

THE ISSUE OF JURISDICTION AND ACCOUNTABILITY IN CRIMEA AND DONBAS THROUGH THE LENSES OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract

Today, the Ukrainian war is amongst the worst humanitarian crises in the world, fact that asks to what extent would the European Court of Human Rights attribute accountability to the relevant State Parties for ECHR violations of individual rights in the contested territories of Crimea and Donbas? In conducting the research for the following chapters, the applied methodology is a doctrinal one. Namely, it has performed a detailed study of the exiting case law issued by the ECtHR and an interpretative analysis of the ECHR. As such, primary and secondary sources of law have been analysed through the process of deductive and inductive reasoning. In addition, the line of argumentation has been assembled through comparisons and analysis of various legal articles, reports, media outlets and literature review. Therefore, in answering the research question, this article performed an extensive analysis of the Court's jurisprudence towards cases of contested territories. The performed analysis was crucial in understanding the complexity of the Court's approach, particularly the controversial judgement of *Ilascu v. Moldova and Russia*. As the article observed, the idea of 'residual obligations' underpinned in territorial sovereignty of the State is challenging especially for contested territories. The term of 'residual positive obligation' was both welcomed and criticized by legal authors since it was clearly a shift from the Court's traditional approach of presumption/rebuttal. This article is however of the opinion that the *Ilascu* approach represents an impediment for the Court to address the ECHR claims primarily in Crimea rather than in Donbas since it runs the risk to provoke a significant political backlash when assessing the residual positive obligations as imposed to the parent State (i.e. Ukraine). This impediment lies on the fact that such residual obligations are inevitably linked to the sovereignty of the State, thus inevitably reducing the scope of the parent's State jurisdiction in cases of territorial contestation. Therefore, as it will be observed throughout the critical analysis of the Court's case law, both Russia and Ukraine can be held responsible for ECHR violations in the contested territories of Crimea and Donbas. However, considering the current political climate, the Court should act carefully with the applications from both Crimea and Donbas due to the on-going nature of the conflict, as it is very easy for the State parties to blame the Court of applying double standards or for being biased.

Keywords: *Accountability; Crimea; Donbas; European Convention on Human Rights; European Court of Human Rights; Ilascu v. Moldova and Russia; Human rights; Litigation process; Ukrainian war.*

JEL CLASSIFICATION: K410 Litigation Process.

The world has witnessed many examples of contested territories in which there is either a dispute over sovereignty or when the parent state is unable to exercise control over its whole territory. Such situations also occur in Europe, where these are increasingly rising in cases before the European Court of Human Rights (hereinafter 'ECtHR' 'Court').² Particularly, with the on-going dispute over Crimea and Eastern Ukraine, the Court inevitably deals with the question of applicability of the European Convention on Human Rights (hereinafter 'ECHR' 'Convention')³ in situations when a State loses its effective control over parts from its territory. Since this is a fairly extensive topic of discussion, this article will critically reflect upon the applicability of the Convention in the contested territories of Crimea, Donetsk People's Republic [hereafter 'DPR'] and Luhansk People's Republic [hereinafter 'LPR']. The formulated research question thus asks to what extent would the Court attribute accountability to the relevant State Parties for ECHR violations of individual rights in the contested territories of Crimea and Donbas? As such, this article primarily explores the applicability of the Convention in contested territories solely in the light of its relevant provisions and the Court's case law. Whereas the research's main focus will rest on the threshold

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² Press release issued by the Registrar of the Court, ECHR 173 (2018) on 09 May 2018 p.1.

³ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 (hereinafter, cited as ECHR).

question of the Convention’s applicability rather than at how its rights and obligations apply in specific factual contexts.

I. TRADITIONAL PRESUMPTION OF ECHR JURISDICTION – GENESIS

Article 1 ECHR prescribes that “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention.”⁴ In its analysis and interpretation, the Court stated that ‘Article 1...sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to ‘securing’ the listed rights and freedoms to persons within its own ‘jurisdiction’. Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States’.⁵ By these means, a State’s jurisdiction under Article 1 ECHR is ‘primarily territorial’.⁶ Hence, the initial approach adopted by the European Commission on Human Rights [hereinafter ‘ECmHR’ ‘Commission’] revolves around the presumption that jurisdiction is generally exercised throughout the entire territory of a State Party.⁷ Nevertheless, this presumption can be rebuttable on facts.⁸ For example, the presumption would be rebutted if a State party is not able to ensure its positive obligation in preventing ECHR violations on its territory particularly due to a shift of effective control. As such, the presumption of responsibility for acts committed on a State’s territory may be limited in cases where a State cannot exercise its authority over part or its entire territorial jurisdiction.⁹

The first cases to apply the ‘rebuttal’ on the presumption of jurisdiction were related to the contested territory of Turkish Republic of Northern Cyprus (hereinafter ‘TRNC’). In 1974 Cyprus has been divided into two when Turkey invaded the northern part; by 1983 the north of Cyprus was inhabited by Turkish Cypriots who declared themselves as a separate entity.¹⁰ In 1985 the TRNC enacted their own Constitution and was formally recognized only by Turkey which considers TRNC as “a democratic and constitutional State that is politically independent of all other sovereign States, including Turkey...”.¹¹ In this light, the ECtHR considered that TRNC citizens are under the *de jure* authority of Cyprus, however subject to the autonomous exercise of the TRNC’s *de facto* government established under the effective control of Turkey.¹² By these means, in the judgement *An and Others v Cyprus* – the sole case brought against Cyprus for violations of the ECHR in the TRNC - the European Commission on Human Rights declared the application inadmissible due to its incompatibility with Article 1 ECHR.¹³ The Commission thus stated that it

⁴ ECHR, Article 1.

⁵ Please see the following jurisprudence: *Soering v. the United Kingdom*, 7 July 1989, § 86, Series A no. 161; cited also in *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, § 66, ECHR 2001-XII; *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 70, ECHR 2012; *Al-Dulimi and Montana Management Inc. v. Switzerland*, no. 5809/08, § 88, 26 November 2013.

⁶ *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, § 59, ECHR 2001-XII; *Khan v. the United Kingdom* (dec.), no. 11987/11, § 25, 28 January 2014.

⁷ See e.g. ECmHR, *Cyprus v Turkey*, Application No 8007/77, Decision of 10 July 1978, §§ 23-24.

⁸ *Ibid.*

⁹ Please see the following jurisprudence: *Loizidou v. Turkey* (Preliminary objections), 23 March 1995, Series A no. 310; *Cyprus v. Turkey* [GC], no. 25781/94, §§ 76–80, ECHR 2001-IV.

¹⁰ A. de Mestral, ‘*The Current Status of the Citizens of the Turkish Republic of Northern Cyprus in the Light of the Non-application of the Acquis Communautaire*’ (2007), pp. 1423-1426.

¹¹ A. Cullen, S. Wheatley, ‘*The Human Rights of Individuals in De facto Regimes under the European Convention on Human Rights*’ (Human Rights Law Review 13:4, 2013), p. 706.

¹² *Cyprus v Turkey*, Application No 25781/94, Judgment of 10 May 2001, §§ 77-78, 149-150.

¹³ ECmHR, *An and Others v Cyprus*, Application No 18270/91, Decision of 18 October 1991:

“The Commission has previously observed that “the European Convention on Human Rights continues to apply to the whole of the territory of the Republic of Cyprus” and that the recognition by Turkey of the Turkish Cypriot administration in the north of Cyprus as “Turkish Federated State of Cyprus” does not affect “the continuing existence of the Republic of Cyprus as a single State and High Contracting Party to the Convention”. At the same time, however,

“finds [...] the authority of the respondent Government [...] is still limited to the southern part of Cyprus. It follows that the Republic of Cyprus cannot be held responsible under Article 1 of the Convention for the acts of Turkish Cypriot authorities in the north of Cyprus of which the present applicants complain.”¹⁴

In following the Commission’s position, the Court mentioned in the *Loizidou v. Turkey* case the rejection of TRNC’s claim to statehood before the United Nations Security Council thus stating that “the international community does not regard the “TRNC” as a State under international law and that the Republic of Cyprus has remained the sole legitimate Government of Cyprus - itself, bound to respect international standards in the field of the protection of human and minority rights”.¹⁵ In addition, the Court did not further specify on the scope of Cyprus’s positive and negative obligations as a parent State of TRNC since it primarily lacks territorial control.¹⁶

What is interesting to observe is that the Court has followed the ‘rebuttal’ approach in its *Assanidze v. Georgia* judgement,¹⁷ but it failed to successfully apply it to the facts of the case.¹⁸ In line with the merits of the case, the claimant complained upon his continuous detention in the Adjarian Autonomous Republic (hereinafter ‘AAR’) despite his acquittal by the Supreme Court of Georgia.¹⁹ As mentioned, the Court departed in its reasoning from the initial presumption that the Convention should apply on the entire territory of the Member State, disregarding any difficulties experienced by “the governing authorities in ensuring compliance throughout any local-self government entity or region”.²⁰ However, the Court could not find sufficient evidence in order to rebut this presumption neither based on AAR’s separatist ambitions nor on the presence of effective control by another State.²¹ In this regard, the ECtHR declined any responsibility to the contested territory, thus stating since Georgia ratified the Convention and since the AAR is not under the effective control of another foreign State, then Georgia must ensure the applicability of the ECHR over AAR.²²

Notably however, the Court has deviated from this approach in the case of *Ilașcu et al. v. Moldova and Russia*.²³

II. THE COURT’S DEVELOPED APPROACH – EVOLUTION?

In the case of of *Ilașcu et al. v. Moldova and Russia* the applicants - Ilie Ilașcu, the leader of the Moldovan Popular Front opposition party, and others - were convicted on a number of terrorist-related charges for illegally combating the *de facto* government of the Moldovan Republic of Transnistria (hereinafter ‘MRT’). The MRT Supreme Court sentenced the applicants variously, from property confiscation to imprisonment and death.²⁴ The ECtHR refused to consider/recognize as lawful the decision of the MRT Supreme Court since the regime is an “entity illegal under the international law, and has not been recognized by the international community”.²⁵ Accordingly, the Court had to decide upon the responsibility of both Moldova and Russia for the illegal arrest,

the Commission has also found that the Government of the Republic of Cyprus "have since 1974 been prevented from exercising their jurisdiction in the north of the island. This restriction on the actual exercise of jurisdiction ... is due to the presence of Turkish armed forces"”.

¹⁴ *Ibid.* [emphasis added]

¹⁵ *Loizidou v Turkey* (merits), Application No 15318/89, Judgment of 18 December 1996, § 44.

¹⁶ M. Milanović, T. Papić, ‘The applicability of the ECHR in contested territories’ (International and Comparative Law Quarterly, Cambridge University Press, University of Nottingham, 2018), p. 9

¹⁷ *Assanidze v. Georgia* 2004-II; 39 EHRR 32.

¹⁸ *Ibid.* §§ 133-134.

¹⁹ *Ibid.* §§ 8-12.

²⁰ *Ibid.* § 146.

²¹ *Ibid.* §§ 133-134.

²² *Ibid.* §146.

²³ M. Milanović, T. Papić, *supra* n.16, p. 10

²⁴ *Ilașcu and others v. Moldova and Russia*, Application No.48787/99, Judgment (8 July 1994), §13.

²⁵ *Ibid.* § 436.

detention and ill treatment of the applicants in the MRT.²⁶ Since 1992 Republic of Moldova does not have effective control over its eastern area,²⁷ while Russia has continuously provided political, economical and military support to the region -thus inevitably contributing to its creation without being in occupation of it.²⁸ Based on these facts, the Court's starting point was to apply the traditional presumption of a State's jurisdiction which "may be limited [only] in exceptional circumstances, particularly where a State is prevented from exercising its authority in part of its territory. [...]"²⁹ In addition to its change of wording for 'rebuttal', the Court further adds that the parent State (i.e. Moldova) has the positive obligation under ECHR to use all diplomatic means to secure the protection of the Convention rights on the contested territory (i.e. MRT), by also including diplomatic dealings with it or the outer-State itself (i.e. Russia).³⁰ Through this, the parent state should peacefully attempt to re-establish the effective control over the separatist territory and thus fulfil its obligations under the Convention.³¹ In line with the judgement, these *residual obligations* are thus two-fold,³² including obligations (a) aiming at re-establishing the State's control over the territory in question, and (b) securing the applicants' individual rights.³³

As such, based on this rationale, Moldova has failed to prove such attempts, thus the Court in 2004 held the Moldavian state responsible, together with the Russian Federation,³⁴ for not safeguarding the ECHR human rights in the case of Ilascu and his group.³⁵

This judgment is highly controversial since most authors believe that it rather blurs than clarifies the idea of jurisdiction under the Convention,³⁶ despite its innovative intent.³⁷ In the eyes of Milovanović and Papić, the holding of the ECtHR in this case was innovative for two reasons. Firstly because the Court adopted a more flexible position, thus not pursuing a 'black or white' vision towards the ECHR applicability in the Member States.³⁸ Secondly, the notion of 'positive obligation' was invoked with respect to the ECHR as a whole, thus allowing for a different scope of obligations depending on the specific circumstances of the case.³⁹ For the authors however, the *Ilascu* ruling is overall problematic since the 'new' idea of residual positive obligations is interlinked with the sovereignty of a State over a territory, which becomes challenging in cases of territorial contestation.⁴⁰ In addition, Gondek argues that the Court not only has confused the concepts of jurisdiction and responsibility, but it also puzzled the concept of 'positive obligations' under Article 1 ECHR since any state obligations – either positive or negative – are directed only to the individuals and not to other state parties of the Convention.⁴¹ As also discussed by Yudkivska,

²⁶ *Ibid.* §331.

²⁷ *Ibid.*

²⁸ *Ibid.* §§ 382, 392.

²⁹ *Ibid.* § 312 [emphasis added];

³⁰ *Ibid.* §§ 333-334.

³¹ *Ibid.* § 333.

³² These inferred positive obligations can be treated as 'residual' since these are derived from the exception to such obligations in the first place. [M. Milanović, T. Papić, *supra* n.16, p. 19]

³³ *Ilascu and Others v. Moldova and Russia*, *supra* n. 24, § 339.

³⁴ *Russia's jurisdiction was extraterritorial [Ilascu and Others v. Moldova and Russia, supra n.24, §392].*

³⁵ *Ibid.*, §§ 121-123.

³⁶ Please see: M. Gondek, 'Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?' (52 *Netherlands International Law Review*, 2005), pp. 349 and 368; G. Yudkivska, 'Territorial Jurisdiction and Positive Obligations of an Occupied State: Some Reflections on Evolving Issues Under Article 1 of the European Convention' in A. van Aaken and I. Motoc (eds) *The European Convention on Human Rights and General International Law (OUP, forthcoming)*, draft available on SSRN at <https://ssrn.com/abstract=2825208>; A. Cullen, S. Wheatley, 'The Human Rights of Individuals in De facto Regimes under the European Convention on Human Rights' (*Human Rights Law Review* 13:4, 2013), p. 702.

³⁷ M. Milanović, T. Papić, *supra* n.16, p. 12.

³⁸ *Ibid.*, p.11.

³⁹ *Ibid.* p.12.

⁴⁰ *Ibid.* p.19.

⁴¹ M. Gondek, *supra* n.36, pp. 349, 368.

the ‘new’ residual obligation to re-establish control appears to be of a pure political rhetoric since it has little to do with the legal obligations of Article 1, thus being hardly subject to a legal assessment under ECHR measures.⁴²

The Court reaffirmed its ‘*Ilascu* approach’ in *Catan and Others v. Moldova and Russia* – where the applicants were Moldovans living in Transnistria who complained under Article 2 of Protocol 1 ECHR [right to education] concerning the closure of Moldavian taught schools and of a systematic campaign against the Romanian language, intimidation and harassment.⁴³ Here the Court stated that such actions were directly intended to enforce the ‘Russification’ of the culture and language of the Moldavian community in MRT, which are in line with the MRT’s objectives of uniting with Russia through an actual separation from Moldova.⁴⁴ With regard to Moldova’s residual obligations the ECtHR elaborated that ‘*Although Moldova has no effective control over the acts of the “MRT” in Transdniestria, the fact that the region is recognised under public international law as part of Moldova’s territory gives rise to an obligation, under Article 1 of the Convention, to use all legal and diplomatic means available to it to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention to those living there.*’⁴⁵ On such grounds, the Court concluded that Russia has been in violation of the right to education by virtue of its continuous support for Transnistria,⁴⁶ whereas Moldova satisfied its positive obligations.⁴⁷ In line with this approach, even though Moldova was discharged from its positive obligations towards the case, the actual protection and enjoyment of the ECHR rights in question depend strictly on the MRT separatist authorities,⁴⁸ which ultimately have effective control over the territory. As such, the Court did not have the chance to elaborate anyhow on the pending issues from the *Ilascu* case since it did not find any residual obligations breached by Moldova. Also, in its recent most recent jurisprudence the Court decided on another similar case, *Sandu and Others v. the Republic of Moldova and Russia* (in July 2018),⁴⁹ which is currently the latest in its *Ilascu* line of case law.⁵⁰ As in its previous decisions, the Court found that indeed both Moldova and Russia exercised jurisdiction in the sense of Article 1 ECHR over the contested territory of Transnistria - Moldova on the basis of sovereign title, and Russia on the basis of its effective control over the area.⁵¹ In this case however, the Court found Moldova again to have discharged its positive obligations towards the applicants, while Russia did not do so, thus incurring to Russia solely the responsibility for violating the Convention.⁵² From another critical standpoint, the Court yet again was not clear in distinguishing the issues of jurisdiction and responsibility since it was not sufficiently precise in attributing responsibility to the Russian state over Transnistria.⁵³ One thus may question whether the

⁴² G. Yudkivska, *supra* n.36, p. 9: ‘I find it rather difficult to reconcile positive obligations towards people remaining on occupied territories with the obligation to refrain from supporting the separatist regime. These obligations seem mutually exclusive – if a state engages in negotiations with separatists requesting them to secure human rights of individuals on occupied territories (that was precisely what the Court was expecting to have been done for Mr. Ilascu), it follows that it would propose something in exchange, such as providing economic support they might need. If Moldova was under obligation to negotiate the release of Mr. Ilascu and others, it had to give something to the separatists in addition to the already ceded territory.’

⁴³ *Catan and Others v. Moldova and Russia*, Application No. 43370/04, 8252/05 and 18454/06, Merits and Just Satisfaction, 19 October 2012, § 149.

⁴⁴ *Ibid.* § 121.

⁴⁵ *Ibid.* § 110.

⁴⁶ *Ibid.* §149.

⁴⁷ *Ibid.* §110.

⁴⁸ M. Milanović, T. Papić, *supra* n.16, p.21.

⁴⁹ *Sandu and Others v. the Republic of Moldova and Russia*, no. 21034/05, 11 February 2014.

⁵⁰ M. Milanović, ‘The Applicability of the ECHR in Contested Territories; Two Other ECHR Cases Against Russia’, 19 July 2018, Available at <<https://www.ejiltalk.org/the-applicability-of-the-echr-in-contested-territories-two-other-echr-cases-against-russia/>> (accessed on 31 August 2018).

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ M. Milanović, ‘Grand Chamber Judgment in *Catan and Others*’ (EJIL: Talk!, 21 October 2012), see online at <<https://www.ejiltalk.org/grand-chamber-judgment-in-catan-and-others/>> (accessed on 30 August 2018).

Court found Russia responsible for the acts of MRT authorities because these are attributable to Russia, or because Russia failed to comply with the positive obligation to prevent ECHR violations by a non-state actor actively operating within an area under its jurisdiction.⁵⁴

On the account of evolving from the traditional presumption/rebuttal approach in the *Ilaşcu* case, the Court is somehow hesitating to develop more upon the ‘residual positive obligations’ concept since it should also include in its interpretation a clear delineation between territorial jurisdiction under Article 1 ECHR, and the attribution of conduct responsibility. As already mentioned, this un-clarity is particularly challenging when considering situations of territorial contestation between two States - as in the Ukrainian conflict – since the whole idea of residual obligations is based on state sovereignty. Therefore, if the Court is to rule upon sovereignty claims in the cases of Crimea and Donbas – when assessing a violation of residual positive obligations – it could potentially unleash a significant political backlash due to the volatile nature of the conflict. Accordingly, the next section will put together all the presented terms and analysed case law so as to assess the obligations of Russia and Ukraine under ECHR law on the contested territories of Crimea and Donbas. Thus, it will further examine the degree of responsibility that the Court may attribute to the ECHR State parties (i.e. Russia and Ukraine) when breaching the European Convention in these contested territories.

III. THE PUZZLE OF RESPONSIBILITY IN CRIMEA AND DONBAS

When considering the Court’s approach to the Convention’s applicability in contested territories under Article 1 ECHR, the previous Section established that certain difficulties might arise. This is because the European Court evolved from its traditional approach in a very ‘fact-dependant’ while reasoning upon different historical-political contexts in its jurisprudence, such as Turkey’s responsibility for ECHR breaches in Northern Cyprus and Russia’s responsibility for violations committed in Transnistria.⁵⁵ As already observed, in its initial approach the Court primarily used the presumption that a State’s jurisdiction is normally exercised throughout the entire territory of a State party.⁵⁶ This presumption can be rebutted on certain facts, such as a State’s inability to exercise effective control over parts of its own territory,⁵⁷ whereas the outcome of this ‘rebuttal’ results in the lack of jurisdiction and thus discharge of any State obligations under the Convention. However, with the case of *Ilaşcu v. Moldova and Russia* the Court decided to depart from this standpoint, thus not fully discharging a State from its obligations under Article 1, even when the State lacks effective control over its territory. Hence, although the State may not be able to fulfil all of its obligations, positive duties remain, requiring it to take all appropriate measures within its power in order to secure Convention rights in accordance with Article 1 ECHR.⁵⁸ These ‘residual positive obligations’ are interlinked with the State’s sovereignty over the territory, thus inevitably reducing the scope of State’s jurisdiction in cases of territorial contestation.⁵⁹ As such, it would be interesting to observe how the Court would assess the ‘sovereignty’ link to the residual positive obligations in the cases of Russia and Ukraine over Crimea and Donbas – since it would inevitably cause a strong backlash in the political arena.

From a hypothetical perspective, Ukraine would definitely look for the Court to affirm its sovereignty, whereas Russia would accept ECHR’s applicability to its own conduct in **Crimea** since it would be support its own claim to sovereignty in the area. Considering the Court’s position, it would have to assess on a factual but also political reasoning as to which State has the sovereignty over Crimea. While considering the manner in which the Crimean annexation occurred and the

⁵⁴ M. Milanović, T. Papić, *supra* n.16, p. 13.

⁵⁵ *Guide on Article 1 of the Convention – Obligation to respect human rights – Concepts of “jurisdiction” and imputability*, § 45.

⁵⁶ Please see: *Ilaşcu and Others v. Moldova and Russia*, *supra* n.24, §313.

⁵⁷ Please see: *Loizidou v. Turkey*, *supra* n. 9; *Cyprus v. Turkey*, *supra* n.9.

⁵⁸ Please see: *Ilaşcu and Others v. Moldova and Russia*, *supra* n.24, §313.

⁵⁹ *Ibid.*

international criticism towards it, the Court would be politically pressured to antagonize Russia in its sovereignty claim. However, the Court should not disregard the fact that Russia has installed a *de facto* government in the peninsula, under which Crimean individuals have their ECHR seemingly protected, thus enforced.⁶⁰ Therefore, the Court would find itself in a difficult position to apply its *Ilascu* approach in this case due to the potential consequences it may cause by recognizing the sovereignty of one state against the other. But nevertheless, if the Court wishes to assess the residual obligations and pursue with its *Ilascu* approach, the Court must accept Ukraine's claim to sovereignty.⁶¹ Based on this move, the ECtHR would dismiss Russia's claim of sovereignty over the peninsula which then begs the question on how would Ukraine enforce a Court's decision in Crimea since it has no actual control over the region? It is thus manifested that despite the Court's good intentions in *Ilascu's* approach, the costs in applying it seem to outweigh its benefits.⁶² From this perspective one may understand why the Court until nowadays did not address any individual or inter-state complaint concerning Crimea in the light of these circumstances at hand. Nevertheless, the Court should pursue its main scope and act in the best interest of the individuals in an appropriate timely manner, despite its political perspectives.

The situation in **Donbas** seems even more complex at because Russia has always denied its involvement in the conflict. With this in mind, the ECtHR would have to deal with the issues of jurisdiction over a separatist region, which is currently beyond the effective control of the parent state and the geographical boundaries of the foreign State. However by the mere fact that Russia denies its involvement into a particular set of events, it does not mean that the Court will accept this standing if it can prove Russian 'effective control' over the region.⁶³ As already noted, the question of whether a State party is actually exercising effective control over another territory outside its borders is one decided facts. In seeking to answer that question the Court has primarily regarded the following general criteria:⁶⁴ (1) the number of soldiers deployed by the State in the relevant territory;⁶⁵ (2) the extent to which the State's military, economic and political support for the local subordinate administration provides it with influence and control over the region.⁶⁶ This test seems fairly simple, however its application to the factual scenarios is much more complex in both terms of legal interpretation and in terms of admissible evidence.⁶⁷

What is interesting to observe is that the European Court has passed its first decision in a case originating from the Luhansk People's Republic, namely the judgement of *Khlebiuk v. Ukraine*.⁶⁸ The case concerned in individual complaint filed by Oleksandr Khlebiuk, an Ukrainian national who had been convicted on several offenses by a LPR court in 2013.⁶⁹ The Ukrainian courts were unable to examine his appeal against his conviction because his case file was blocked in the LPR region.⁷⁰ Accordingly, the applicant filed a complaint against Ukraine for not protecting his right to fair trial within a reasonable time (Article 6(1) ECHR), whereas the Court concluded that since the State used appropriate measures to secure the protection of this right, it was thus was not breach of the

⁶⁰ W. A. Schabas, 'The European convention on human rights: a commentary' (Oxford University Press, 2015), p.93 '[...]the enforcement of the Convention will be ensured, first and foremost, by the national Courts'.

⁶¹ M. Milanović, T. Papić, *supra* n.16, p.22

⁶² *Ibid.*

⁶³ Kanstantin Dzehtsiarou, 'The European Court of Human Rights and the Armed Conflict between Russia and Ukraine', 27 November 2015, Available at: < <https://verfassungsblog.de/european-court-human-rights-armed-conflict-russia-ukraine/> > (accessed on 30 August 2018).

⁶⁴ *Guide on Article 1 of the Convention*, *supra* n. 55, § 36.

⁶⁵ This is the criterion to which the Court had hitherto attached the greatest importance (*Loizidou v. Turkey (merits)*, §§ 16, 56; *Ilașcu and Others v. Moldova and Russia*, *supra* n.24, § 387)

⁶⁶ *Ibid.*; *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, Council of Europe: European Court of Human Rights, 7 July 2011, § 139.

⁶⁷ Please see Kanstantin Dzehtsiarou article, *supra* n. 63.

⁶⁸ *Khlebiuk v. Ukraine*, Application no. 2945/16, Council of Europe: European Court of Human Rights, 25 July 2017.

⁶⁹ *Ibid.* § 7.

⁷⁰ *Ibid.* §§ 13-17.

Convention.⁷¹ This case however did not consider the issue of jurisdiction, sovereignty or responsibility because the applicant only complained about the actions of Ukraine, ignoring the involvement of Russia.⁷² Nevertheless, this judgement could give an indication as towards the Court’s approach in the contested area of Donbas since the Court came to the conclusion that the Ukrainian authorities had done all in their power, under the circumstances of the hostilities in eastern Ukraine, to address Mr. Khlebig’s situation.⁷³

With one small step ahead in the Court’s jurisprudence concerning the Ukrainian conflict, one should still be aware that there have been submitted more than 3000 individual applications since 2014, and that only one case was admitted where several others got rejected as manifestly ill founded.⁷⁴ This numerical statistic is low, but as already mentioned, the Court should act carefully with applications from both Crimea and Donbas due to the on-going nature of the conflict, as it is very easy for the State parties to blame the Court of applying double standards or for being biased.

Therefore, the Section has ultimately answered the research question posed by this article: to what extent would the Court attribute accountability to the relevant State Parties for ECHR violations of individual rights in the contested territories of Crimea and Donbas? As already observed throughout the critical analysis of the Court’s case law, both Russia and Ukraine can be held responsible for ECHR violations in the contested territories of Crimea and Donbas. Russia, as a foreign interfering State on Ukraine’s territory could be held liable for ECHR violations in the Donbas region if the Court could prove its effective control over the area. Pursuing with the indicative vector given by the Court in the *Khlebig* case, the Court would not seem inclined to attribute accountability to Ukraine over ECHR violations occurring in Donbas if it finds Russia in effective control of the area; thus continuing to apply its traditional presumption/rebuttal approach. However, the situation is different in the case of Crimea in the light of the Court’s new jurisdiction approach, known throughout this article as the *Ilascu* approach. Since the Court introduced the concept of ‘residual positive obligations’ and directly tied it with the State’s sovereignty over the territory, it has inevitably also reduced the scope of parent’s State jurisdiction in cases of territorial contestation. Hence, although the parent State may not be able to fulfil all of its obligations, positive duties remain, requiring it to take all appropriate measures within its power in order to secure Convention rights in accordance with Article 1. Accordingly, as it occurred in the *Ilascu* case, Ukraine as a parent State could also be found in violation of ECHR rights over Crimea, despite the fact that it does not have effective control over the territory. Furthermore, with the sovereignty tie to these residual obligations, the Court would find itself in an impasse since in accepting Russia’s claim of sovereignty would inevitably declare the annexation legal, and in accepting Ukraine’s claim of sovereignty would not result in an effective move due to its lack of effective control over the area. Therefore, the Court’s extent in attributing accountability to Russia and/or Ukraine over ECHR violations in Crimea depends solely on the Court’s perspective which should be directed towards the best interest of the individuals.

CONCLUSION

In any war of power and aggression there is always agony inflicted upon the individuals living on contested territories in which there is either a dispute over sovereignty or when a parent State is ultimately unable to exercise effective control over all of its territory. This ‘agony’ is often reflected through a perpetual fear of death, imminent threat of being displaced, constant suppression, and persistent deprivation of basic human rights. Since February 2018, there are four years from the Russian annexation of Crimea and from the rebellious escalations in Ukraine’s East

⁷¹ *Ibid.* §§ 74-82.

⁷² Press Release issued by the Registrar of the Court in the case of *Khlebig v. Ukraine* [ECHR 256 (2017) 25.07.2017]

⁷³ *Khlebig v. Ukraine*, *supra* n.68, § 78; See also <<http://euromaidanpress.com/2017/07/27/ukraine-wins-first-donbas-case-in-echr/>> (accessed on 31 August 2018).

⁷⁴ *Tsezar and others v. Ukraine and Lisnyy and others v. Ukraine and Russia*. Press Release issued by the Registrar of the Court on 9 May 2018, *supra* n.2.

side. More than 10, 000 people have died, including 3,000 civilians, whereas more than 2 million individuals have been internally displaced or put a risk.⁷⁵ Today, the Ukrainian war is amongst the worst humanitarian crises in the world, fact that triggers this articles' critical research question: to what extent would the European Court of Human Rights attribute accountability to the relevant State Parties for ECHR violations of individual rights in the contested territories of Crimea and Donbas?

In answering the research question, this article performed an in-depth analysis of the Court's jurisprudence towards cases of contested territories. The performed analysis was crucial in understanding the complexity of the Court's approach, particularly the controversial judgement of *Ilascu v. Moldova and Russia*. As the article observed, the idea of 'residual obligations' underpinned in territorial sovereignty of the State is challenging especially for contested territories. The term of 'residual positive obligation' was both welcomed and criticized by legal authors since it was clearly a shift from the Court's traditional approach of presumption/rebuttal. This article is however of the opinion that the *Ilascu* approach represents an impediment for the Court to address the ECHR claims primarily in Crimea rather than in Donbas since it runs the risk to provoke a significant political backlash when assessing the residual positive obligations as imposed to the parent State (i.e. Ukraine). This impediment lies on the fact that such residual obligations are inevitably linked to the sovereignty of the State, thus inevitably reducing the scope of the parent's State jurisdiction in cases of territorial contestation. Therefore, as already observed throughout the critical analysis of the Court's case law, both Russia and Ukraine can be held responsible for ECHR violations in the contested territories of Crimea and Donbas. However, considering the current political climate, the Court should act carefully with applications from both Crimea and Donbas due to the on-going nature of the conflict, as it is very easy for the State parties to blame the Court of applying double standards or for being biased.

Finally, this article has emphasized on the fact that nowadays the Ukrainian conflict is still amongst the worst humanitarian crises in the world, and it needs the attention of the international and regional justice systems. Therefore, despite the political aspects that the Court might take into consideration, it should have its primary attention to the best interests of the Crimean and Eastern Ukrainian individuals.

BIBLIOGRAPHY:

1. AWARDS BY COURTS AND TRIBUNALS

1.1. *European Court of Human Rights*

- *Ilascu and Others v. Moldova and Russia*, Application no. 48787/99, Council of Europe: European Court of Human Rights, 8 July 2004.
- *Loizidou v. Turkey* (Preliminary objections), 23 March 1995, Series A no. 310.
- *Loizidou v Turkey* (merits), Application No 15318/89, Judgment of 18 December 1996
- *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161.
- *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, ECHR 2001-XII.
- *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012.
- *Al-Dulimi and Montana Management Inc. v. Switzerland*, no. 5809/08, 26 November 2013.
- *Catan and Others v. Moldova and Russia*, Applications no. 43370/04, 8252/05 and 18454/06, ECtHR.
- *Khan v. the United Kingdom* (dec.), no. 11987/11.
- *Assanidze v. Georgia*, 2004-II; 39 EHRR 32.
- *Khlebiuk v. Ukraine*, Application no. 2945/16, Council of Europe: European Court of Human Rights, 25 July 2017.
- *Tsezar and others v. Ukraine and Lisnyy and others v. Ukraine and Russia*. Press Release issued by the Registrar of the Court on 9 May 2018.

⁷⁵ BBC, *Ukraine ceasefire: New Minsk agreement key points*, 12 February 2015, Available at <<https://www.bbc.com/news/world-europe-31436513>> [last accessed: 12 August 2018]; Julian Coman, *On the frontline of Europe's forgotten war in Ukraine*, *The Guardian*, 12 November 2017, Available at <<https://www.theguardian.com/world/2017/nov/12/ukraine-on-the-front-line-of-europes-forgotten-war>>.

- Sandu and Others v. the Republic of Moldova and Russia, no. 21034/05, 11 February 2014.
- 1.2. *European Commission on Human Rights*
 - Cyprus v Turkey, Application No 8007/77 [ECmHR], Decision of 10 July 1978.
 - An and Others v Cyprus, Application No 18270/91 [ECmHR], Decision of 18 October 1991.
- 2. INTERNATIONAL AGREEMENTS
 - Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.
- 3. LITERATURE
 - 3.1. *Books*
 - Schabas, William A. The European convention on human rights: a commentary. (Oxford University Press, 2015)
 - 3.2. *Articles*
 - A. de Mestral, ‘The Current Status of the Citizens of the Turkish Republic of Northern Cyprus in the Light of the Non-application of the Acquis Communautaire’ (2007)
 - M. Milanović, T. Papić, ‘The applicability of the ECHR in contested territories’ In International and Comparative Law Quarterly (Cambridge University Press, University of Nottingham, 2018).
 - L. Gondek, ‘Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?’ (52 Netherlands International Law Review, 2005),
 - G. Yudkivska, ‘Territorial Jurisdiction and Positive Obligations of an Occupied State: Some Reflections on Evolving Issues Under Article 1 of the European Convention,’ in A van Aaken and I Motoc (eds) The European Convention on Human Rights and General International Law.
 - Cullen, Anthony, and Steven Wheatley. "The human rights of individuals in de facto regimes under the European Convention on Human Rights." Human Rights Law Review 13.
 - M. Milanović, The Applicability of the ECHR in Contested Territories; Two Other ECHR Cases Against Russia, 19 July 2018, Available at <https://www.ejiltalk.org/the-applicability-of-the-echr-in-contested-territories-two-other-echr-cases-against-russia/>
 - M Milanović, Grand Chamber Judgment in Catan and Others, 21 October 2012, Available at <https://www.ejiltalk.org/grand-chamber-judgment-in-catan-and-others/>.
 - Kanstantsin Dzehtsiarou, The European Court of Human Rights and the Armed Conflict between Russia and Ukraine, 27 November 2014, Available at: <https://verfassungsblog.de/european-court-human-rights-armed-conflict-russia-ukraine/>.
- 4. NEWSPAPER ARTICLES
 - BBC, Ukraine ceasefire: New Minsk agreement key points, 12 February 2015, Available at <https://www.bbc.com/news/world-europe-31436513>
 - Julian Coman, On the frontline of Europe’s forgotten war in Ukraine, The Guardian, 12 November 2017, Available at <https://www.theguardian.com/world/2017/nov/12/ukraine-on-the-front-line-of-europes-forgotten-war>
- 5. COUNCIL OF EUROPE
 - 5.1. *Press Releases*
 - Press Release issued by the Registrar of the Court in the case of Khlebk v. Ukraine [ECHR 256 (2017) 25.07.2017].
 - Press Release issued by the Registrar of the Court on 9 May 2018, in the cases Tsezar and others v. Ukraine and Lisnyy and others v. Ukraine and Russia.
 - Guide on Article 1 of the Convention – Obligation to respect human rights – Concepts of “jurisdiction” and imputability,
- 6. MISCELLANEOUS
 - 6.1. *Websites*
 - See <http://euromaidanpress.com/2017/07/27/ukraine-wins-first-donbas-case-in-echr/> (accessed on 31 August 2018).