

**THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE CONTEXT
OF THE RUSSIAN-UKRAINIAN CONFLICT**

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Annotation: In late 2014, the mother of a young woman who was on board the Malaysia Airlines aircraft which was shot down over eastern Ukraine in the summer of 2014 brought a case against Ukraine before the European Court of Human Rights. The applicant claimed that Ukraine had failed to close its airspace and in doing so had violated the human rights of her daughter. This raises a number of issues concerning the applicability of the European Convention on Human Rights to the current situation in parts of Ukraine which are not under the full control of the Ukrainian government. Both Russia and Ukraine are parties to the European Convention on Human Rights. Every victim of a human rights violation who was under the jurisdiction of a state party at the time in question can bring a case to the European Court of Human Rights. The issue of jurisdiction is distinct from the title to a territory under international law. It is possible that Russia, directly or indirectly, is exercising jurisdiction in some parts of Ukraine. This, however, does not mean that Ukraine would have lost all legal responsibility. There might still be a residual responsibility of Ukraine. In addition, the question has to be asked if there are domestic remedies which would have to be exhausted before bringing a case to the European Court of Human Rights. Residents of parts of Ukraine currently controlled by Russia should not be required to exhaust remedies offered by Russia in order for their case to be admissible to the European Court of Human Rights.

Key words: Ukraine, Russia, Crimea, Donbass, European Convention on Human Rights, European Court of Human Rights, MH17.

Анотація: Статтю присвячено вирішенню питання щодо відповідальності держави у Європейському суді з прав людини за порушення прав людини, скоєні на території, яка тимчасово державою не контролюється. Питання відповідальності розглядається в контексті конкретної справи, поданої проти України родичами загиблих в авіакатастрофі літака МН 17 Малайзійських авіаліній. Заявники звинувачують Україну у тому, що вона порушила право на життя, не заклавши повітряний простір для літаків цивільної авіації над зоною військового конфлікту. На думку автора, при розгляді цієї справи Європейський суд має враховувати, що територія, де сталася катастрофа, не контролювалася українським урядом.

Ключові слова: Україна, РФ, Крим, Донбас, Європейська конвенція про захист прав людини та основоположних свобод, Європейський суд з прав людини, літак МН 17.

Аннотация: В статье рассматривается проблема ответственности государства в Европейском суде по правам человека за нарушения, допущенные на территории, которая временно не контролируется государством. Вопрос ответственности анализируется в контексте конкретной жалобы, поданной в Европейский суд против Украины родственниками погибших в авиакатастрофе самолета МН 17 Малайзийских авиалиний. По мнению заявителя, Украина нарушила право на жизнь пассажиров рейса, оставив воздушное пространство над зоной военного конфликта открытым для самолетов гражданской авиации. Автор отстаивает позиции, что при рассмотрении этого дела Европейский суд должен учитывать то обстоятельство, что территория, над которой произошла катастрофа, временно не контролируется украинским правительством.

Ключевые слова: Украина, РФ, Крым, Донбас, Европейская конвенция защиты прав человека и основоположных свобод, Европейский суд по правам человека, самолет МН 17.

1. Introduction

The armed conflict in Eastern and Southern parts of Ukraine in the course of this year¹ has led to many violations of human rights². It is not the aim of this article to elaborate on all violations of human rights in the course of this conflict. The prevention of further human rights violations as well as detailed and effective investigations into all human rights violations in the course of this conflict, regardless of the identity or nationality of perpetrators or victims, is an urgent necessity which the parties involved and in particular the international community have to meet. Rather than looking at specific rights which have been violated, this article is meant to address issues which concern general questions concerning the European Convention on Human Rights³ (ECHR).

2. Claims to independence

The claims to independence by entities such as the Republic of Crimea and the People's Republics of Donetsk or Lugansk are incompatible with international law and null and void, as is the annexation of Crimea and Sevastopol into the Russian Federation⁴. If they would have any legal effect, Ukraine would cease to be responsible for these territories⁵. In the case of Crimea and Sevastopol, the Russian Federation itself claims to have jurisdiction over the area and hence is fully

responsible for human rights violations there. The requirement of jurisdiction within the meaning of Article 1 ECHR refers to jurisdiction *de facto*, not necessarily *de jure*. Russia's responsibility in so far cannot be contested, despite the lack of title to territory on the part of Russia. The situation is more complicated in the embattled oblasts of Donetsk and Lugansk, which also have declared independence. Unlike in the case of Crimea, Russia was not quick to incorporate the areas into the Russian Federation and at the time of writing Russia demands a special status for these areas within Ukraine but not their independence⁶.

Would any part of Ukraine become independent in accordance with international law, the Convention would no longer apply there. Because of Article 59 (1) ECHR, newly independent states first have to become members of the Council of Europe before they can become parties to the ECHR⁷.

3. Russia's Responsibility

But also Russia can be responsible for human rights violations done on its behalf and by forces which are if not *de jure* than at least *de facto* under its control.

3.1 Extraterritorial effect of the ECHR and the Responsibility of the Occupying Power

The concept of jurisdiction in Article 1 of the European Convention on Human Rights (ECHR), which is vital for the application of the ECHR goes beyond the notion of territory. An essential element of statehood,

territory is the most natural way to describe the reach of the power of the state. It is this power, the effective exercise of authority, and the population which are the other requirements of statehood. However, the wording of Article 1 ECHR already indicates a personal approach⁸. This personal approach is not completely contrary to the territorial approach but highlights that jurisdiction, while usually territorial in nature, does not have to be territorial. Indeed, the European Court of Human Rights has on several occasions considered specific extraterritorial actions to amount to violations of the Convention⁹, culminating in the finding in *Al-Skeini v. United Kingdom*¹⁰ that «[w]hat is decisive [...] is the exercise of physical power and control over the person in question»¹¹. Even without exercising control over any part of Ukraine, Russia can still be held accountable as long as it exercises control over a single individual – regardless of his or her whereabouts.

3.2 Accountability of a State for Violations of the ECHR by proxy

A key element of Russia's strategy in the attacks on Ukraine is the use of (initially) unidentified armed forces which not only gives the attacker the benefit of surprise but also provides a certain degree of deniability. This deniability, however, is only political and not legal in nature. While it might be more difficult to prove that a state is really in control of unidentified armed forces which operate abroad, international law already has sufficient legal standards under both general international law and international criminal law to ensure that the states which are behind such attacks can be held accountable:

Under classical international law, it is the states which claim rights on behalf of their citizens on the international level but not as rights of the citizens but as their own rights¹². Therefore there is no corresponding responsibility of states for crimes which have been committed abroad by their citizens, unless they acted on behalf of the state. In this regard, however, the nationality of the acting person or persons is irrelevant. The test outlined by the International Court of Justice in *Nicaragua v. United States*¹³ still remains the relevant standard for the attribution of private actions to a state in terms of state responsibility. In the field of International Criminal Law, the standard created by the International Criminal Tribunal for the former Yugoslavia in *Tadić*¹⁴, which differs from the *Nicaragua* test¹⁵, provides rules for the determination of responsibility on the part of a state.

Also under the European Convention on Human Rights the states parties to it can be held accountable beyond exercises of public authority¹⁶, be it in the form of *ultra vires* acts or by using proxies who act on behalf of the state, as seems to be happening in Ukraine. The Convention is meant not to allow states to circumvent their responsibilities. Therefore Russia can be held accountable for human rights violations committed in its name by proxy fighters. In the case of the ECHR, the Russian Federation can literally be held accountable as Article 41 ECHR allows the Court to impose compensation payments on offending states.

4. Responsibility of an occupied state to continue to enforce the ECHR

While the general rule is that a state exercises jurisdiction over its entire territory¹⁷, this is not necessarily the case if part of the national territory is

occupied by a foreign power¹⁸. But the European Court of Human Rights has also noted in a case concerning Transnistria that the partially occupied state continues to have an obligation to take the action it can take (which naturally would be less than were it in full control of the area in question) in order to protect human rights there¹⁹. This is more than a residual responsibility but it is the original obligation incumbent on every state which is a party to the ECHR.

5. States of Emergency and Derogations from the ECHR

It appears that so far neither Ukraine nor Russia have submitted to the Secretary General of the Council of Europe²⁰ a derogation in connection with the ongoing conflict. However, even then would many of the human rights violations which have occurred in Ukraine still fall within the scope of the states' obligations because the right to life, the prohibitions of torture and slavery and the *nulla poena sine lege* principle are exempt in this regard and have to be respected at all times²¹.

6. Conclusions

Civilians have suffered a wide range of massive human rights abuses during this conflict. But the terror regime imposed on the people of Ukraine by the occupation forces can be met with the weapon of law. While the use of armed force against an other nation is incompatible with the spirit of the Convention, the current situation in Ukraine is not so far out of the scope of the experience of the Convention organs that it could not be dealt with. To the contrary, the Court has already dealt with situations in which armed force was used²². The Turkish invasion of Cyprus, the 2008 Russian-Georgian war (which in many ways seems to have been a prelude to the current conflict), the continued presence of Russian forces in Moldova's Transnistria, Turkish operations against Kurdish terrorists, the Second Chechnyan War, NATO's Operation Allied Force against the former Yugoslavia, Britain's involvement in Operation Iraqi Freedom come to mind. The European Convention on Human Rights is therefore well-suited to deal with conflicts such as the one currently underway in Ukraine. Both Russia and Ukraine are European nations and the shared European values embodied in the ECHR can provide part of the solution for some of the issues involved in the current situation:

Victims of human rights violations should feel encouraged to seek recourse at the European Court of Human Rights. In many cases there will be no effective domestic mechanism, freeing potential applicants from the duty to exhaust domestic remedies before approaching the Court in Strasbourg²³. Applications to the Court have to be brought no later than six months after the end of the human rights violation in question²⁴ or – if domestic remedies have been available – no later than six months after the last decision by domestic courts²⁵. Ukraine has already brought an inter-state application to the European Court of Human Rights under Article 35 ECHR²⁶. This case is still pending in Strasbourg but the Court has issued interim measures on 13 March 2014, the day the application was submitted to the Court, urging Russia «refrain from measures which might threaten the life and health of the civilian population on the territory of Ukraine»²⁷. The victims of human rights violations in Ukraine, regardless of the nationality or identity of the victim or the perpetrator, are

not helpless but continue to enjoy the protection of the European Convention on Human Rights.

ПРИМІТКИ

1. This text is up to date as of 9 September 2014.
2. On developments in Ukraine during the Summer of 2014 see Stefan Kirchner, *Interim Measures in Inter-State Proceedings before the European Court of Human Rights: Ukraine v. Russia*, in: 3 University of Baltimore Journal of International Law (2014-2015), forthcoming.
3. European Treaty Series No. 5.
4. See in more detail Stefan Kirchner, *Crimea's Declaration of Independence and the subsequent Annexation by Russia under International Law*, in: 18 Gonzaga Journal of International Law (2014-2015), forthcoming.
5. Cf. in general Bernadette Rainey / Elizabeth Wicks / Clare Ovey, Jacobs, White & Ovey – *The European Convention on Human Rights*, 6th ed., Oxford University Press, Oxford, 2014, p. 101.
6. Neil MacFarquhar, *Ukraine Deal Imposes Truce Putin Devised*, in: New York Times, 6 September 2014, p. A1, <http://www.nytimes.com/2014/09/06/world/europe/ukraine-cease-fire.html?_r=0>.
7. Rainey et al. (note 6), p. 101.
8. Christoph Grabenwarter, *European Convention on Human Rights*, 1st ed., Verlag C. H. Beck, Munich, 2014, p. 6.
9. For an overview over the development of the Court's case law see Rainey et al. (note 6), pp. 90 et seq.
10. European Court of Human Rights, *Al-Skeini and others v. United Kingdom*, Application no. 35763/97, Judgment of 21 November 2001.
11. Al-Skeini (note 11), para. 136; also quoted by Rainey et al. (note 6), p. 94.
12. See very instructively Emanuela-Chiara Gillard, *Reparation for violations of international humanitarian law*, in: 85 (851) *International Review of the Red Cross* (2003), pp. 529 et seq., <https://www.icrc.org/eng/assets/files/other/irrc_851_gillard.pdf>, at pp. 536 et seq.
13. International Court of Justice, *Nicaragua v. United States (Military and Paramilitary Activities in and against Nicaragua)*, Judgment of 27 June 1986 (Merits), <<http://www.icj-cij.org/docket/files/70/6485.pdf>>, paras. 114 et seq.
14. International Criminal Tribunal for the former Yugoslavia, *Tadić ("Prijedor")*, Case no. IT-94-1, Judgment of 7 May 1997, <<http://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf>>, pp. 243 et seq.
15. See also Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, in: 18 *European Journal of International Law* (2007), pp. 649 et seq., <<http://www.ejil.org/pdfs/18/4/233.pdf>>
16. Rainey et al. (note 6), p. 141.
17. European Court of Human Rights, *Ilascu and others v. Moldova and Russia*, Application no. 48787/99, Judgment of 8 July 2004, para. 312; Rainey et al. (note 6), p. 95.
18. *Ibid.*
19. Ilascu (note 18), para., 331; Rainey et al. (note 6), pp. 95 et seq.
20. Stefan Kirchner, *Human Rights Guarantees During States of Emergency: The European Convention on Human Rights*, in: 3 (2) *Baltic Journal of Law & Politics* (2010), pp. 1 et seq., at p. 14; see also Christoph Grabenwarter, *Europäische Menschenrechtskonvention*, 3rd ed., Verlag C. H. Beck, Munich, 2008, p. 13; Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights*, 3rd ed., Sweet & Maxwell, London, 2007, p. 262.
21. Kirchner (note 21), p. 16.
22. Kirchner (note 2).
23. Cf. Reid (note 21), pp. 31 et seq.
24. *Ibid.*, p. 26.
25. *Ibid.*
26. Application no. 20958/14, submitted on 13 March 2014. On this case see in more detail Kirchner (note 2).
27. European Court of Human Rights, Press Release issued by the Registrar of the Court, *Interim measure granted in inter-State case brought by Ukraine against Russia*, ECHR 073 (2014), 13 March 2014, <<http://hudoc.echr.coe.int/webservices/content/pdf/003-4699472-5703982>>.