

*Kirchner S. Residual Responsibility under the European Convention on Human Rights for Territories Not Currently Under Government Control*

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**Residual Responsibility under the European Convention on Human Rights  
for Territories Not Currently Under Government Control<sup>i</sup>**

**1. Introduction**

The shooting down of the Malaysia Airlines commercial airliner MH17 over embattled eastern Ukraine in July 2014 has raised the question in how far Ukraine can be held responsible for human rights violations committed by non-state or foreign actors in parts of Ukraine which are no longer under full government control. This question is distinct from the question of Russian responsibility for actions by regular Russian forces and irregular pro-Russian forces operating on the territory of Ukraine. This kind of legal problem could only become relevant after international law outlawed the acquisition of title to territory by armed conquest. Even more recently, the European Convention on Human Rights<sup>ii</sup> (ECHR) outlawed a range of human rights violations and provided victims of human rights violations with the possibility to sue states in an international forum.<sup>iii</sup> In the case of the murder of the passengers and crew of flight MH17 the mother of one victim has filed a case against Ukraine

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<sup>i</sup> This text is based on two texts which were first published under the title “The War in Ukraine and Residual Responsibility under the European Convention on Human Rights for Territories Not Currently Under Government Control” and “Do residents of Crimea and Sevastopol have to exhaust Russian remedies prior to bringing a case against Russia at the European Court of Human Rights?” in the blog *Revista Latinoamericana de Derecho Internacional*, 2 December 2014.

<sup>ii</sup> Available online at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>iii</sup> Article 34 ECHR.

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with the European Court of Human Right for failing to prevent the shooting down of the airliner.<sup>i</sup> From a practical perspective, suing Ukraine is far easier than suing Russia because at this time it remains unclear who actually shot down the aircraft. Article 1 ECHR requires the “jurisdiction” of the state which is accused of having violated human rights. It might well be significantly easier to prove that Ukraine still has jurisdiction over the disputed territory than to prove that Russia has acquired jurisdiction.

## 2. Jurisdiction

The concept of jurisdiction within the meaning of Article 1 ECHR, while heavily influenced by notions of territory,<sup>ii</sup> is not limited to a state’s territory. Indeed, the word territory is not found in Article 1 ECHR.<sup>iii</sup> Instead, the Convention “applies a personal criterion”.<sup>iv</sup> Everybody who falls within the jurisdiction of a state which is a party to the ECHR is protected by it. This can include all forms of public authority and does not require the individual in question to be a citizen of the state in question, or of any state for that matter. For example somebody who lives in state A and applies for a visa in state B, with state B being a party to the ECHR, falls under the jurisdiction of state B for the purposes of Article 1 ECHR as far as the visa application is concerned.

## 3. Responsibility of the Russian Federation

It has long been debated whether military action would be sufficient to trigger the jurisdiction under Article 1 ECHR of a state intervening abroad. Article 1 ECHR

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<sup>i</sup> No author named, Mother of German MH17 victim takes Ukraine to human rights court, in: The Telegraph, 30 November 2014, <http://www.telegraph.co.uk/news/worldnews/europe/ukraine/11263486/Mother-of-German-MH17-victim-takes-Ukraine-to-human-rights-court.html> (last visited 2 December 2014).

<sup>ii</sup> See Christoph Grabenwarter, European Convention on Human Rights, Commentary, C.H. Beck, Munich, 2014, p. 6, who refers to Article 1 ECHR as “reflect[ing] an essentially territorial notion of jurisdiction” and ECtHR, *Bankovic and others v. Belgium and others*, Application no. 52207/99, Judgment of 12 December 2001, paras. 19 *et seq.*

<sup>iii</sup> Grabenwarter, *op. cit.*, p. 6.

<sup>iv</sup> *Ibid.*

requires “effective overall control”.<sup>i</sup> It does not matter if control is exercised through armed forces or public administration.<sup>ii</sup> Occupation by military force can go beyond the threshold of Article 1 ECHR and lead to legal responsibility.<sup>iii</sup> The factual control of parts of Ukraine by pro-Russian and Russian armed forces in itself can amount to an effective overall control. Whether a person falls under Russia’s jurisdiction has to be decided on a case by case basis.<sup>iv</sup> The exercise of governmental powers is an essential aspect of statehood and of title to territory - but both aspects independent of the issue of jurisdiction under Article 1 ECHR. Therefore Russia can be held responsible under the Convention without having title to the territory in question.

#### **4. Residual responsibility of Ukraine**

But even if the situation in Eastern Ukraine were to trigger the legal responsibility of the Russian Federation, it would not release Ukraine from all legal responsibility under the Convention. Instead, even an occupied nation still retains some residual responsibility under the ECHR. The state, being represented by the elected head of state, has still some capability to act. Even if the entire government were in exile or most members of government were killed, those who validly represent the state, and lacking representatives, all citizens, remain responsible for the protection of human rights. Occupation by a foreign power does not free the occupied state from all human rights obligations. The occupied state must use other ways to raise the issue in international fora.<sup>v</sup> Against this backdrop, the decision by the Ukrainian government to stop public services in parts of Ukraine under Russian or pro-Russian control has to be seen from the perspective of human rights as well. While there might be many practical considerations for deciding to end public services and governance activities due to practical impossibility, human rights obligations under the ECHR are not dependent on the state’s possibilities. As long as

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<sup>i</sup> *Ibid.*, p. 8.

<sup>ii</sup> *Ibid.*

<sup>iii</sup> *Ibid.*, p. 9.

<sup>iv</sup> Cf. *ibid.*, p. 8.

<sup>v</sup> *Ibid.*, p. 7, referring to the relationship between Moldova and the so called “Moldovan Transdnistrian Republic” (*ibid.*).

there is jurisdiction, the state has the duty to respect and protect human rights under the European Convention on Human Rights. This protection has to be as effective as possible. Strictly speaking, there is also a kind of responsibility which not follow from Article 1 ECHR but from good faith principles, which are part of international law as general principles as envisaged by Article 38 of the Statute of the International Court of Justice.<sup>i</sup> Without any effective local government there is no jurisdiction within the meaning of Article 1 ECHR. Yet, those persons who were under the jurisdiction of one state which is losing or already has lost jurisdiction have a valid expectation to be protected. While this provides a bias towards assuming the responsibility of the occupying state,<sup>ii</sup> this does not free the Court from the need to positively establish the new jurisdiction of the occupying power.

## 5. Exhaustion of domestic remedies?

But if victims of human rights violations can invoke the European Convention on Human Rights in situations of armed conflict and shifting or illegal control of territory, how can they be expected to comply with the general requirement<sup>iii</sup> to exhaust domestic remedies? Article 35 paragraph 1 ECHR does not impose an “absolute” obligation.<sup>iv</sup> If there are no domestic remedies available, none have to be exhausted. Although “doubts”<sup>v</sup> on the part of the applicant about the effectiveness of any available domestic remedies are not sufficient to free the applicant from the general obligation under Article 35 paragraph 1 ECHR,<sup>vi</sup> the applicant is not obliged to attempt to exhaust obviously ineffective domestic remedies.<sup>vii</sup>

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<sup>i</sup> Available online at <http://www.icj-cij.org/documents/?p1=4&p2=2>.

<sup>ii</sup> Grabenwarter, *op. cit.*, p. 9.

<sup>iii</sup> Article 35 paragraph 1 ECHR.

<sup>iv</sup> European Court of Human Rights, *Foka v. Turkey*, Application No. 28940/95, Decision of 9 November 2006, para. 11.

<sup>v</sup> Bernadette Rainey, Elizabeth Wicks, Clare Ovey, *The European Convention on Human Rights*, 6th ed., Oxford University Press, Oxford, 2014, p. 35.

<sup>vi</sup> European Court of Human Rights, *Burden v. United Kingdom*, Application No. 13378/05, Judgment of 29 April 2008, paras. 40 *et seq.*

<sup>vii</sup> European Court of Human Rights, *Daddi v. Italy*, Application No. 15476/09, Decision of 16 June 2009; Rainey *et al.*, *op. cit.*, p. 35.

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In the case of the parts of the territory of Ukraine which are currently controlled by Russian and / or pro-Russian irregular armed forces, there are no effective legal remedies. Therefore, assuming the absence of applicable effective remedies elsewhere under Ukrainian law, victims of human rights violations, as well as the relatives of the passengers of flight MH17, can apply directly to the European Court of Human Rights.

What is new about the situation in Crimea is that one state which is a party to the ECHR not only occupies an other party's territory or controls it through proxies, as it continues to be the case in eastern parts of Ukraine, as well as parts of Cyprus, Moldova and Georgia.<sup>i</sup> This raises the question whether victims of human rights violations who are resident in Crimea would have to exhaust domestic remedies which are made available by the Russian Federation prior to bringing a case to Strasbourg. Requiring applicants to exhaust the available remedies offered by Russia would reflect the applicability of the ECHR all cases in which victims of human rights violations are under the jurisprudence of a state. Likewise, in cross-border cases, for example those in which a permit issued for the operation of a factory which causes air pollution on one side of the border also affects nearby residents across the border, recourse has to be sought in the state which has issued the permit in question. The case of Crimea and Sevastopol,<sup>ii</sup> however, is different. The ECHR is part of Public International Law as a whole. The prohibition of the use of force, in particular for the acquisition of territory, is a norm of *jus cogens* and the prohibition of the recognition of such conquests is at the very least customary international law, if not *jus cogens* as well. The Court must not accept a claim to title to territory which is incompatible with international law. Were the European Court of Human Rights to require applicants from Crimea to exhaust Russian 'domestic' remedies it would not mean that the Strasbourg organs or any of the other states which have ratified the

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<sup>i</sup> In this context, Ireland could be named as well. The situation with regard to Ireland, though, is significantly different due to the positive diplomatic relations between the Republic of Ireland and the United Kingdom. Yet it is somewhat similar to the other examples because the 1998 Good Friday Agreement explicitly allowed for the possibility for a reunified Ireland, which in turn means that the Republic of Ireland has not given up all claims to the territory held by Britain.

<sup>ii</sup> For the sake of readability, the term "Crimea" will be used here to refer to the geographical area of Crimean peninsula, including both the Autonomous Republic of Crimea as well as the Special Status City of Sevastopol.

ECHR have explicitly or implicitly recognized Russian sovereignty over Crimea but only jurisdiction within the meaning of Article 1 ECHR. But requiring the applicant to exhaust remedies offered by Russia to the residents of Crimea would also mean requiring the applicant to accept, if only for the purpose of securing admissibility of their future application to the European Court of Human Rights, the legitimacy of Russian rule over Crimea - which is not compatible with international law. Therefore residents of the Crimean peninsula should not be required by the Court to exhaust local remedies offered by the Russian Federation before they can bring a case to the European Court of Human Rights.

## **6. Concluding remarks**

The case of MH17 is only the tip of the iceberg. There are numerous other human rights violations happening in parts of Ukraine which are no longer under government control. While the government of Ukraine may no longer have full control over its country's entire territory, it retains a residual responsibility for what happens in Ukraine, even in parts of Ukraine which it no longer controls. The authorities of Ukraine therefore are not in a position to ignore human rights violations by third parties which are committed in the territory in question. This means that the Ukrainian government will have to raise human rights violations in the occupied areas whenever possible and, once control over the territories will have been restored, will have to ensure that human rights violations can be dealt with by the authorities, including courts, in an effective manner.

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**Abstract:** Article 1 of the European Convention on Human Rights (ECHR), which has been ratified by 47 states, including Ukraine and Russia, requires - among other issues - an applicant to be under the "jurisdiction" of the state in order for an

application to the ECHR. Jurisdiction within the meaning of the ECHR requires control. Since 2014, parts of the territory of Ukraine are no longer under the control of the legitimate organs of the Ukrainian state. This raises the question, in how far Ukraine can be held accountable before the European Court of Human Rights for failing to prevent human rights violations. This question has become relevant in the context of the murder of foreign civilians on board a Malaysian airliner over Ukraine in July 2014. This article shows that the loss of de facto control not only does not mean a loss of sovereignty, it also does not mean that the state which is no longer in full control of its territory would be free from all obligations. Therefore Ukraine retains a residual responsibility for the protection of human rights also in parts of its territory currently outside its control.

**Keywords:** European Convention on Human Rights, Ukraine, Russia, War, Crimea, Donbass.