can assume that they must also be guaranteed. These cases are discussed in detail below. Finally, and perhaps most importantly, the ECtHR refers to the obligation to secure the rights deriving from the fact that Turkey is exercising control over the territory. Thus, the factual control that Turkey exercised over territory was crucial in determining that jurisdiction arose.

A similar emphasis on *de facto* control is evident with the so-called "personal jurisdiction" approach.[38] In one of the earliest forays into the application of human rights during extra-territorial armed conflicts, also involving the situation in Northern Cyprus, the European Commission on Human Rights stated that "authorised agents of Turkey […] bring any other persons or property in Cyprus 'within the jurisdiction' of Turkey, in the sense of Article 1 of the Convention, to the extent that they exercise control over such persons or property."[39] This *de facto* control approach has been

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[33] *Loizidou v. Turkey (Preliminary Objections)*, *supra* note 31, para. 62.

[34] Noam Lubell, *Human Rights Obligations in Military Occupation*, 94(885) International Review of the Red Cross 317, 320 (2012).

[35] *Cyprus v. Turkey*, Application No. 25781/94, Judgment, 10 May 2001, para. 77.

[36] *Jaloud v. Netherlands*, Application No. 47708/08, Judgment (Grand Chamber), 20 November 2014.

[37] *Al-Skeini and Others v. United Kingdom*, *supra* note 18.

[38] *See, for example*, Cedric Ryngaert, *Clarifying the Extraterritorial Application of the European Convention on Human Rights*, 28(74) Utrecht Journal of International and European Law 57, 59 (2012); Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* 173 (Oxford: Oxford University Press, 2011).

[39] *Cyprus v. Turkey*, *supra* note 17, para. 10.

applied subsequently in numerous decisions, largely relating to instances when an individual is brought within the custody of a Contracting Party to the Convention.[40] Thus, the ECtHR contends that *de facto* control is the decisive factor in determining the existence of both of these types of jurisdiction under the ECHR.[41]

As will be demonstrated in our analysis of the situation in Ukraine below, the problem lies not with the conception of jurisdiction in terms of *de facto* control, but rather with the chronically indecisive and inconsistent approach the ECtHR has taken to interpreting and applying *de facto* control in cases involving violations of the Convention in both domestic and foreign armed conflicts.

2. The Crimean "Annexation"

Shortly after Viktor Yanukovych fled Ukraine in February 2014, pro-Russian gunmen took control of key government buildings in Crimea.[42] Over the following weeks, Russian forces based in Sevastopol, supported by troops from the Russian mainland, took control of the entire Crimean Peninsula. A referendum was then held on 16 March on whether Crimea should become part of Russia, which was passed.[43] The territory was formally annexed by Russia through the Treaty on Accession of the Republic of Crimea to Russia,[44] which was followed by a domestic legal act of the Russian State. The "annexation" of the Crimean Peninsula gives rise to a very important question – who is now responsible for protecting human rights in this territory, Ukraine, Russia or do they each have obligations to uphold?

Before discussing this further, it is important to clear up the difference between belligerent occupation and annexation, which is of crucial importance. Under IHL, territory is considered occupied when it is placed under the authority of the hostile army and the occupation extends only to the territory where its authority has been established and can be exercised.[45] Belligerent occupation is considered a transient

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[40] *See, for example*, *Öcalan v. Turkey (Merits)*, Application No. 46221/99, Judgment (Grand Chamber), 12 May 2005, para. 91; *Freda v. Italy*, Application No. 8916/80, Decision, 7 October 1980.

[41] As opposed to the exercise of legal authority. *See* on this Mirja Trilsch & Alexandra Ruth, *Bankovic v. Belgium*, 97 American Journal of International Law 168, 171 (2003) and Nehal C. Bhuta, *Conflicting International Obligations and the Risk of Torture and Unfair Trial: Critical Comments on R (Al-Saadoon and Mufdhi) v. Secretary of State for Defence and Al-Saadoon and Mufdhi v. United Kingdom*, 7(5) Journal of International Criminal Justice 1133, 1138 (2009).

[42] Ukraine Crisis: Timeline, *supra* note 4.

[43] Crimea Referendum: Voters Back Russia Union, BBC News, 16 March 2014 (Aug. 2, 2018), available at http://www.bbc.co.uk/news/world-europe-26606097.

[44] A Treaty between the Russian Federation and the Republic of Crimea on the Accession of the Republic of Crimea to the Russian Federation and on Forming New Constituent Entities within the Russian Federation, Russian Federation-Republic of Crimea, 18 March 2014 (Aug. 2, 2018), available at https://en.wikisource.org/wiki/Treaty_on_the_Accession_of_the_Republic_of_Crimea_to_Russia.

[45] Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, 205 C.T.S. 277, Art. 42.

status under international law with the occupier bound to respect the existing laws in force within the territory "unless absolutely prevented" from doing so.[46] As Carcano notes, this limitation on the occupying power protects the separate existence of the State, its institutions and its laws and constitutes a critical boundary between occupation and annexation.[47] The fate of occupied territory is typically determined by a peace treaty once the conflict between the parties is resolved.[48] By contrast annexation describes a domestic legal act of a State purporting to extend sovereignty over a piece of territory over which it has gained effective control through non-consensual, forcible means.[49]

The exact status of the territory, annexed or occupied, could have a considerable impact in determining which State is responsible for human rights protection within a territory. The situation in Crimea has prompted human rights claims against both Russia and Ukraine at the ECtHR and documents issued by the court state that approximately 4,000 individual applications relating to the events in both Crimea and Eastern Ukraine have been submitted.[50] Notably, as well as applications being lodged solely against Ukraine or Russia, a number of have been lodged against both states.[51]

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[46] Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, Art. 43. *See also* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 3, Art. 4, which states "neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question." For an interesting analysis of the genesis of this rule *see* Eyal Benvenisti, *The Origins of the Concept of Belligerent Occupation*, 26(3) Law and History Review 621, 648 (2008).

[47] Andrea Carcano, *The Transformation of Occupied Territory in International Law* 24 (Leiden: Brill/Nijhoff, 2015).

[48] *Id.* at 19; this approach is also mentioned by the ECtHR in *Al-Skeini and Others v. United Kingdom*, *supra* note 18, para. 89.

[49] Daniel Costelloe, *Treaty Succession in Annexed Territory*, 65(2) International & Comparative Law Quarterly 343, 353 (2016); As Fox notes – An assertion of *de jure* authority through annexation is fundamentally at odds with the temporary nature of occupation – Gregory H. Fox, *The Occupation of Iraq*, 36 Georgetown Journal of International Law 195, 298 (2004–2005).

[50] European Court of Human Rights, Press Country Profile – Ukraine (July 2018) (Aug. 2, 2018), available at https://www.echr.coe.int/Documents/CP_Ukraine_ENG.pdf.

[51] European Court of Human Rights, Press Country Profile – Russia (July 2018), at 16 (Aug. 2, 2018), available at http://www.echr.coe.int/Documents/CP_Russia_ENG.pdf. Cases from the east of Ukraine concerning destruction of property as a result of shelling have been brought against both Russia and Ukraine, *see Lisnyy v. Ukraine and Russia*, Application No. 44913/15, Judgment (Section I), 5 July 2016. Indeed Ukraine itself has launched an inter-State complaint against Russia concerning the annexation of Crimea, which is currently pending before the ECtHR – *Ukraine v. Russia* (Application No. 20958/14) – *see* European Court of Human Rights, European Court of Human Rights Communicates to Russia New Inter-State Case Concerning Events in Crimea and Eastern Ukraine, 1 October 2015 (Aug. 2, 2018), available at http://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-5187816-6420666&filename=ECHR%20communicates%20new%20inter-State%20case%20concerning%20events%20in%20Crimea%20and%20Eastern%20Ukraine.pdf; for more analysis of the inter-state case *see* Koch 2016 and Stefan Kirchner, *Interim Measures in Inter-State Proceedings Before the European Court of Human Rights: Ukraine v. Russia*, 3(1) University of Baltimore Journal of International Law 33 (2015).

The fact that these applications have been lodged against both Ukraine and Russia and against each State individually indicates that the duty bearer for human rights obligations in Crimea remains unclear. Two potential scenarios emerge in respect of the situation in Crimea.

2.1. Scenario 1 – Crimea Has Been Annexed

The first scenario assumes that Russia's annexation of Crimea is legitimate, and Crimea now forms part of its territory. If this were the case, the responsibility of both Russia and Ukraine for human rights protection in Crimea would be relatively clear.

2.1.1. Russia's Responsibility for Human Rights

In order for State responsibility to arise under international law, the conduct consisting of an action or omission must be (a) attributable to the State under international law and (b) it must constitute a breach of the State's international obligations.[52] Before a State can breach an obligation, the obligation must first be owed.[53] In the context of the Convention, this means that the applicant must, generally speaking, be within the State's jurisdiction before attribution is determined and State responsibility held to arise.[54] If Crimea is now *de jure* part of Russian territory, Russia would be presumed to exercise jurisdiction over this region for the purposes of Article 1 of the ECHR.[55] This presumption is rebuttable, but it is difficult to rebut in practice.[56]

State responsibility may not arise for every act/omission that occurs within a State's jurisdiction. The State may not be held responsible for the acts of private actors, because those acts may not be attributable to it.[57] Equally, acts that are attributable to the State may not give rise to State responsibility where the State does not owe obligations to the victims under international law, which is contingent on the exercise

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[52] James Crawford, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2 Yearbook of the International Law Commission 1, 34 (2001).

[53] Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To*, 25(4) Leiden Journal of International Law 857, 867 (2012); O'Boyle 2004, at 130.

[54] Crawford 2001, at 35; Milanovic 2008, at 437; occasionally the Court may be required to determine whether the acts of particular soldiers are attributable to the State first before considering the issue of control, *see* Milanovic & Papic 2009, at 273.

[55] *Assanidze v. Georgia*, Application No. 71503/01, Judgment (Grand Chamber), 8 April 2004, para. 139, the ECtHR here uses the term competence interchangeably with jurisdiction in this case in para. 137. *See also* Koch 2016, at 184–185.

[56] This is in part down to the international legal principle of territorial integrity *see* Marcelo G. Kohen, *Secession: International Law Perspectives* 369 (Cambridge: Cambridge University Press, 2006) and Enrico Milano, *Unlawful Territorial Situations in International Law – Reconciling Effectiveness, Legality and Legitimacy* 123–125 (Leiden: Brill, 2005).

[57] James Crawford & Simon Olleson, *The Nature and Forms of International Responsibility in International Law* in *International Law* 441, 454 (M.D. Evans (ed.), 3rd ed., Oxford: Oxford University Press, 2010).

of jurisdiction. Determining the issue of attribution of conduct to Russia would also be more straightforward in this scenario. The situation in Crimea is different from other secessionist entities in Europe such as the Moldovan Republic of Transdniestria (MRT) or the Turkish Republic of Northern Cyprus (TRNC). Those entities have declared independence and been supported by another State, Russia and Turkey respectively, however their independence has not been broadly recognised by the international community. This has led to problems with determining who is responsible for protecting human rights within these territories. The supporting States, Russia and Turkey, regularly claim that the actions of the secessionist entities cannot be attributed to Russia and Turkey as they are independent.[58] The ECtHR has often bypassed this issue by ruling that it is not necessary that the supporting State "actually exercises detailed control over the policies and actions" of the authorities of the secessionist entity,[59] what matters is that the supporting States exercise effective authority or at the very least have a decisive influence over the secessionist entity which "survives by virtue of the military, economic, financial and political support given to it' by the supporting state."[60] Where the supporting State does this, the actions of the secessionist entity will be attributed to the supporting State with the ECtHR effectively equating the authorities of the secessionist entity with *de facto* organs or agents of the supporting State for whose acts it may *generally* be held responsible.[61]

This fraught situation would be avoided in the context of Crimea because, as Russia expressly claims that Crimea is now part of its territory, attributing the conduct of the agents operating there to Russia is not problematic. In sum, if Crimea is genuinely part of the Russian Federation now, the issues of jurisdiction and attribution concerning that State are relatively clear cut.

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[58] *Catan and Others v. Moldova and Russia*, Applications No. 43370/04, 8252/05 and 18454/06, Judgment (Grand Chamber), 19 October 2012, paras. 96–101; *Mozer v. Moldova and Russia*, Application No. 11138/10, Judgment (Grand Chamber), 23 February 2016, paras. 92–95; *Loizidou v. Turkey (Preliminary Objections)*, *supra* note 31, para. 54; *Cyprus v. Turkey*, *supra* note 35, para. 69.

[59] *Loizidou v. Turkey (Preliminary Objections)*, *supra* note 31, para. 56; *Catan and Others v. Moldova and Russia*, *supra* note 58, paras. 106 and 150; *Ilaşcu and Others v. Moldova and Russia*, *supra* note 25, para. 315; *Mozer v. Moldova and Russia*, *supra* note 58, para. 157.

[60] *Mozer v. Moldova and Russia*, *supra* note 58, para. 157; *Cyprus v. Turkey*, *supra* note 35, para. 77; *Ilaşcu and Others v. Moldova and Russia*, *supra* note 25, paras. 316 and 392; *Catan and Others v. Moldova and Russia*, *supra* note 58, para. 150.

[61] Stefan Talmon, *The Responsibility of Outside Powers for Acts of Secessionist Entities*, 58(3) International & Comparative Law Quarterly 493, 510–511 (2009); Marek Szydło, *Extra-Territorial Application of the European Convention on Human Rights After Al-Skeini and Al-Jedda*, 12(1) International Criminal Law Review 271, 281 (2012). The European Commission made a statement on responsibility for *de facto* state agents in *Stocke v. Germany*, Application No. 11755/85, Judgment, 19 March 1991: "In the case of collusion between State authorities, i.e. any State official irrespective of his hierarchical position, and a private individual for the purpose of returning against his will a person living abroad, without consent of his State of residence, to its territory where he is prosecuted, the High Contracting Party concerned incurs responsibility for the acts of the private individual who *de facto* acts on its behalf."

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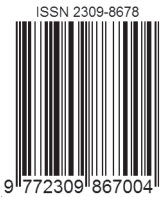

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