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Дія ЄКПЛ на окупованій та непідконтрольній Україні території
(Effect of the European Convention on Human Rights on the Occupied and Uncontrolled Territory of Ukraine)

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INTRODUCTION

Relevance of the study. 2014 appeared to be a dreadful year for Ukraine, its sovereignty and stability, Ukrainian society and by implications – for the international community. In February 2014 Russia commenced its ploy aimed at infringing the sovereignty and territorial integrity of Ukraine at the Crimean Peninsula of Ukraine, eventually illegally annexing and occupying Crimea following the military seizure of the major state institutions in Crimea and conduction of the illegitimate "referendum". Further, in April 2014 pro-Russian separatists, backed up by the so-called "little green men", further recognized as Russian militants[1], started seizing the state buildings in the East of Ukraine, which further escalated into the sweeping Russian armed aggression against Ukraine continuing for over 7 years so far. These events have obviously caused the indefinite amount of the violations of human rights from the right to peaceful enjoyment of property and tragically to the right to life.

The history of similar conflicts in Europe, including the conflicts in Nagorny Karabakh, Transdniestria, South Ossetia and Abkhazia, Chechnya and Northern Cyprus, indicated that there will be a wave of application regarding events in Crimea and East of Ukraine. Moreover, European Court of Human Rights has announced that there are already around 4000 individual applications on the topic pending in the Court's workload[2]. However, since the circumstances in both regions are very complicated, there is no apparent solution to the issue of jurisdiction over these territories. Every time, when the Court faced the issue of occupation and extraterritorial jurisdiction, it was forced to meet a new challenge of analyzing factual events and context of the violation before establishing the jurisdiction and deciding the case on merits. Thus, the topic of the application of the European Convention on Human Rights is extremely relevant both in theoretical and practical way. Theoretically, this research will encompass the analysis of all the key cases regarding territorial conflicts in Europe,

[1] Грабська А. (2014) РНБО: На Донбас проникли "зелені чоловічки" з Росії. Deutsche Welle. Режим доступу: https://www.dw.com/uk/рнбо-на-донбас-проникли-зелені-чоловічки-з-росії/a-17792650

[2] European Court of Human Rights. (2018) Grand Chamber to examine four complaints by Ukraine against Russia over Crimea and Eastern Ukraine. Registrar of the Court. Press Release. Retrieved from: https://bit.ly/37a7nh4

thus creating a broad picture of possible territorial effect of the Convention. Simultaneously, on the practical side, the research provides specific advice on the basis of personal conclusions regarding the jurisdiction over the mentioned territories, both for Ukrainian government and prospective applicants in the potential cases. The proposed actions may serve as the peremptory guidance for both parties.

The academic novelty of the research lays in the new perspective on the answer to the issue of the responsibility of either Russia or Ukraine for the violations committed in Crimea and the Eastern territories. Generally, the coverage of the specific topic regarding Ukraine is rather scarce. There are several blog-like texts by M. Milanovic and basically one major work by S. Wallace and C. Mallory "Applying the European Convention on Human Rights to the Conflict in Ukraine", which investigates into the application of Convention to the territories of Crimea and East of Ukraine. The work, however, in my opinion, contains a lot of contradictory conclusions, and I have disagreed with the majority of them. Upon the analysis of the dozens of reports and statements by international organizations I have concluded that the status of Crimea is determined and thus the application of the Convention is rather predictable. The detailed analysis of the "Constitution" and the "Republic of Crimea" allowed me to provide additional evidence for the satisfaction of the effective control test to prove Russian jurisdiction in Crimea. The analysis of the ICJ practice on the issue of responsibility for non-state actors actions facilitated the proposal of the new strategy for proving Russia's responsibility for the actions of separatist "DNR" and "LNR". Thus, I have come to the conclusions regarding the potential responsibility of Russia for the violations in Crimea and the East of Ukraine, which have not been expressed in the literature before, contributing to the scientific novelty of work.

Research objectives. The purpose of the research is to provide the proposal on actions for Ukrainian government and potential applicants, so that the state of Ukraine potentially acts in accordance to the standards provided by the European Court of Human Rights, while the applicants also receive adequate redress for the violations of their rights and freedoms. The objectives include the undertaking to analyze the general territorial effect of the Convention to provide the theoretical basis for further research,

as well as the current status of the territories, subject to the research, analyze the possible ways of Court's practice application to foresee the potential cases outcomes and establishment of Russia's or Ukraine's jurisdiction or the jurisdiction of both states and finally provide the guidance for actions on the basis of well-grounded conclusions.

Object and subject of the research. The object of the research constitutes in the territorial effect of the Convention of human rights. The subject of the research is the application of the ECHR to the occupied and uncontrolled territories, particularly to the territories of Eastern Ukraine and Crimean Peninsula and the establishment of the jurisdiction over these territories.

Methodological approach. In my work I have completely focused on the comparative rather than doctrinal method of analysis, analyzing the Court's practice in context of the underlying events, instead of exclusively distinguishing Court's legal rationale. The comparative method foresees, that the practice of the court is being analyzed as a whole, as well as the cases are collated and differentiated among each other. Further, the results of practice comparison are layered on the analysis of relevant circumstances ad events on the occupied and uncontrolled territories of Ukraine. Besides, I have used the qualitative empirical approach to distinguish the patterns of jurisdiction establishment through Court practice, as well as adopt it to the circumstances on the basis of existing data.

Resources. The major source of data for analysis in this research is extracted from the practice of mainly ECtHR, as well as International Court of Justice. I have also used the reports and statements of international organizations, as well as works of national and international scholars. Besides, in an attempt to establish factual circumstances many news reports have been analyzed.

The structure of work. The work consists of introduction, three sections, eight subsections, conclusions and the references list. The main part of the work constitutes of 89 pages.

SECTION I.

GENERAL METHODOLOGICAL PRINCIPLES OF THE RESEARCH OF THE EFFECT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ON THE OCCUPIED AND UNCONTROLLED TERRITORY OF UKRAINE

1.1. Territorial effect of the European Convention on Human Rights

Article 1 of the European Convention on Human Rights states: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention"[3]. The word "jurisdiction" in the Article creates an essence of it, and as will be further depicted, is also the fundament for the applicability of the human rights system for the Contracting States of the Convention. Jurisdiction constitutes a threshold criterion for the application of the European Convention on Human Rights along with other international treaties[4]. S. Besson makes a noteworthy statement that the "(…) the ECHR [European Convention on Human Rights] has made the *relationship of jurisdiction* a pivotal notion to understanding who the right-holders, but also the duty-bearers of ECHR rights are"[5]. The scholar also states that in terms of European Court of Human Rights (ECtHR) and the Convention a particular perspective on the jurisdiction should be focused on – state jurisdiction, which defines the relationship between the person, as rights-holder and state, as the obligation-bearer[6]. State jurisdiction is required for the person to be able to exercise their human rights against that exact state and the latter to be held liable for the violations thereof[7]. Therefore, I agree with Besson's conclusion that Article 1 of the Convention accounts for the "jurisdiction" to be de jure and a de facto condition for the rights guaranteed by the Convention.

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[3] European Convention on Human Rights as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16. November 4, 1950. Article 1. Retrieved from: https://www.echr.coe.int/Documents/Convention_ENG.pdf

[4] Ilaşcu and Others v. Moldova and Russia [GC], no. 48787/99, § 311, ECHR 2004-VII. Retrieved from: https://hudoc.echr.coe.int/eng#{"itemid":["001-61886"]} and Al-Skeini and Others v. the United Kingdom [GC], no. 55721/07, § 130, ECHR 2011. Retrieved from: https://hudoc.echr.coe.int/fre#%7B%22itemid%22:[%22001-105606%22]%7D

[5] Besson, S. (2012). The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to. Leiden Journal of International Law, 25(4), 860. Retrieved from: https://www-cambridge-org.eur.idm.oclc.org/core/services/aop-cambridge-core/content/view/9A46A4AB7E13C7D740B3ED5A18D5DEF5/S0922156512000489a.pdf/extraterritoriality_of_the_european_convention_on_human_rights_why_human_rights_depend_on_jurisdiction_and_what_jurisdiction_amounts_to.pdf

[6] Besson, S. (2012). The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to. 865

[7] Ilaşcu and Others v. Moldova and Russia, supra note 2, § 311

The notion of the jurisdiction in public international law has neither been defined unliterally or peremptory and thus remains widely discussed by the scholars. For the purposes of the Convention and practice of the ECtHR, jurisdiction, is, however, defined in a four-dimensional way: territorial (ratione loci), temporal (ratione temporis), personal (ratione personae), and subject-matter (ratione materiae)[8]. These four aspects of jurisdiction are also necessary for the application to the ECtHR to be regarded admissible[9], which, in our opinion, supports S. Besson's statement provided earlier. Generally, in international public law, jurisdiction is often related to the sovereignty of the state, which, in turn, is usually limited by its territory. Moreover, the presumption of the unlawfulness of the state's actions outside of the territory exists[10].

In the European human rights system, the jurisdiction of the Contracting Party is "*primarily territorial",* as it has been numerously stated by the ECtHR[11]. Two presumptions, which are coherent with the public international law, may be singled out of this statement, as validly noted by A. Demetriades: (1) a negative presumption of the non-exercising of the state's jurisdiction outside of its borders; and (2) a positive presumption that the state's jurisdiction is exercisable throughout the states whole lawful de jure territory[12]. Both have been formed by the ECtHR in its practice[13]. These presumptions are however linked to the use of the word "primarily", rather than "exclusively" and therefore they may be overcome in "exceptional circumstances". The exceptions to the first presumption are convened under the notion of extraterritorial jurisdiction, whereas the exceptions to the other presumption define the circumstances where the Contracting Party shall not be held liable for the violations that occurred within its lawful territory. All these exceptions are of paramount

[8] Schabas, W. A. (2015). The European Convention on Human Rights: A Commentary. Oxford Commentaries on International Law, 93. Retrieved from: https://opil-ouplaw-com.eur.idm.oclc.org/view/10.1093/law/9780199594061.001.0001/law-9780199594061-chapter-6#law-9780199594061-chapter-6-div2-87

[9] European Court of Human Rights & Council of Europe (2020). Practical Guide on Admissibility Criteria, 52. Retrieved from: https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf

[10] Ryngaert, C.M.J. (2015) Orakhelashvili, Alexander (ed.). Research Handbook on Jurisdiction and Immunities in International Law, Research Handbooks in International Law series, 52, Retrieved from: http://dspace.library.uu.nl/handle/1874/357811

[11] Banković and Others v. Belgium and Others [GC], no. 52207/99, § 61, ECHR 2001-XII. Retrieved from: http://hudoc.echr.coe.int/eng?i=001-22099; and European Court of Human Rights & Council of Europe (2019). Guide on Article 1 of the European Convention on Human Rights, 2. Retrieved from: https://www.echr.coe.int/documents/guide_art_1_eng.pdf

[12] Demetriades, A. (2020) Reconceptualising extraterritoriality under the ECHR as concurrent responsibility: the case for a principled and tailored approach, European journal of legal studies, Vol. 12, No. 1, 167. Retrieved from: https://cadmus.eui.eu/handle/1814/66988

[13] See for example Ilaşcu and Others v. Moldova and Russia, supra note 2, §212: "*From the standpoint of public international law, the words "within their jurisdiction" in Article 1 of the Convention must be understood to mean that a State's jurisdictional competence is primarily territorial (see Banković and Others, cited above, § 59), but also that jurisdiction is presumed to be exercised normally throughout the State's territory*".

importance for this research and I thus regard it essentially necessary to describe them scarcely here, for the further sections to have a profound theoretical background.

The exceptions to the territoriality principles have been established through the analysis of the ECtHR practice, however, the Court itself emphasizes that "(…) the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extraterritorially must be determined concerning the particular facts[14] [in each case]". This also gives the ground for the statement that these exceptions are not exclusive, and even after almost 70 years of Court practice the completely new circumstances may result in the new exceptions to the territoriality principle or the utterly new interpretation of the existing ones[15]. The exceptions are based on two of the previously mentioned aspects of jurisdiction: *ratione loci* and *ratione personae*.

Ratione loci from Latin means "by reason of the place"[16] and it basically defines the territory where the right-holder shall be situated to have the rights against the state. Ratione loci exception is based on the "*effective control*" principle[17], namely effective control over the territory. The effective control principle arises from the understanding of the state's jurisdiction rather as the power than authority[18], which means that instead of focusing on the legal entitlement of the state's ability to act and enforce its decisions, the actual ability of the country to do so is taken into account. The underlying idea of the concept may be summarized in the desire of the EU to avoid any vacuum or grey zones in the human rights system within the "legal space" of the Convention[19]. The effectiveness of the control is a conditional notion, and the scholars

[14] Al-Skeini and Others v. the United Kingdom [GC], no. 55721/07, § 132, ECHR 2011. Retrieved from: http://hudoc.echr.coe.int/fre?i=001-105606
[15] Gondek, M. (2005). Extraterritorial Application of The European Convention on Human Rights: Territorial Focus in the Age of Globalization? Netherlands International Law Review, 52(3), 37. Retrieved from: https://www-cambridge-org.eur.idm.oclc.org/core/journals/netherlands-international-law-review/article/extraterritorial-application-of-the-european-convention-on-human-rights-territorial-focus-in-the-age-of-globalization/A6B6B9A768F1A2777B4B34DCE621E397
[16] Fellmeth, A. X. & Horwitz M. (2011) Guide to Latin in International Law. Oxford University Press. Retrieved from: https://www-oxfordreference-com.eur.idm.oclc.org/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-1790
[17] European Court of Human Rights & Council of Europe (2019). Guide on Article 1 of the European Convention on Human Rights, 12
[18] Budzianowska, D. C. (2012). Some reflections on the extraterritorial application of the european convention on human rights, *Wroclaw Review of Law, Administration & Economics*, *2*(1), 56. Retrieved from: https://content.sciendo.com/view/journals/wrlae/2/1/article-p51.xml?language=en
[19] Pourgourides, C. Areas where the European Convention on Human Rights cannot be implemented. Committee on Legal Affairs and Human Rights Report no.9730. Retrieved from: http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=10095&lang=EN

analyzing the extraterritorial effect of the Convention tend to criticize ECtHR for the lack of a predictable uniform approach as to the criteria of the effective control test[20].

Effective control over the territory is obtained by the state through lawful or unlawful military actions and has usually been recognized in two types of situations: (1) military occupation; and (2) the creation and/or support of the separatist entity by the Contracting Party on the legal territory of the other state[21]. The first general criterion for effective control in either situation is the number of troops deployed to the territory by the occupying state[22]. The particular number of troops is hard to establish, whereas the Court has regarded both 30 000 soldiers of the Turkish army in Northern Cyprus[23], and 10 000 Russian troops in Transdniestria, Moldova[24] to be sufficient for the satisfaction of the criterion. This is because the first criterion shall, however, be taken into consideration in summary with the second one: military, economic, and political support[25], which results in the ability of the state to influence and control the policy of the exact region. Examples of such support may include the provision of military ammunition and weapons[26], assisting with rebuilding the infrastructure after the war[27], recognition of the local unauthorized government contrary to the lack of recognition thereof by the international community[28].

When the effective control is obtained due to the *military occupation*, the Court, while considering the case[29], takes into account Article 42 of the Regulations concerning the Laws and Customs of War on Land, also known as the Hague Convention, in defining "occupation", which states that (1) the territory is considered

[20] See for example Gondek, M. (2005). Extraterritorial Application of The European Convention on Human Rights: Territorial Focus in the Age of Globalization?, 369: "A sharp contrast between the expansive interpretation of the notion of jurisdiction in case of territorial applicability of the ECHR, which exists even when there is no control, and restrictive interpretation of the same legal concept in case of extraterritorial application of the Convention, raises legitimate moral concerns, voiced for example by Judge Loukaides in his partly dissenting opinion in Ilascu"; and also Duttwiler, M. (2012). Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights. Netherlands Quarterly of Human Rights, 30(2), 152. Retrieved from: https://journals-sagepub-com.eur.idm.oclc.org/doi/pdf/10.1177/016934411203000202 "Both the Commission and the Court used the criteria of actual authority and control to determine whether jurisdiction was given. However, neither organ has ever clarified how these terms relate to each other, and to the concept of jurisdiction".

[21] European Court of Human Rights & Council of Europe (2019). Guide on Article 1 of the European Convention on Human Rights, 17-18.

[22] European Court of Human Rights & Council of Europe (2019). Guide on Article 1 of the European Convention on Human Rights, 17.

[23] In the case of Loizidou v. Turkey, no.15318/89, §16, ECHR 1996-VI. Retrieved from: http://hudoc.echr.coe.int/eng?i=001-58007

[24] In the case of Ilaşcu and Others v. Moldova and Russia, supra note 2; and International Crisis Group (2004). Moldova: Regional Tensions over Transdniestria, Europe Report no.157, 5. Retrieved from: https://d2071andvip0wj.cloudfront.net/157-moldova-regional-tensions-over-transdniestria.pdf

[25] European Court of Human Rights & Council of Europe (2019). Guide on Article 1 of the European Convention on Human Rights, 17.

[26] Ilaşcu and Others v. Moldova and Russia, supra note 2, §380

[27] Al-Skeini and Others v. the United Kingdom, supra note 12, § 21

[28] Ilaşcu and Others v. Moldova and Russia, supra note 2, §2

[29] Jaloud v. The Netherlands, no. 47708/08, § 91, ECHR 2014. Retrieved from: http://hudoc.echr.coe.int/eng?i=001-148367

occupied when it is placed under the authority of the hostile army; and (2) the occupied territory is limited to the area, where such authority is not only established but can also be exercised[30]. However, ECtHR has also stated that "the status of "occupying power" within the meaning of Article 42 (…), or lack of it, is not per se determinative[31]", since the Court also considers "relative factual context[32]" not only the rules of international law.

The facts signalizing the reach of the effectiveness of the control threshold may include, among others, assuming by the occupier of the public powers (part of public powers) that are normally exercised by the official government. For instance, in the case of *Al-Skeini and Others v. the United Kingdom*, which concerned the temporary occupation of the region in Iraq by the US and UK forces and their allies within the operation of UN in Iraq, the Court has taken into account the letter written by the Permanent Representatives of the United Kingdom and the United States to the President of the United Nations Security Council, where the respondent government through their representatives have solely assumed the powers of safety ensuring:

> (…), the United States, the United Kingdom and Coalition partners (…) have created the Coalition Provisional Authority (…) to exercise powers of government temporarily, and, as necessary, especially to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction[33].

This has been further reiterated by the UN Security Council in its Resolution[34], and the Court has grounded its decision of the existence of the jurisdictional link between the UK and the violations, subject to the case, on the official acceptance of the powers, usually exercised by local authorities, by the UK.

However, the Court has considered a case of *Issa and Others v. Turkey*, where the Kurdistan nationals were, as claimed by their relatives, killed by the Turkish army near a Kurdish village on the territory of Iraq[35]. The Court has not established the jurisdictional link between Turkey and the violations due to (1) majorly, lack of the

[30] The Hague Convention IV respecting the Laws and Customs of War and its annex: Regulations concerning the Laws and Customs of War on Land. October 18, 1907. Article 42. Retrieved from: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/195
[31] Jaloud v. The Netherlands, supra note 27, § 142
[32] Jaloud v. The Netherlands, supra note 27, § 141
[33] Al-Skeini and Others v. the United Kingdom, supra note 12, § 11
[34] Al-Skeini and Others v. the United Kingdom, supra note 12, § 146
[35] Issa and Others v. Turkey, no. 31821/96, ECHR 2004. Retrieved from: http://hudoc.echr.coe.int/eng?i=001-67460

evidence other than somewhat hazy testimonies of the deceased' relatives[36]; and (2) non-establishment of the effective control of Turkey over the territory of Kurdish villages, despite the undisputed fact of the Turkish military operations[37]. The latter conclusion was made by the Court in comparison to the case of *Loizidou v. Turkey*, where the armed forces of Turkey were situated on a rather constant basis all over the territory of Northern Cyprus[38]. It is however worth mentioning that, in my opinion, the reasoning provided by the Court in the exact case is rather scarce and generic, which, as I assume, may be caused by the political significance in the cases like *Issa and Others v. Turkey*, since the international community does not have a unilateral opinion regarding the independence movement of Kurds and does not officially support it[39]. To sum up, the effective control of the territory is deemed to be held by the occupying party, if the occupation is continuing or rather permanent and the occupying state assumes all or important part of the obligations, which are, under the regular circumstances, performed by the government of the state or local government.

As it has been stated above, the other circumstances, in which effective control is usually established are through the *creation and/or support of the separatist entity or organization* by the Contracting Party on the legal territory of the other state. The peculiar criterion is that the separatist entity is not recognized by the international community. To illustrate this, it is worth taking notice of the two landmark cases in the ECtHR practice: previously noted *Ilascu and Others v. Moldova and Russia* and *Azemi v. Serbia*. In the *Ilascu* case, the Court has established that Russia exercised effective control over the territory of Transdniestria, because of the facts, among others that signalized the support by Russia of the Trandniestria separatist self-proclaimed government of so-called "The Moldavian Republic of Transdniestria", which was not recognized by the international community[40]. Simultaneously, the case of *Azemi v. Serbia* considered the authority of Serbia over the territory of Kosovo, which at that

[36] Issa and Others v. Turkey, supra note 33, §§ 80-81
[37] Issa and Others v. Turkey, supra note 33, § 75
[38] Loizidou v. Turkey, supra note 21.
[39] Besheer, M. (2019) UN Security Council Meets on Turkey's Offensive Against Kurds. VoaNews. Retrieved from: https://www.voanews.com/europe/un-security-council-meets-turkeys-offensive-against-kurds
[40] Ilaşcu and Others v. Moldova and Russia, supra note 2, §§ 386-394

time has already proclaimed its independence. In the historical context, the territory of Kosovo was once a part of Yugoslavia, included in the territories of Serbia. After the separation of former Yugoslavian states into Serbia and Montenegro, Serbia, despite the outcomes of the Kosovo conflict in 1999 continued to perceive Kosovo as the part of its territory, whereas Kosovo, with the help of the UN, has developed into an independent country. Kosovo has proclaimed independence in 2008[41]. Upon the declaration of independence most countries of the European Union, the United States, and other members of the United Nations have recognized Kosovo as a separate, independent state. As of today, 114 states have recognized Kosovo as an independent state[42]. In its decision in the case, ECtHR refuses the pertinence of the effective control of Serbia over the region because the country is well recognized by the international community, and despite its undecided status, it has all the necessary features of a separate state that solely controls its territories[43]. Thus, the extraterritorial jurisdiction may be established in case the Contracting Party supports or establishes the separatist entity in the territory of the other state, which, importantly, is not recognized by the international community in its majority.

The previous paragraphs describing ratione loci-based exceptions from the territoriality principle focused on the "active Contracting Party", which is acting outside of its territory. However, there is also another player on the field, namely the so-called "passive" party – the state, territory of which has been occupied or where the separatist actions are occurring[44]. Since the territory is legally and de jure deemed of the passive state, the Court does not need to establish the presence of jurisdiction. The Court presumes that the state does exercise the competence and control over all its territory – this primary standpoint for the Court is also called "a presumption of competence", as it was called by ECtHR[45], or "presumption of jurisdiction", as it is

[41] Broek, M. A struggle for independence in Kosovo. The role of the international community in determining the region's future. Nijmegen School of Management. Radboud University Nijmegen, 3. Retrieved from: https://theses.ubn.ru.nl/bitstream/handle/123456789/2732/Broek%2C_Marjolein_van_den_1.pdf?sequence=1

[42] The Ministry of Foreign Affairs and Diaspora. Republic of Kosovo. (2020) International recognitions of the Republic of Kosovo. Retrieved from: https://www.mfa-ks.net/en/politika/483/njohjet-ndrkombtare-t-republiks-s-kosovs/483

[43] Azemi v. Serbia, no. 11209/09, §§ 45-49, ECHR 2013. Retrieved from: http://hudoc.echr.coe.int/eng?i=001-139052

[44] European Court of Human Rights & Council of Europe (2020). Articles 1 and 5. Extra-territorial jurisdiction, jurisdiction of territorial State prevented from exercising its authority in part of its territory, and validity of detention and criminal proceedings in de facto entities. Research division, 11. Retrieved from: https://www.echr.coe.int/Documents/Research_report_articles_1_5_ENG.pdf

[45] Assanidze v. Georgia, no. 71503/01, § 139, ECHR 2004-II. Retrieved from: http://hudoc.echr.coe.int/fre?i=001-61875

denoted in the relevant literature[46]. I believe it's worth clarifying that the presumption is referring to the "primarily territorial" wording, describing jurisdiction of the state, set forth by the ECtHR in many cases, and earlier noted herein. The Court, however, states that there may be valid reasons to rebut the presumption: "(…) presumption may be limited in exceptional circumstances, particularly where a State is prevented from exercising its authority in part of its territory[47]". The exceptional circumstances, as logically follows from the previous exceptions, are the cases of military occupation or formation of separatist entities on its territories. If these are established the obligations of the state on the exact territory are limited, but, by no means discharged. The State remains under the positive obligation "(…) under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention[48]". The scope of the positive obligation of the passive state has been obliquely described mostly in the so-called Moldavian cases[49] and the Research Department of the ECtHR has accumulated the aspects of the obligation, categorizing and systemizing them as follows[50].

The first group of obligations includes the "general measures to re-establish control over the territory". Firstly, the passive party shall "refrain from supporting the separatist regime[51]" and accordingly, reject any allegation of the self-proclaimed government or occupying state as to the seizure of the territory. The passive state should be consistent in their rhetoric and actions, showing that the occupied territory belongs to them. T. Eatwell in her brief has expressed her concern, whether negotiating and cooperating with the separatists regarding the human rights issues could be qualified as support, and if the latter is true, the author suggests that this interpretation

[46] Gałka, K. (2015). The Jurisdiction Criterion in Article 1 of the ECHR and a Territorial State, International Community Law Review, 17(4-5), 485. Retrieved from: https://brill-com.eur.idm.oclc.org/view/journals/iclr/17/4-5/article-p474_5.xml
[47] Ilaşcu and Others v. Moldova and Russia, supra note 2, §312
[48] Ilaşcu and Others v. Moldova and Russia, supra note 2, §331
[49] See for example Ilaşcu and Others v. Moldova and Russia, supra note 2; Catan and Others v. the Republic of Moldova and Russia [GC], no. 43370/04; no. 18454/06; no. 8252/05. Retrieved from: https://hudoc.echr.coe.int/eng#{"itemid":["001-114082"]}
[50] European Court of Human Rights & Council of Europe (2020). Articles 1 and 5. Extra-territorial jurisdiction, jurisdiction of territorial State prevented from exercising its authority in part of its territory, and validity of detention and criminal proceedings in de facto entities.
[51] Ilaşcu and Others v. Moldova and Russia, supra note 2, §340

would "act as a disincentive"[52]. From the Court practice one may, however, find an express answer to the concern. In *Ilascu*, the Court has stated that the facts of Moldova collaborating with the separatist government in the matters of "(…) security matters and (…) cooperation in other fields such as air traffic control, telephone links, and sport[53]", due to their limited nature and aim, shall not be regarded as support to the separatist government. Secondly, the other obligation of the state is to "act to re-establish control over the disputed territory[54]". The Court has expressly stated that it is not their job to order the states on how to re-establish control over the territory. The Court shall exclusively weigh, whether the efforts have been sufficient in the existing circumstances[55]. From the Moldavian example, where the military power of Moldova has not been sufficient to conquer the territories back, ECtHR has agreed that the following measures sufficed to cover for the re-establishing obligation:

> (a) bring criminal proceedings against separatist government officials; (b) international declaration of the intention to re-establish control (e.g. by stating that in the convention); (c) diplomatic steps to involve third states into the negotiations; (d) visible rhetoric that asserts the sovereignty of the occupied state over the occupied territories[56].

To resume, the first group of obligations requires the passive state to refrain from showing their support to the occupation or separatist regime, unless this support aims at securing human rights for the local community and to put any reasonable effort, given the existing circumstances, to reestablish the control over the seized territories.

The second group of obligations is more specific and concerns the exact case and, even more precisely, the specific applicant in the case. The Court has established that the state must, primarily, use all the political and diplomatic measures to eliminate the violation of human rights of the exact applicant. These may include sending doctors to the applicant to control their health, financially aiding the applicant's family, so they can provide support for the applicant as they should[57], as well as constantly applying

[52] Eatwell T. (2018) State Responsibility for Human Rights Violations Committed in the State's Territory by Armed Non-State Actors. The Geneva Academy of International Humanitarian Law and Human Rights, 20. Retrieved from: https://www.geneva-academy.ch/joomlatools-files/docman-files/Academy%20Briefing%2013.pdf
[53] Ilaşcu and Others v. Moldova and Russia, supra note 2, §345
[54] European Court of Human Rights & Council of Europe (2020). Articles 1 and 5. Extra-territorial jurisdiction, jurisdiction of territorial State prevented from exercising its authority in part of its territory, and validity of detention and criminal proceedings in de facto entities, 18
[55] Ilaşcu and Others v. Moldova and Russia, supra note 2, §340
[56] Ilaşcu and Others v. Moldova and Russia, supra note 2, §§ 342-344
[57] Ilaşcu and Others v. Moldova and Russia, supra note 2, §346

to the international community and the separatist entity to stop the violations[58]. The other measures that may be taken by the passive state may be appropriate judicial measures, such as quashing the verdict and sentence imposed by the illegitimate courts of the separatist entity, declaring amnesty to the illegally sentenced, starting criminal proceedings against the judges of the illegal courts, etc.[59]. Summarizing, the second group of obligations requires the state to put all the efforts to remedy the situation of the applicant, whether these measures are likely to give positive results or there is little hope. Last, but not least, for all these measures to be satisfactory to fulfill the positive obligation under Article 1, they should be constant and consistent[60].

The effective control principle and its application, described in the paragraphs above, have been reviewed through the prism of ratione loci, therefore the above-mentioned exceptions to the territoriality principle concerned control over the territory. This jurisdiction is also often called territorial or spatial jurisdiction[61]. Simultaneously, the circumstances of international affairs, hierarchical relations, together with power, authority, and law, may result in the state, where the control is established over the person, rather than land. These situations create the ground for the other group of exceptions to the territoriality principle – *ratione personae* exceptions, which create the ground for the notion of "personal jurisdiction[62]". Interestingly, S. Besson argues that so-called personal and territorial jurisdictions are not alternatives, rather, they are complementary. This may be well envisioned through the milestone Grand Chamber cases *Bankovic and Others v. Belgium and Others* and *Al-Skeini case*, which will be further discussed herein. The author also clarifies an important aspect of jurisdiction: it is always personal, meaning that it represents the relations between the person in the instant case and the state. The functional notions of "territorial" and "personal" jurisdiction are used to describe the main distinction between them: in the first instance, all persons within the territory are under the jurisdiction, while in the latter one, the

[58] Ilaşcu and Others v. Moldova and Russia, supra note 2, §344
[59] Ilaşcu and Others v. Moldova and Russia, supra note 2, §346.
[60] European Court of Human Rights & Council of Europe (2020). Articles 1 and 5. Extra-territorial jurisdiction, jurisdiction of territorial State prevented from exercising its authority in part of its territory, and validity of detention and criminal proceedings in de facto entities, 22
[61] Mills, A. (2014) Rethinking Jurisdiction in International Law. British Yearbook of International Law, Volume 84, Issue 1. Retrieved from: https://academic-oup-com.eur.idm.oclc.org/bybil/article/84/1/187/2262836
[62] Mills, A. (2014) Rethinking Jurisdiction in International Law.

control and thus jurisdiction is imposed on the person by actions of exact agents, rather than location[63].

Ratione personae, from Latin, means "by reason of person"[64]. These exceptions are caused by the fact that even though the Contracting State does not exercise control over the territory, but the power of this state in exact circumstances suffices to personal control over the other people[65]. As it is summarized by M. Duttwiller, as long as the person and their property are impacted by the acts, which are attributable to the Contracting State, the jurisdiction of that state over the person is established[66]. The four main circumstances facilitating ratione personae exceptions include: acts of diplomatic and consular agents, acts committed on board a ship or aircraft, the exercise of another State's sovereign authority with its agreement, and use of force by a State's agents operating outside its territory[67].

The principle of extraterritoriality based on acts of diplomatic and consular agents is mostly established based on the *Bankovic* and *Al-Skeini* cases. The essence of the principle sets forth that where the activities of a State's diplomatic or consular agents abroad are occurring, disregarding the absence or presence of any effective control over territory or individuals, the state exercises its extraterritorial jurisdiction if the agents are exercising State authority[68]. The Court has also established that the jurisdiction is exercised by the State Party even concerning (a) citizens of the State Party living abroad if their rights are affected by the actions of the diplomats or consuls of the State Party in the state of their current residence[69]; and, to the contrary, (b) persons that are currently dwelling on the territory of the State Party, whilst the actions of consular or diplomatic agents, affecting the person's rights, are performed outside of the State Party territory[70]. H. King notices a very particular aspect, regarding the

[63] Besson, S. (2012). The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to. 875-876
[64] Fellmeth, A. X. & Horwitz M. (2011) Guide to Latin in International Law. Oxford University Press. Retrieved from: https://www-oxfordreference-com.eur.idm.oclc.org/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-1792
[65] Besson, S. (2012). The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to. 875.
[66] Duttwiler, M. (2012). Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights, 162
[67] European Court of Human Rights & Council of Europe (2019). Guide on Article 1 of the European Convention on Human Rights, 12-14
[68] Nahhas and Hadri v. Belgium, no. 3599/18, ECHR 2018. Written Submissions on Behalf of the Aire Centre (Advice on Individual Rights in Europe), The Dutch Refugee Council (DCR), the European Council on Refugees and Exiles (ECRE) and the International Commission of Jurists (ICJ), 1. Retrieved from: https://www.icj.org/wp-content/uploads/2018/09/Belgium-Nahhas-Intervention-Advocacy-Legal-Submission-2018-ENG.pdf
[69] X. v. Germany (dec.), no. 54646/17, ECHR 2017. Retrieved from: http://hudoc.echr.coe.int/eng?i=001-179279
[70] X. v. the United Kingdom (dec.), no. 6998/75, ECHR 1980. Retrieved from: https://bit.ly/3q4qIsr

extent of the State Party's obligations when the jurisdiction is exercised through the consular or diplomatic officials: on the one hand, the range of possibly implicated rights is rather extensive, since the consular officials may be involved in the whole variety of person's life. Simultaneously, the competence of the consuls or diplomats, as prescribed by law, is very circumscribed and thus the amount of the State's obligations is rather limited[71]. Therefore, the obligation of the official, shall there be mistreatment of the person under their control, is in the following range: to perform everything that is reasonably possible but within the powers and authority provided to them by the State. Shall the consular or diplomatic agent safeguard due performance of the obligation, the State's obligations shall also be considered maintained.

Another very peculiar exclusion from the territoriality principle regards the acts committed on board a ship or aircraft[72]. It is, however, rather based on the customary international law and stays in line with the international public law, including the provisions of the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft[73], which contains the obligation for the parties to extend their jurisdiction in criminal proceedings to the aircrafts, which are outside the national territory, and also the provisions of the UN Convention on the Law of Sea stating the respective provision regarding ships[74]. It is also worth reminding that "criminal" proceedings are interpreted much wider by ECtHR, than usually in national legislation, Thus, I believe it is viable to suggest that the Court has logically and fully adapted the customary approach, tailoring it to fit the practice and purposes of the Convention.

Further, the exercise of another State's sovereign authority with its agreement constitutes the other exception, invoking extraterritorial jurisdiction[75]. As it was quoted in the *Bankovic case* and then reiterated in *Al-Skeini*:

> "(…) the Court has recognized the exercise of extraterritorial jurisdiction by a Contracting State when, through the consent, invitation, or acquiescence of the Government of that

[71] King, H. (2009). The Extraterritorial Human Rights Obligations of States. Human Rights Law Review, 9, 550. Retrieved from: https://www.researchgate.net/publication/249278022_The_Extraterritorial_Human_Rights_Obligations_of_States
[72] Banković and Others v. Belgium and Others, supra note 9, § 73
[73] Convention on offences and certain other acts committed on board aircraft. September 14, 1963. Retrieved from: https://treaties-un-org.eur.idm.oclc.org/doc/db/terrorism/conv1-english.pdf
[74] United Nations Convention on the Law of Sea. December 17, 1970. Retrieved from: https://www-un-org.eur.idm.oclc.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf
[75] European Court of Human Rights & Council of Europe (2019). Guide on Article 1 of the European Convention on Human Rights,13

> territory, it exercises all or some of the public powers normally to be exercised by that Government. Thus, where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State[76]".

The way this criterion was worded in the *Bankovic case* has been largely criticized in the literature, and thus it will be further discussed in this subsection. Polemics aside, this Court practice allows to single out four main aspects of the exception: (a) one Contracting State is exercising extraterritorial jurisdiction; (b) the other Contracting State has somehow, through custom, agreement, an invitation or in any other way has sanctioned the first one to do so; (c) the state acting extra-territorially has assumed some public functions usually performed by the territorial state; (d) the acts and their results, due to their nature and source of authority, are attributable to the state that acts out of its territory. In *Al-Skeini,* as discussed above in this subsection, since the UN-authorized interim government under UK control and responsibility assumed the security obligations, the actions performed by the government were treated as actions of UK agents, attributable to the UK. At the same time in *Drozd and Janousek v. France and Spain*, the Court has not attributed the actions of the judges, which were delegated by the respondent governments to the Andorran tribunal to serve there under the law of Andorra and its relations with the respondent governments. The Court resolved that even though the judges are nationals of the Contracting Parties, are appointed by the respective Contracting Parties under the agreement with Andorra, they are however not acting on behalf of Contracting Parties, and their actions are not attributable to the Contracting Parties. The main arguments of the Court clarified that (a) the judges are not acting on behalf of their countries; (b) the Contracting Parties' governments do not influence the judges or the Court; (c) the Andorran tribunal acts in its own capacity and the judicial function is not overtaken by the Contracting Parties through their agents since the judicial decisions are subject to the review by neither Spanish nor French courts[77]. Other circumstances that lead to the authorized actions of

[76] Al-Skeini and Others v. the United Kingdom, supra note 12, § 135 and Banković and Others v. Belgium and Others, supra note 9, § 71
[77] Drozd and Janousek v. France and Spain, no. 12747/87, §§ 94-96, ECHR 1992. Retrieved from: http://hudoc.echr.coe.int/eng?i=001-57774

one state, on the territory of the other, are the instances of extradition, where the Court has numerously concluded that the state, which is requesting the extradition, is responsible for the detention, arrest, and well-being of the person, even if the detention has been executed by the other state[78].

Along with the previous exceptions, categorized pursuant to the specific grouped circumstances that sufficed for obtaining control over the person, there are also more generic cases. These are cases, where the agents of the state – generally persons who've been handed any type and amount of authority, have been using force against the persons outside of the Contracting State's territory, or other ways acting in a way that directly or indirectly infringed the rights of a person. The state agents include soldiers[79], secret agents[80], crews of ships[81] , etc. Therefore, previous, and in general all the ratione personae exceptions may be accumulated under the control over the person principle, which is caused by the State's agent acting outside of that State's territory.

I have resumed in the above paragraphs that extra attention is required to be paid to the case of *Bankovic*. This exigency of the *Bankovic case* is caused by the fact that the HUDOC database tags this case as key, the case was further cited in an extensive amount of cases regarding extraterritorial jurisdiction, as well as it raised the roof with expert discussions and criticism as to the consistency of the decision with the previous Court practice. Theoretical enthusiasts have created a tendency of distinguishing the pre- and post-Bankovic periods in the ECtHR's practice regarding extra-territoriality. It was then adopted by numerous researchers[82]. In my opinion, it is worth discussing the uproar around the case to follow the development of the Court's opinion, but first, the historical discourse into the pre-Bankovic era should be introduced.

[78] Stephens v. Malta (no. 1), no. 11956/07, §§ 51-54, ECHR 2009. Retrieved from: http://hudoc.echr.coe.int/eng?i=001-92351
[79] Al-Saadoon and Mufdhi v. the United Kingdom (dec.), no. 61498/08, §§ 86-89, ECHR 2009. Retrieved from: http://hudoc.echr.coe.int/eng?i=001-93398
[80] Stocké v. Germany, no. 11755/85, ECHR 1989. Retrieved from: https://bit.ly/3fC8nOU
[81] Hirsi Jamaa and Others v. Italy [GC], no. 27765/09, § 75, ECHR 2012. Retrieved from: http://hudoc.echr.coe.int/eng?i=001-109231
[82]Miltner, B. (2012) Revisiting Extraterritoriality after Al-Skeini: The ECHR and Its Lessons, 33 Mich. J. Int'l L. Retrieved from: https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1016&context=mjil and Gondek, M. (2005). Extraterritorial Application of The European Convention on Human Rights: Territorial Focus in the Age of Globalization?; and Budzianowska, D. (2012). Some reflections on the extraterritorial application of the European Convention on Human Rights. Wroclaw Review of Law, Administration & Economics. Retrieved from: https://www.researchgate.net/publication/271310605_Some_reflections_on_the_extraterritorial_application_of_the_European_Convention_on_Human_Rights

The first wave of cases, where the notions of jurisdiction and extraterritoriality were considered by ECtHR, were the cases about the occupation by Turkey of Northern Cyprus in 1974 and further occurrences over the territory[83]. The most essential cases were *Cyprus v. Tukey* and *Loizidou v. Turkey*. Through these cases, the backbone of the notion of effective control over territory has been established. These have already been enumerated in this subsection, during the overview of the territorial jurisdiction: (a) military occupation; (b) support of the local self-proclaimed government; and (c) a number of troops, entailed the notion of effective control. Also, ground-basing cases regarding control over a person have been reviewed by the Court. In *Soerring v. the UK*, the Court dealt with the extradition, and established the principle of non-refoulment[84], which prohibits the extradition, if there is a chance that the extradited person will be subject to "torture or other cruel, inhumane or degrading treatment[85]".

In 1999 the Grand Chamber reviewed the *Bankovic case* as to the admissibility and decided that the case was inadmissible. For a clear understanding, I will lay forth, in a nutshell, the facts of the case and the outcome. The case's triggering event was the bombing of Radio-Television Serbia headquarters in Belgium by NATO during the Kosovo conflict in 1999. When the building collapsed after the bomb had hit, 32 people were killed or seriously injured. Those victims included the six applicants that brought the case against the 17 member States of NATO which are also Contracting States to the Convention. The applicants complained about the violations under Article 2 (the right to life), Article 10 (freedom of expression), and Article 13 (the right to an effective remedy). The Court, however, has never reviewed the material part of the case. The application was declared inadmissible based on incompatibility ratione loci.

This decision is called "restrictive" by critics and, whilst it refers to the Turkish cases, it defies a lot from the interpretation of jurisdiction provided in the early Court practice. It is worth admitting that there are significant differences between Bankovic and Northern Cyprus cases. For instance, the presence of NATO forces was not as

[83] Atkin, N., Biddiss, M., & Tallett, F. (2011). The wiley-blackwell dictionary of modern european history since 1789. ProQuest Ebook Central, 189. Retrieved from: https://ebookcentral-proquest-com.eur.idm.oclc.org/lib/eur/reader.action?docID=4043963&ppg=415# 189
[84] Gondek, M. (2005). Extraterritorial Application of The European Convention on Human Rights: Territorial Focus in the Age of Globalization?, 355
[85] Soering v. The United Kingdom, no. 14038/88, ECHR 1989. Retrieved from: http://hudoc.echr.coe.int/eng?i=001-57619

numerous and permanent in Serbia, as Turkish troops on the territory of Northern Cyprus. Also, NATO forces may not be claimed to have occupied the territory, thus, it may not be stated that they had the overall effective control over the territory[86]. Scholars tend to establish three main vague points of the decision.

First, the Court has dug deep into the semantics of the notion of "jurisdiction" and shifted the focus to the "essential" or "primary[87]" territoriality of it. What is usually criticized by the scholars in this perspective, is that such interpretation is very restrictive and narrow-minded. The notion of jurisdiction stretches far more widely, than in the only dimension of territoriality, say the experts[88]. Whereas this is true and the wider interpretation of jurisdiction is particularly inherent for human rights treaties, it's worth considering that the starting point for the international law in the term of jurisdiction is the territory of the state[89]. From this point of view, I believe that the Court has had the legal and theoretical grounds to state the territorial nature of the jurisdiction, since "primarily" does not mean exclusively.

The second widely criticized wording says that the extraterritorial jurisdiction is exceptional, and is being exercised only when

> (...) the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises *all or some of the public powers normally to be exercised by that Government*[90].

And whereas it is true that the circumstances of extraterritoriality are exceptional, further Court practice explicitly depicts that limiting the cases of extraterritoriality exclusively to military occupation or measuring it by the criterion of assuming of the public powers seems indeed restrictive. G. Ress attempts to argue that the Court meant these exceptional enumerated requirements, including the public powers criterion, to reflect the cases of military occupation exclusively, and not all extraterritoriality

[86] Holcroft-Emmess, N. (2012). Life after Bankovic and Al-Skeini v. UK: Extraterritorial Jurisdiction under the European Convention on Human Rights. Oxford University Undergraduate Law Journal, 2012(1), 13. Retrieved from: https://heinonline-org.eur.idm.oclc.org/HOL/Page?handle=hein.journals/oxfuniv1&div=7&g_sent=1&casa_token=&collection=journals
[87] Banković and Others v. Belgium and Others, supra note 9, §§ 59-61
[88] Gondek, M. (2005). Extraterritorial Application of The European Convention on Human Rights: Territorial Focus in the Age of Globalization?, 363-364
[89] Ress, G. (2002) Problems of Extraterritorial Human Rights Violations-The Jurisdiction of the European Court of Human Rights: The Bankovic Case. 12 IT. Y.B. INT'L L. 51, 81. Retrieved from: https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1016&context=mjil
[90] Banković and Others v. Belgium and Others, supra note 9, § 71

exceptions[91]. From my perspective, the wording of the quoted paragraph and the preceding ones does not allow to make such an assumption. Besides, neither does the following ECtHR practice, in particular the Moldavian cases, allow us to state that assuming public powers is necessary for the exercise of extraterritorial jurisdiction.

The last largely condemned point of the decision was the introduction of the notion of "*legal space*" or "*espace juridique*". M. Gondek fairly emphasizes that if the following passage from the decision is treated literally, it may be perceived as highly restrictive:

> "In short, the Convention is a multilateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (espace juridique) of the Contracting States. The FRY [Federal Republic of Yugoslavia] clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favor of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention[92]".

This statement was made by Court in reply to the argument of the applicants, which reiterated the previous practice in *Cyprus v. Turkey*[93]. ECtHR has found in the latter case that the mission of the Convention was to omit the vacuum in the Convention system of human rights. In the *Bankovic* case, the Court has explained that the vacuum is not created in that very instance, since Yugoslavia at that point has not enacted the Convention, and thus the citizens thereof have never enjoyed the protection provided by the ECHR human rights system. And whereas it is true that the Convention has not been designed to work universally, this argument seems to diminish the universality of human rights and limits the validity of the Convention exclusively by the borders of the Contracting Parties. The Court has further itself deviated from this concept, by deciding on the extraterritorial jurisdiction of Contracting Parties in Kenya[94] and Iraq[95].

[91] Ress, G. (2002) Problems of Extraterritorial Human Rights Violations-The Jurisdiction of the European Court of Human Rights: The Bankovic Case, 62
[92] Banković and Others v. Belgium and Others, supra note 9, § 80
[93] Cyprus v. Turkey, no. 25781/94, ECHR 2014. Retrieved from: http://hudoc.echr.coe.int/eng?i=001-59454
[94] Öcalan v. Turkey, no. 46221/99, ECHR 2005-IV. Retrieved from: http://hudoc.echr.coe.int/eng?i=001-69022
[95] Issa and Others v. Turkey, supra note 33

The hints of the above analysis logically lead us to the conclusion that the Court somehow stepped away from their reasoning in the post-Bankovic development of its practice. The Moldavian cases and the milestone cases of *Ocalan v. Turkey, Issa and Others v. Turkey*, along with other cases that developed the notion of personal control further, show that the Court does not apply the principles developed in Bankovic, and rather returns to ones from the *Loizidou*. Interestingly enough, the Court has decided *Bankovic* unanimously, which signalizes that there haven't been obvious consistent reasons for the Court to change its approach in the cases following *Bankovic*. Such a sharp twist, in my opinion, allows us to deem that the Court has accepted their mistaken interpretation in the case of *Bankovic*. This view is supported by the Concurring Opinion of Judge Rozakis in the case of *Al-Skeini*, who points out that even though the Court still supports its wording from *Bankovic*, regarding the exercise of public powers, it does not any more regard it to be exceptionally necessary to establish extra-territoriality[96]. All in all, whereas the case of *Bankovic* is controversial, and I personally side with the scholars, stating that the decision was restrictive and inconsistent with the general ECtHR practice, it has been the first decision of the Court with an extremely profound analysis of the nature of jurisdiction, and it has instituted the lively discussion between scholars and drastic rapid developments in Court's practice.

Summing up the exceptions to the territoriality principle leading to the exercise of the state's extra-territorial jurisdiction it is worth repeatedly emphasizing the following. The state's jurisdiction is indeed primarily territorial, but the Court's practice has solely extended it in three other capacities: temporal, personal, and subject-matter. The second one, together with the territorial, is the basis for the said exceptions forming the principles of effective control over the person and/or over the territory. And while theoretical studies allow distinguishing different categories of these exceptions based on specific circumstances, such as military actions or diplomacy and politics, jurisdiction, either regular or extra-territorial, remains personal and defines the relationship that makes the state obliged before the exact person,

[96] Al-Skeini and Others v. the United Kingdom, supra note 12, Concurring opinion of Judge Rozakis.

irrespective of the person's physical location, shall their rights be affected by the acts, attributable to that state.

1.2. Current state of research

The issue of extraterritorial jurisdiction under the Convention is an animated issue subject to scholarly discussion, developing together with the practice of the ECtHR. However, the issues of extraterritoriality have been raised by scholars in other contexts primarily to the *Bankovic* case, which caused the majority of the currently present researches to be developed and published. Theodor Meron in 1995 discussed the extraterritoriality of the human rights treaties taking the American perspective, coming, however, to the conclusion, like those adopted today in the human rights protection system. The author argues that the aim of the "bona fide interpretation" of the human rights treaties is to promote human rights. The very narrow exclusively territorial interpretation of jurisdiction is, by words of Meron, an "anathema to the basic idea of human rights" which is to ensure the absolute respect of rights of the persons that are in the jurisdictional link with the state[97]. In 1996 an extensive and further numerously cited book "Extraterritorial Jurisdiction in Theory and Practice" under the editing of Dr. Karl M. Messen has been issued. The book constitutes an impressive work that regards the extraterritoriality of international public law in general, as well as the application of the principles to separate branches of law, including Environmental, Banking, and Criminal[98]. These and other generic researches of extraterritoriality constituted a solid basis for the scholars to work on the more specific investigations of the practice of ECtHR exclusively. However, the comparative perspective with the international treaties, other than the Convention provides the chance to see the new possible spaces for interpretation or development of the Court's vector of thought.

[97] Meron, T. (1995). Extraterritoriality of Human Rights Treaties. The American Journal of International Law, 89(1), 82. Retrieved from: https://www-jstor-org.eur.idm.oclc.org/stable/2203895?seq=5#metadata_info_tab_contents

[98] Meessen, K. M. (1996) Extraterritorial Jurisdiction in Theory and Practice: [contains the Edited of a Symposium Held in Dresden Between 8 and 10 October 1993]. Martinus Nijhoff Publishers, 98. Retrieved from: https://bit.ly/33eHpHN

Thus, to gain the basis for in-depth research, I have also referred to the comprehensive comparative researches, including the work of Luis Jardon, "The Interpretation of Jurisdictional Clauses in Human Rights Treaties" and the article of Hugh King "The Extraterritorial Human Rights Obligations of States". Both authors concluded that "jurisdiction" in international law appears to be a very complex multi-component notion with various aspects that may be singled out under the circumstances[99]. However, the first research focuses more on the subsystems of international law depending on their subject and object, while King strictly classifies the jurisdiction into three categories depending on its nature. Despite the completely different approach and primary standpoint for research, both authors illustrate with their conclusions that the jurisdiction concerning human rights is never a black or white concept. While Jardon believes that the extraterritorial jurisdiction of human rights includes the aspects of all other subsystems of human rights depending on the rights' nature[100], King argues that even though the three typed of jurisdiction are distinguished, they are not contradictory or mutually exclusive, and the exact extraterritorial exercise of jurisdiction may be tailored to specific circumstances[101].

As to the state of research on the specific topic of extraterritoriality under the Convention, it is worth mentioning that basic factual organized materials are first and foremost presented by the ECtHR and its structural compounds. For instance, the Case-law Guide on Article 1 presented by the Court and developed by its jurisconsults provides the categories of exceptions to the territoriality principle, as well as singles out the major cases on the subject. The Research Division of the ECtHR also brings out the researches on the exact topics, such as the cited herein Extraterritorial jurisdiction research under Articles 1 and 5. While these materials do not continue any estimations or assumptions of experts, they allow to clearly see the vector and development of Court position, and ground your own opinion on the obtained sequence of material facts. Many scholarly works describe the exceptions to the territoriality

[99] King, H.. (2009). The Extraterritorial Human Rights Obligations of States and Jardon coclusion sections, 547-550; and Jardón, Luis. (2013). The Interpretation of Jurisdictional Clauses in Human Rights Treaties. Anuario Mexicano de Derecho Internacional, 142-143. Retrieved from: https://www.researchgate.net/publication/273792126_The_Interpretation_of_Jurisdictional_Clauses_in_Human_Rights_Treaties

[100] Jardón, L. (2013). The Interpretation of Jurisdictional Clauses in Human Rights Treaties, 142-143.

[101] King, H.. (2009). The Extraterritorial Human Rights Obligations of States and Jardon coclusion sections, 547-550

principles. Most of them usually follow the groups established in the Case-law Guide on Article 1 but develop the thoughts and cases in more detail, providing the pro and contra examples, illustrating ambiguity in the Court practice or contrast between the cases. These works include the researches of M. Duttwiller, S. Besson, S. Miller, A. Demetriades, A.R. Jay, and many others. The profound volumetric work has been presented by M. Gondek, with his detailed research of the Court's position development through the lenses of Bankovic twist. Some researchers have also been performed by Ukrainian scholars, including O. Bazov[102], D. Hudyma[103], L. Falaleeva who have presented an in-depth analysis of the extraterritoriality, in a manner, similar to that of international scholars: with a detailed and profound analysis of the ECtHR practice and their summaries and assumptions. Such an extensive basis of the material for analysis provides for the chance to distinguish peculiar and fresh ideas or perspectives of each of the scholars, and by infiltrating and critically estimating them, integrate them into the practical part of this research.

Concerning the narrow subject of the effect of the Convention on the occupied and uncontrolled territory of Ukraine, the state of research may be characterized as scarce and rather basic. There are just a few works focused directly on the Ukrainian circumstances, which include the work by T. Horbachevska[104], G. Nuridzhanian[105] and M. Millanovic[106]. There is however one ground-breaking extensive work "Applying the European Convention on Human Rights to the Conflict in Ukraine" by S. Wallace and C. Mallory, which, even though discussing all the aspects in details, does not provide any clear answers, mostly due to their absence, but also due to the lack of any expert opinions expressed in public within the issue of the occupation of the territory

[102] Базов, О. (2015) Питання юрисдикції Європейського суду з прав людини щодо розгляду міждержавних справ. Юридична Україна № 6, 84-91. Режим доступу: http://nbuv.gov.ua/UJRN/urykr_2015_6_14

[103] Гудима, Д. (2015) Принцип екстериторіальності у практиці Європейського суду з прав людини. Юридичний журнал «Право України» (україномовна версія) 2/2015, 113-127. Режим доступу: http://irbis.library.dp.ua/cgi-bin/irbis64r_12/cgiirbis_64.exe?LNG=&Z21ID=&I21DBN=CBS_PRINT&P21DBN=CBS&S21STN=1&S21REF=&S21FMT=fullw_print&C21COM=S&S21CNR=&S21P01=0&S21P02=0&S21LOG=1&S21P03=K=&S21STR=екстериторіальна%20юрисдикція

[104] Горбачевська, Т. (2019) Захист прав людини у збройному конфлікті між Україною та Росією: питання юрисдикції у світлі практики Європейського суду з прав людини. Зобов'язання, що випливають з фактичного або загального контролю держави-агресора (Частина І). Права Людини в Україні. Інформаційний портал Харківської правозахисної групи. Режим доступу: http://khpg.org/index.php?id=1562658156

[105] Nuridzhanian, G. (2017) (Non-)Recognition of De Facto Regimes in Case Law of the European Court of Human Rights: Implications for Cases Involving Crimea and Eastern Ukraine. EJIl:Talk! Blog of the European Journal of International Law. Retrieved from: https://www.ejiltalk.org/non-recognition-of-de-facto-regimes-in-case-law-of-the-european-court-of-human-rights-implications-for-cases-involving-crimea-and-eastern-ukraine/

[106] Milanovic, M. & Papic, T. (2018) The Applicability of the ECHR in Contested Territories. International and Comparative Law Quarterly, Forthcoming. Retrieved from: https://papers-ssrn-com.eur.idm.oclc.org/sol3/papers.cfm?abstract_id=3207716

of Ukraine. The article is much referred to throughout the research, however, mostly I tend to disagree with the conclusions made in the article or the approach taken by the authors. Nevertheless, the article takes a broad two-sided view and the authors allege the possible jurisdiction of Russia and Ukraine in every section, providing the profound analysis of ECtHR's practice. Also, there are many articles on cases of extraterritorial jurisdictions due to military actions, specifically focused on the UN intervention operations, Iraq, Afghanistan and Libya. Those are, among others, created by A. R. Jay[107], T. Abdel-Monem[108] and R. C. Watkins[109].

In conclusion, the general topic of jurisdiction and extraterritorial application of the Convention is deeply and thoroughly researched both by national and international scholars. There are also works focusing on the related to the subject of the research topic of the extraterritorial application of the convention in case of military actions. However, the particular topic of the Convention application to the violations in Crimea and Eastern territories of Ukraine appears to be under researched and left out of the general scholarly attention, thus requiring further research and contribution to the field.

1.3. Legal regime of the occupied and uncontrolled territories of Ukraine.

1.3.1. Legal regime of the Crimean Peninsula

In February-March 2014 Ukraine was struck by traumatizing and critical events. The Crimean Peninsula, which is the territory of Ukraine, namely the Autonomous Republic of Crimea (ARC), was illegally annexed and further occupied by Russia. The use of the terminology "illegally annexed" and "occupied" will be

[107] Jay, A. R. (2014). The European Convention on Human Rights and the Black Hole of State Responsibility. New York University Journal of International Law and Politics, 47(1), 207-244. Retrieved from: https://heinonline-org.eur.idm.oclc.org/HOL/IFLPMetaData?type=article&id=2002052644&collection=journals&men_tab=srchresults&set_as_cursor=0

[108] Abdel-Monem, T. (2005). How Far Do the Lawless Areas of Europe Extend Extraterritorial Application of the European Convention on Human Rights. Journal of Transnational Law & Policy, 14(2), 159-214. Retrieved from: https://heinonline-org.eur.idm.oclc.org/HOL/Page?public=true&handle=hein.journals/jtrnlwp14&div=12&start_page=159&collection=journals&set_as_cursor=1&men_tab=srchresults

[109] Watkins, R. C. (2014). Jurisdiction in International Human Rights Law: Application of the European Convention to Soldiers Deployed Overseas. Finnish Yearbook of International Law, 24, 145-182. Retrieved from: https://heinonline-org.eur.idm.oclc.org/HOL/Page?public=true&handle=hein.intyb/finnybki0024&div=8&start_page=145&collection=intyb&set_as_cursor=0&men_tab=srchresults

further grounded in this subsection, but first, I believe there is a need to provide a short historical discourse into these events.

The events of winter 2014 and the Revolution of Dignity are the concrete political and social background, which, however, in my opinion, do not require detailed description herein. They were followed by political and civil decisions. President Yanukovych fled the country on the 21st of February 2014[110]. Thereupon the outright action towards illegal annexation of Crimea began to take place. On the 23rd of February, through the absolutely unconstitutional voting "by hand" in the streets on the demonstration led by pro-Russian political forces in Sevastopol, the new "mayor" of Sevastopol, capital of Crimea, was elected. It appeared to be Russian businessman O. Chalyi. On the 25th of February, the deputies of the State Duma of Russia arrived at Crimea. They announced that in case the people of Crimea vote for "accession to Russia" on the so-called referendum or the Supreme Council of ARC will ask the Russian government for this, they will assist the citizens with performing their will and are ready to accept Crimea as part of Russian territory.

On the night of the 27th of February, the militants without identification signs have seized the buildings of the Supreme Council and Ministers Council of ARC and flew the flag of the Russian federation above them. The militants called themselves the "self-defense of Russian-speaking citizens" and refused to negotiate with any representatives of the legitimate government of ARC. The same morning, the deputies of the Crimean Supreme Council arrived at the building. They announced to be attending the extraordinary session of the Council, however, they were forced to abandon their mobile phones before entering the Council. During this session, the following decisions were voted: (1) by 61 out of 64 votes in favor of the conduction of the republican referendum on the 25th of May, 2014. First, the subject of the referendum had to be the extension of the Crimean autonomy. Further, as the conflict was escalating the date of the referendum was altered twice, moving it eventually to the

[110] See Задорожній О. (2015) Анексія Криму — міжнародний злочин. Монографія. Бібліотека кафедри міжнародного права, 572 с. Режим доступу: https://play.google.com/store/books/details/Анексія_Криму_міжнародний_злочин_Монографія?id=ZE_7CgAAQBAJ&hl=en_US herein and further for references regarding the facts of Crimea occupation.

16th of March, and the subject was shifted to the question of "reuniting" Crimean Peninsula with Russia; (2) by 55 votes in favor motion of no confidence to the Ministers Council of ARC; (3) by 53 votes in favor election of the new premier of ARC – S.Aksyonov, leader of the pro-Russian political party "Russkoe Edinstvo" ("Russian Unity"). Further, the military attack continued to escalate.

There were many occurrences of military aggression that happened throughout 28th of February, among them, the combatants without identification marks, further identified as Russian militants, so-called "green little men", have seized the Simferopol and Sevastopol airports, as well as the building of the state television and radio company "Crimea". The military conflict was heating up on the sea border: the Russian military has blocked the control point of the State Border Guard Service of Ukraine brigade 810; Russian military vessel has entered the waters of Ukraine without authorization; State Border Guard Service has also informed of the illegal crossing of Kerch Strait by 7 Russian military helicopters. Continuing acts of military aggression, despite the resistance of Ukrainian soldiers, have led to the seizure by Russian forces of most of the vessels of the Ukrainian Navy and all military bases of Armed Forces of Ukraine, situated on the peninsula by the end of March. The soldiers and military officers that refused to swear to the Russian Military were evacuated from the Peninsula. Some collaborated with the occupants and became the militants in the Russian Forces. On the 1st of March, by the initiation of the "premier" of ARC, the Russian government has authorized the use of military forces of the Russian Federation in Ukraine with the aim to "stabilize the socio-political state in the country". Security Council of Ukraine has reacted to such a decision and has ratified to put all Armed Forces of Ukraine on alert.

On the 6th of March Supreme Council of ARC has allegedly voted by 78 out 81 votes for the accession of Crimea to the Russian Federation. At the same time on the 11th of March, the Council has enacted the Declaration of Independence of Crimea and Sevastopol, which set forward that the "Republic of Crimea" is an independent and sovereign state, which upon the results of the referendum, may address Russian Federation with the offer to accept the "Republic of Crimea" as part of the Federation.

Hence, on March 16 the so-called “referendum” was conducted. Russian media have propagated that the attendance on the referendum reached 81.4% and 96.77% of the present have voted “in favor” of the accession of Crimea to Russia. The referendum was conducted under the control of Russian military forces, there were no international observers present since the international community has not recognized the validity of the referendum. There were multiple pressure and falsification factors apart from the military control of this “expression of will”, including the fact that foreigners with Russian passports could vote during the referendum, or that the statistics of the Russian Electoral Commission indicated that 123% of Sevastopol citizens have voted[111].

During these events, the Ukrainian government has been taking diplomatic steps within international public law to somehow interfere with the illegal actions of Russia. They however were unsuccessful, since Russia has chosen the way of military aggression, rather than diplomatic negotiations. The Constitutional Court of Ukraine, within its powers, has pronounced the decision of the Supreme Council of ARC regarding the conduction of the referendum to be unconstitutional. Ukraine has addressed international institutions. On March 13, the government of Ukraine has lodged the interim measures request to the ECtHR under Rule 39 and the President of the Third Section has applied the Rule, calling Russian Federation and Ukraine to refrain from “military actions, which might entail breaches of the Convention rights of the civilian population, including putting their life and health at risk, and to comply with their engagements under the Convention, notably in respect of Articles 2 (right to life) and 3 (prohibition of inhuman or degrading treatment)”[112]. Russian Federation has ignored the decision of the Court. On the 14th of March before the referendum, the Committee of Ministers of the Council of Europe have reiterated that Ukraine sovereignty and territorial integrity shall remain intact[113]. Further on the 20th of March they have condemned the “referendum” and announced it to be “in violation of the

[111] 5 канал (2018). Незаконний "референдум" у Криму: хроніка фальсифікації. 5 канал. Режим доступу: https://www.5.ua/suspilstvo/nezakonnyi-referendum-u-krymu-khronika-falsyfikatsii-166592.html

[112] European Court of Human Rights. (2013) Interim measure granted in inter-State case brought by Ukraine against Russia. Press Release – General. Retrieved from: https://hudoc.echr.coe.int/eng-press#{"itemid":["003-4699472-5703982"]}

[113] Situation in Ukraine (CM/Del/Dec(2014)1192/1.31). 1194th meeting – 12-14 March 2014. Item 1.7. Council of Europe. Committee of Ministers. Retrieved from: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c631a

Ukrainian legislation"[114]. In the decision of the Committee as of April 3rd, 2014 the Ministers have stressed that the referendum was illegal and "the subsequent illegal annexation by the Russian Federation cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol"[115]. Further, there were multiple resolutions, declarations, and decisions of the international organizations, including the United Nations, G7, Parliamentary Assembly of the Council of Europe. These will be further referred to and discussed.

Russian Federation has also undertaken a series of measures to "legitimize" their actions. These have been condemned by the international community[116] and not affected the non-recognition of the legality of the referendum, but Russia has ignored the position of the international community. Apart from voting against all the resolutions of the international community and using their veto right on the decisions of the UN Security Council regarding Ukraine in March 2014[117], Russia has enacted a list of legislative decisions which demonstratively justified the illegal annexation of Crimea[118]. On the 18th of March V. Putin and the self-proclaimed representatives of Crimea have signed the "Agreement between the Russian Federation and the Republic of Crimea on the admission of the Republic of Crimea to the Russian Federation and the formation of new entities within the Russian Federation". This agreement is regarded as the end of "official" annexation of Crimea and is deemed to be illegitimate by the international community. Further, the State Duma of the Russian Federation has ratified the Agreement and the respective law, which facilitation the accession of the "Republic of Crimea" to the Russian Federation.

It is also worth denoting that multiple evidence of the attribution to the Russian federation of all the actions aimed at the annexation of Crimea and military attacks during the period of February-March 2014 exist. At first Russian officials have denied the presence of Russian forces in Crimea, since most of the actions were undertaken

[114] Situation in Ukraine (CM/Del/Dec(2014)1192/1.31). 1195th meeting – 19-20 March 2014. Item 1.7. Council of Europe. Committee of Ministers. Retrieved from: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c615f
[115] Situation in Ukraine (CM/Del/Dec(2014)1192/1.31). 1196th meeting – 2-3 April 2014. Item 1.8. Council of Europe. Committee of Ministers. Retrieved from: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c5f7f
[116] See for example Situation in Ukraine (CM/Del/Dec(2014)1192/1.31). 1195th meeting – 19-20 March 2014. Item 1.7.
[117] Задорожній, О. (2015) Анексія Криму — міжнародний злочин. Монографія, 209
[118] Задорожній, О. (2015) Анексія Криму — міжнародний злочин. Монографія.

by the previously noted "green little men"[119]. However, as time passed the rhetoric has changed. The most evidential appear to be the speeches and announces of the president of the Russian Federation, where he admitted the presence of Russian forces in Crimea during the illegal annexation[120]. Interestingly, the media have also found numerous evidence of admittance of this fact by V. Putin in the propagandist Russian movie about Crimea "Crimea. Road to home" («Крим. Шлях додому»)[121]. The Ukrainian government has used the interview of the president as the evidence in ECtHR[122]. The presence of Russian forces has also been stated in the international resolutions, for instance in the resolution of the European Parliament as of April 17th, 20`4, where the Parliament has stated that "an illegal and illegitimate referendum was organized on 16 March 2014 in the Autonomous Republic of Crimea and the city of Sevastopol and was conducted under the control of Russian troops".

In general, the attribution of actions that led to illegal annexation to the Russian federation does not appear to constitute subject to any doubt in the international community from March 2014 until today. This may be proved by the multiple decisions of international organizations and the general "non-recognition" policy regarding the annexation of the Crimean Peninsula[123].

The EU Council has first claimed the non-recognition policy in March 2014[124]. Further on, it became the constant statement point, to be claimed and reaffirmed by the Council in multiple decisions, including the decisions as of March 20th, 2015[125]; March

[119] Харченко, О.О., за ред. (2016) Територія Криму. Хроніка окупації Криму. Українське національне інформаційне агентство «Укрінформ». Журнал «Територія Крим», No1 (1), 6. Режим доступу: https://static.ukrinform.com/files/1499850029-9647.pdf

[120] Регіональний центр прав людини, Українська Гельсінська спілка з прав людини (2019) Окупація Криму: «Без знаків, без імені, ховаючись за спинами цивільних». УГСПЛ, 9. Режим доступу: https://helsinki.org.ua/wp-content/uploads/2020/01/Web_Okupation_Crimea_ukr_A4.pdf

[121] Чуперські, М., Гербст, Дж. Е., Гігінз Е., Полякова А., Вілсон Д. (2015) Ховаючись у всіх на очах. Війна Путіна проти України. Атлантична рада Сполучених Штатів, 24. Режим доступу: https://www.atlanticcouncil.org/wp-content/uploads/2019/08/HPS_Ukrainian.pdf; and Центр Журналістських Розслідувань. (2019). У ЄСПЛ Росія заперечує усі вимоги скарги України про порушення прав людини у Криму. Режим доступу: https://investigator.org.ua/ua/news-2/219668/

[122] Українська правда. (2015) Яценюк пригрозив Росії судом за анексію Криму. Режим доступу: https://www.pravda.com.ua/news/2015/08/23/7078761/ and Центр Журналістських Розслідувань. (2019). У ЄСПЛ Росія заперечує усі вимоги скарги України про порушення прав людини у Криму.

[123] Wesslau, F. (2016) Why non-recognition matters in Crime. Wider Europe. European Council of Foreign Relations. Retrieved from: https://ecfr.eu/article/commentary_why_non_recognition_matters_in_crimea6043/

[124] European Union External Actions. (2020) The EU non-recognition policy for Crimea and Sevastopol: Fact Sheet. 171215_24. Retrieved from: https://eeas.europa.eu/headquarters/headquarters-Homepage/37464/eu-non-recognition-policy-crimea-and-sevastopol-fact-sheet_en

[125] European Council. General Secretariat of the Council. (2015) European Council meeting (19 and 20 March 2015) – Conclusions. Retrieved from: https://www.consilium.europa.eu/media/21888/european-council-conclusions-19-20-march-2015-en.pdf

16th, 2016[126]; June 19th, 2017[127]; March 16th, 2018[128]; March 17th, 2019[129]; and March 17th, 2020[130]. European states have reaffirmed the policy in their personal declarations as well[131]. In all these statements, the EU councils and their states use the wording of "occupation and illegal annexation of Crimea" which significantly defines the status of Crimea today. The PACE also approved the same policy of non-recognition and maintained the statement of the illegality of the referendum[132].

United Nations have also condemned the illegal annexation. One of the first decisions was adopted on March 27, 2014, when by "a recorded vote of 100 in favor to 11 against, with 58 abstentions, the Assembly adopted a resolution titled "Territorial integrity of Ukraine", calling on States, international organizations and specialized agencies not to recognize any change in the status of Crimea or the Black Sea port city of Sevastopol, and to refrain from actions or dealings that might be interpreted as such[133]". States such as Canada, Brazil, Japan, and the USA voted in favor of the decision, signalizing that the states, other than those collaborating with Russia (e.g. Cuba, Armenia, and the Democratic People's Republic of Korea, which voted against) have condemned the illegal annexation. Further, the UN has adopted 7 resolutions

[126]Council of the EU. (2016) Declaration by the High Representative on behalf of the EU on Crimea. Press release. Retrieved from: https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/hr-eu-crimea/?utm_source=dsms-auto&utm_medium=email&utm_campaign=Declaration+by+the+High+Representative+on+behalf+of+the+EU+on+Crimea

[127] Council of the EU. (2017) Illegal annexation of Crimea and Sevastopol: EU extends sanctions by one year. Press release. Retrieved from: https://www.consilium.europa.eu/en/press/press-releases/2017/06/19/crimea-sevastopol-eu-extends-sanctions/

[128] Council of the EU. (2018) Declaration by the High Representative Federica Mogherini on behalf of the EU on the Autonomous Republic of Crimea and the city of Sevastopol. Press release. Retrieved from: https://www.consilium.europa.eu/en/press/press-releases/2018/03/16/declaration-by-the-high-representative-federica-mogherini-on-behalf-of-the-eu-on-the-autonomous-republic-of-crimea-and-the-city-of-sevastopol/

[129] Council of the EU. (2019) Declaration by the High Representative Federica Mogherini on behalf of the EU on the Autonomous Republic of Crimea and the city of Sevastopol. Press release. Retrieved from: https://www.consilium.europa.eu/en/press/press-releases/2019/03/17/declaration-by-the-high-representative-federica-mogherini-on-behalf-of-the-eu-on-the-autonomous-republic-of-crimea-and-the-city-of-sevastopol/

[130] Council of the EU. (2020) Declaration by the High Representative Josep Borrell Fontelles, on behalf of the European Union, on the Autonomous Republic of Crimea and the city of Sevastopol. Press release. Retrieved from: https://www.consilium.europa.eu/en/press/press-releases/2020/03/16/declaration-by-the-high-representative-josep-borrell-fontelles-on-behalf-of-the-european-union-on-the-autonomous-republic-of-crimea-and-the-city-of-sevastopol/

[131] See for instance *Declaration by France*: Permanent mission of France to the United Nations in New York. (2020) France reaffirms condemnation of the illegal annexation of Crimea. Statement by Mr. Nicolas de Rivière, Permanent Representative of France to the United Nations. Security Council Arria-formula meeting - 21 May 2020. Retrieved from: https://onu.delegfrance.org/France-reaffirms-condemnation-of-the-illegal-annexation-of-Crimea; *Statement by Italy*: Diplomatic and Parliamentary Practice of the Republic of Italy (2018) The Italian Government's Stance on the Annexation of Crimea and the Sanctions against the Russian Federation. Retrieved from: https://italyspractice.info/2019/06/30/the-italian-governments-stance-on-the-annexation-of-crimea-and-the-sanctions-against-the-russian-federation/; *Statement by the UK*: Ukrinform (2020) Great Britain will never recognize illegal annexation of Crimea – ambassador. Retrieved from: https://www.ukrinform.net/rubric-polytics/2880273-great-britain-will-never-recognize-illegal-annexation-of-crimea-ambassador.html

[132] Parliamentary Assembly of the Council of Europe. (2014) The illegal annexation of Crimea has no legal effect and is not recognized by the Council of Europe. Press release. Retrieved from: https://pace.coe.int/en/news/4975

[133] United Nations General Assembly. (2014) Canada, Costa Rica, Germany, Lithuania, Poland and Ukraine: draft resolution Territorial integrity of Ukraine as of 24 March 2014. A/68/L.39. Sixty-eighth session. Agenda item 33 (b). Retrieved from: https://undocs.org/a/68/l.39; and United Nations. General Assembly. (2014) General Assembly Adopts Resolution Calling upon States Not to Recognize Changes in Status of Crimea Region. Press prelease. GA/11493. Retrieved from: https://www-un-org.eur.idm.oclc.org/press/en/2014/ga11493.doc.htm

stating that the annexation of Crimea was illegal. The same was reiterated during the recent 47th session of the UN General Assembly in February 2020[134].

NATO Parliamentary Assembly has enacted the declaration in May 2014, which included statements: "Russia's aggression against Ukraine", "illegal and illegitimate seizure of Crimea" and "Russia's military intervention (…) in Ukraine"[135]. The OSCE "Resolution on Clear, Gross and Uncorrected Violations of Helsinki Principles by the Russian Federation" as of June-July 2014 also emphasizes the "the occupation of the territory of Ukraine", "actions, which include military aggression (…) to have been unprovoked, and to be based on completely unfounded premises and pretexts", it equally states that "referendum in Crimea as an illegitimate and illegal act, the results of which have no validity whatsoever", as well as condemns the "the armed intervention by forces under the control of the Russian Federation in Ukraine, and the human rights violations that they continue to cause"[136]. Thus, the international community on a different level and by different acts has made it clear that the status of Crimea is precepted by the world as the status of the occupied territory, which has been illegally annexed.

Ukraine has also denominated the status of Ukraine through legislative mechanisms. On April 15, 2014, the Supreme Council of Ukraine has enacted the Law "On Ensuring Civil Rights and Freedoms, and the Legal Regime on the Temporarily Occupied Territory of Ukraine[137]". Article 3 of the Law defines (1) the land territory of the Autonomous Republic of Crimea and the city of Sevastopol, the internal waters of Ukraine of these territories; (2) internal sea waters and the territorial sea of Ukraine around the Crimean Peninsula; (3) the territory of the exclusive (maritime) economic zone of Ukraine along the coast of the Crimean Peninsula and the adjacent to the coast of the continental shelf of Ukraine, which is subject to jurisdiction Ukraine; (4) the

[134] United Nations. General Assembly. (2014) Concerned about Ongoing Militarization of Crimea, Human Rights Violations in Eastern Ukraine, Speakers Tell General Assembly Minsk Agreements Must Be Fully Implemented. Press prelease. GA/ 12241. Retrieved from: https://www-un-org.eur.idm.oclc.org/press/en/2020/ga12241.doc.htm

[135] NATO Parliamentary Assembly (2014) Declaration on Transatlantic Relations. 080 SESP 14 E rev. 2, 5. Retrieved from: https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2014_06/20140606_140530-npa-declaration-transatl.pdf

[136] OSCE Parliamentary Assembly (2014) Resolution on Clear, Gross and Uncorrected Violations of Helsinki Principles by the Russian Federation. 2014 Baku Final Declaration. Retrieved from: http://www.old.oscepa.org/meetings/annual-sessions/2014-baku-annual-session/2014-baku-final-declaration/1850-06

[137] Про забезпечення прав і свобод громадян та правовий режим на тимчасово окупованій території України. Закон України № 1207-VII від 15.04.2014. Відомості Верховної Ради (ВВР), 2014, № 26, ст.892. Режим доступу: https://zakon.rada.gov.ua/laws/card/1207-18

subsoil under and airspace over these territories; - to have the status of temporarily occupies the territory of Ukraine. The Law states that the reason for such status is the "military aggression of the Russian Federation" and further concerns the rights and freedoms of the people on the occupied territories, the regime for crossing borders, payment of social benefits, business activity, etc. The wording "temporarily occupied territory of Ukraine" is constantly used in Ukraine by the state officials, government, Courts, and media and remains the official definition of the status of the Crimean Peninsula. Besides, as it was indicated before, such a wording finds enormous support in international decisions.

To remove the confusion regarding the terminology which will be further used in the research, it is worth drawing the lines between "occupation", "annexation" and "illegal annexation". Under Article 42 of the 1907 Hague Regulations, a "territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised[138]". Whereas there is no legislative definition of "annexation", in the international public law it is regarded to be the "forcible acquisition of territory by one State at the expense of another State", and is regarded to be the illegal mode of the acquisition of land since it contradicts the "prohibition of the threat or use of force[139]". The main difference between the occupation and the annexation lies in the following. The occupation is essentially deemed to be a temporary, de facto situation. The occupied state is not deprived of their ownership over the territory or its sovereignty. The occupation only interferes with the ability of the occupied state to exercise its rights and powers over the territory. The annexation however means that the territory has been acquired by the other state and it is now the territory of the annexing state. The state from which the territory has been annexed exercises its powers over the territory neither de jure nor de facto[140]. Simply put, the annexed territory of state A is

[138] The Hague Convention IV respecting the Laws and Customs of War and its annex: Regulations concerning the Laws and Customs of War on Land. October 18, 1907. Article 42

[139] Hofmann R. (2020) Annexation. Max Planck Encyclopedias of International Law [MPIL]. Retrieved from: https://opil-ouplaw-com.eur.idm.oclc.org/view/10.1093/law:epil/9780199231690/law-9780199231690-e1376

[140] International Committee of the Red Cross (1958) Commentary of Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, August 12, 1949. Article 47. Retrieved from: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=C4712FE71392AFE1C12563CD0042C34A

no longer regarded to be the territory of state A in principle. Having established this essential difference, it is worth clarifying that when the phrase "illegal annexation" is used, it means that the territory has been occupied and de jure remains the territory of the harmed state[141]. Therefore, where the international community states that the territory has been "illegally annexed" it expressly means that the territory of the Crimean Peninsula has been occupied.

Lastly, I would like to address the contradictory, from my perspective, the statement presented by S. Wallace and C. Mallory in their article regarding the application of ECHR to the occupied territory of Ukraine. When discussing the possible application of the Convention on the territory of Crimea, the authors indicate that the status of the territory is undefined and thus they take a two-sided view, where the Crimean Peninsula has been either occupied or annexed[142]. From my perspective, such an approach is rather troubling, since it indicates the incoherence with the international community's standpoint of the non-recognition of the "annexation" and respective Ukrainian legislation. Besides, it seems that the only argument in favor of possible "annexed" status of Crimea, they present the Resolution of the Supreme Council 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 as of June 5, 2015, where the phrase "Due to *the annexation* and temporary occupation by the Russian Federation of an integral part of Ukraine – the Autonomous Republic of Crimea and the city of Sevastopol…[143]", rather than "illegal annexation" is used. The authors claim that the statement is "confusing and contradictory" and the government presents "two conflicting claims that Russia has annexed this territory and that it is engaged in a "temporary occupation[144]". Based on this statement the authors further develop the idea

[141] Wrange, P., & Helaoui, S. (2015) Occupation/annexation of a territory: Respect for international humanitarian law and human rights consistent EU policy. EU Parliament. Directorate-General for External Policies. Policy Department, 23. Retrieved from: https://www.europarl.europa.eu/RegData/etudes/STUD/2015/534995/EXPO_STU(2015)534995_EN.pdf
[142] Wallace, S. & Mallory, C. (2018). Applying the European Convention on Human Rights to the Conflict in Ukraine, 46
[143] Про Заяву Верховної Ради України "Про відступ України від окремих зобов'язань, визначених Міжнародним пактом про громадянські і політичні права та Конвенцією про захист прав людини і основоположних свобод". Постанова ВРУ від 21.05.2015. Відомості Верховної Ради (ВВР), 2015, № 29, ст.267. Режим доступу: https://zakon.rada.gov.ua/laws/show/462-19
[144] Wallace, S. & Mallory, C. (2018). Applying the European Convention on Human Rights to the Conflict in Ukraine, 46

that the status of Crimean Peninsula may be regarded as "annexed"[145]. This seems to be the exaggeration due to the following. Whereas it is true that under the international public law the mode of "occupation" and "annexation" is contradictory, and it is also true that the Supreme Council has unfortunately repeated this disreputable mistake in the following Derogation Declarations[146], I believe that the general rhetoric of Ukraine, the Law with a clear statement of occupation and the international resolutions provide a substantial basis to perceive this mistake by the Supreme Council as not consequential enough, to affect the perception of the international judicial institutions, including ECtHR. Besides, from the legal standpoint the resolutions of the Ukrainian Supreme Council have lower legal effect than the Laws of Ukraine, and thus the contradiction between the Resolutions and the Law "On Ensuring Civil Rights and Freedoms, and the Legal Regime on the Temporarily Occupied Territory of Ukraine" shall be resolved in favor of the law. Also, Ukraine maintains the statement as to the "occupation" and not "annexation" in its statements in the ECtHR during the case of "Ukraine v. Russia" which has not been decided as of the submission of the research[147].

Consequently, taking into account numerous declarations resolutions, decisions, and reports of the principal international organization, the maintained "non-recognition" policy of the international community, the diplomatic position of Ukraine and the legislation of Ukraine, the "referendum" conducted on March 16th, 2014 in Crimea shall be deemed illegitimate and illegal, and the Crimean Peninsula shall remain to be de jure the territory of Ukraine, which has, however, been illegally annexed and occupied by Russian Federation.

[145] Wallace, S. & Mallory, C. (2018). Applying the European Convention on Human Rights to the Conflict in Ukraine. Russian Law Journal, 20-21. Retrieved from: https://www.russianlawjournal.org/jour/article/view/527

[146] Council of Europe. Treaty Office (2020) Reservations and Declarations for Treaty No.005 - Convention for the Protection of Human Rights and Fundamental Freedoms. Status as of 26/11/2020. Retrieved from: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=kCENU17k&_coeconventions_WAR_coeconventionsportlet_enVigueur=false&_coeconventions_WAR_coeconventionsportlet_searchBy=state&_coeconventions_WAR_coeconventionsportlet_codePays=U&_coeconventions_WAR_coeconventionsportlet_codeNature=10

[147] Щур М. (2019) Суд з прав людини у Страсбурзі заслухав справу України проти Росії про порушення прав людини в Криму. Радіо Свобода. Режим доступу: https://www.radiosvoboda.org/a/ukrajina-rosija-krym-strasburg/30159365.html

1.3.2. Legal regime of the Eastern territories of Ukraine

Occupation of Crimea unfortunately was not the only hardship that hit Ukraine in the spring of 2014. The events in the East of Ukraine which lead to multiple victims, fighting, shooting, and bombing started to escalate in April 2014. Before getting into the details of the aggression occurring in the East of Ukraine it is worth clarifying the terminology, which is to be used.

First, under the Eastern territories or East of Ukraine shall be understood the territories which are currently named as "temporarily occupied territories" under the Law "On the peculiarities of the state policy on ensuring the state sovereignty of Ukraine in the temporarily occupied territories in Donetsk and Luhansk regions[148]". Simply put, these are mainly the territories of Luhansk and Donetsk regions, also the territories of the so-called illegal self-proclaimed Donetsk People's Republic (DPR, also commonly DNR) and Luhansk People's Republic (LPR, also commonly LNR). The exact borders of this territory have been changing throughout the six years of aggression of the Russian Federation against Ukraine, but have majorly remained within the territories of these two regions of Ukraine[149].

Secondly, attention should be paid to the qualification of actions. Media and resources are filled with the notions of "Russian-Ukrainian war", "Donbas Conflict", "armed conflict" etc. I personally believe that the only viable option to characterize the actions of the opponent is "*armed aggression of the Russian Federation against Ukraine*". This is supported by the previously noted Law regarding the territories in the Donetsk and Luhansk regions, where the Ukrainian legislator specifically states that "the occupation" of the Donetsk and Luhansk regions has been caused by the armed aggression of the Russian Federation against Ukraine[150]. Besides, the same term is used by the Organization for Security and Co-operation in Europe (OSCE)[151].

[148] Про особливості державної політики із забезпечення державного суверенітету України на тимчасово окупованих територіях у Донецькій та Луганській областях. Закон України № 2268-VIII від 18.01.2018. Відомості Верховної Ради (ВВР), 2018, № 10, ст.54. Режим доступу: https://zakon.rada.gov.ua/laws/show/2268-19#Text

[149] See Радіо Свобода. (2015) Ситуація в зоні бойових дій на Донбасі. Режим доступу: https://www.radiosvoboda.org/a/26970062.html to explore the changing of the borders and front line between the Russian-terrorist militants and Armed Forces of Ukraine.

[150] Про особливості державної політики із забезпечення державного суверенітету України на тимчасово окупованих територіях у Донецькій та Луганській областях, supra note 144, Преамбула.

[151] See for example U.S. Mission to OSCE. (2020) Ongoing Violations of International Law and Defiance of OSCE Principles and Commitments by the Russian Federation in Ukraine. As delivered by Ambassador James S. Gilmore III on June 4, 2020. Retrieved from: https://osce.usmission.gov/on-russias-ongoing-aggression-against-ukraine/

European Parliament utilizes literally the same term of "Russian military aggression against Ukraine"[152]. Secretary-General Anders Fogh Rasmusen has also used the same words in his powerful speech, stating that "Russia's military aggression in Ukraine is the most serious crisis in Europe since the fall of the Berlin Wall[153]". Thus, there is a consensus in the international community that the events in the East of Ukraine shall be denominated as Russian armed or military aggression against Ukraine or other wording with the same essence. It is also worth reiterating that under the international humanitarian law, the circumstances of aggression may not be called "war" since the declaration of such is required under Article I of the 1907 Hague Convention relative to the Opening of Hostilities, which states that: "the Contracting powers agree that hostilities between them should not begin without a *previous unequivocal notice*, which shall be either in the form of a *declaration of war* with reasons therefor, or of an *ultimatum with a conditional declaration of war*[154]". Since neither Ukraine nor Russia has declared war, the occurrences shall not be denominated as such, at least for the purposes of objective and legislatively correct research.

Whereas the armed aggression of the Russian Federation has been already continuing for more than 5 years, describing all the events of the attacks and battles is both irrelevant and lacking sense. However, to provide consistency to this work, in my humble opinion, it is worth describing the beginning of the conflict and the most dramatic events thereof. Following the events of the Revolution of Dignity and the illegal annexation of Crimea, the pro-Russian separatist meetings began to occur in the cities throughout the eastern region. The demonstrations rarely were peaceful and usually led to clashes and fights of the demonstrators with pro-Ukrainian citizens. On April 6, 2014, the first seizure of the state buildings began. The local police and administration officials were either unprepared to infringe the invasions or were acting in favor of the separatists. Thus, the main governmental buildings in Donetsk and

[152] See for example EU Parliamentary Assembly. (2015) Resolution on the Russian military aggression against Ukraine and the urgent need for a peaceful resolution to the conflict (2015/C315/06). Official Journal of the European Union. Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22015P0923(06)&qid=1582482436387&from=EN&fbclid=IwAR05_Qf5-Ob43XMMY_89PAB1uozEg39hGTtpX2pogoyhzOYXiI251O80vYk

[153] NATO (2014) A strong NATO in a changed world. Speech by NATO Secretary General Anders Fogh Rasmussen at the "Brussels Forum" as of March 21, 2014. Retrieved from: https://www.nato.int/cps/en/natohq/opinions_108215.htm

[154] Convention (III) relative to the Opening of Hostilities. 1907 Hague Convention (III). October 18, 1907. Article I. Retrieved from: https://ihl-databases.icrc.org/ihl/INTRO/190?OpenDocument

Luhansk have been seized. Also, the buildings of the Security Service of Ukraine in Luhansk and Donetsk, which contained large amounts of weapons have been occupied by the separatist militants. On April 7, 2014, the demonstrators in Donetsk led by pro-Russian activists have proclaimed the creation of separatist "DNR" and enacted the "Declaration of Independence. Further, on April 28, 2014, Luhansk has repeated similar actions to proclaim "LNR". On April 12, 2014, the armed combatants, again declared to be "little green men" – the combatants of Russian forces without any identifying emblems, have seized the state administration in the city Slovyansk. Within the next few days, other cities in the Donetsk region have started to "accept the authority" of "DNR". Separatists gained access to the weapons in the police departments and departments of internal forces, thus the danger and anarchy level was increasing rapidly. Unexpectedly, on April 8, 2014, the combatants have also seized the regional state administration in Kharkiv, the major city in the East of Ukraine, which, however, mainly did not support pro-Russian views. The special department "Alfa" of the Ukrainian Internal Forces has repulsed the combatants and freed the building of the administration. Further, there were no major actions of separatist militants in Kharkiv. On April 14th, 2014 the Ukrainian government has officially launched the anti-terroristic operation (ATO). From there on the tense battles and military operations began. The battles were officially occurring between the Armed Forces of Ukraine and Ukrainian Volunteer Battalions against the pro-Russian separatist combatants. There were serious battles in Mariupol, which was freed by the Armed Forces of Ukraine and further remained Ukrainian city out of aggression zone. Also, the major battles include the fusillade near Volnovakha, Debaltsevo, Donetsk Airport, and tragic Ilovaisk Cauldron, as well as many others. The attacks have been escalating extremely quickly, the front line has been changing rapidly and inconsistently, while some of the Ukrainian military operations appeared to be successful and others failed[155]. The victims on both sides are huge, and as of today are

[155] The chronic of the Russian armed aggression are taken from: Червоненко, В. (2015) Війна на Донбасі у цифрах і перемир'ях. BBC Україна. Режим доступу: https://www.bbc.com/ukrainian/politics/2015/02/150205_donbas_ato_total_summary_vc; and Інформаційно-аналітичний Центр Національної Безпеки України. (2014) Хроніка війни на Донбасі: від мітингів до танків. Режим доступу: http://mediarnbo.org/2014/10/18/hronika-viyni-na-donbasi-vid-mitingiv/

assessed by the UN in approximately 42 000 – 44 000, out of which, approximately 13 000 of killed, including approximately 5000 Armed Forces of Ukraine soldiers[156]. The ATO ended on April 30, 2018, and has been reformed into the Joint Forced Operation. The aim of the operation has not been changed by the reform, the alterations were mainly in the field of management and commandment. The Joint Forces Operation is currently effective.

However, the further arising question, is how are any of these actions attributable to Russia. Russia has been denying their participation in the aggression since 2014, and still upholds the same rhetoric today, despite the recognition of the whole international community[157]. At the same time, recently, on December 2, 2020 on the propagandist event in the Security Council of UN organized by Russia, where the representatives of "DNR" and "LNR" where supposed to speak, which was also boycotted by Ukraine, UK, US, France, Belgium and Lithuania, the representative of Russian Federation in the UN has called the conflict a "political conflict between Ukraine and Russia[158]", which was sudden and contrary to the previous statements of Russia. However, at the same time, he has denied that the conflict is "armed" or "military"[159]. Thus, the recognition of political conflict does not really mean, that Russia anyhow accepts the presence of Russian forces in the Eastern territories, which is of paramount importance for the extraterritorial jurisdiction establishment. There are multiple pieces of evidence presented and reported by Ukrainian and international media, as well as international organizations, functioning on the territory of Eastern Ukraine. For instance, the presence of "Russia-trained forces utilizing Russia-provided equipment in the Donbas" has been recognized by the Ambassador of US mission to OSCE James S. Gilmore[160], the same has been recognized by the Minister of Foreign

[156] Радіо Свобода. (2020) Хроніка війни на Донбасі: від мітингів до танків. Режим доступу: https://www.radiosvoboda.org/a/news-oon-zhertvy-viyny-na-donbasi/30818348.html

[157] Рада національної безпеки і оборони України (2014) Оперативна інформація Інформаційно-аналітичного центру РНБОУ за 30 серпня. Військові дії в зоні конфлікту. Режим доступу: https://www.rnbo.gov.ua/ua/Diialnist/1797.html?PRINT

[158] Українська делегація для участі у Тристоронній контактній групі. (2020, 3 грудня) UkrdelegationTCG. Official Page. https://www.facebook.com/UkrdelegationTCG/?ref=page_internal [Facebook update]. Режим доступу: https://www.facebook.com/UkrdelegationTCG/posts/142132907697128

[159] Українська делегація для участі у Тристоронній контактній групі. (2020, 3 грудня)

[160] U.S. Mission to OSCE. (2020) Ongoing Violations of International Law and Defiance of OSCE Principles and Commitments by the Russian Federation in Ukraine. As delivered by Ambassador James S. Gilmore III on May 21, 2020. Retrieved from: https://osce.usmission.gov/on-russias-aggression-against-ukraine-10-2-2/

affairs of France[161] and Germany[162]. The statement regarding the presence of Russian troops has also been announced by the NATO-Ukraine Commission, where they called Russian Federation to cease "intervening militarily in the Donetsk and Luhansk regions and to withdraw troops, equipment, and mercenaries from the territory of Ukraine[163]". Other more material proofs are provided by media investigators. For instance, Wilfried Martens Centre for European studies has presented the report called "Caught in the Act. Proof of Russian Military Intervention in Ukraine", where the authors analyze the open-source information, as well as apply expert knowledge on weapons and military equipment and come to the conclusions that (1) Russia does supply the separatists with the weapons, since they could nor been obtained by them through other sources due to the exclusive presence of such weapons in Russian Military forces, and (2) due to the presence of exact tanks, including T-72B3 and other military machinery that Russian military presence was present in the East of Ukraine[164]. The same has been reported by The Guardian[165], BBC[166] , and other media sources. Last, but not least, it is worth noting that Russia has taken part in the peace negotiations as an interested party starting from the first negotiations in Geneva in April 2014[167] and has remained the constant party of the Trilateral Contact Group on Ukraine till today[168]. Russia has excused such interest by being the "independent intermediary" and protection of Russian-speaking society, which is however assessed by the experts as the obvious evidence of, at the very least, Russia's involvement in the aggression[169].

One more question of paramount importance for the basis of this research is the legal status of the Eastern territories of Ukraine in terms of the Russian armed

[161] Passarieollo, Ch. (2014) France's Fabius Urges Lavrov to Call Cease Fire in Ukraine. The Wall Street Journal. Retrieved from: https://www.wsj.com/articles/frances-fabius-urges-lavrov-to-call-cease-fire-in-ukraine-1402838260

[162] Rettman, A. (2014) Germany and US voice concern on Russian troops in Ukraine. EU Observer. Foreign Affairs. Retrieved from: https://euobserver.com/foreign/125378

[163] NATO (2019) Statement of the NATO-Ukraine Commission Kyiv as of 31 October 2019. Retrieved from: https://www.nato.int/cps/en/natohq/official_texts_170408.htm?selectedLocale=en

[164] Cech, A. & Janda, J. (2015) Caught in the Act Proof of Russian Military Intervention in Ukraine. Wilfried Martens Centre for European studies. Retrieved from: https://martenscentre.eu/sites/default/files/publication-files/russian-military-intervention-ukraine_0.pdf

[165] Walker, Sh. (2019) New evidence emerges of Russian role in Ukraine conflict. Research group Forensic Architecture collected images to use in ECHR case. The Guardian. Retrieved from: https://www.theguardian.com/world/2019/aug/18/new-video-evidence-of-russian-tanks-in-ukraine-european-court-human-rights

[166] Малюкова, М. (2019) Нові докази російської присутності на Донбасі. Огляд ЗМІ. ВВС Моніторинг. Режим доступу: https://www.bbc.com/ukrainian/press-review-49395260

[167] Червоненко, В. (2015) Війна на Донбасі у цифрах і перемир'ях.

[168] OSCE. (2020) Press Statement of Special Representative Grau after the regular Meeting of Trilateral Contact Group in Minsk on 14 May 2020. OSCE Chairmanship, Press Release. Retrieved from: https://www.osce.org/chairmanship/452407

[169] Парахонський, Б., Яворська, Г. (2019) Онтологія війни і миру: безпека, стратегія, смисл : монографія. Київ: НІСД, 9. Режим доступу: https://niss.gov.ua/sites/default/files/2019-07/Monografiya_Ontologiya_print.pdf

aggression against Ukraine occurring therein. Whereas the Crimean status could be rather unequivocally defined through the diplomatic position of Ukraine, Ukrainian legislation, and multiple decisions, resolutions, and statements of the international community and major international organizations, as the occupied and illegally annexed territories, the status of Eastern territories is more disputable. The Law of Ukraine "On the peculiarities of the state policy on ensuring the state sovereignty of Ukraine in the temporarily occupied territories in Donetsk and Luhansk regions[170]" provides these territories with the status of "temporarily occupied territories", implying that the occupying state is Russian Federation. the Ukrainian government states the same in the previously mentioned Resolution of the Supreme Council 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 as of June 5, 2015[171], when addressing the Council of Europe. This view is however rather unpopular in the international community and, in view of ECtHR claims, the statements of only the Ukrainian government may not be regarded as sufficient. There are no official statements or resolutions, where international representatives of the major organizations would use the wording "occupied territories" toward the East of Ukraine. Such statements are usually presented only by the representatives and delegations of Ukraine[172]. Besides, the actual circumstances of the situation in Crimea and in Ukraine differ a lot. Russia has officially recognized Crimea as part of their territory and regards it to be the territory under their authority, while the separatist organizations are exercising authority over Eastern Ukraine. In Crimea, all public powers are assumed by the Russian government, while again in Eastern Ukraine these are performed by "DNR" and "LNR", which, though supported by Russia, declare themselves to be independent. There also are many other factors that distinguish the status of Crimea and Eastern territories. For the

[170] Про особливості державної політики із забезпечення державного суверенітету України на тимчасово окупованих територіях у Донецькій та Луганській областях, supra note 144.
[171] Про Заяву Верховної Ради України "Про відступ України від окремих зобов'язань, визначених Міжнародним пактом про громадянські і політичні права та Конвенцією про захист прав людини і основоположних свобод". Постанова ВРУ від 21.05.2015, supra note 140.
[172] See for example: Permanent Mission of Ukraine to the International Organizations in Vienna. Statement by the Delegation of Ukraine at the 956th FSC Plenary Meeting on Russia's ongoing aggression against Ukraine and illegal occupation of Crimea. 30 September 2020, Agenda item 3, General Statements. Retrieved from: https://www.osce.org/files/f/documents/1/d/466683.pdf

purposes of this section, it is worth emphasizing that the status of Eastern territories is ambiguous and may not be definitely determined herein. Conversely, the status of the territories for the purposes of ECtHR cases resolution will be analyzed in further sections with the view of factual circumstances and the Court's practice.

To conclude, the first section has allowed to create a stable theoretical basis and identify main categories of paramount importance for the further in-depth research and application of the latter to the circumstances of occupation of Crimea and loss of control over the Eastern territories. In particular, the broadly researched issue of the exceptions to the territoriality principle has allowed to establish, that the exceptions which I will further tailor to apply regarding potential cases include territorial and personal jurisdiction, which may bring up the liability of the contracting party for the actions of its agents or the whole state system irrespective of the state's de-jure territory.

SECTION II.
LIABILITY FOR THE INFRINGEMENT OF HUMAN RIGHTS ON THE OCCUPIED AND UNCONTROLLED TERRITORIES OF UKRAINE UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

2.1. Liability for the infringement of human rights on the territory of the Crimean Peninsula

Since the beginning of Russian aggression and illegitimate actions against Ukraine starting from February 2014, due to the world experience with similar situations, including conflicts in Nagorny Karabakh, Transdniestria, South Ossetia and Abkhazia and Chechnya, it was obvious that ECHR will be overwhelmed with the cases on the topic. Based on Georgian cases,[173] it was also expected that Ukraine would bring interstate applications to Court. Indeed, the first application of *Ukraine v. Russia* was lodged even before the "official" date of illegal annexation on March 13, 2014. Further, another three interstate applications were lodged by Ukraine, which concerned events in Crimea, events in the East of Ukraine, or both. The third application Ukraine v. Russia (III) was however struck out by the ECtHR since the Ukrainian government did not wish to pursue the application anymore[174]. As of today, no decisions have been issued by the Court on any of the applications yet. Besides, the Court reports that there are around 4000 individual applications pending, allegedly considering the events in either Crimea or Eastern Ukraine[175]. None of the applications regarding Crimea have been decided yet, and only a few concerning events in Eastern Ukraine had received adjudication by the Court. As the analytics say, the Court still holds a large backlog of the applications regarding the Chechnya conflict, which were mostly filed in 2003-2005[176], thus the predictions on when the individual cases regarding Ukraine will be decided are mostly impossible to make. Therefore, since there is yet no interpretation

[173] Georgia v. Russia (I) [GC], no. 13255/07, ECHR 2019. Retrieved from: http://hudoc.echr.coe.int/eng?i=001-189019; Georgia v. Russia (II) (relinquishment), no. 38263/08, ECHR 2008. Retrieved from: https://bit.ly/3la3jST
[174] European Court of Human Rights. (2018) Grand Chamber to examine four complaints by Ukraine against Russia over Crimea and Eastern Ukraine. Registrar of the Court. Press Release.
[175] European Court of Human Rights. (2018) Grand Chamber to examine four complaints by Ukraine against Russia over Crimea and Eastern Ukraine.
[176] Aolain F. N. (2015) The European Convention meets the Crisis in Ukraine. Just Security. Retrieved from: https://www.justsecurity.org/21903/european-convention-crisis-ukraine/

of the events in Crimea by ECtHR and no practice to provide at least deliberate certainty, it is now a matter of analysis of similar practice to foresee and design possible outcomes of the cases in terms of the jurisdiction of Russia, Ukraine or both Contracting States.

Before diving into the analysis of the Court's case-law it is also worth mentioning that the circumstances of Crimea occupation are different in material facts from all the other similar cases, including the cases concerning, as mentioned earlier, conflicts in Nagorny Karabakh, Transdniestria, South Ossetia and Abkhazia, Chechnya and Northern Cyprus. Officially, even from the side of the occupying state, or the state infringing international law by supporting separatist entities, neither of the territories in question in these regions were declared by such states to be acquired by the latter and to be considered the territory of the latter. In the Transdniestria issue, a separate self-proclaimed "republic" has been formed. Same in Northern Cyprus, and Nagorny Karabakh. While it is obvious that these new self-proclaimed entities have been supported and controlled by Russia, Turkey and Armenia respectively, neither of these countries have claimed the territories, subject to the case, to be part of their territory. While in Russia's interpretation Crimea is officially regarded to be the independent "Republic of Crimea", the constitution of the latter states that it constitutes an inalienable part of the Russian Federation[177]. Russia has not filed any reservations or derogations regarding the territory of the Federation[178], to which Convention shall be applicable. Thus, under Article 1 and the "primarily territorial" perception of jurisdiction, referred to in the first subsection hereof, it should be logical to presume that Russia should admit its jurisdiction over Crimea under the Convention, without any exceptions. This generally appears to be true based on the statements made by Russian representatives during the oral hearings of the case Ukraine v. Russia[179] on September 11, 2019. British QC M. Swainston, representing Russia, has stated that

[177] Конституция Республики Крым. Государственный Совет Республики Крым. 11 апреля 2014 года. Статья 1. Режим доступу: https://rk.gov.ru/ru/structure/39

[178] Council of Europe. Treaty Office (2020) Reservations and Declarations for Treaty No.005 - Convention for the Protection of Human Rights and Fundamental Freedoms. Status as of 26/11/2020.

[179] European Court of Human Rights. (2019) Grand Chamber hearing on inter-State case Ukraine v. Russia (re Crimea). Registrar of the Court. Press Release. Retrieved from: https://bit.ly/3mn3wTW

Russia accepts "potential jurisdiction" over Crimea. The discussion was further circling around the date of this acceptance, which, however, will be further discussed. Ukraine, from its side, has filed the previously mentioned and troubling in separate points Resolution 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 as of June 5, 2015[180], where Ukraine has stated that: "The Russian Federation, as the Aggressor State and Occupying Power, bears *full responsibility for respect of human rights* in the temporarily occupied territories of Ukraine under international humanitarian law and international human rights law[181]". However, as it appears obvious from the numerous cases in ECtHR practice, it is not the official "announcements", resolutions of the Contracting States – parties to the case, naming of the circumstances or other relative things that appear to be of the paramount value for the Court. It is rather the true grounded facts and residual circumstances that are considered as evidence by the Court and taken into account during the deliberation of the case. In my opinion, the same treatment applies to Court practice. While the official status of Crimea, as treated by Russia, is different from the territories in mentioned cases and it appears that they are more applicable to the analysis of the potential cases regarding Eastern Ukraine, it is worth remembering that the extraterritorial jurisdiction practice is rather coherent and consistent, even though built-up out of the cases with various circumstances.

The starting point for the analysis in this subsection remains coherent with the conclusions of previous research – Crimea is considered to be an inalienable de jure territory of Ukraine, which has been illegally annexed and occupied by the Russian Federation. The facts provided in subsection 1.3.1., in my opinion, substantially prove the fact of occupation and lack of any basis to consider that the Crimean Peninsula has been annexed, thus this subsection will be built on the factual basis of occupation and will further consider the prospective responsibility of either Contracting Party.

[180] Про Заяву Верховної Ради України "Про відступ України від окремих зобов'язань, визначених Міжнародним пактом про громадянські і політичні права та Конвенцією про захист прав людини і основоположних свобод". Постанова ВРУ від 21.05.2015, supra note 140.
[181] Про Заяву Верховної Ради України "Про відступ України від окремих зобов'язань, визначених Міжнародним пактом про громадянські і політичні права та Конвенцією про захист прав людини і основоположних свобод". Постанова ВРУ від 21.05.2015, supra note 140.

Moreover, whereas Crimea has been occupied by Russia, my initial presumption of the analysis is that Russia shall exercise effective control over the territory, thus the circumstances create the "ratione loci" exception to the territoriality principle in a form of military occupation. The validity of this presumption becomes subject to analysis in this subsection.

Firstly, it is worth stating that the status of occupying power is not always decisive for the application of the effective control over territory principle, as followed from the practice of ECtHR, in particular the *Al-Skeini case.* The case is about the six Iraqi citizens, who were killed in Iraq in 2003 by the British forces. The circumstances of the UK presence in the Basra region of Iraq are the following. Authorized by the UN, in March 2003, a Coalition of Armed Forces under unified command started the invasion of Iraq; by April 5, 2003, large UK forces captured the Basra region. The British have formed the Coalition Provisional Authority, the main powers of which was to exercise powers of government temporarily. At the same time, they have immediately claimed their intention to transfer the power from the CPA to the Iraqi government as soon as possible. Thus, already in June 2004 full authority was transferred from the British Authority to the Iraqi interim government. The Court recognizes in the decision numerous times that British powers, for the time of the CPA activity were considered to be the "occupying power[182]". However, when applying the principles to the case, the Court has chosen to apply the personal jurisdiction rather than the territorial one. The Court states that "the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basra during the period in question, exercised authority and control over individuals killed[183]". The Court does not even consider the application of the effective control over the territory principle to the case, even though the prerequisites for the establishment of such control are present, for instance, the presence of a large number of troops and exercise of public powers[184]. The Court does not explain the omission of the effective control over territory principle,

[182] Al-Skeini and Others v. the United Kingdom, supra note 12, § 142
[183] Al-Skeini and Others v. the United Kingdom, supra note 12, § 149
[184] Al-Skeini and Others v. the United Kingdom, supra note 12, §§ 147-149

however, the researchers agree that such application is rather inconsistent and odd[185]. The troubling nature of such a decision can also be followed by the concurring opinions to the case. Judge Rozakis clearly states that she considers "(…) that the right approach to the matter would have been for the Court to have included that aspect of the jurisdiction in the exercise of the "State authority and control" test, and to have simply determined that "effective" control[186]". A similar opinion was expressed by Judge Bonello, who also reiterated on the effective control over territory approach, stating that "(…) once a State is acknowledged by international law to be "an Occupying Power", a rebuttable presumption ought to arise that the Occupying Power has "authority and control" over the occupied territory[187]". The application of the State's agent approach narrows the actions that may be attributed to the state, and presume that as the general rule, the actions that happen at the specific territory remain the responsibility of the territorial state, while the effective control over the area approach provides for the transfer of human right protection obligation on the occupying state.

It is true that despite the concurring opinions, ECtHR's decision in the case creates the uncertainty in terms of whether the Court will indeed apply the effective control over territory principle, where it appears to be logical to do so. S. Wallace and C. Mallory have paid a significant amount of attention to this fact and concluded that the presence of this decision in Court's practice, leads to the situation where "the degree of responsibility Russia bears (…) remains unclear and this is linked largely to the ECtHR's inconsistent approach in testing for spatial jurisdiction[188]". In my opinion, such a conclusion is a bit hectic and exaggerated. I do not offer to disregard the *Al-Skeini case* as part of the Court's practice, but I consider it necessary to draw attention to the following fact. As it was established in the theoretical part of the research, apart from the criteria of a number of troops and exercise of public powers in the cases of effective control in the conditions of military occupation, the Court also considers the

[185] See for example Wallace, S. & Mallory, C. (2018). Applying the European Convention on Human Rights to the Conflict in Ukraine, 19-21; and Milanovic, M. (2011) European Court Decides Al-Skeini and Al-Jedda. EJIL-Talk! Blog of the European Journal of International Law. Retrieved from: https://www.ejiltalk.org/european-court-decides-al-skeini-and-al-jedda/
[186] Al-Skeini and Others v. the United Kingdom, supra note 12, Concurring opinion of Judge Rozakis
[187] Al-Skeini and Others v. the United Kingdom, supra note 12, Concurring opinion of Judge Rozakis
[188] Wallace, S. & Mallory, C. (2018). Applying the European Convention on Human Rights to the Conflict in Ukraine, 29

continuance or permanence of the occupation. The length of this period is rather undefined, and while the occupation for over a year with the performance of government functions appears to be rather substantial, it appears to be ponderable that the British administration has declared from the very beginning their intentions to transfer the powers to locally elected government at the earliest possibility[189]. Also, the fact of two concurring opinions in the case provides the basis for mitigating the thoroughness of the case for the Court's practice. Crimea has been occupied by the Russian Federation already for almost 7 years. Russia does not recognize the fact of occupation, therefore does not consider discussing the possibility of the return of Crimea and de-escalation of Russian troops from the peninsula, despite multiple sanctions, warnings, resolutions, and appeals of the international community. Last, but not least, without involvement in the political discussions, the occupation of Iraq appears to be more or less "legitimate" since it was authorized by the UN Security Council[190]. The occupation and illegal annexation of Crimea possess no legitimate basis at all, and none of those claimed by the Russian Federation is recognized as legal by Ukraine or the international community. All of these facts, to my mind, amount up to the radical difference between the circumstances in Al-Skeini and Crimean conditions.

There are however other cases that describe the circumstances much closer to those in the Crimean case. In particular the Northern Cyprus cases, such as *Cyprus v. Turkey*[191], *Xenides-Arestis v. Turkey*[192], *Demades v. Turkey*[193] , and *Loizidou v. Turkey*[194]. The latter is considered to be the primary case, where the principles of effective control over territory were set forth by ECtHR[195]and were further cited in the interstate case, as well as taken as the basis for the decisions in the other Northern Cyprus cases. These cases consider the Turkish invasion of Cyprus in 1974. As a result of the military actions, the island of Cyprus was divided into two parts. The

[189] R. (Al-Skeini) v. Secretary of State for Defence U.K. House of Lords. UKHL 26., §116. Retrieved from: https://www.casebriefs.com/blog/law/international-law/international-law-keyed-to-damrosche/chapter-11/al-skeini-v-secretary-of-state-for-defense/
[190] Al-Skeini and Others v. the United Kingdom, supra note 12, §9-23
[191] Cyprus v. Turkey, supra note 91.
[192] Xenides-Arestis v. Turkey, no. 46347/99. ECHR 2005. Retrieved from: http://hudoc.echr.coe.int/eng?i=001-71800
[193] Demades v. Turkey, no. 16219/90. ECHR 2003. Retrieved from: http://hudoc.echr.coe.int/eng?i=001-61272
[194] Loizidou v. Turkey, supra note 21.
[195] European Court of Human Rights & Council of Europe (2019). Guide on Article 1 of the European Convention on Human Rights, 5-6.

autonomous Cypriot administration was established in the northern part of Cyprus. Over 200 000 people were displaced and expulsed from their homes[196]. The so-called "Turkish Republic of Northern Cyprus" (TRNC) was created there. The TRNC is fully controlled by Turkey and aligns its policy completely with the orders from the Turkish government even though TRNC, from the internal side, has its own government and independent administration of the country[197]. The international community does not recognize the division of the Republic of Cyprus and considers the territories de jure Cypriot and occupied by Turkey[198]. In the case the Court has first stated the general concept of effective control over territory and its consequences, stating that

> "(…) the responsibility of a Contracting Party could 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 the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration[199]".

Further, the Court singles out the first previously mentioned criteria: the presence of troops. ECtHR states that

> "It is not necessary to determine whether (…) Turkey actually exercises detailed control over the policies and actions of the authorities of the "TRNC". It is obvious from the large number of troops engaged in active duties in Northern Cyprus (…) that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her [Turkey's] responsibility for the policies and actions of the "TRNC"[200]".

The *Loizidou case* basically established the first criteria that are now essential to determine the presence of effective control – the number of troops. In terms of Crimea, the peninsula has been taken over by Russian military forces from the beginning of the conflict. All Armed Forces of Ukraine have been evacuated from Crimea. All the enforcement agencies are also controlled by Russia, therefore all and any power structures in Crimea are under the command of Russia. Besides, the data from

[196] Pericleous, Ch. (2009) Cyprus Referendum: A Divided Island and the Challenge of the Annan Plan. Volume 26 van International library of twentieth century history, I.B.Tauris, 201. Retrieved from: https://books.google.nl/books?id=PHQAAwAAQBAJ&pg=PA201&redir_esc=y
[197] Akgun, C. (2010) The Case of TRNC in the context of Recognition of States under International Law. Ankara Bar Review 2010/1, 14-15. Retrived from: http://uniset.ca/microstates2/trnc_akgun.pdf
[198] The Law Library of Congress, Global Legal Research Center (2009) Cyprus: Destruction of Cultural Property in the Northern Part of Cyprus and Violations of International Law. Retrieved from: https://www.loc.gov/law/help/cultural-property-destruction/cyprus.php
[199] Loizidou v. Turkey, supra note 21, § 52
[200] Loizidou v. Turkey, supra note 21, § 56

Ukrainian Military Intelligence and OSCE sources confirm the presence of almost 32 000[201] Russian soldiers in Crimea, 81 airplanes and helicopters, and other military equipment and weapons[202]. These facts have also been presented by the representatives of Ukraine during the hearings in the interstate case in ECHR by I. Lishchyna and B. Emmerson[203]. In my opinion, all of these facts are more than grave to satisfy the first criterion.

The second criterion for establishing effective control over territory is the persistence or permanence of the occupation. This criterion is best illustrated through the *Issa case*. As it was previously cited, the case considers the Kurdistan region, and the Court has considered that there isn't enough basis for establishing effective control over the territory. One of the reasons for this absence of grounds was the following argument of the ECtHR. The Court agrees that the number of troops in Kurdistan equals to those Turkish troops in Northern Cyprus, but the Court distinguishes that the time during which the troops in Northern Cyprus were present was substantially longer[204]. The occupation of Northern Cyprus has been continuing for over 45 years so far. At the time of case consideration, the occupation has been continuing for 22 years, at the time of application lodging - 15. The presence of Turkish forces in Kurdistan at the time of application (1994-1998) was substantial but occasional. Throughout four years there were 14 military operations, the longest of which lasted six weeks[205]. The Court though does not provide any explanation to the criteria, and as mentioned earlier, it remains unclear. However, I believe that comparing the facts, considered by the Court in the *Issa case* and the 45 years occupation of Cyprus, one may find the logic behind the inability of ECtHR to equalize the cases. The occupation of Crimea has been continuing for 7 years so far. The occupation is permanent and consistent without any changes in the situation. Besides, considering the statements of Russia, occupation is perceived by them as legitimate and therefore with no intention to be terminated. It

[201] Mader, G. (2020) How Much Has Russia Militarised the Crimea?. European Security and Defense. Retrieved from: https://euro-sd.com/2020/03/allgemein/16510/how-much-has-russia-militarised-the-crimea/
[202] Tucker P. (2019) Exclusive: US Intelligence Officials and Satellite Photos Detail Russian Military Buildup on Crimea. Defense One. Retrieved from: https://www.defenseone.com/threats/2019/06/exclusive-satellite-photos-detail-russian-military-buildup-crimea/157642/
[203] European Court of Human Rights (2019, September 11) Grand Chamber hearing. Ukraine v. Russia (re Crimea) (no. 20958/14). Time code [1:10:00-1:42:00]. Retrieved from: https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=2095814_11092019&language=en
[204] Issa and Others v. Turkey, supra note 33, § 75
[205] Issa and Others v. Turkey, supra note 33, § 45

appears to me that the residual facts of Northern Cyprus and Crimea occupation appear to be rather similar in the dimension of validity and significance for the Court. The Court, allegedly, will consider the circumstances of Crimean cases to resemble the TRNC cases, rather than Kurdistan cases. All arguments considered, I believe that there are enough grounds to deem the second criterion to be satisfied with Crimea as well.

Further, the third criterion for the application of effective control over territory principle is assuming by the occupier of the public powers (part of public powers) that are normally exercised by the official government. As it was described in detail before, this criterion was first stipulated in the *Bankovic case* as the necessary one for extraterritorial jurisdiction. After the critical flurry, the Court has backpedaled in their practice and has already treated the exercise of public power as an important, but not a mandatory signal of effective control presence in *Al-Skeini*. To the benefit of the Ukrainian possible position in ECtHR, the occupying state in Crimea does exercise all the public powers, normally exercised by the local government. The governmental system of the "Republic of Crimea" is described in their Constitution. Throughout the whole Constitution there are references to the Constitution and laws of the Russian Federation, which basically indicate that even though Crimea has some sovereignty in building the system of governmental administration, it must be compliant with the policy of the Russian Federation[206]. Besides, the Constitution of Crimea refers to Article 72 of the Constitution of the Russian Federation, where the subjects of "joint jurisdiction of the Russian Federation and the subjects of the Russian Federation[207]" are listed. Thus, under the Russian control in Crimea, are, among others: (1) protection of the rights and freedoms of man and citizen; protection of the rights of national minorities; ensuring the rule of law, law and order, public security, border zone regime; (2) coordination of issues of health care; social protection, including social security; (3) establishment of common principles of taxation and dues in the Russian Federation; administrative, administrative procedure, labor, family, housing, land, water, and forest

[206] Конституция Республики Крым. Статья 6.
[207] Конституция Российской Федерации. Принята всенародным голосованием 12 декабря 1993 года. Официальный интернет-портал правовой информации. Статья 72. Режим доступу: http://publication.pravo.gov.ru/Document/View/0001202007040001?index=27&rangeSize=1

legislation; (4) personnel of the judicial and law enforcement agencies; the Bar, notaryship; (5) coordination of international and foreign economic relations of the subjects of the Russian Federation[208]. Besides, the Constitution of "Republic of Crimea" indicates that to be elected to serve as the Head of "The Republic of Crimea"[209], deputy of the State Council – the legislative body of the "Republic of Crimea"[210], the candidates shall be the citizens of Russian Federation. Besides, the Constitution indicates that the judiciary is formed in accordance with the laws of the Russian Federation[211], and the Attorney General of the "Republic" is appointed by the president of the Russian Federation upon the recommendation of the Attorney General of the Russian Federation[212]. Of course, Ukraine does not recognize the validity of the Constitution of the "Republic of Crimea", however, Ukraine also does not possess any ability to control the territory or appoint a Ukrainian administration in Crimea. The provisions of the Constitution indicate that the "Republic of Crimea" does not exercise the public powers independently from the Russian Federation. Administrative powers, judiciary, law enforcement, health care, the principles of legislation in all spheres of social interaction, external relations, internal policy are all either directly or indirectly controlled by the Russian Federation. Consequently, I believe it may be undoubtfully stated that the Russian Federation, as the occupying state, has assumed all the public powers in Crimea that are usually exercised by the local government.

One troubling case that may raise a question as to the jurisdiction of Ukraine over Crimea in terms of protection of human rights is *Sargsyan v. Azerbaijan*. The case is often quoted when considering the extraterritoriality exceptions since it is one of the major cases regarding the Nagorny-Karabakh conflict[213]. In the center of the case is the village Gulistan in the territory of Azerbaijan. The village lies in the area which is a subject of the conflict over Nagorno-Karabakh. In 1991 Azerbaijan has proclaimed its independence and the village has been claimed by the self-established Nagorno-

[208] Конституция Российской Федерации. Статья 72.
[209] Конституция Республики Крым. Статья 62
[210] Конституция Республики Крым. Статья 71
[211] Конституция Республики Крым. Статья 86
[212] Конституция Республики Крым. Статья 87
[213] See for example Gałka, K. (2015). The Jurisdiction Criterion in Article 1 of the ECHR and a Territorial State, 485; and Wallace, S. & Mallory, C. (2018). Applying the European Convention on Human Rights to the Conflict in Ukraine, 37

Karabakh Republic (NKR) as part of its territory. Nevertheless, internationally, the village is regarded to be the part de jure Azerbaijan territory[214]. Azerbaijan government in its submission claimed that

> "the village, situated in a V-shaped valley on the northern bank of the River Inzachay, was on the Line of Contact, meaning that it was surrounded by armed forces of Azerbaijan on one side and of Armenia on the other side. Armenian forces held strategically advantageous positions on a steep, forested slope south of the river, while Azerbaijani positions on the north bank of the river were situated in the lower, relatively open territory[215]".

Further, the government has stated that actually, the village was neither under the effective control of Azerbaijan nor of Armenia, since it is a deserted village, in a contested area that constitutes "a dangerous environment", in particular, because "the village and its surroundings were mined[216]". Thus, in this case, Azerbaijan was trying to find a way to eliminate and exclude the territory out of its jurisdiction. I believe, this case should have been considered in the light of Crimean circumstances, since the "input data" of the official status of the territory is equal to that in Crimea: the territory is internationally recognized as the territory of State A, the territory is occupied by the other forces, State A tries to derogate from the responsibility for human rights protection due to the inability to establish control over the territory. In the *Sargsyan case*, the Court did not accept the claims of the government. The Court has taken into account the fact that unlike in the well-established practice of Moldova conflict cases, in the case of Gulistan village, it was not occupied by the hostile army. It was the disputed area, which however was not under the control of the Armenian Army. The Court stipulates that unlike in cases concerning the Republic of Moldova, which the Government has cited "the acceptance that the territorial State had only limited responsibility under the Convention was compensated by the finding that another Convention State exceptionally exercised jurisdiction outside its territory and thus had full responsibility under the Convention[217]". Since it was not the case in the case of Gulistan village, even though the Court admits that Azerbaijan may "encounter

[214] Sargsyan v. Azerbaijan, no. 40167/06, §§ 14-24, ECHR 2015. Retrieved from: http://hudoc.echr.coe.int/eng?i=001-155662
[215] Sargsyan v. Azerbaijan, supra note 208, §§ 47-48
[216] Sargsyan v. Azerbaijan, supra note 208, §§ 47-48
[217] Sargsyan v. Azerbaijan, supra note 208, § 148

difficulties at a practical level in exercising their authority in the area of Gulistan[218]", the Court has reiterated the "the need to avoid a vacuum in Convention protection[219]" and held that Azerbaijan has not demonstrated enough exceptional circumstances that would exclude their responsibility[220]. Whereas, as mentioned earlier, some aspects of the case are rather alike, the Crimean situation differs a lot. The situation is closer to that of Transdniestria, where the occupying state has its army all over the territory and exercises effective control over the territory, thus, the jurisdiction of Russia substitutes the jurisdiction of Ukraine, and the vacuum in protection is not created. Therefore, the risk of the outcome in potential Crimean cases, like the outcome in the *Sargsyan case* is eliminated by the actual facts and circumstances of the Crimean occupation.

However, the Court practice indicates that the occupied State still remains responsible for positive obligations even if the territory remains under the effective control of other Contracting State. This is mainly established through the Moldavian cases, mainly the *Ilascu case* and *Catan case*. In *Ilascu*, as described earlier, the Court has established that the jurisdiction over the Moldavian Republic of Transdniestria was exercised by Russian Federation, however, the Court indicated that the obligations of the occupied State are not completely discharged:

> "where a Contracting State is prevented from exercising its authority over the whole of its territory by a constraining de facto situation, such as obtains when a separatist regime is set up, whether or not this is accompanied by military occupation by another State, *it does not thereby cease to have jurisdiction within the meaning of Article 1 of the Convention* over that part of its territory temporarily subject to a local authority sustained by rebel forces or by another State[221]".

The Court indicated that these obligations are however limited to the positive obligations of the general measures to re-establish control over the territory and use all the political and diplomatic leverage it owns to eliminate the violation of human rights, which were described in detail in subsection 1.1. hereof. These positive obligations are considered to be the "minimum" obligations that the passive State may bear in the extraterritorial jurisdiction cases.

[218] Sargsyan v. Azerbaijan, supra note 208, § 150
[219] Sargsyan v. Azerbaijan, supra note 208, § 148
[220] Sargsyan v. Azerbaijan, supra note 208, §§150-151.
[221] Ilaşcu and Others v. Moldova and Russia, supra note 2, §333

S. Wallace and C. Mallory, however, indicate that there are cases, where the obligations of the State that lost control over the territory, are not limited to these limited ones, but the state is further obliged to uphold all Convention rights within that territory on the regular basis[222]. The case presented as an example is *Isayeva v. Russia*[223], which concerned the conflict in Chechnya. The case concerned the bombarding by Russian forces of the villagers in the Chechnya region that were allegedly moving through the safe "passage" to save themselves, it was still hit by Russian aviation bombs. The applicant's son and three nieces were killed[224]. The authors discuss the fact that in this case, Russia has lost control over the territory of Chechnya, due to the local rebel and insurgency. They indicate that the Court admits the loss of control, but nevertheless does not investigate, whether the presumption of Russia's control over the de jure Russian territory of the village and does not mitigate the obligations of Russia, considering it obligated to conduct a proper investigation[225]. They further indicate that this case law created uncertainty regarding the extent that Ukrainian obligations will be limited in terms of Crimea. I tend to disagree with the authors' analysis of the case. In my opinion, the Court did not examine the loss of control over the territory in the discussed case due to the fact that the Court has presumed the exercise of jurisdiction due to the actions of State agents – Russian troops[226], and therefore the need to consider the territorial aspect of jurisdiction was neglected. Besides, the authors indicate that the Court has admitted the loss of control by referring to the wording of the decision "situation in Chechnya had called for *exceptional measures* on behalf of the State to *regain control* over the Republic and to suppress the illegal armed insurgency". It should be however noted that the Court has used this wording while assessing the justification of the use of lethal force in Chechnya, and this statement, to my mind, shall not be considered as the one, indicating the presence of the effective control over the territory by any other party. Summing up, I consider the circumstances of the *Isayeva case* contrasting with the circumstances in

[222] Wallace, S. & Mallory, C. (2018). Applying the European Convention on Human Rights to the Conflict in Ukraine, 35
[223] Isayeva v. Russia, no. 57950/00, ECHR 2005. Retrieved from: http://hudoc.echr.coe.int/eng?i=001-68381
[224] Isayeva v. Russia, supra note 217, §§ 12-28
[225] Wallace, S. & Mallory, C. (2018). Applying the European Convention on Human Rights to the Conflict in Ukraine, 36
[226] Isayeva v. Russia, supra note 217, § 210

Crimea in so many aspects, starting from material facts to the application of different concepts of territorial jurisdiction for the latter one and the concept of personal jurisdiction in Chechnya.

In contrast, the situation of the Moldavian conflict and Crimean occupation are much more alike. The Russian occupation is equally recognized in both regions and the fact of occupation, in general, is not subject to discussion in the international community. In *Ilascu* the Court has applied the effective control over territory principles, using the test presented in this subsection. Thus, considering my previous conclusions as to the satisfaction of all three criteria, I believe there are feasible arguments to assume that Ukrainian positive obligations will only be limited to those, stated in the *Ilascu case*. Whether Ukraine adheres to these obligations is the other issue for research and will be further analyzed in the third section. Besides, another argument for the limiting of Ukraine's obligations equally to the practice in *Ilascu* is that the case has become the basis for the creation of well-established practice. The *Ilascu*-type cases regarding Transdniestria are decided through the "fast track procedure" by the Court sitting as a Committee of three judges. In recent time 17 cases have on Moldova have been decided by the three-judges Committee[227]. The analytics consider this to be a viable indication of the possibility that the Court has agreed to use the approach in Ilascu, to be definitive for the cases of alike extraterritorial jurisdiction exceptions, in terms of "the concepts of jurisdiction, state responsibility, and attribution of conduct[228]". Thus, if these assumptions by experts come true, the considerate chance of the application of the same principles as in *Ilascu* to Crimean cases exists.

Consequently, I believe that considering all the above-mentioned arguments and conclusions, it may be assumed that in the possible Crimean cases, ECtHR will establish the jurisdiction of the Russian Federation over the territory of Crimea, due to the fact that Russia exercises effective control over the whole territory of Crimean Peninsula, while the obligations of Ukraine under Convention will be limited by

[227] Hamid, L. (2019) Ilaşcu: from contested precedent to well-established case-law. Strasbourg Observers. Retrieved from: https://strasbourgobservers.com/2019/10/31/ilascu-from-contested-precedent-to-well-established-case-law/
[228] Hamid, L. (2019) Ilaşcu: from contested precedent to well-established case-law.

positive minimum obligations to use all the political and diplomatic leverage it owns to eliminate the violation of human rights. However, the last aspect that remains unclear within the alleged Crimean cases, is the commencement date of Russia's jurisdiction over the territory and Ukraine's limitation of obligations. This issue has been brought up by the Russian and the Ukrainian governments during the hearings in the interstate *Ukraine v. Russia case*. The Ukrainian government maintains that Russia started to exercise effective control over Crimea on February 27, 2014, when the first demonstration in Crimea started. the Ukrainian government logically maintains this position, since starting from February 27, 2014, there were multiple violations of human rights by the Russian military forces acting on the territory of Crimea. Russian representatives state that they may accept the jurisdiction over Crimea exclusively from March 18, 201,4 after the conduction of the "referendum" and official accession of Crimea to the Russian Federation[229]. From the perspective of the criteria of effective control over the territory, it is worth indicating that the situation has indeed changed in terms of factual circumstances throughout the period of the beginning of the conflict and by the date of the "referendum". As it may be followed from the description of the events provided in subsection 1.3.1. hereof, in the beginning, the numbers of Russian troops at the peninsula was considerably lower, than after the referendum, also, the local government was still somehow functioning and the Armed Forces of Ukraine still remained a significant presence at the territory of the peninsula, as well as law-enforcement units, which were involved in the attempts to infringe the seizure of administrative buildings. Besides, the occupation at that point was not actually yet established and the permanence and continuance thereof were hard to establish as of that moment. On the other hand, starting from February 27, 2014, as presented by Ukrainian representatives during the hearings, the decisions of the Supreme Council of ARC regarding the conduction of "referendum" and accession to Russia was taken during "parliamentary session by gunpoint' which installed Russia's puppet leaders, and the fact that the pseudo-referendum basically lacked any choice of options; was

[229] Coynash, G. (2019) Russia tells ECHR that it didn't annex Crimea & accuses Ukraine & West of 'fake evidence". Human Rights in Ukraine. Website of the Kharkiv Human Rights Protection Group. Retrieved from: http://khpg.org/en/index.php?id=1568254821

held at gunpoint, 'observed' by Russia's far-right and other friends[230]". The Russian military was indeed already present on the Peninsula and started occupying the administrative and strategically crucial buildings, as well as attacking the Ukrainian Navy. Thus, from this perspective, it may be proved that Russia has already started to exercise public powers instead of local government from February 27, 2014. In general, I tend to agree with M. Millanovic that the outcome regarding the date of effective control over the territory largely depends on the evidence presented by the parties[231]. However, I would also like to remind that even if the Court will disagree as to the establishment of Russia's effective control over the territory from February 27, 2014, this fact does not exempt Russia's liability for the actions of their State agents – troops, law enforcement agencies, etc. during the period until March 18, 2014. Thus, Ukraine shall further reiterate on the personal jurisdiction for the actions of State agents of Russia and Russia's respective responsibility, shall the effective control over territory be established as of Match 18, 2014 or any other date.

To conclude, I believe that upon close analysis of the factual circumstances of Crimea occupation, as well as close analysis of the ECtHR's practice, it may be positively assumed that the Crimean Peninsula remains the de jure territory of Ukraine, but due to the occupation by Russia, the jurisdiction under the Convention is now exercised by Russian Federation, as the state that exercises effective control over the territory of Crimean Peninsula. Also, there are substantial similarities between the circumstances in the *Ilascu case*, which became the Court's well-established practice, and potential Crimean cases that allow presuming that the obligation of Ukraine will be limited to the minimal positive obligations. The only unclear moment, heavily depending on the adversity of the hearings and case procedure, is the commencement of the effective control over the territory. However, disregarding the data, accepted by the Court for the establishment of such control, before that date, Russia shall remain

[230] Coynash, G. (2019) Russia tells ECHR that it didn't annex Crimea & accuses Ukraine & West of 'fake evidence".
[231] Milanovic M. (2019) Does the European Court of Human Rights Have to Decide on Sovereignty over Crimea? Part I: Jurisdiction in Article 1 ECHR. EJIL-Talk! Blog of the European Journal of International Law. Retrieved from: https://www.ejiltalk.org/does-the-european-court-of-human-rights-have-to-decide-on-sovereignty-over-crimea-part-i-jurisdiction-in-article-1-echr/

liable for all the human rights violations on the territory of Crimea, which were caused by Russian State agents under the concept of personal jurisdiction.

2.2. Liability for the infringement of human rights in the Eastern territories of Ukraine

Whereas the analysis of the application of the Convention in Crimea appeared to be complicated and with many variables, analysis of the application in the Eastern territories constitutes a real struggle. The Eastern territories do not possess the determined status of occupation, since only Ukraine uses such a description of the territories' legal status, while the international community omits such statements. Unlike with Crimea, the Court has already considered cases regarding the Eastern territories, namely *Lisnyy and Others v. Ukraine and Russia* and *Khlebik v. Ukraine*. However, the Court did not provide a detailed analysis of the jurisdiction issue in these cases, thus providing little clearance for the issue. Russian armed aggression escalated into the conflict between the following parties: Ukrainian side with Armed Forces of Ukraine and volunteer battalions and Russian side with pro-Russian separatist combatants and Russian military forces. The actions of all these actors may force the infringement of human rights and therefore the responsibility for these actions under the Convention shall be established.

The least confusing are the allegations as to the responsibility for the actions of the Armed Forces of Ukraine. The troops of the Armed Forces of Ukraine are considered to be acting as the State agents, besides, their actions are committed on the territory of Ukraine, therefore the responsibility of Ukraine for these actions does not appear to involve any doubts. The assessment becomes less straightforward when referring to the volunteer battalions. Allegedly, Ukraine may be regarded to be responsible for the actions of these battalions if they are "subject to the instructions emanating from the central political and military authorities[232]". L. Veldt has

[232] Kalshoven, F. (1991). State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of Hague Convention IV of 1907 to Article 91 of Additional Protocol I of 1977 and beyond. The International and Comparative Law Quarterly, 40(4), 835. Retrieved from: https://www-jstor-org.eur.idm.oclc.org/stable/759957?seq=1#metadata_info_tab_contents.

thoroughly researched the issues of integration and mobilization of the volunteer battalions[233]. In her research the author indicates that the mobilization of the battalions was indeed legitimized by Ukrainian forces in 2014 since the technical and organizational state of the Army was weak and the army was not in the capacity to resist the Russian and separatist aggression. The legislative basis for the emergence of battalions constituted the amendments as of April 9, 2014, to Law "On the Defense of Ukraine[234]", where under Article 12 the volunteer battalions were regarded to be acting under the control of Armed Forces of Ukraine. Veldt states that despite the legislation "some battalions were strongly connected to either the Ministry of Internal Affairs, specifically Avakov, or the Ministry of Defense from the beginning, while others were, or at least claimed to be, independently operating movements[235]". This created a rather unstable situation, but the government has immediately started the integration of the volunteer battalions into the structure of the Armed Forces. By virtue of separate decrees regarding separate battalions, most of them came under the subordination of either Ministry of Defense or the Ministry of Internal Affairs[236]. Therefore, whereas the militants in the volunteer battalions were subordinate to the administrative structures of Ukraine, it may be stated that they are thus instructed and controlled by Ukrainian authorities. In such a case, Ukraine shall be held liable for the actions of the members of these battalions that are acting and the State agents. A much more complicated situation appears to be with the battalions of "Right Sector" and "OUN" since they have not agreed to become integrated into the Armed Forces of Ukraine[237]. Despite that, they are cooperating with the Joint Forces Operation headquarters and operate "in close cooperation with the official Ukrainian forces on or near the frontline[238]". Thus, whereas the actions of "Right Sector" and "OUN" are following

[233] Veldt, L. (2018) Defining Security and the State: An Analysis of the Ukrainian Volunteer Battalions and the Renegotiation of the Public-Private Divide. Utrecht University Repository. Faculty of Humanities Thesis. Retrieved from: https://dspace.library.uu.nl/handle/1874/373708
[234] Про оборону України. Закон України від 06.12.1991 № 1932-XII. Відомості Верховної Ради України (ВВР), 1992, № 9, ст.106. Режим доступу: https://zakon.rada.gov.ua/laws/show/1932-12#Text
[235] Veldt, L. (2018) Defining Security and the State: An Analysis of the Ukrainian Volunteer Battalions and the Renegotiation of the Public-Private Divide, 50.
[236] See for example: Міністерство Оборони України. (2015) Офіційне роз'яснення щодо ситуації навколо батальйону «Айдар». Режим доступу: https://www.mil.gov.ua/news/2015/03/01/oficzijne-rozyasnennya-shhodo-situaczii-navkolo-bataljonu-ajdar--/
[237] Гуральська, А. (2015) Звіт: Добровольчі батальйони. Виникнення, діяльність, суперечності. Фундація «Відкритий діалог». Режим доступу: https://ua.odfoundation.eu/a/6444,zvit-dobrovolchi-bataljony-vynyknennja-dijalnist-superechnosti/
[238] Amnesty International and Human Rights Watch (2016) "You Don't Exist" Arbitrary Detentions, Enforced Disappearances, and Torture in Eastern Ukraine, 11. Retrieved from: https://www.amnesty.nl/content/uploads/2016/07/ukrainian_report.pdf?x31794

the commands and statements of the commanders of Joint Forces Operation, it may be regarded that they are acting under the command and guidance of Ukrainian authorities. Consequently, the actions of the Armed Forces of Ukraine and the volunteer battalions shall be considered to be the actions of the State agents and Ukraine shall bear responsibility for these actions under the Convention.

However, the more complicated issues arise, when the actions of pro-Russian separatist combatants of DNR and LNR infringe human rights, or generally when human rights are infringed on the Eastern territories of Ukraine. The establishment of the responsibility for these infringements and jurisdiction over these territories constitute the most significant subject of this subsection. The most beneficial for Ukraine and rather likely, considering the facts of the Russian armed aggression in the East of Ukraine and the previous practice of the ECtHR, is the recognition of Ukraine's loss of control over the territory and the establishment of Russian jurisdiction over the territories due to the effective control over the territories. The most applicable Court practice appears to be the practice in the previously analyzed Moldavian cases. The facts of the commencement of conflict in Transdniestria are extremely resembling those of the beginning of the conflict in the East of Ukraine. The separatist units began a war with the Moldavian Armed Forces, Russia has provided their army to help the separatists and therefore the territory was occupied by the separatists, while Moldova ceased to exercise control over the territory[239]. In *Ilascu*, a detailed analysis of the circumstances of the seizure is provided. The Court applies the effective control over territory test and concludes that the territory is under the effective control of Russia, though not as the result of military occupation, but as the result of the support of the separatist entity – "The Moldavian Republic of Transdniestria" (MRT). The first criterion of the test is equal to that, applied in the case of military occupation.

First, is the number of troops situated in the territory. In *Ilascu* the Court states:

> during the Moldavian conflict in 1991-92 forces of the 14th Army (which owed allegiance to the USSR, the CIS, and the Russian Federation in turn) stationed in Transdniestria, an integral part of the territory of the Republic of Moldova, fought with and on behalf of the Transdniestrian separatist forces. Moreover, large quantities of weapons from the stores

[239] Ilaşcu and Others v. Moldova and Russia, supra note 2, §§ 28-101

> of the 14th Army (which later became the ROG) were voluntarily transferred to the separatists, who were also able to seize possession of other weapons unopposed by Russian soldiers[240].

In subsection 1.3.2. hereof I have briefly started to analyze the presence of Russian troops and weapons that could only be obtained by the combatants from Russian military forces. Apart from this evidence, there are pictures from NATO satellites that indicate the presence of the Russian Army on the territory of Ukraine[241]. The same has been confirmed by U.S. Intelligence[242]. The challenge for Ukraine appears to lay in the evidence of the substantial presence of Russian troops and equipment in Eastern Ukraine to justify the satisfaction of the first criteria. Considering that there is substantial evidence of Russian troops presence and the Ukrainian Ministry of Defense constantly provides statements regarding the number of Russian military forces and equipment in Eastern Ukraine, I presume that if Ukraine prepares the evidence thoroughly, the Court will have enough data to agree that the presence of Russian army is substantial.

The second criterion imposed by the Court is the support of the separatist entity. In *Ilascu* the Court indicates that the Russian Federation has provided political, financial, and military support in setting up and maintaining the separatist entity[243]. The Court emphasizes the following financial support from Russia to MRT:

> The Court attaches particular importance to the financial support enjoyed by the "MRT" by virtue of the following agreements it has concluded with the Russian Federation: the agreement signed on 20 March 1998 between the Russian Federation and the representative of the "MRT", which provided for the division between the "MRT" and the Russian Federation of part of the income from the sale of the ROG's equipment; the agreement of 15 June 2001, which concerned joint work with a view to using armaments, military technology, and ammunition; the Russian Federation's reduction by one hundred million United States dollars of the debt owed to it by the "MRT"; and the supply of Russian gas to Transdniestria on more advantageous financial terms than those given to the rest of Moldova[244].

[240] Ilaşcu and Others v. Moldova and Russia, supra note 2, §380
[241] BBC News. (2014) Ukraine crisis: Nato images 'show Russia troops'. Retrieved from: https://www.bbc.com/news/world-europe-28972878
[242] Harris, Sh.& Dreazen Y. (2014) U.S. Intel Sources: Russian Invasion of Eastern Ukraine Increasingly Likely. Report. Foreign Policy. Retrieved from: https://foreignpolicy.com/2014/03/27/u-s-intel-sources-russian-invasion-of-eastern-ukraine-increasingly-likely/
[243] Ilaşcu and Others v. Moldova and Russia, supra note 2, § 382
[244] Ilaşcu and Others v. Moldova and Russia, supra note 2, § 390

Besides, the Court establishes the military support through the provision of troops and military weapons and equipment, possessed by the Russian Federation, to MRT[245]. Finally, the Court indicates that Russia has provided political support to the separatist entity through the political declarations, including the statements of the then Vice-President of Russian Federation: "the 14th Army should act as a buffer between the combatants so that the *Transdniestrian people could obtain their independence and their sovereignty* and work in peace[246]" and that Russian Federation "recognized the legitimacy of the entity created on the left bank of the Dniester[247]", as well as the statement of the President of Russian Federation Yeltsin, who said: "Russia has lent, is lending and will continue to lend its economic and political support to the Transdniestrian region[248]".

Concerning Eastern Ukraine, there is substantial evidence of financial support of "DNR" and "LNR" by the Russian government. For instance, by October 2019 OSCE has reported 86th humanitarian convoys entering Ukrainian territories[249]. The OSCE has also reported that Russian Border Guards do not allow the observers of OSCE to be present during the inspection of the cargos in the convoys and that while several trucks in the convoys are marked as "Humanitarian Aid", the other are filled with the cargo of undetermined aim[250]. While humanitarian convoys are usually not regarded to be the financing of the separatist entities, European Union has declared that the humanitarian convoys shall be internationally authorized, and thus those provided by Russia infringe the sovereignty of Ukraine. This places these convoys into the dimension of alleged financing the functioning of "DNR" and "LNR". Besides, the Security Service of Ukraine has claimed that it has collected intelligence data and investigated that Russia is financing "DNR" and "LNR" by approximately a billion

[245] Ilaşcu and Others v. Moldova and Russia, supra note 2, § 57
[246] Ilaşcu and Others v. Moldova and Russia, supra note 2, § 75
[247] Ilaşcu and Others v. Moldova and Russia, supra note 2, § 137
[248] Ilaşcu and Others v. Moldova and Russia, supra note 2, § 138
[249] OSCE Observer Mission at the Russian Checkpoints Gukovo and Donetsk (2019) Spot Report by OSCE Observer Mission: 86th Russian convoy of 16 vehicles crossed into Ukraine and returned through the Donetsk Border Crossing Point. OSCE. Retrieved from: https://www.osce.org/observer-mission-at-russian-checkpoints-gukovo-and-donetsk/436937
[250] OSCE Special Monitoring Mission to Ukraine (2018) Latest from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received as of 19:30, 24 May 2018. Retrieved from: https://www.osce.org/special-monitoring-mission-to-ukraine/382531

Russian rubles per year[251]. Referring to the military support, it is worth reminding the report of Wilfried Martens Centre that indicated the presence in the Eastern Ukraine of weapons that could only be obtained from Russian military forces[252]. The same has been established by the ARES report regarding the analysis of arms and munition of the pro-Russian combatants[253]. Finally, the representative of the US in the OSCE has alleged that the "humanitarian convoys" from Russia actually contain weapons and military equipment, since there is "the obvious link between previous such "humanitarian convoys" and the surge in attacks and shelling in Donbas by Russian-led forces[254]". As to the political support, Russia has not recognized the self-proclaimed "DNR" and "LNR", however, there are several statements that indicate that Russia is lenient towards such recognition. For instance, V. Putin has stated during the live interview on the Russian channel that Russia does not exclude the possibility of recognizing the separatist entities[255]. The Spokesman of the President of the Russian Federation Peskov has stated that Moscow will continue to support the citizens of Donbas since Russia and Ukraine do not significantly approach the "solution of the conflict"[256]. Besides, the political support may be established by the fact that in April 2019, V. Putin has issued a decree, by which the procedure of obtaining Russian citizenship and passports for the residents of Eastern Ukraine has been simplified and accelerated. Moreover, the fact of support of Eastern territories by Ukraine has been an official claim and remedy asked for in the case of Ukraine v. Russia in the International Court of Justice[257]. Finally, the presence of support has been recognized by NATO, since NATO-Ukraine Commission has urged Russia "(…) to cease all political, financial and military support to militant groups and to stop intervening

[251] Мехед, Н. (2020) Росія щороку фінансує "ЛНР" на 30 мільярдів рублів – СБУ. Deutsche Welle. https://www.dw.com/uk/росія-щороку-фінансує-лнр-на-30-мільярдів-рублів-сбу/a-52052076

[252] Cech, A. & Janda, J. (2015) Caught in the Act Proof of Russian Military Intervention in Ukraine.

[253] ARES (2014) Research Report No.3 "Raising Red Flags: An Examination of Arms & Munitions in the Ongoing Conflict in Ukraine, 2014". ARES – Armament Research Services. Retrieved from: https://armamentresearch.com/ares-research-report-no-3-raising-red-flags-an-examination-of-arms-munitions-in-the-ongoing-conflict-in-ukraine-2014/

[254] Укрінформ (2018) Штати в ОБСЄ сумніваються, чи справді конвої РФ на Донбасі гуманітарні. Режим доступу: https://www.ukrinform.ua/rubric-polytics/2809897-stati-v-obse-sumnivautsa-ci-spravdi-konvoi-rf-na-donbasi-gumanitarni.html

[255] Дубенський В. (2015) Путін не виключив можливості визнання Росією "ДНР" і "ЛНР". Deutsche Welle. Режим доступу: https://www.dw.com/uk/путін-не-виключив-можливості-визнання-росією-днр-і-лнр/a-18391472

[256] Українська Правда (2020) Кремль відреагував на заяву Бородая про приєднання ОРДЛО до Росії. Режим дотсупу: https://www.pravda.com.ua/news/2020/07/6/7258337/

[257] Ukraine v. Russian Federation. Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all forms of Racial Discrimination. Preliminary Objections. International Court of Justice. Judgment of 8 November 2019. 14, §136. Retrieved from: https://www.icj-cij.org/public/files/case-related/166/166-20191108-JUD-01-00-EN.pdf

militarily in the Donetsk and Luhansk regions and to withdraw troops, equipment, and mercenaries from the territory of Ukraine[258]". I regard it to be feasible to admit that the facts of support in Moldavian cases have a more official basis and Russia was more open as to their support of MRT, even though denied involvement in the submissions to the ECtHR. At the same time, it is also worth considering that the arguments provided herein could only be obtained through open sources and media reports, while the government, presenting the evidence in the Court may use the intelligence and military data. Therefore, I believe that the provided evidence and arguments are substantial enough, to recognize that the second criterion of the provision of the support has also been recognized.

The criteria of exercise of public powers and the continuance of the occupation were not applied in the test, since they are valid only for the situations of military occupation. In *Cyprus v. Turkey*, the Court has stated that

> having effective overall control over Northern Cyprus, [Turkey's] responsibility cannot be confined to the acts of its own soldiers or officials in Northern Cyprus but must also be engaged by virtue *of the acts of the local administration which survives by virtue of Turkish military and other support*[259].

Therefore, the establishment of direct control over the administration of powers is not required to be established in the cases of effective control over territory exercised through the support of the separatist entity. Thus, having established these facts, there are factual and precedent grounds to allege that the Court may establish the loss of control over territory by Ukraine and exercise of jurisdiction over the Eastern territories by the Russian Federation. Besides, the loss of control of Ukraine has been obliquely admitted by ECtHR in the case of *Khlebik v. Ukraine*, where the Court states that "case file is no longer available as a result of hostilities in *the areas the Government does not control*[260]". Further, it is worth reiterating that same as in the case of Crimea, if the Court establishes Russian effective control over the territory, the positive obligations of Ukraine again will be limited to the general measures to re-establish control over

[258] NATO (2019) Statement of the NATO-Ukraine Commission Kyiv as of 31 October 2019.
[259] Cyprus v. Turkey, supra note 91, § 88.
[260] Klebik v. Ukraine, no. 2945/16, § 70, ECHR 2017. Retrieved from: https://hudoc.echr.coe.int/fre#{"itemid":["001-175656"]}

the territory and use all the political and diplomatic leverage it owns to eliminate the violation of human rights.

Though, there are doubts as to the prospects of the establishment of effective control over Eastern territories by the Russian Federation due to reasons other than lack of facts or evidence. I have previously indicated on the example of Kurdistan that ECtHR has shown reluctance to admit the extraterritorial jurisdiction of the State in the conflict, which has not been yet unilaterally assessed by the international community, since the decision may become the political instruments. The researchers express the same apprehensions as to the Eastern Ukraine territories, stipulating that

> recognizing that Russia was in control of Eastern Ukraine would be highly controversial and, although judgments should not be influenced by the potential responses of contracting States, it would almost certainly result in a backlash against the Court, and may even affect any peace talks aimed at finding a political settlement to the dispute[261].

Considering the fact that I tend to share these fears, it is thus necessary to explore and discuss other possible outcomes of potential cases regarding the jurisdiction over the territory of Ukraine.

As discovered earlier in the first section, the alternative to territorial jurisdiction is personal jurisdiction, if there is an aim of establishing extraterritorial jurisdiction of the Contracting Party. In the situation of Eastern territories, it is hard to imagine, other options of the establishment by the Court both lack of jurisdiction of both countries, due to the continuing policy of ECtHR regarding the unacceptability of the "vacuum" of protection within the "legal space of the Convention[262]", as well as the jurisdiction of Ukraine over the territories. Like the *Isayeva case*[263], analyzed earlier it may be suggested that because of the unwillingness to establish Russia's territorial jurisdiction over Eastern territories, the Court may omit the analysis of effective control prerequisites and jump to the jurisdiction of Ukraine. But again, as I have suggested earlier, this jurisdiction may only arise within the actions of the State agents, e.g. troops, acting on the Eastern territories, which is obvious. It is hard to imagine that

[261] Wallace, S. & Mallory, C. (2018). Applying the European Convention on Human Rights to the Conflict in Ukraine, 56
[262] Al-Skeini and Others v. the United Kingdom, supra note 12, § 142.
[263] Isayeva v. Russia, supra note 217

giving all circumstances and Court practice the Court will bluntly suggest that Ukraine still exercises jurisdiction over the territories of Eastern Ukraine, despite the numerous international reports, obvious seizure of territories by "DNR" and "LNR" for over 7 years so far, the arguments provided in this subsection regarding the support of Russia and the *Khlebik* decision. Besides, such establishment would be incompatible with the repeated statement of the Court that the Convention possesses a special character of "a constitutional instrument of European public order (ordre public) for the protection of individual human beings and its role, as set out in Article 19 of the Convention "to ensure the observance of the engagements undertaken by the High Contracting Parties[264]". Since Ukraine has no control over the territories, therefore neither judicial nor law enforcement agencies of Ukraine are under the control of Ukrainian authorities, it is practically impossible for Ukraine to satisfy the aim of Convention protection of individuals. The suggestion from the Court that Ukraine shall exercise its jurisdiction over the territories, would indirectly require Ukraine to take military actions, which is far beyond the competence of the Court and also in violation of Minsk ceasefire agreements.

Therefore, the alternative to Russia's personal jurisdiction appears to be the most viable one. S. Wallace and C. Mallory suggest in. their research that the Russian Federation could be stipulated to exercise personal jurisdiction through the de facto control over persons in three different cases, coherent with those, discussed in the first section of this agreement: (1) through custody; (2) due to the location of the individuals; (3) through instantaneous acts, in other words, through single acts. Basically, all of these cases foresee that the extraterritorial jurisdiction arises by virtue of the use of force by a State's agents operating outside its territory[265]. While the classification proposed by the researchers appears to be relevant to discuss possible violations in the circumstances of Russian armed aggression, it appears to me that integrating that high level of complication into the understanding of State agent's jurisdiction will only facilitate more confusion as to the possible outcome of potential

[264] Sargsyan v. Azerbaijan, supra note 208, §§ 147
[265] European Court of Human Rights & Council of Europe (2019). Guide on Article 1 of the European Convention on Human Rights, 14-15.

cases, which is already rather unclear. A basic theoretical introduction into the establishment of jurisdiction through the use of force has already been discussed in the first section. Further, I would like to provide several examples of Court practice, on when the use of force by State agents has caused extraterritorial jurisdiction with the mere aim to generally illustrate the possible circumstances of cases that may be lodged before Court and thus the expected outcome. It is also worth mentioning that personal jurisdiction is very specific, and B. Miltner calls these cases to be "cherry-picking" since the Court is "embracing a variety of circumstances[266]" without one particular pattern. These cases are extremely focused on the circumstances of the infringement of the alleged rights of a specific individual, rather than the general background of such violation.

One of the key cases regarding the use of force is *Öcalan v. Turkey*. The case concerned the applicant, who was the leader of the Kurdistan Working Party and has been detained in Kenya. He was forced by the Kenyan Ministry of Foreign Affairs to leave the country, which he reached during his multiple attempts to look for asylum because he has not properly declared his identity when crossing the Kenyan border. The applicant had been detained in Kenya. Kenyan officials have accompanied Mr. Öcalan to Nairobi airport, stating that he had the free will to leave for any destination of his choice. After arriving at the airport, he was, however, arrested by Turkish officials in the international zone. The applicant has complained about the violation of Article 5 (c) due to the multiple violations of his rights during the arrest and custody[267]. The Court has been straightforward and established that "after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the "jurisdiction" of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory[268]". There are multiple cases of the political prisoners: Ukrainian soldiers, commanders, volunteer battalion members, and other activists

[266] Miltner, B. (2012) Revisiting Extraterritoriality after Al-Skeini: The ECHR and Its Lessons, 696-698
[267] Öcalan v. Turkey, supra note 92, §§ 12-46
[268] Öcalan v. Turkey, supra note 92, § 91

being arrested on the territory of Eastern uncontrolled territories and further detained and held in custody in Russia[269]. Thus, the *Öcalan case* may become of particular importance for these potential applications.

The other prominent case is the case of *Al-Saadoon and Mufdhi v. the United Kingdom*. The applicants, Mr. Al-Saadoon and Mr. Mufdhi, both Iraqi nationals, were both suspected of killing two British servicemen in Al-Zubair, Iraq during the Iraq invasion by US and UK forces in 2003. They were detained to a British-run facilities in Iraq, where they remained until their Court hearing[270]. The Court had to establish whether the United Kingdom has exercised personal jurisdiction over the detainees. The Court came to the positive conclusion that since the detention facilities were established and further run by the British forces, acting as state agents of the UK and

> given the total and exclusive de facto, and subsequently also de jure, control exercised by *the United Kingdom authorities over the premises in question*, the individuals detained there, including the applicants, were within the United Kingdom's jurisdiction[271].

Therefore, in this case, the Court has established personal jurisdiction through the fact that the individuals were located on the premises under the control of the Contracting Party, without establishing effective control over the specific territory. Again, as of August 2020, the Security Service of Ukraine reports that 235 Ukrainian military captives are detained in the uncontrolled Eastern territories of Ukraine[272]. Thus, the establishment of Russian control over these premises may involve Russian personal jurisdiction over these detainees.

Therefore, in my opinion, the main issue of the personal jurisdiction is not to analyze the various factual circumstances of such cases and construe possible outcome, but to find out, whether Russia may be responsible for the actions of the "DNR" and "LNR" officials and combatants, since they are obviously not the State agents of Russian Federation, in the general meaning. If the latter is not regarded by Court to be Russian State agents, the situation of complete ambiguity will occur, since, as

[269] Ржеутська Л. (2018) Список "політичних в'язнів Кремля": як туди потрапляють і що це дає? Deutsche Welle: https://www.dw.com/uk/список-політичних-вязнів-кремля-як-туди-потрапляють-і-що-це-дає/a-45156122
[270] Al-Saadoon and Mufdhi v. the United Kingdom (dec.), supra note 77, §§ 2-26
[271] Al-Saadoon and Mufdhi v. the United Kingdom (dec.), supra note 77, §§ 86-88
[272] Радіо Свобода (2020) СБУ: 235 людей незаконно позбавлені волі в ОРДЛО. Режим доступу: https://www.radiosvoboda.org/a/news-sbu-utrymuvani-v-ordlo/30783531.html

concluded earlier, Ukraine allegedly, may not be held to exercise jurisdiction over these territories as well. The issue does not arise, where the Court will be able to establish through the evidence that the violations of human rights have been performed directly by the Russian troops and Russian government officials acting on the territory of Ukraine. However, the huge amount of human rights violations in the Eastern territories is performed by pro-Russian separatist combatants. Besides, there are many civilians conducting their normal lives on these territories, and their rights, for instance, right to peaceful enjoyment of property, right to a fair trial, right to the freedom of thought, conscience and religion, and other rights protected by the Convention and Protocols thereto may be violated. "DNR" and "LNR" act officially as independent entities and have their own administrative structure of state bodies, the judicial system, and law enforcement. Therefore, to establish that Russia may exercise personal jurisdiction over the individuals in these cases, it needs to be established that Russia has the control over the "authorities" and combatants of "DNR" and "LNR" and they are acting under the guidance and command of Russian authorities.

While ECtHR has not previously considered any such issues with similar circumstances, the practice that may be found applicable has been created by the International Court of Justice (ICJ). ICJ has considered the issues of responsibility of the State for the actions of non-state actors in several cases, including the case of *Nicaragua v. the United States of America*, concerning the armed intervention of US into Nicaragua[273], the case of *Bosnia and Herzegovina v. Serbia, and Montenegro*, regarding the events of the massacre Srebrenica[274] and the case of *Georgia v. Russia*, regarding the events in South Ossetia and Abkhazia[275]. Through these cases, ICJ has established a rather persistent approach on "the responsibility for the acts of what are

[273] Nicaragua v. United States of America. Case concerning Military and Paramilitary Activities in and Against Nicaragua. Jurisdiction Of The Court And Admissibility Of The Application. International Court of Justice. Judgment of 26 November 1984. Retrieved from: https://www.icj-cij.org/en/case/70/judgments

[274] Bosnia and Herzegovina v. Serbia and Montenegro. Application of the Convention on the Prevention and Punishment of the Crime of Genocide. Preliminary Objections. International Court of Justice. Judgment of 11 July 1996https://www.icj-cij.org/en/case/91/judgments

[275] Georgia v. Russian Federation. Application of the International Convention on the Elimination of All Forms of Racial Discrimination. Preliminary Objections. International Court of Justice. Judgment of 1 April 2011. Retrieved from: https://www.icj-cij.org/public/files/case-related/140/140-20110401-JUD-01-00-EN.pdf

prima facie non-state actors[276]". ICJ uses two tests through which the responsibility of the State for non-state actors may be established: (a) the complete control or complete dependence test, established through the *Nicaragua case*; and (b) the overall control test established through the *Tadic case* of the International Criminal Court for the former Yugoslavia (ICTY)[277].

In *Nicaragua case* ICJ has stated that there are two groups of non-state actors, whose actions may be attributable to the state: (a) those totally dependent on the foreign state – paid, equipped, generally supported by, and operating according to the planning and direction of organs of that state, whose actions are undoubtedly attributable to the state; and (b) persons who, although paid, financed and equipped by a foreign state, nonetheless retained a degree of independence of that state[278]. In Nicaragua's case, the second group consisted of the Nicaraguan rebels, in other words – separatists. The test for the actions of these rebels to be attributable to the US was that the US would bear effective control over these rebels and should have "directed or enforced the perpetration of the acts contrary to human rights and humanitarian law[279]". The researchers explain that it shall mean that the State should issue directions to the non-state actors on specific operations and completely, control, command, and guide them while these operations are performed[280]. The test is regarded to be rather strict, because, as the ICJ states, to "(…) equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them[281]". The U.S. was not regarded to be liable for the actions of the state actors under the complete control test, even though ICJ has established that the U.S. has trained, armed, equipped, financed, supplied, or

[276] Milanović, M. (2009). State Responsibility for Acts of Non-state Actors: A Comment on Griebel and Plücken. Leiden Journal of International Law, 22(2), 2. Retrieved from: https://www-cambridge-org.eur.idm.oclc.org/core/journals/leiden-journal-of-international-law/article/state-responsibility-for-acts-of-nonstate-actors-a-comment-on-griebel-and-plucken/4F3C1A1A17DDC686A8A30EF553E76188

[277] Tadić (IT-94-1), United Nations. International Criminal Tribunal for the former Yugoslavia. 15 July 1999. Retrieved from: https://www.icty.org/en/case/tadic

[278] Cassese, A. (2007). The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia. European Journal of International Law. 18, 652. Retrieved from: https://www.researchgate.net/publication/31069541_The_Nicaragua_and_Tadic_Tests_Revisited_in_Light_of_the_ICJ_Judgment_on_Genocide_in_Bosnia

[279] Cassese, A. (2007). The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia, 653

[280] Álvarez Ortega, E. (2015) The attribution of international responsibility to a State for conduct of private individuals within the territory of another State. InDret. Revista Para El Análisis Del Derecho, 10-11. Retrieved from: https://indret.com/wp-content/themes/indret/pdf/1116_es.pdf

[281] Bosnia and Herzegovina v. Serbia and Montenegro, supra note 268, §§ 392-393.

otherwise encouraged, supported, and aided the Nicaraguan rebels[282]. Therefore, it is considered that for the complete control test to be satisfied, the non-state actors should practically perform the functions of and be in the subordination equal to the status of a state body, despite not bearing such status by law[283].

In the *Tadic case,* ICTY has established the other degree of control over actions by organized and hierarchically structured groups, such as military or paramilitary units. ICTY has indicated that in the case of the control over the group, the fact of the general control over the group is sufficient, and specific instructions command is not required to establish the "overall" control of the state and attribute the actions of these groups to it. A. Cassese, analyses that if a state supports a hierarchically organized group, a military or paramilitary unit "financially, logistically, organizationally and, in addition, coordinates its military actions or takes part in such coordination or planning" this substantially implies that "the state normally has a say in, as well as an impact on, the planning or organization of the group's activities[284]". The researcher also states that even if the performance of the exact actions has not been ordered and commanded by the state, it still shall bear responsibility for any activity of the group due to the nature of the state's influence over the group[285].

While the first test appears to be too constraining for ECtHR to apply it to the territories of Eastern Ukraine, due to the fact that the self-proclaimed entities officially do possess relevant autonomy through their own administration bodies, law enforcement, judiciary, and army, the second one seems to have a great potential for implementation. "DNR" and "LNR" are undoubtedly hierarchically structured groups with the whole system of administrative units. The financial and logistical support of Russia through convoys and financing of "DNR" and "LNR" has already been described in this section. The organizational support shall mean that Russia has been involved in the establishment of separatist entities. There is evidence of the presence of Russian combatants during the early actions of pro-Russian separatists in spring

[282] Cassese, A. (2007). The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia, 652
[283] Milanović, M. (2009). State Responsibility for Acts of Non-state Actors: A Comment on Griebel and Plücken,11
[284] Cassese, A. (2007). The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia, 661.
[285] Cassese, A. (2007). The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia, 661

2014 when occupying the building of Ukrainian state bodies[286]. Besides, when "DNR" have proclaimed "independence" they have addressed V. Putin with the request to provide them support[287]. There are also multiple statements of analytics and experts, for instance of the former U.S. Special Representative for Ukraine K. Volker, who states that "DNR" and "LNR" were created by the Russian Federation to conceive Russia's role in the aggression in the East of Ukraine[288]. There are also statements by Ukrainian Helsinki Human Rights Union that indicate the coordination of military operations of separatist combatants by Russia, in particular:

> According to data obtained from interrogations of captured Russian servicemen and information from open sources, it is known that the separatist units, their organization, command, and operations are under the control of Russian military personnel[289].

All of this considered, provided that the government of Ukraine, having the much more extensive arsenal of tools, including intelligence agencies and military data, will be able to present the Court with sufficient evidence of Russian support and coordination of functioning of "DNR" and "LNR" and their military units, it may be consequently resolved that through the application of the "overall control" test, Russia is responsible for all the actions of "DNR" and "LNR" as non-state actors, including the actions of their administration, judiciary, and combatants. Thus, the state officials and combatants of "DNR" and "LNR" will be regarded to be the State agents for the establishment of personal extraterritorial jurisdiction over individuals by ECtHR. It is, however, worth mentioning that even though ECtHR has previously referred to the practice of ICJ in its deliberations[290], these tests were never previously applied, and therefore there is no Court's practice to support these conclusions.

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[286] Українська правда (2014) На Донеччині "зелені чоловічки" захопили ще 2 відділки МВС – очевидці. Режим доступу: https://www.pravda.com.ua/news/2014/04/12/7022194/

[287] Українська правда (2014) Донецькі сепаратисти погрожують, що попросять Путіна ввести війська. Режим доступу: https://www.pravda.com.ua/news/2014/04/7/7021602/

[288] Інформаційне агентство Уніан (2018) Волкер: созданные РФ «ДНР» и «ЛНР» должны быть ликвидированы - они не соответствуют Конституции Украины. Режим доступу: https://www.unian.net/politics/10029470-volker-sozdannye-rf-dnr-i-lnr-dolzhny-byt-likvidirovany-oni-ne-sootvetstvuyut-konstitucii-ukrainy-video.html

[289] Гарбар, О.; Конопкін, А.; Кореньков О.; Мовчан О.; за ред. Павліченко О.; Мартиненко О. (2018) Збройний конфлікт в Україні: Військова підтримка незаконних збройних формувань «ДНР» та «ЛНР» з боку Російської Федерації. Українська Гельсінська спілка з прав людини, 10. Режим доступу: https://helsinki.org.ua/wp-content/uploads/2018/05/New.pdf

[290] See for example: Hassan v. The United Kingdom, no. 29750/09, ECHR 2014. Retrieved from: https://hudoc.echr.coe.int/eng#{"tabview":["document"],"itemid":["001-146501"]}

Thus, on the one hand, there are all prerequisites for ECtHR to stipulate that Russia exercises effective control over the territories of Eastern Ukraine, regarding which Ukraine has lost its control. Still, there are certain apprehensions that such a decision would be of strong political influence and, therefore, such resolution of the potential cases in the nearest future does not appear to be inherent to the policy of ECtHR. On the other hand, the only other viable option for the Court to omit admittance of the "vacuum" of Convention's protection on the territory of Europe, is to establish Russian personal jurisdiction over individuals in each case. For the Court to be able to do so, it should examine, where the actions of non-state actors – pro-Russian separatists, "DNR" and "LNR" may be attributable to Russia. Whereas there is the applicable practice of ICJ, ECtHR has never examined such issues before and the deliberation of the case through the completely new lenses does not allow to make any predictions as to the outcome with certainty. Consequently, I should frankly admit that the establishment of the jurisdiction in potential cases regarding Eastern territories of Ukraine appears to be extremely unclear. The ECtHR seems to be standing before the difficult choice of politically influential decision, "vacuum" in the Convention's protection and the new challenge of the completely different interpretation of personal jurisdiction of individuals.

Hence, the common conclusions upon the analysis set forth in the second section of this research allow to state with a great level of certainty, that the multitude of political, social and diplomatic factors are actually the main distinguishing basis between the level of certainty as to the potential outcomes of the cases regarding the Crimea and Eastern territories. Whereas the large amount of statements and general consensus of the international community as to the status of "occupies and illegally annexed" Crimea lead to the rather likely unambiguous outcome of the establishment of Russian extraterritorial jurisdiction over Crimea through the exercises effective control over the territory, the lack of definite attitude of the international community towards involvement of Russia in the events in the Eastern territories of Ukraine bars me from the conclusions of close certainty regarding the latter potential cases.

SECTION III.

STRATEGY FOR PROTECTION OF THE INTERESTS IN THE POTENTIAL ECTHR CASES CONCERNING THE VIOLATIONS OF HUMAN RIGHTS ON THE OCCUPIED AND UNCONTROLLED TERRITORIES OF UKRAINE

3.1. Strategy for protection of the interests of the state of Ukraine in the potential ECtHR cases

Having analyzed the ECtHR practice and correlated it with the factual circumstances of the Crimean occupation and Russian armed aggression against Ukraine in the East of Ukraine, I have come up with a few proposals that may appear useful for Ukraine in terms of the potential cases brought in connection with these actions. First and foremost, as the famous quote of B. Franklin says: "An ounce of prevention is worth a pound of cure[291]". Obviously enough, the state does not lose the case in ECtHR if it does not violate the Articles of Convention and does not infringe human rights. However, in the context of jurisdiction exercising, as it was concluded in the second section of this research, Ukraine allegedly may only exercise limited jurisdiction over both Crimea and Eastern territories. Ukraine may exercise personal jurisdiction for the actions committed by Ukraine's state agents and, in any case, Ukraine carries minimal positive obligations with regard to these territories, which include the general measures to re-establish control over the territory and use all the political and diplomatic leverage it owns to eliminate the violation of human rights. In the latter case, shall these obligations be properly performed by the Ukrainian government, even if Ukraine will stand before ECtHR as the responding state, the Court, allegedly, will not hold Ukraine liable for the violations. Pursuant to the conclusions of subsection 1.1. on the basis of *Ilascu case*, the positive obligations may

[291] University of Cambridge Research (2012) Ounce of prevention, pound of cure. Cambridge University. Retrieved from: https://www.cam.ac.uk/research/news/ounce-of-prevention-pound-of-cure

be divided into two categories. I will further analyze whether the actions of the Ukrainian government are sufficient to satisfy all of them.

The first group consists of the "general measures to re-establish control over the territory". To begin with, within these measures Ukraine shall omit any actions that would express support to the separatist regime, whilst collaborating with the separatists in the fields like security, air traffic control, telephone links and sport, is not regarded to constitute support if it is aimed at securing proper living conditions of the civilians living on the territory. Ukraine has never supported any actions of separatists, never recognized the validity of the actions performed by them or the self-proclaimed "DNR" and "LNR", as well as Ukraine has never recognized the validity of the referendum in Crimea and the Constitutional Court has declared it to be void[292]. There are multiple statements of the Presidents of Ukraine[293], Ministers[294] and other officials, which confirm the rhetoric of non-recognition of neither the regime of "DNR" and "LNR" nor the illegal annexation of Crimea. Mainly, the negotiations about any actions on Eastern territories are conducted through the peace negotiations by the Trilateral Contact Group on Ukraine which is observed by the OSCE and the aim of which is to find a diplomatic resolution of the war. Ukrainian officials state that these negotiations do not mean any recognition of the separatist regime[295] and thus, it may be concluded that Ukraine maintains its rhetoric of non-recognition. With regard to Crimea, it has been taken off the table in any negotiations and the position of Ukraine, together with the international community regarding the illegality of Crimea annexation has not changed since 2014[296]. The other points of tangency between the Ukrainian government and the officials of the "Republic of Crimea" or "DNR" and "LNR"

[292] Рішення Конституційного Суду України у справі за конституційними поданнями виконуючого обов'язки Президента України, Голови Верховної Ради України та Уповноваженого Верховної Ради України з прав людини щодо відповідності Конституції України (конституційності) Постанови Верховної Ради Автономної Республіки Крим „Про проведення загальнокримського референдуму" (справа про проведення місцевого референдуму в Автономній Республіці Крим) від 14 березня 2014 року. Конституційний Суд України. Справа № 1-13/2014. Режим доступу: https://zakon.rada.gov.ua/laws/show/v002p710-14#Text

[293] See for example: BBC News. Україна. (2014) Порошенко скликає РНБО через "вибори" на Донбасі. Режим доступу: https://www.bbc.com/ukrainian/politics/2014/11/141103_poroshenko_rnbo_donbas_law_zsh and Інформаційне агентсво Уніан (2019) Зеленський публічно визнав РФ агресором. Режим доступу: https://www.unian.ua/politics/10560675-zelenskiy-publichno-viznav-rf-agresorom.html

[294] See for example: Українська Правда. (2016) Україна не визнає лідерів "ДНР" і ЛНР" – Клімкін. Режим доступу: https://www.pravda.com.ua/news/2016/07/6/7113872/

[295] Dickinson P. (2020) Ukraine agrees to dialogue with Russian-led republics. Atlantic Council. Retrieved from: https://www.atlanticcouncil.org/blogs/ukrainealert/ukraine-agrees-to-dialogue-with-russian-led-republics/

[296] Українська Правда (2020) Зеленський пропонує повернути питання Криму на порядок денний. Режим доступу: https://www.pravda.com.ua/news/2020/06/12/7255473/

include the release of prisoners and captives, provision of water and other communications to Crimea, payment of social benefits on the Eastern territories and other similar issues of the living conditions of civilians. The exchange of prisoners and captives that has been conducted several terms is aimed at securing life and avoid tortures of Ukrainian soldiers and activists. It is also a longstanding practice in international humanitarian law that does not imply any recognition or support[297]. As to the payment of social benefits and facilitation of water supply, even though they induce huge political debate[298], these issues stay within the recognized by the Court actions of limited nature[299] that are aimed not on the support of the regime but the humanitarian aid of Ukrainian citizens, living on these territories. The general vector of policy and actions of the Ukrainian government concerning Crimea and East is rather straightforward and stable, thus, in my opinion, the Court shall not have any doubts as to the satisfaction of this group of obligations.

Also, within the first group, Ukraine shall perform acts aimed at re-establishing control over the disputed territory. These actions do not consist of the requirement to declare war. In the Moldavian conflict situation, in which the military power of Moldova has not been sufficient to conquer the territories back, ECtHR has evaluated the actions of Moldova and considered the following be sufficient: (a) bring criminal proceedings against separatist government officials; (b) international declaration of the intention to re-establish control; (c) diplomatic steps to involve third states into the negotiations; (d) visible rhetoric that asserts the sovereignty of the occupied state over the occupied territories. Ukraine has definitely put a lot of military effort in the first place to control the situation both in Crimea and in the Eastern territories, which were described in subsection 1.3. Considering that these efforts appeared to be not sufficient to return the territories under the control of the Ukrainian government, and considering that there is little doubt ECtHR will even try to evaluate the efficiency of military actions within ATO or JFO since it is absolutely outside of the Courts authority and

[297] Удовенко А. (2020) Хронологія обмінів полоненими: 2014-2020 рр. Правозахисна коаліція Справедливість заради миру на Донбасі. Режим доступу: https://jfp.org.ua/blog/blog/blog_articles/58

[298] Укрінформ. (2020) Вода в Крим: вихід з гуманітарної катастрофи чи занурення в полон окупації?. Режим доступу: https://www.ukrinform.ua/rubric-crimea/3124927-voda-v-krim-vihid-z-gumanitarnoi-katastrofi-ci-zanurenna-v-polon-okupacii.html

[299] Ilaşcu and Others v. Moldova and Russia, supra note 2, §345

practice, it appears to be valid to suggest that the situations of Moldavian government and the government of Ukraine are pretty similar. Hence, if Ukraine takes the measures, analogous to those of Moldova, we may presume that the obligation will be regarded fulfilled. Several combatants and officials of the separatist regime have been arrested by Ukrainian authorities, for instance, the Head of the Election Commission, who has organized the "referendum" in "DNR" Roman Lyagin. However, criminal proceedings are still pending and the media suggest that the case hearings are being purposely delayed[300]. There is also a case against the vice Attorney General of "DNR"[301] and the Attorney General of "DNR"[302] but the criminal proceedings are pending as well. These separatists, however, have not been detained since they are either on the territories of "DNR" or in Russia and thus Ukrainian law enforcement bodies cannot capture them. Still, the initiation of these cases by the General Attorney's Office of Ukraine indicates that the separatist officials will be brought to trial if and when they are captured. Ukraine has declared its policy of Crimea deoccupation and return of Eastern territories under the control of Ukraine multiple times, for instance through the statements of President[303] or through cooperation with European countries and international organizations to develop a plan of actions with their help[304]. Besides, the international community is involved in the negotiations in a whole range of ways and measures: diplomatic by, for instance, conduction of G7 summit, instead of G8[305]; individual restrictive measures over some involved individuals; economic sanctions[306]. There is a whole compilation of statements and reactions to Russian aggression by the international organizations and numerous states individually, which were scarcely described before. All things considered, I believe that it may be stated that the

[300] Радіо Свобода (2020) Що відбувається у справі бойовика Романа Лягіна, якого звинувачують в організації катівні. Донбас Реалії. Режим доступу: https://www.radiosvoboda.org/a/30646914.html

[301] Українська Правда (2016) Що відбувається у справі бойовика Романа Лягіна, якого звинувачують в організації катівні. Режим доступу: https://www.pravda.com.ua/news/2016/08/1/7116533/

[302] Еспресо (2014) ГПУ порушила справу проти "генпрокурора" ДНР. Espreso.tv. Режим доступу: https://espreso.tv/news/2014/06/11/hpu_porushyla_spravu_proty_henprokurora_dnr

[303] Ліга. Новини (2017) Україна сповнена рішучості повернути Крим мирно – Порошенко. Режим доступу: https://ua-news.liga.net/politics/news/ukra_na_spovnena_r_shuchost_povernuti_krim_mirno_poroshenko

[304] See for example: Укрінформ (2019) припинення війни та повернення Криму — Зеленський. Режим доступу: https://www.ukrinform.ua/rubric-crimea/2770846-kiiv-i-varsava-skoordinuvali-kroki-dla-pripinenna-vijni-ta-povernenna-krimu-zelenskij.html

[305] G7 The Hague declaration asof 24 March 2014. European Council. The President. The Hague, 24 March 2014. EUCO 73/14. Retrieved from: http://www.g7.utoronto.ca/summit/2014brussels/hague-declaration.pdf

[306] Council of the European Union. (2020) EU restrictive measures in response to the crisis in Ukraine. Policies. Sanctions: how and hen the EU adopts restrictive measures. Retrieved from: https://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/#

involvement of the international community into the conflict and negotiations together with a rather stable and one-sided policy of Ukraine of non-recognition of annexation suggest that Ukraine has put a lot of effort in order to satisfy its first positive obligation of general diplomatic measures.

The second group of obligations, as it was discovered, is focused on the circumstances of the exact case and the applicant's well-being, meaning that the state has to use all political and diplomatic measures in the attempt to eliminate the particular violation or aid the situation, by, for example, sending doctors to the applicant or provide the family of the applicant with financial aid. The other measures proposed by the Court include addressing the international community and the separatist entity to stop the violations, quashing the verdict and sentence imposed by the illegitimate Courts of the separatist entity, declaring amnesty, etc. The obvious illustrative situation is the policy of aiding captives and prisoners illegally held in Russian prisons or detained on the territory of "DNR" and "LNR". Ukraine has led a pretty active and broad policy of aiding the families of the military captives, including payments to the families of the navy sailors that were captured by Russian forces[307]. Also, in the situations of N. Savchenko and O. Sentsov Ukraine has provided a lot of attention, so that the international community was aware of their illegal detention. For instance, Thorbjorn Jagland, secretary-general of the Council of Europe has made a statement, urging Russia to free Oleg Sentsov[308]. Ministry of Foreign Affairs regularly addresses Russia with demands to free political prisoners[309]. Also, during the captivity of N. Savchenko, Ukraine has constantly made official appeals to Russian authorities to allow the doctors from the Ukrainian side to observe the detainee[310]. Thus, these actions of the Ukrainian government indicate that in general Ukraine has a stable policy of helping those, whose rights are violated, and whom Ukraine cannot help directly due to the lack of control. Besides, the other argument in favor of the fulfillment of this

[307] Слово і Діло. Аналітичний портал (2019) У МінТОТ назвали суму виплат сім'ям політв'язнів. Режим доступу: https://www.slovoidilo.ua/2019/01/17/novyna/polityka/mintot-nazvaly-sumu-vyplat-simyam-politvyazniv

[308] RadioFreeEurope. RadioLiberty. (2018) Council Of Europe Calls On Russia To Free Ukrainian Filmmaker Sentsov. Retrieved from: https://www.rferl.org/a/ukraine-council-of-europe-calls-on-russia-to-free-filmmaker-sentsov/29307113.html

[309] BBC News. Україна (2016) МЗС вимагає від Росії негайно звільнити українців-політв'язнів. Режим доступу: https://www.bbc.com/ukrainian/news-38458214

[310] BBC News. Україна (2016) Про стан Надії Савченко поки нічого не відомо - сестра. Режим доступу: https://www.bbc.com/ukrainian/politics/2016/03/160307_savchenko_hunger_or

obligation by Ukraine is the *Khlebik case*. In the case, the applicant complained about the examination of his appeal, since his case file was in Luhansk, which was not under the control of the Ukrainian government[311]. The Court agreed that the area was out of the government's control and thus found no violation. But the Court has also paid separate attention to the fact that the government indeed tried to remedy the situation by involving police to perform investigation regarding the requested files and addressing the International Committee of the Red Cross, which operated in both the Government-controlled and the non-Government-controlled areas, in facilitating the transfer of files from the Court of Appeal's building in Luhansk. Therefore, in my opinion, the measures of a similar nature may also be regarded as those satisfying the obligation to use all diplomatic and political measured to aid or eliminate the violation.

To conclude, I believe that if Ukraine continues to consistently and proactively uphold the positive obligations, as described herein, there are great chances that if the application will be lodged against only Ukraine or both Russia and Ukraine, the Court will find no violations of the limited positive obligations by Ukraine. This will also create a positive image of Ukraine in the international arena and serve as the basis for the further practice of the Court in similar cases.

As I have stated before, Ukraine may also exercise personal jurisdiction for the actions committed by its State agents. In my opinion, the only proposed action for the Ukrainian government in these circumstances is to remedy the long-lasting situation of Ukraine of complete ignorance and lack of proper investigation of the violations committed by law enforcement agencies and other state authorities. ECtHR has reviewed a multitude of cases regarding lack of proper investigation of police ill-treatment against Ukraine, and in the case of *Kaverzin v. Ukraine*, the Court has specifically noted that the issue is systematic and that the "(…) lack of any meaningful efforts on the part of the authorities in this regard perpetuates a climate of virtually total impunity for such acts[312]". Thus, if the situation continues and extends to no

[311] Klebik v. Ukraine, supra note 254, §§ 8-21
[312] Kaverzin v. Ukraine, no. 23893/03, § 178, ECHR 2012. Retrieved from: http://hudoc.echr.coe.int/eng?i=001-110895

effective investigation of the wrongful acts of the military this will cause another mass wave of judgments against Ukraine.

Finally, it is worth establishing Ukraine's role in submitting evidence to the Court to prove the jurisdiction of Russia. If we consider the finding of the Court that Russia exercises effective control over the territory of Crimean Peninsula and/or Eastern territories of Ukraine, Ukraine should submit evidence to prove the satisfaction of the criteria of the test. The government should not only pay attention to the evidence collected by Ukrainian authorities personally but also facilitate, involve, and endorse the functioning, operation, and presence of diverse international organization's representatives in the areas, since, as seen from ECtHR practice, the Court values their reports and conclusions as evidence of high persuasiveness.

However, in continuation of my suggestion as to the possible application of ICJ practice in order for the Court to conclude that the "DNR" and "LNR" are hierarchical organizations acting as the State agents of Russia, I suggest that the Ukrainian government should analyze the case of Georgia v. Russia[313] heard and decided by ICJ. The circumstances of the case are in many ways similar to those of Russian armed aggression in the East of Ukraine. The application in the case was filed by Georgia on August 12, 2008, after the invasion by the Russian military of South Ossetia. Georgia has accused Russia of breaching the International Convention on the Elimination of All Forms of Racial Discrimination since over a twenty-year period Russia has murdered and displaced thousands of ethnic Georgians. Russia has stated that Russian troops do not exercise control over South Ossetia and also that it is not responsible for the actions of Ossetian separatist groups. The case was dismissed on the basis that Georgia has not adhered to the obligation of first attempting to negotiate with Russia and only if the latter would be unsuccessful – take the case to ICJ[314]. Even though ICJ did not really deliberate on the merits of the case, it nevertheless evaluated some of the evidence provided by the Georgian government, regarding the fact Russia has been

[313] Georgia v. Russian Federation, supra note 269.
[314] Georgia v. Russian Federation, supra note 269, § 187

supporting and aiding Ossetian separatists. For instance, the Court evaluates the letter of the Georgian president, where he requested a meeting of the Security Council:

> The letter began with a reference to the "savage massacre of the civilian population". (…) He [Georgian president] expected the Council to use its authority "to coerce Abkhaz leaders to cease their abominable violations of human dignity and the heartless slaughter of these persecuted ethnic Georgians", and expressed the hope that the Council would instruct all United Nations members to desist in their support of Abkhaz separatists[315].

The ICJ further indicates that the only reference to the Russian Federation was to the fact that the Gudauta side was "equipped with state-of-the-art weapons, currently at the disposal of the Russian military forces[316]". The ICJ thus concludes that "the letter emphasized the responsibility of Abkhaz separatists, the Court does not consider that the letter makes *a relevant claim against the Russian Federation[317]*". The ICJ also reviewed this statement of Georgian Parliament:

> [t]he Russian peacekeeping forces, deployed in the region under the auspices of the Commonwealth of Independent States [Russian peacekeeping forces], did nothing to confront the actions of the Abkhaz side. Instead, in a number of cases, they assisted separatists in conducting punitive operations against the peaceful population[318].

The ICJ stated that the statement did not include any evidence against Russian forces, and the letter only suggested that the Peacekeeping forces were present during the massacre, but that they supported and participated in it. In general, the Court has evaluated a large amount of these statements and has finally concluded that "(…) so far as the subject-matter of each document or statement is concerned, it complains of actions by the Abkhaz authorities, often referred to as "separatists", rather than by the Russian Federation[319]". This conclusion of the ICJ, in my opinion, shall bring to the Ukrainian government's attention the following deductions. First that the evidence submitted may not be oblique, they shall contain details and facts in order to be persuasive and relevant. Second that the statements of national authorities are evaluated by the Court, so the authorities shall make them regularly and publicly, providing the society not only with generic posh statements but also facts and data.

[315] Georgia v. Russian Federation, supra note 269, § 57
[316] Georgia v. Russian Federation, supra note 269, § 57
[317] Georgia v. Russian Federation, supra note 269, § 57
[318] Georgia v. Russian Federation, supra note 269, § 61
[319] Georgia v. Russian Federation, supra note 269, § 63

Third that allegedly, presence of any international organization's statements and resolutions would add credibility to the submitted evidence, thus, again, Ukraine shall, by all means, endorse such involvement. It is also worth noting that Georgia has also brought a claim against Russia in ECtHR and the Court has found Russia in violation of the Convention. However, in the case of *Georgia v. Russia* (I) the Court did not examine the acts of Ossetian separatists and their attribution to Russia, but rather argumentized its decision on the basis of direct orders and resolution of the Russian Federation that caused the Russian military forces, which are Russia's state agents, to perform violations and ethnic cleansings of Georgians[320].

In summary, the proposed actions for the state of Ukraine include: (a) further proper performance of the positive obligations regarding both Crimea and Eastern territories through the general diplomatic and political measures, consistent non-recognition policy of the consequences of Russian aggression and criminal persecution of the representatives of the separatist regime, as well as through aiding and assisting exact applicants to the maximum possible extent to eliminate or mitigate the consequences of violations; (b) proper investigation of the cases regarding the ill-treatment and other violations committed by the State agents of Ukraine, in particular police and army; (c) present, collect and proactively facilitate valid evidence of Russian control over "DNR" and "LNR" through the political statements with specific facts and involvement of international organizations to have the testimonies approving the credibility of these statements.

3.2. Strategy for protection of the interests of potential applicants to ECtHR, whose rights have been violated on the occupied and uncontrolled territories of Ukraine

First and foremost, the factor allowing the applicant to receive at least a theoretical chance of success in ECtHR is to lodge an admissible application. The list of the admissibility criteria is pretty extensive[321], however, in the specific instance of

[320] Georgia v. Russia (I), supra note 167, § 178
[321] European Court of Human Rights & Council of Europe (2020). Practical Guide on Admissibility Criteria.

extra territorial jurisdiction several of them stand out, and, in my opinion, their fulfillment shall be purposely tailored.

First, throughout the whole research I have been discussing, whether jurisdiction is exercised by Russia, Ukraine or both, and therefore, I believe it is worth proposing the potential applicants on the State(s) against which the application is directed. It is wort emphasizing that ECtHR does not have the institute of replacement of improper defendant, inherent for civil law proceedings. Therefore, if the defendant State, chose in the application by the applicant, does not exercise jurisdiction over the territory or personal jurisdiction, the application is considered incompatible ratione loci and/or ratione personae and declared inadmissible[322]. Following my conclusions in the subsection 2.1., I regard that if would be sufficient for the applicant to lodge the application against Russian Federation exclusively, unless the applicant has the reasonable evidence to prove that the violation occurred due to the actions of the State agents of Ukraine. In the latter case, the application shall be filed against Ukraine, and, allegedly also against Russia, since if Russian effective control over the territory is established by court, Russia may still bear some obligations regarding, for instance, investigation of the violation or facilitation thereof by providing access to evidence or coordination of actions of law enforcement agencies. Such an imposition of obligation, also called as duty to cooperate[323], was developed by the Court practice and most recently formulated in the case of case of *Güzelyurtlu and Others v. Cyprus and Turkey*. The case concerns the murder of the three Turkish Cypriot individuals, residing in the territory of Republic of Cyprus. After the Republic of Cyprus conducted its investigation, several suspects have been identified, however, even though at some point they were located at the territory under control of Cyprus, they have managed to flee to TRNC. There was lack of cooperation between two countries and therefore the evidence, incriminating these suspects and the suspects could not be connected and brought to trial by neither TRNC nor Cyprus police. The relatives of the deceased have

[322] Mozer v. the Republic of Moldova and Russia, no 11138/10, § 79, ECHR 2016. Retrieved from: http://hudoc.echr.coe.int/eng?i=001-161055
[323] Zamboni, M. (2019) Romeo Castaño v Belgium and the Duty to Cooperate under the ECHR. EJIl:Talk! Blog of the European Journal of International Law. Retrieved from: https://www.ejiltalk.org/romeo-castano-v-belgium-and-the-duty-to-cooperate-under-the-echr/

applied to the Court against both Turkey and Cyprus, alleging that the states have failed to conduct an effective investigation. The Court have stated that

> in interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms (…). In cases where an effective investigation into an unlawful killing which occurred within the jurisdiction of one Contracting State requires the involvement of more than one Contracting State, the Court finds that the Convention's special character as a collective enforcement treaty entails in principle an obligation on the part of the States concerned to cooperate effectively with each other in order to elucidate the circumstances of the killing and to bring the perpetrators to justice[324].

The Court have concluded that the obligation to carry an effective investigation arose in respect of both states[325]. The analytics have also noted that this decision of the Court appears to be especially interesting and politically controversial in the light of the continuing conflict between Turkey and Cyprus, similar to the conflict between Russia and Ukraine, since

> (…) the cooperation between police forces of different states is inextricably connected with international recognition of these states[326]", and that exchange of evidence in view of Cyprus could be regarded as "support to an illegal regime operating within its territory[327].

Nevertheless, since the circumstances of the case and political background are rather similar, this case may become precedential for the potential cases regarding the personal jurisdiction of Ukraine exercised on the territory of Crimea.

Regarding the territories of Eastern Ukraine, pursuant to the conclusions of previous section, before there is consistent practice of the Court as to the jurisdiction over these territories, the burden of choosing defendant state and proving their jurisdiction somehow shifts to the applicant's side. Choosing one wrong State to direct the claims against will lead to the need to collect the evidence in order to prove this state's jurisdiction, which is quite a difficult process with access exclusively to open resources. If the Court does not find this evidence credible, the application will be regarded inadmissible. However, lodging the application against both states will allow

[324] Güzelyurtlu and Others v. Cyprus and Turkey, no. 36925/07, § 232, ECHR 2019. Retrieved from: http://hudoc.echr.coe.int/spa?i=001-189781
[325] Güzelyurtlu and Others v. Cyprus and Turkey, supra note 318, § 231.
[326] Hadjigeorgiou, N. (2019) Güzelyurtlu and Others v. Cyprus and Turkey: An Important Legal Development or a Step Too Far? Crossroads Europe. Retrieved from: https://crossroads.ideasoneurope.eu/2019/11/27/guzelyurtlu-and-others-v-cyprus-and-turkey-an-important-legal-development-or-a-step-too-far/
[327] Hadjigeorgiou, N. (2019) Güzelyurtlu and Others v. Cyprus and Turkey: An Important Legal Development or a Step Too Far?

to transfer the burden of proof regarding jurisdiction back to the states, who will be fending off the allegations regarding their jurisdiction. Consequently, there is a high probability that the Court, in the pursuit of avoiding "vacuum" of Convention protection on the territory of Europe, will except the jurisdiction of one of the countries.

Further, the other admissibility criteria that, in my opinion, shall be specially treated is the procedural rule of exhaustion of domestic remedies. Under the Article 35 of the Convention "[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law (...)[328]". The purpose of this rule is to provide the national authorities, with the opportunity to remedy the alleged violations[329]. However, if the jurisdiction over the territory or person is not obvious and determining the respondent State is also a questionable issue, the doubts as to which domestic remedies should be exhausted arise. The Court has already paid attention to this issue, mainly in the Northern Cyprus cases, which is beneficial for Ukrainian applicants due to the similarities in the circumstances. It is worth mentioning that in the international law there is a so called "Namibia principle" established by ICJ in the case of *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (South-West Africa). The Court there concluded that the non-recognition of the illegal regime should not result in the automatic application of the doctrine of nullity of the actions of de-facto illegal administration, and some of the acts, including the registration of births, deaths and marriages shall be regarded valid. ICJ explained that the aim of this principle is the well-fare of the local people[330]. ECtHR has adopted this principle first in general in *Loizidou v. Turkey*[331], and then to the issue of the exhaustion of domestic remedies in the case of *Cyprus v. Turkey*. The Court first in general develops the idea of the local people wellbeing:

> Life goes on in the territory concerned for its inhabitants. That life must be made tolerable and be protected by the de facto authorities, including their courts; and, in the very interest of the inhabitants, the acts of these authorities related thereto cannot be simply ignored

[328] European Convention on Human Rights, supra note 2, Article 35.
[329] European Court of Human Rights & Council of Europe (2020). Practical Guide on Admissibility Criteria, 25
[330] Cullen, A. & Wheatley, S. (2013) The Human Rights of Individuals in De Facto Regimes Under the European Convention on Human Rights. Human Rights Law Review, 708. Retrieved from: https://www.corteidh.or.cr/tablas/r32259.pdf
[331] Loizidou v. Turkey, supra note 21, § 45

> by third States or by international institutions, especially courts, including this one. To hold otherwise would amount to stripping the inhabitants of the territory of all their rights whenever they are discussed in an international context, which would amount to depriving them even of the minimum standard of rights to which they are entitled[332].

Further the Court concludes that to be able to apply to the courts of the de-facto administration is "(…) in the very interest of the inhabitants of the "TRNC" (…)[333]" and thus the "remedies available in the "TRNC" may be regarded as "domestic remedies" of the respondent State and that the question of their effectiveness is to be considered in the specific circumstances where it arises[334]". The Court however makes a reservation, stating that the recognition of such remedies, as those necessary to be exhausted, does not mean the recognition of the legality of the regime[335]. However, Judge Palm in her Partly Dissenting Opinion has disagreed with the Court position, stating that through establishing the requirement to exhaust the remedies, the Court alleges that it may actually recognize as valid the decisions of the "TRNC" Court's which is contrasting sufficiently to the UN and international position regarding Northern Cyprus, and, besides, there is "obvious and justifiable lack of confidence" in the "TRNC's" system of administration of justice[336]. In the Moldavian cases the Court has shifted its position throughout the time. While in *Ilascu case* the Court has not recognized the validity of the "MRT" courts, stating that it is "(…) an entity which is illegal under international law and has not been recognized by the international community[337]", while already in the *Mozer case* the Court recognized that the principles described *Ilascu* are not complaint with the Court practice. The Court has stated that if it had any evidence provided by Russia (which it did not) proving that the courts of "MRT" reflect "a judicial tradition compatible with the Convention", the Court may allegedly decide that their decisions are valid for the purposes of the case[338], thus shifting to the position analogous to the one in Northern Cyprus cases. So, in

[332] Cyprus v. Turkey, supra note 91, § 96
[333] Cyprus v. Turkey, supra note 91, § 101
[334] Cyprus v. Turkey, supra note 91, § 102
[335] Cyprus v. Turkey, supra note 91, § 101
[336] Cyprus v. Turkey, supra note 91, Partly Dissenting Opinion of Judge Palm joined by Judges Jungwiert, Levits, Panţîru, Kovler And Marcus-Helmons.
[337] Ilaşcu and Others v. Moldova and Russia, supra note 2, §436
[338] Mozer v. the Republic of Moldova and Russia, supra note 316, § 147

respect of the Ukrainian situation, this analysis allows to make the following assumptions.

First, if we are considering applications regarding Crimea, the situation appears to be rather straightforward, Crimean courts officially operate pursuant to the judiciary system of Russia. Russia, being a Party to Convention, is deemed to have "a judicial tradition compatible with the Convention[339]", therefore it appears to be viable to suggest that from the perspective of Cyprus cases, the exhaustion of domestic remedies available under the "Constitution" of "Republic of Crimea" will be regarded as necessary admissibility criteria, unless, again, the application is lodged in connection with actions of Ukrainian state agents against Ukraine.

With regard to Eastern Ukraine, the situation is more complicated. On the one hand, following the case of *Cyprus v. Turkey*, it may be presumed that the remedies provided by the Courts of "DNR" and "LNR" may be required to be exhausted. On the other hand, pursuant to Court practice, under the Article 6 of the Convention, the Court shall be impartial, independent and established by law[340] and there are serious doubts as to the adherence of separatist courts to any of those requirements. Therefore, following the practice from *Mozer*, it is likely that the Courts will not require the applicants to exhaust those remedies. The question arises, whether then there are any other domestic remedies that the applicants shall exhaust, before applying to ECHR, namely the courts of Ukraine or Russian Federation. It is impossible to suggest that, as of now, it will be possible for the potential applicants to bring cases regarding the violations that occurred in the Eastern territories to Russian courts. The acceptance of the jurisdiction over these cases by Russian courts will indirectly indicate the recognition of jurisdiction over the Eastern territories or personal jurisdiction for the officials and combatants of "DNR" and "LNR", which is completely incompatible to current Russian statements. As to the Ukrainian courts, first of all, as I have concluded before, it is highly unlikely that Ukraine will be recognized as still having control and

[339] Mozer v. the Republic of Moldova and Russia, supra note 316, § 147
[340] European Court of Human Rights & Council of Europe (2019). Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (criminal limb), 19-23. Retrieved from: https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf

thus territorial jurisdiction in the East. Besides, the remedy shall be effective in order for it to be mandatory to be applied to by the applicant. The Court states that

> (…) where requiring the applicant to use a particular remedy would be unreasonable in practice and would constitute a disproportionate obstacle to the effective exercise of the right of individual application under Article 34 of the Convention, the Court concludes that the applicant is dispensed from that requirement[341].

If the violation of the human rights has been caused by the actions of combatants or "DNR" and "LNR" officials, Ukrainian courts do not appear to be able to provide effective remedy, since the courts will not be able to facilitate adversarial trial in civil proceedings, assess the evidence and involve the defendant in criminal proceedings, and, generally, enforce the decision. Therefore, it appears that foreseeing the decision of the Court on the requirement of exhausting the remedies in the illegal courts of "DNR" and "LNR" is impossible, however, the applicants allegedly will be able to substantiate their claims regarding non-exhaustion by referring to the biased, dependent and illegal nature of these courts, as well as ineffectiveness of other remedies, including addressing Ukrainian courts.

Summing it all up, I would like to suggest the following guidance for the potential applicants to ECtHR regarding the events in Crimea: (a) the application shall be addressed against Russia; (b) the remedies provided under the "Constitution" of the "Republic of Crimea" should be exhausted, since the argument of invalidity of the courts of occupying regime most probably will be rejected by the Court; (c) if the application concerns the actions of State agents of Ukraine, it is worth considering including Russia as the defendant, if the case required investigation or any cooperation on the territory of Crimea. The potential applicants in cases regarding events in Eastern Ukraine should, allegedly, perform the following: (a) lodge the application against both Russia and Ukraine, so that to throw off the burden of proving the jurisdiction; (b) if not applying to the illegal court of "DNR" and "LNR" – substantiating the claim by the evidence of lack of adherence of their justice system to the Convention standards.

[341] M.S. v. Croatia (no. 2), no. 75450/12, §§ 123-125, ECHR 2015. Retrieved from: Kaverzin v. Ukraine, no. 23893/03, § 178, ECHR 2012. Retrieved from: http://hudoc.echr.coe.int/eng?i=001-152259

CONCLUSIONS

The results of the conducted research, to my mind, have proved and substantiated the relevance and demand in the development of the topic. The following conclusions provide a completely new perspective on the presumed application of ECHR to the violations on the territory of Crimea and the Eastern territories of Ukraine.

Regarding the territory of Crimean Peninsula. The analysis of numerous declarations, resolutions, decisions, and reports of the principal international organizations, as well as international community, representatives of the European states and U.S., allowed to make a firm statement, that the Crimean Peninsula shall remain to be de jure the territory of Ukraine, which has, however, been illegally annexed and occupied by Russian Federation. It is also substantiated by the "non-recognition" policy promoted by the international community, the diplomatic position of Ukraine and the legislation of Ukraine. Further having analyzed in details the circumstances of Crimean occupation in comparison with the circumstances of other conflicts, which were subject to ECtHR cases, I have assumed, that the jurisdiction over the territory of Peninsula under the Convention is now exercised by Russian Federation, as it exercises effective control over the territory thereof. Ukrainian jurisdiction on the territory of Crimea is limited by either minimal obligations of, as established in *Ilascu case*, the general measures to re-establish control over the territory and use all the political and diplomatic leverage it owns to eliminate the violation of human rights; or to the personal jurisdiction due to the acts of the State agents of Ukraine. At the same time, in the latter case, Russia may still be held responsible for the performance of duty to cooperate in investigation of the acts of Ukrainian State agents on the territory of Crimea. It however remains unclear, when does Russia's effective control over the territory of Crimea commence, but the outcome of the decision majorly depends on the evidence provided by the governments of Ukraine and Russia. Despite the date of establishment of Russia's spatial jurisdiction, Russia shall still be held liable for the acts of Russian State agents prior to the established date. The applicants in the potential cases regarding violations on the territory of Crimea should

lodge the applications against Russia and exhaust the domestic remedies provided by the local de-facto regime, unless they have reasonable grounds to suggest that the violation occurred due to the actions of Ukrainian State agents, in which case they should lodge the application against both Contracting State's with the view of, again, Russia's prospective obligation to cooperate in investigation.

Regarding Eastern territories of Ukraine. The conclusions on jurisdiction over the territories of Eastern Ukraine are less definite. Theoretically, there is enough evidence and previous practice of ECtHR to assume that the Court may establish Russia's exercising of effective control over the territories of Eastern Ukraine, regarding which Ukraine has lost its control. At the same time, it is plausible to suggest, that such a decision would be of strong political influence and, therefore, the Court may be reluctant to enact it. Thus, it is assumed that in order to omit admittance of the "vacuum" of Convention's protection on the territory of Europe, the Court will be establishing personal jurisdiction of Ukrainian State agent's, where applicable, or Russian personal jurisdiction over individuals in each case. ECtHR will gace the challenge of examining whether the actions of non-state actors – pro-Russian separatists, "DNR" and "LNR" may be attributable to Russia. It is proposed that the Court may ground its decision of attribution on the basis of practice of ICJ, applying the overall control test. Consequently, due to the uncertainty and unpredictability of the Court's decision, the potential applicants are advised to lodge the applications against both Russia and Ukraine to throw off the burden of proving the jurisdiction of either state. Also, the applicants are presumed to not be required to exhaust the domestic remedies in the illegal courts of "DNR" and "LNR" but shall strive to provide the evidence of lack of adherence of their justice system to the Convention standards.

Regarding the proposed actions of Ukraine. The proposed actions for the state of Ukraine in potential cases are similar regarding both territories: to continue to properly perform minimal positive obligations of Ukraine; and to properly investigate the cases regarding the ill-treatment and other violations committed by the State agents of Ukraine, in particular police and army, since it appears to be a recognized by the ECtHR systematic problem of Ukrainian government. Besides, in order to facilitate

valid evidence of Russian control over “DNR” and “LNR”, Ukrainian government shall claim relevant political statements with specific facts regarding Russian support and control over the separatist entities and involve international organizations to collect the testimonies proving the credibility of these statements.

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ЗАЯВА

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про оригінальність академічної роботи та самостійність її виконання

Я, *Забродська Килина-Анастасія Едуардівна,* декларуючи свою відданість засадам академічної доброчесності й християнської етики праці, та відповідно до діючого «Положення про запобігання академічному плагіату та іншим видам порушення академічної доброчесності й коректне застосування цитат в освітньому процесі, науково-педагогічній та науковій діяльності Закладу вищої освіти «Український Католицький Університет», цим посвідчую, що підготовлена мною на кафедрі теорії права та прав люди академічна робота *«Дія Конвенції про захист прав та основоположних свобод на окупованій та непідконтрольній Україні території» («Effect of the European Convention on Human Rights on the occupied and uncontrolled territory of Ukraine»)* **є самостійним дослідженням і не містить елементів академічного плагіату**. Зокрема, всі письмові запозичення з друкованих та електронних публікацій у підготовленій мною академічній роботі оформлені та мають відповідні покликання.

Водночас заявляю, що я ознайомлений/а з визначеною в діючому «Положенні про запобігання академічному плагіату та іншим видам порушення академічної доброчесності й коректне застосування цитат в освітньому процесі, науково-педагогічній та науковій діяльності Закладу вищої освіти «Український Католицький Університет» дефініцією поняття «*академічний плагіат*» як «оприлюднення (частково або повністю) наукових (творчих) результатів, отриманих іншими особами, як результатів власного дослідження (творчості) та/або відтворення опублікованих текстів (оприлюднених творів мистецтва) інших авторів без зазначення авторства».

Я також усвідомлюю, що несу повну відповідальність за присутність в академічній роботі академічного плагіату, і розумію всі негативні наслідки для власної репутації та репутації Університету в разі порушення мною норм академічної доброчесності. Я також визнаю слушність політики УКУ, яка передбачає, що виявлення академічного плагіату в моїй академічній роботі може бути підставою для відрахування з числа студентів Університету.

Дата *Підпис*