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Interim Measures in Inter-State Proceedings before the European Court of Human Rights: Ukraine v. Russia

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INTERIM MEASURES IN INTER-STATE PROCEEDINGS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: *UKRAINE V. RUSSIA*

Dr. Stefan Kirchner

“Does no one remember the former Yugoslavia? Using principles of self-determination to justify ethnic homogeneity has resulted in ethnic cleansing. This brand of nationalism carried to its logical conclusion is ugly, plain and simple.”¹

ABSTRACT: Over the course of the year 2014, the situation in Ukraine has turned from a domestic political issue involving protests, killings, and the ouster of the former president, into a military confrontation with Russia. At the time of writing (August 2014), Russia has annexed Crimea and is supporting separatists, who are in a state of civil war against the Ukrainian state, in Eastern parts of the country. This conflict is ongoing and an unknown number of civilians have been killed, notably the passengers of the Malaysia Airlines flight MH17, which is thought to have been shot down over the conflict zone. Hundreds of thousands of Ukrainians have become refugees, the majority being internally displaced persons, many also fleeing into Russia. Both Ukraine and Russia are parties to the European Convention on Human Rights (ECHR). In addition to the individual complaints procedure, the European Convention on Human Rights allows for inter-state complaints. Ukraine has already used this procedural possibility, in the Crimea takeover in March 2014, to bring Russia before the European Court of Human Rights (ECtHR). While rarely utilized, this procedure has been employed by states to protect specific rights of citizens, or deal with a conflict with other states. In particular, in the absence of jurisdiction by, for example, the International Court of Justice (ICJ), the ECtHR is a forum which can be reached immediately so long as parties to the ECHR are involved.

1. Lea Brilmayer, *Why the Crimean Referendum is Illegal*, THE GUARDIAN (Mar. 14, 2014), <http://www.theguardian.com/commentisfree/2014/mar/14/crimean-referendum-illegal-international-law>.

This article analyzes the case law of the European Court of Human Rights in inter-state complaints pertaining to armed conflicts and situations of occupation. It will be shown that, although the conflict is still ongoing and the situation could be considered political in nature, there are indeed legal grievances for which the ECtHR is the right forum. In addition, the applicability of the ECHR to situations of armed conflict will be investigated. While the case between Ukraine and Russia is still pending before the ECtHR, the Court has already issued interim measures. While the European Court of Human Rights usually enjoys a very high rate of compliance, the question is if the current obvious non-compliance by both parties threatens to undermine the persuasive power of the ECtHR.

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I. INTRODUCTION

In March 2014, Russia annexed the Ukrainian territories of Crimea and Sevastopol after (initially unidentified) gunmen had taken over the area² and after a referendum (the democratic nature³ and legality of which, under international law,⁴ have been contested) had allegedly shown a majority vote for independence from Ukraine. Russian forces took over Crimea in response to what Vladimir Putin referred to as “uncontrolled crime spreading to the eastern region of the country,”⁵ which culminated in the annexation on March 18, 2014,⁶ and which is seen by Russia as a “reunification.”⁷

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2. *Ukraine Crisis: Timeline*, BBC NEWS, <http://www.bbc.com/news/world-middle-east-26248275> (last updated Nov. 13, 2014).
 3. Brilmayer, *supra* note 1.
 4. *Crimea Result Makes “a Mockery” of Democracy, Says Hague*, BBC NEWS, <http://www.bbc.com/news/uk-politics-26606556> (last updated Mar. 16, 2014).
 5. Chrisella Herzog, *Political Legitimacy and International Law in Crimea: Pushing the U.S. and Russia Apart*, DIPLOMATIC COURIER (May 8, 2014), <http://www.diplomaticcourier.com/news/topics/politics/2187-political-legitimacy-and-international-law-in-crimea-pushing-the-u-s-and-russia-apart>.
 6. Shaun Walker & Ian Trayner, *Putin Confirms Crimea Annexation as Ukraine Soldier Becomes First Casualty*, THE GUARDIAN, Mar. 19, 2014, <http://www.theguardian.com/world/2014/mar/18/putin-confirms-annexation-crimea-ukrainian-soldier-casualty>.
 7. Herzog, *supra* note 5.

Crimea, which is also home to a small minority of predominantly Jewish Karaims,⁸ was known as Taurica in antiquity⁹ and has been ruled by Greeks, Romans, Goths, Mongols and Byzantium.¹⁰ Geographically, the term “Crimea” refers to the peninsula as a whole. From a political Ukrainian perspective, it consists of the Autonomous Republic of Crimea (which already enjoys more autonomy than Ukraine’s regions or oblasts) and the city of Sevastopol, which, like the capitol Kyiv, enjoys special status in Ukrainian law. Both the autonomous province of Crimea and the special status city of Sevastopol were included in the self-proclaimed “Republic of Crimea,” which then sought admission to the Russian Federation.

From a Russian point of view, the Autonomous Republic of Crimea is now one of the Federal Subjects of the Russian Federation. Russia consists not of states but of Federal Subjects that may have different designations, such as republics, provinces, districts or territories. The latter is similar to the organized incorporated territories in the United States, although all Russian Federal Subjects are legally equal under Russian Constitutional Law. Sevastopol is considered by the Russian government to be one of three Federal Cities of Russia, like Moscow and St. Petersburg. All Federal Cities are also Federal Subjects under Russian law, unlike Washington D.C. in the United States, but similar to the status of the city-states of Berlin, Hamburg, and Bremen in Germany. By designating the Crimea and Sevastopol in accordance with terminology already used to describe Russia’s administrative subdivisions, the Russian government has made it clear that it not only intends to occupy, but to annex these areas into Russia. These steps can be seen as an attempt to take back at least some of the territory lost when the Soviet Union (USSR), which was heavily dominated by Russia, fell apart, which has also raised concern over Russia’s ambitions among other European states.

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8. Paul Goble, *The Karaims - Another Forgotten People of Crimea Now at Risk*, INTERPRETER MAG. (Apr. 15, 2014), <http://www.interpretermag.com/the-karaims-another-forgotten-people-of-crimea-now-at-risk/>.
 9. Adam Taylor, *To Understand Crimea, Take a Look Back at its Complicated History*, WASH. POST (Feb. 27, 2014), <http://www.washingtonpost.com/blogs/worldviews/wp/2014/02/27/to-understand-crimea-take-a-look-back-at-its-complicated-history/>.
 10. *Id.*

An allegedly independent “Republic of Crimea,” comprised of Crimea and Sevastopol,¹¹ was declared by so-called local separatists but not recognized by any state. The new “Republic” was short lived, as its main political activity consisted of asking Russia to incorporate it into the Russian Federation.¹² Since the incorporation on March 18, 2014, Russia considers Crimea and Sevastopol to have been reunified with the *rodina*, the motherland. The German word “Anschluss” has been used to describe the annexation of Crimea and Sevastopol by Russia.¹³ The term commonly refers to the annexation of Austria into Germany on March 12, 1938. The use of the term *anschluss* to describe recent events in Crimea and Sevastopol, however, can disguise that there might be stronger similarity to the annexation of the Sudetenland by Germany in late 1938. The annexation of the Sudetenland was based on claims that Germany was protecting ethnic Germans in Czechoslovakia. This was a precursor for the invasion of the remainder of Czechoslovakia the following year. While history is not a necessary predictor of future events, the historic parallels are troubling. The annexation of Crimea has been followed by an ongoing armed conflict in Eastern Ukraine, which seems to follow the same pattern of covert operations seen in Crimea, though on a whole new level.

While Eastern and Southern Ukraine are now referred to as “New Russia,” Crimea and Sevastopol have a stronger cultural and historical bond with Russia. Crimea had been a part of Russia since 1783, but was given by the Presidium of the Supreme Soviet of the USSR to Ukraine in 1954, when both Russia and Ukraine were part of the Soviet Union. Since the Soviet Union was dominated by Russia, the transfer was perceived as symbolic, but also aimed at buying Ukrainian

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11. *Autonomous Republic of Crimea: Information Sheet*, MINISTRY OF FOREIGN AFFAIRS OF UKR., available at <http://mfa.gov.ua/en/about-ukraine/info/regions/1-crimea>.
 12. *Pro-Russian Leader Asks Putin for Help*, CBS NEWS (Mar. 1, 2014), <http://www.cbsnews.com/news/crimeas-leader-claims-control-asks-russias-vladimir-putin-for-help/>.
 13. George Packer, *Terms of Crisis*, THE NEW YORKER (Mar. 31, 2014), <http://www.newyorker.com/magazine/2014/03/31/terms-of-crisis>; Catherine A. Fitzpatrick, *Russia This Week: Is the Crimean Annexation Putin's Anschluss?*, THE INTERPRETER (Apr. 4, 2014), <http://www.interpretermag.com/russia-this-week-hate-campaigns-against-anti-war-critics/>.

compliance with the Soviet regime in the wake of the Holodomor, the starvation of millions of Ukrainians in the 1930s. Among many Russians, however, the idea persisted that Crimea and Sevastopol were part of Russia. The port of Sevastopol has long been of enormous strategic importance for Russia and was the home base of Russia's Black Sea Fleet even after Ukrainian independence in 1991. Crimea's strategic location allows control over the Black Sea and consequently is vital for securing Russia's access to the Mediterranean Sea,¹⁴ which was already an issue in the nineteenth-century.

Crimea is no stranger to armed conflict: the Crimean War (1854-1856) pitted Britain, France and the Ottoman Empire against Russia.¹⁵ This conflict concerned blocking Russia's advances¹⁶ towards the Danube River¹⁷ and the Mediterranean Sea.¹⁸ Accordingly, the conflict was restricted to the region,¹⁹ although there were some British efforts to blockade Russian ports in the Baltic Sea.²⁰ The Crimean War was a financial disaster for the Ottoman Empire.²¹ Faced with interest rates of up to 30% per year,²² as late the 1870s, the Ottoman Empire had to use two-thirds of the state's income just to service the debt incurred in financing the war.²³

In 1944, the Crimean Tatars suffered nearly complete ethnic cleansing when 200,000 Crimean Tatars were deported by Stalin.²⁴

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14. Robert Orr, *Why Crimea Matters to Russia*, FIN. TIMES BLOG (Mar. 3, 2014, 5:22 PM), <http://blogs.ft.com/the-world/2014/03/why-crimea-matters-to-russia/>; Caroline Mortimer, *Ukraine Crisis: Why Is Crimea So Important to Russia?*, THE INDEP. (Mar. 3, 2014), <http://www.independent.co.uk/news/world/europe/ukraine-crisis-why-is-crimea-so-important-to-russia-9166447.html>.
 15. John Darwin, *DER IMPERIALE TRAUM - DIE GLOBALGESCHICHTE GROSSER REICHE 1400-2000*, 216 (2010).
 16. William Woodruff, *A CONCISE HISTORY OF THE MODERN WORLD 168* (Little Brown Book Grp. 2005) (1991).
 17. *Cf. Id.* at 74.
 18. *Cf. Id.*
 19. Darwin, *supra* note 15, at 216.
 20. Darwin, *supra* note 15, at 216.
 21. Darwin, *supra* note 15, at 275.
 22. Darwin, *supra* note 15, at 276.
 23. Darwin, *supra* note 15, at 275 et seq.
 24. Tony Barber, *Crimea: A Region Divided*, FIN. TIMES (Mar. 6, 2014, 6:58 PM), <http://www.ft.com/cms/s/0/e3d3e3e4-a473-11e3-9cb0-00144feab7de.html#slide0>.

Seventy to ninety thousand were killed or died in the process.²⁵ They were resettled after the end of World War II.²⁶ Ten years later, Khrushchev transferred Crimea from Russia to Ukraine,²⁷ ostensibly to placate the Ukrainians over the Holodomor.²⁸ Around 80% of the population of Crimea are ethnic Russians or speak Russian;²⁹ 13% are Crimean Tatars.³⁰ During the Soviet era this seemed to be of little consequence,³¹ but when Ukraine became independent in 1991, “Crimea [turned], virtually overnight, from a largely Russian-populated bastion of Soviet naval might into the most ethnically and politically contested region of [the] newly independent Ukrainian state.”³²

There had been tensions in Crimea prior to Russia’s invasion,³³ but these were by no means so severe as to suggest military action. The close cultural and historic ties between Crimea, Sevastopol, and Russia also do not justify annexation by Russia. Throughout European history borders have been redrawn many times, and the idea that states’ borders should be equal to ethnic home areas harkens back to the darkest horrors of war. After World War II and the Cold War, Europe came together in peace and cooperation, with respect for human rights and the rule of law. It seems as if Moscow is sacrificing this consensus in favor of regaining the standing it enjoyed on the international stage before the end of the Soviet Union.

Despite Russia’s initial claim that the unidentified soldiers that took control of Crimea in the spring of 2014 were Crimean self-defense forces,³⁴ rather than forces of the Russian Federation, they were later

25. *Id.*

26. J. Otto Pohl, *The Deportation and Fate of the Crimean Tatars*, INT’L COMMITTEE FOR CRIMEA (2000), <http://www.iccrimea.org/scholarly/jopohl.html>.

27. Barber, *supra* note 24.

28. Barber, *supra* note 24.

29. Barber, *supra* note 24.

30. Barber, *supra* note 24.

31. Barber, *supra* note 24.

32. Barber, *supra* note 24.

33. Barber, *supra* note 24.

34. Bill Chappell & Mark Memmott, *Putin Says Those Aren’t Russian Forces in Crimea*, NPR (Mar. 4, 2014), <http://www.npr.org/blogs/thetwo-way/2014/03/04/285653335/putin-says-those-arent-russian-forces-in-crimea>.

confirmed to be Russian.³⁵ As will be shown, Russia is responsible for the ongoing human rights violations by these forces in the disputed peninsula. These violations include not only violence and threats against Ukrainians, but also attacks against journalists and threats of ethnic cleansing.³⁶ The announcement on March 19, 2014 that some Crimean Tatars would have to leave their homes in order to accommodate the “social needs”³⁷ of ethnic Russians,³⁸ came just one day after President Putin had declared that Tatar would become the third official language, along with Russian and Ukrainian, in Crimea.³⁹ If accurate, this report raises serious human rights concerns. Already since the early days of the crisis, the work of journalists in Crimea has been subject to severe limitations,⁴⁰ which include the use of violence by pro-Russian forces against reporters addressing the situation there.⁴¹

In the summer of 2014, the situation in Crimea and Sevastopol has been stabilized upon incorporation into the Russian Federation, although done in violation of international law and of Ukraine’s sovereignty. In the meantime, Russia has built up a large number of forces at the border of Ukraine and continues to support armed forces that fight a war against the Ukrainian government in the eastern provinces of Donetsk and Lugansk, both of which have declared their

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35. *Russian Invasion of Ukraine*, UKR. POLICY (Feb. 27, 2014), <http://ukrainianpolicy.com/russian-invasion-of-ukraine/>.
 36. Andrew Korybko, *Ethnic and Cultural Cleansing in Ukraine*, GLOBAL RESEARCH (June 18, 2014), <http://www.globalresearch.ca/ethnic-and-cultural-cleansing-in-ukraine/5387539>.
 37. Mary Chastain, *Crimean Government Tells Tatars to Leave Their Lands*, BREITBART.COM (Mar. 19, 2014), <http://www.breitbart.com/Big-Peace/2014/03/19/Crimean-Government-Tells-Tatars-to-Leave-Their-Lands>; *Crimean Tatars Call on International Community to Support Their Right to Self-Determination*, UNPO (May 8, 2014), <http://www.unpo.org/article/16898>.
 38. *Id.*
 39. Alice Speri, *Crimean Tatars Hardly Reassured by Putin’s Promise of Inclusion*, VICE NEWS (Mar. 18, 2014), <https://news.vice.com/article/crimean-tatars-hardly-reassured-by-putin-s-promises-of-inclusion>.
 40. Nicholas Williams, *Blunt instruments: Media repression in the Ukraine crisis*, INDEX ON CENSORSHIP (June 25, 2014), <http://www.indexoncensorship.org/2014/06/blunt-instruments-media-repression-ukraine-crisis/>.
 41. See Antonia Molloy, *Ukraine crisis: Ukrainian journalist being held by pro-Russian separatists is accused of ‘war crimes’*, THE INDEPENDENT, (Apr. 21, 2014), <http://www.independent.co.uk/news/world/europe/ukraine-crisis-ukrainian-journalist-being-held-by-prorussian-separatists-is-accused-of-war-crimes-9273291.html>.

independence from Ukraine.⁴² These battles have led to hundreds of thousands of Ukrainians fleeing their homes as well as to an unknown number of civilian deaths.⁴³ The conflict gained global attention with the shooting down of a civilian airliner, Malaysian Airlines flight MH17, which flew over Ukraine during a flight from Amsterdam to Kuala Lumpur.⁴⁴ Russia is suspected of not only training and supplying separatist forces fighting in eastern Ukraine but also of direct combat activities against Ukraine in Ukrainian territory. It appears that the goal of the current Russian government is not simply the annexation of Ukraine, but rather, to turn Ukraine into a failed state.⁴⁵

This strategy is similar to the 2008 war against Georgia and the continuing situation in Moldova, to use the creation of self-proclaimed independent ‘states,’ which lack international recognition, to destabilize the original country to the point at which further integration into either the European Union (EU) or the North Atlantic Treaty Organization (NATO) becomes impossible.⁴⁶ In addition, references to parts of Ukraine as “New Russia,” a historic term which dates back to Catherine the Great, have raised fears that larger parts of Eastern and Southern Ukraine could share Crimea’s fate.⁴⁷ In late August 2014, Russian or Russian-supported forces have crossed into Southeast

42. Stephen Lendman, *Lugansk and Donetsk Declare Independence*, STEVE LENDMAN BLOG (May 12, 2014), <http://sjlendman.blogspot.ch/2014/05/lugansk-and-donetsk-declare-independence.html>.

43. *Ukraine: UN report shows rising civilian deaths, ongoing rights abuses*, UN NEWS CENTRE, (Aug. 29, 2014), <http://www.un.org/apps/news/story.asp?NewsID=48588#.VAiwwMbSSQo>.

44. Agencies, *MH17 crash: Shooting down the Malaysia Airlines Airlines flight ‘may amount to a war crime’, says UN*, THE TELEGRAPH, (July 28, 2014), <http://www.telegraph.co.uk/news/worldnews/europe/ukraine/10995087/MH17-crash-Shooting-down-the-Malaysia-Airlines-flight-may-amount-to-a-war-crime-says-UN.html>.

45. Sergey Aleksashenko, *Ukraine is Failing as a State*, THE MOSCOW TIMES, (Dec. 13, 2014), <http://www.themoscowtimes.com/opinion/article/ukraine-is-failing-as-a-state/491462.html>.

46. *Pro-Russian opposition in Moldova spreads anti-EU myths to destabilize situation*, IPN (Aug. 14, 2014), <http://www.ipn.md/en/politica/63829>.

47. Max Fisher, *The very scary word in Putin’s new statement on the Ukraine Crisis*, VOX (Aug. 28, 2014), <http://www.vox.com/2014/8/28/6080589/putin-ukraines-rebels-novorossiya>.

Ukraine near Mariupol,⁴⁸ and a geographical valuation makes it clear that it is possible that these forces will attempt to create a land connection from Russia proper to occupied Crimea.

In August 2014, NATO estimated that approximately 1,000 members of the Russian armed forces were involved in the fighting in Ukraine. The events in Ukraine can be seen as a form of imperialist politics that aims at regaining some of the ground lost by Russia since the end of the Cold War. It is important to keep in mind that the Russian sphere of influence has shrunk dramatically in the last quarter of a century. In 1989, Russian forces were standing in East Germany. Today, many former Warsaw Pact countries are members of NATO and the EU. Therefore, some consider the efforts by the current Russian government to be a form of pushback against the West after having lost the Cold War. In some respects, however, Russia has joined the rest of Europe. Russia is a European nation and, like almost all European countries (notable exceptions are Belarus, Kosovo,⁴⁹ Kazakhstan⁵⁰), has become a member of the Council of Europe⁵¹ (COE)⁵² and ratified the European Convention on Human Rights

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48. Alexey Eremenko, *As Rebels Advance, Russia Is Accused of Sending Troops to Ukraine*, THE MOSCOW TIMES, (Aug. 28, 2014), <http://www.themoscowtimes.com/news/article/as-rebels-advance-russia-is-accused-of-sending-troops-to-ukraine/506080.html>.
49. *Kosovo's Path to the Council of Europe: Identifying Procedures*, GROUP FOR LEGAL & POL. STUD. (Sept. 2013), <http://legalpoliticalstudies.org/2013/09/kosovos-path-to-the-council-of-europe-identifying-procedures-obstacles-and-solutions-for-membership-2/>.
50. Hasan Kanbolat, *Kazakhstan wants to take its place in Europe*, TODAY'S ZAMAN (Feb. 17, 2009), http://www.todayszaman.com/columnists/hasan-kanbolat_167154-kazakhstan-wants-to-take-its-place-in-europe.html.
51. MICHAEL HASS, INTERNATIONAL HUMAN RIGHTS- A COMPREHENSIVE INTRODUCTION 274-275 (Routledge 2008) (On the Council of Europe).
52. The Vatican State is not a member of the Council of Europe either but it has to be kept in mind that the Vatican state is a relatively new legal entity and that the Catholic Church has traditionally been represented on the international stage by the Holy See. While the Vatican State is a party to technical treaties concerning e.g. Telecommunication or Postal Services, foreign affairs and human rights issues are dealt with by the Holy See. While it is prevented from being a party to many international treaties which are only open to states, the Holy See enjoys observer status at many international organizations, including the Council of Europe. By seeking observer status, the Holy See can express its support for the efforts of an organization, even if it is unable to join. This, too, can be said for the Council of Europe's work, in

(ECHR).⁵³ The European system of human rights protection⁵⁴ has long served to protect human rights by giving victims a place in international law, but also allows states to invoke human rights vis-à-vis other states who have ratified the Convention.⁵⁵

II. THE CASE OF *UKRAINE V. RUSSIA* BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

A. Application

On March 13, 2014, Ukraine brought a case against Russia before the European Court of Human Rights (ECtHR).⁵⁶ The legal basis for this inter-state case is Article 33 ECHR, to which both Ukraine and Russia are parties.⁵⁷ The relevant provision reads as follows:

Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.⁵⁸

The ECtHR, which is based in Strasbourg, France, is still dealing with the case, and at the time of writing no decision has been made on the material questions of the case. However, on the day of the application, the Court issued interim measures.⁵⁹

particular in the fields of peaceful coexistence and cooperation in Europe as well as the protection of human rights.

53. *Press Country Profile: Russia*, EUR. CT. H.R., http://www.echr.coe.int/Documents/CP_Russia_ENG.pdf (last updated Oct. 2014).

54. For an overview over the European human rights system, see Rhona K.M. Smith, *TEXTBOOK ON INTERNATIONAL HUMAN RIGHTS* 96 et seq. (2014).

55. *Id.*

56. *Ukraine v. Russia*, App. No. 20158/14, EUR. CT. H.R., HUDOC (Mar. 13, 2014), <http://www.echr.coe.int>.

57. Council of Europe, EUR. CONV. FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, as amended by Protocols Nos. 11 and 14, Nov. 4, 1950, art. 33.

58. *Id.*

59. Press Release, Registrar of the Court, EUR. CT. H.R., *Interim Measures Granted in Inter-State Case Brought by Ukraine Against Russia* (Mar. 13, 2014), <http://hudoc.echr.coe.int/webservices/content/pdf/003-4699472-5703982>.

B. Rights concerned

The application only relates to the situation in Crimea. Because the application by Ukraine remains secret for the duration of the proceedings, the exact details of Ukraine's claims are unknown. There are still some open questions surrounding the case. At this time "it cannot be determined on which specific criteria the court based its imposition of interim measures. [I]nterim measures are not published with official court reasons [and] the Ukrainian Government's application entered under Article 33 of the ECHR is not yet accessible, rendering it hard to give a prognosis regarding its chance of success."⁶⁰ Also, "the question [has been raised] whether this might be a case of "legal forum shopping" and if the [International Court of Justice] might not have been"⁶¹ a more appropriate forum for what is essentially an international conflict, which now has taken on a military dimension.

It appears likely that the case will show parallels to that of *Georgia v. Russia (II)*.⁶² This case is not to be confused with *Georgia v. Russia (I)*,⁶³ which was brought before the ECtHR in 2007 and decided in the summer of 2014, and which dealt with the expulsion of Georgian citizens from Russia.⁶⁴ *Georgia v. Russia (II)*, on the other hand, deals with events in the context of Russia's 2008 war against Georgia⁶⁵ which led to the creation of two self-proclaimed but hardly recognized would-be 'states,' South Ossetia and Abkhazia. This is a reminder that Russia's tactics of astro-turf-separatism is hardly new.

60. Frederike Kollmer, *In the interim in Strasbourg re: the crisis in Crimea*, in: CAMBRIDGE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW (2014), <http://cjlcl.org.uk/2014/03/27/interim-strasbourg-re-crisis-crimea/>.

61. *Id.*

62. See Philip Leach, *Ukraine, Russia and Crimea in the European Court of Human Rights*, EJIL TALK! (Mar. 19, 2014), <http://www.ejiltalk.org/ukraine-russia-and-crimea-in-the-european-court-of-human-rights/>.

63. *Georgia v. Russia (I)*, App. No. 13255/07, EUR. CT. H.R. (June 30, 2009), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145546>.

64. Press Release, EUR. CT. H.R., *Russia's Policy in 2006 of Arresting, Detaining, and Expelling Large Numbers of Georgian Nationals Violated the Convention* (July 3, 2014), <http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-4811514-5865358>.

65. *Georgia v. Russia (II)*, App. No. 38263/08, EUR. CT. H.R. (Dec. 13, 2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108097>.

The inter-state case of *Georgia v. Russia (II)*, which was held to be admissible in 2011 and is still pending before the Court,⁶⁶ has visible parallels to the ongoing conflict. Georgia claimed “that, in the course of indiscriminate and disproportionate attacks by Russian forces and/or by the separatist forces under their control, hundreds of civilians were injured, killed, detained or went missing, thousands of civilians had their property and homes destroyed and over 300,000 people were forced to”⁶⁷ flee. At the time of writing, the number of refugees in the Ukraine crisis, according to estimates by Russian authorities and the UN High Commissioner for Refugees (UNHCR), is more than one million, most of whom have fled to Russia.⁶⁸ In *Georgia v. Russia (II)*, Russia claimed that it did not have jurisdiction over the combat area⁶⁹ and doubted the applicability of the ECHR to armed conflict.⁷⁰

In addition to the examples of violations of Georgia’s territorial integrity as well as the ‘republics’ in Crimea (including Sevastopol), Donetsk and Luhansk, the case of *Transnistria* comes to mind. The latter is a strip of land east of the Dniester river in Moldova, which declared its independence shortly after the fall of the Soviet Union. To this day, Russian “peacekeepers” operate in Transnistria, and it is claimed that many among the local population (as in South Ossetia, Abkhazia, Donetsk and Luhansk) within the disputed territory wish to become part of the Russian Federation. Should Russian forces conquer the south of Ukraine, this territory would border Transnistria, suggesting a wider Russian claim.

The referendum, which from a Russian perspective paved the way for the breaking away of Crimea and Sevastopol from Ukraine, has already been viewed as illegal.⁷¹ Despite the illegality of conquest by force,⁷² the Russian Federation has been in de facto control of Crimea and Sevastopol since March. While an occupied state remains responsible under the ECHR for human rights violations across its

66. *Id.*, ¶ 20.

67. *Georgia v. Russia*, *supra* note 65.

68. *Number of displaced inside Ukraine more than doubles since early August to 260,000*, UNHCR (Sept. 2, 2014), <http://www.unhcr.org/540590ae9.html>.

69. Leach, *supra* note 62.

70. Leach, *supra* note 62.

71. Brilmayer, *supra* note 1.

72. Brilmayer, *supra* note 1.

territory,⁷³ it will be shown that Russia has jurisdiction over Crimea and Sevastopol within the meaning of Article 1 ECHR.⁷⁴ Jurisdiction in this sense of the term, however, does not give Russia any legal title to this territory but can only trigger Russia's responsibility under the ECHR.⁷⁵

C. Decision of 13 March 2014

On the same day that Ukraine brought the case to the European Court of Human Rights, the ECtHR granted the applicant interim relief and ordered both State parties “to refrain from taking any measures, in particular 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).”⁷⁶

The case raises three issues which need to be dealt with in more detail: 1) how do inter-state cases before the ECtHR work and which effect can they have;⁷⁷ 2) how is interim relief granted and implemented in proceedings before the ECtHR, and can notions on interim relief in Article 43 cases be transferred to interim relief issues in Article 33 cases;⁷⁸ and 3) which state is actually responsible for human rights violations in Crimea and Sevastopol?⁷⁹

73. Noam Lubell, *Human Rights Obligations in Military Occupation*, 94 INT'L REV. OF THE RED CROSS 317, 333-34(2012), <http://www.icrc.org/eng/assets/files/review/2012/irrc-885-lubell.pdf>.

74. Council of Europe, EUR. CONV. FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, as amended by Protocols Nos. 11 and 14, Nov. 4, 1950, art. 1.

75. *See generally id.*

76. *Id.* at art. 2.

77. Ukraine v. Russia, App. No. 20958/14, 073, EUR. CT. H.R. (2014).

78. *See id.*

79. *See id.*

III. INTER-STATE CASES BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

The individual complaint procedure under Article 34 is the feature of the ECHR which provides a real “[n]ovelty”⁸⁰ in that it had not been possible before for individuals to sue states on an international level.⁸¹ Today, individuals are significantly more important for international law than they used to be in classical, Westphalian, international law.⁸² The procedure under Article 34 remains the crowning achievement of this development.⁸³ The inter-state procedure under Article 33⁸⁴ on the other hand, is a reminder that the ECHR, despite its nature as a self-contained legal regime, which has taken international law to an entirely new level, remains an international treaty between states.

Just as the states are the primary focus for the application of the Convention and therefore have the primary responsibility for compliance, the procedure under Article 33 ECHR is a reminder of the states’ responsibilities.⁸⁵ By virtue of Article 33, not only the European Court of Human Rights, but all states which are parties to the Convention have a “guardian function”⁸⁶ with regard to the ECHR. However, states are usually reluctant to sacrifice good political relations for the purposes of human rights. Therefore, the inter-state procedure under Art. 33 “has generally been used very sparingly.”⁸⁷ States which have ratified the ECHR have resorted to this instrument only in rare and very serious cases. Examples of such cases include

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80. Stefan Kirchner, *The Pre-Natal Personal Scope of Article 2 Section 1 Sentence 1 of the Eur. Convention on Human Rights*, 6 LAW AND FORENSIC SCI. 94, 94 (2012).
 81. Alastair Mowbray, *The European Convention*, in INTERNATIONAL HUMAN RIGHTS LAW- SIX DECADES AFTER THE UDHR AND BEYOND 271, 288 (Mashood A. Baderin & Manisuli Ssenyojo, eds., 2010).
 82. Christopher C. Joyner, INTERNATIONAL LAW IN THE 21ST CENTURY – RULES FOR GLOBAL GOVERNANCE 62 (2005).
 83. ECHR, *supra* note 74 at art. 34
 84. See HENRY J. STEINER, PHILIP ALSTON & RYAN GOLDMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 947-63 (3rd ed. 2008) (providing an overview on all the case law on Article 33 ECHR cases).
 85. Council of Europe, *supra* note 74 at art. 34
 86. CHRISTOPH GRABENWARTER, EUROPEAN CONVENTION ON HUMAN RIGHTS – COMMENTARY 8 (2014).
 87. Ukraine v. Russia, App. No. 20958/14, 073, EUR. CT. H.R. (2014).

the so called Greek Case⁸⁸ during military rule, and mainly (but not necessarily),⁸⁹ those cases which involve violations of the human rights of their own nationals by another state,⁹⁰ such as in the case of *Denmark v. Turkey*⁹¹ and *Georgia v. Russia (I)*.⁹²

The European Court of Human Rights is also no stranger to armed conflicts, having ruled on the use of force with regard to military operations in the former Yugoslavia,⁹³ Chechnya,⁹⁴ Turkey⁹⁵ and Iraq.⁹⁶ International Humanitarian Law and the ECHR are not mutually exclusive,⁹⁷ and the ECHR is also applicable in wartime, as evidenced by the existence of rules in the Convention, which provide for the possibility of derogations in wartime and similar situations.⁹⁸ Indeed, the European Court of Human Rights has already dealt with the aftermath of armed conflicts, such as the invasion and continuing occupation of a part of Cyprus by Turkey,⁹⁹ or Russia's 2008 war against Georgia.¹⁰⁰ The case brought before the Court by Ukraine only refers to the situation in Crimea.

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88. Denmark, Sweden, Netherlands v. Greece, App. No. 3321/67, 3322/67, 3323/67, 3344/67 Eur. Comm'n on H.R. ("The Greek Case," 1969 Y.B. Eur. Conv. on H.R. XII).
89. Cf. GRABENWARTER, *supra* note 86 at 48.
90. Cf. GRABENWARTER, *supra* note 86 at 48.
91. Cf. GRABENWARTER, *supra* note 86 at 48.
92. Leach, *supra* note 62.
93. Bankovic et. al. v. Belgium et. al., App. No. 52207/99, EUR. CT. H.R. (2001).
94. Isayeva v. Russia, App. No. 57950/00, EUR. CT. H.R. (2005).
95. Menten et. al v. Turkey, App. No. 58/1996/667/867, EUR. CT. H.R. (1997).
96. Hassan v. United Kingdom, App. No. 29750/09, Information Note on the Court's case-law No. 164, 164 EUR. CT. H.R. (1997), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-7571>.
97. UN Human Rights Committee, GENERAL COMMENT NO. 31, ¶ 11. U.N. Doc. CCPR/C/21/Rev.1/Add/13 (May 26, 2004), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/419/56/PDF/G0441956.pdf?OpenElement>.
98. Stefan Kirchner, *Human Rights Guarantees during States of Emergency: The European Convention on Human Rights*, 3 BALTIC J. OF LAW AND POL. 2, 1 et seq. (2010).
99. Frank Hoffmeister, *Case note: Cyprus v. Turkey*, 96 A.J.I.L. 445 et seq. (2002).
100. Leach, *supra* note 62.

IV. INTERIM RELIEF UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS¹⁰¹

Normally the European Court of Human Rights takes years to conclude a case. This comes as no surprise because the forty-seven judges are inundated with cases, and despite efforts to make it more difficult to bring a case before the court with tightened admissibility requirements, the Court still has a large backlog. Sometimes, though, a case brought before the Court requires an immediate response. The European Convention on Human Rights does not provide for such a possibility.¹⁰² The Court has created procedural rules, the Rules of Court (RoC).¹⁰³ Rule 39 of the Rules of Court allows the Court to act quickly,¹⁰⁴ and to “*indicate* that a measure be taken in the interests of the parties or the proper conduct of proceedings.”¹⁰⁵ Usually, this means protecting the applicant against impending state measures, which could impact his or her rights to an extent that the exercise of the human rights in question becomes difficult or impossible, or could cause damage to the applicant during the course of the proceedings.

Typically, the applicant will be in a much weaker position than the state, and while the Court will remain neutral towards the parties, the structure of ECHR cases will often require the Court to stop the state from behaving in a certain way, although interim measures can be imposed on the applicant as well.¹⁰⁶ In the following, we will first look at interim measures in cases of individual applications under Article 34, of which there are far more than in Article 33 cases, before

101. See generally R. St. J. MacDonald, *Interim Measures in International Law with Special Reference to the European System for the Protection of Human Rights*, 52 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [HEIDELBERG J. OF INT’L LAW] 703 (1992) (Ger.).

102. See generally, Council of Europe, *supra* note 74.

103. EUR. CT. H.R., RULES OF COURT (July 1, 2014), http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf.

104. *Id.* at Rule 39.

105. KAREN REID, A PRACTITIONER’S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 9 (2007); EUR. CT. H.R., *supra* note 103 at Rule 39.

106. KAREN REID, *supra* note 105 at 21.

dealing with the question of the transferability of notions developed by the Court in individual complaints to inter-state cases.¹⁰⁷

In Article 34 cases, the respondent state is considered to have violated the right to individual petition, which is inherent in Article 34, if it fails to comply with interim measures.¹⁰⁸ While interim measures are not included in the Convention, Rule 39 RoC is used to interpret Article 34. Because the Convention is based on the idea of effective protection of human rights,¹⁰⁹ the possibility to bring a case before the Court under Article 34 is not just the result of a procedural rule, but actually a right under the Convention, and compliance with Article 34 requires states to take measures aimed at safeguarding the human rights in relation to which a complaint has been lodged under Article 34. This necessarily includes compliance with interim measures ordered by the court.

In order to enforce judgments, the European human rights system relies on the Council of Europe's Council of Ministers.¹¹⁰ As far as compliance with interim measures is concerned "the Court [. . .] relies on the good will and co-operation of the Contracting States."¹¹¹ Therefore the Court will only take interim measures if there is a "pressing reason"¹¹² to take urgent action in order to safeguard human rights; "it is only in cases of extreme urgency that interim measures are indicated: the fact must *prima facie* point [to] a violation of the Convention, and the omission to take the proposed measures must result or threaten to result in irreparable injury to certain vital interests of the parties or to the progress of the examination."¹¹³ To highlight

107. Council of Europe, *supra* note 74 at art. 34.

108. Mamatkulov and Askarov v. Turkey, App. No. 46827/99, 46951/99, EUR. CT. H.R. (2005); Council of Europe, *supra* note 74 at art. 34; REID, *supra* note 105 at 19.

109. Mamatkulov and Askarov v. Turkey, App. No. 46827/99, 46951/99, EUR. CT. H.R., (2005).

110. *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights*, COUNCIL OF EUROPE, http://www.coe.int/t/dghl/monitoring/execution/Presentation/Pres_Exec_en.asp.

111. Mamatkulov and Askarov v. Turkey, App. No. 46827/99, 46951/99, EUR. CT. H.R., (2005); REID, *supra* note 105, at 19.

112. Mamatkulov and Askarov v. Turkey, App. No. 46827/99, 46951/99, EUR. CT. H.R., (2005); REID, *supra* note 105, at 19.

113. PIETER VAN DIJK ET AL., *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 119 (Leo Zwaak ed., 4th ed. 2006).

how restrictively the Court has used Rule 39 RoC, it is noteworthy that not even detention issues are thought to normally require such measures.¹¹⁴

If interim measures are ordered, the respondent government is informed at once and the case is fast-tracked “for review at an early opportunity. If the request is refused, the case may nonetheless proceed for examination on admissibility and merits in the normal manner.”¹¹⁵ The review is necessary because the application of Rule 39 RoC requires a risk to human rights.¹¹⁶ If that risk no longer exists, the interim measures will not be continued, as the reason for the application no longer exists.¹¹⁷ “The Court’s competence to issue interim measures is not granted by the ECHR itself, but governed by Rule 39 of the Rules of Court, which the High Contracting Parties do not submit themselves to, but which are adopted by the Court itself in accordance with Article 25 literal “d” of the ECHR.”¹¹⁸

The Rules of Court were not agreed upon by the states’ parties to the ECHR directly, but were created by the ECtHR on the behalf of the ECHR and therefore are considered to be “derived consensual law. . . [T]he ECHR initially negated a binding effect of interim measures even after Protocol no. 11 came into effect.”¹¹⁹ In *Cruz Varas v. Sweden*¹²⁰ the ECtHR “had to decide on the argument that the failure to comply with the Commission’s indication of an interim measure amounted to a violation of Sweden’s obligation under Article 25 (the present Article 34) not to hinder the effective exercise of the right of individual petition.”¹²¹ It held that this was not the case,¹²² but that the Court had to rely on the “good faith co-operation”¹²³ of states. This view, however, was not to last.

114. REID, *supra* note 105, at 20.

115. See EUR. CT. H.R., *supra* note 103.

116. EUR. CT. H.R., *supra* note 103 at Rule 39.

117. REID, *supra* note 105, at 21.

118. Kollmer, *supra* note 60.

119. Kollmer, *supra* note 60.

120. Cruz Varas et.al. v. Sweden, App. No. 15576/89, EUR. CT. H.R. (1991).

121. VAN DIJK ET AL., *supra* note 113, at 110.

122. Cruz Varas v. Sweden, *supra* note 120, ¶ 94-105.

123. VAN DIJK ET AL., *supra* note 113, at 110.

In *Mamatkulov and Adburasulovic v. Turkey*¹²⁴ as well as in the first *Öcalan* case, *Öcalan v. Turkey*,¹²⁵ the Court decided that interim measures under Rule 39 RoC are indeed legally binding.¹²⁶ Non-compliance with an interim measure “can lead to a violation of the right of individual application (under Article 34 ECHR), at least if the contested act . . . has effected the core of the right of individual application.”¹²⁷ Since *Mamatkulov and Askarov v. Turkey* the ECtHR considers them to be binding.¹²⁸ The ECtHR has “[f]ollow[ed] the “trend” set by the ICJ in the LaGrand case,”¹²⁹ but then went far beyond it by expanding the definition of what is required by states in order to avoid running afoul of the Convention. In the case of *Olaechea Cahuas v. Spain*, the court ruled that:

[N]on-compliance with the interim measures per se would result in a breach of the Convention. It assumed this to be the case, regardless of the fact that non-compliance with an interim measure did not lead, post facto, to an infringement of the right to application in accordance with Article 34 of the ECHR. The Court confirmed this assumption in the case of *Mostafa et al. v. Turkey*. Thereby it elevates – and this is quite remarkable – a simple regulatory rule to the status of a Convention right, by linking Rule 39 of the Rules of Court, directly to Article 34 of the ECHR. The court’s argument here again is one of efficiency.¹³⁰

At the end of the day, states are more likely than not to comply with interim measures imposed by the ECtHR.¹³¹ The rules on interim measures apply equally if the application is lodged under Article 34 or under Article 33 of the ECHR.¹³²

124. *Mamatkulov and Askarov v. Turkey*, App. No. 46827/99, 46951/99, EUR. CT. H.R. (2005).

125. *Öcalan v. Turkey*, App. No. 46221/99, EUR. CT. H.R. (2005).

126. *Mamatkulov and Askarov v. Turkey*, App. No. 46827/99, 46951/99 ¶ 129, EUR. CT. H.R. (2005); *Öcalan v. Turkey*, App. No. 46221/99 ¶ 170, EUR. CT. H.R. (2005).

127. VAN DIJK ET AL., *supra* note 113, at 110.

128. Kollmer, *supra* note 60.

129. Kollmer, *supra* note 60.

130. Kollmer, *supra* note 60; *citing* *Olaechea Cahuas v. Spain*, App. No. 24668/03, EUR. CT. H.R. (2006); *Mostafa et. al. v. Turkey*, App. No. 16348/05 EUR. CT. H.R. (2008).

131. VAN DIJK ET AL., *supra* note 113, at 113.

132. Kollmer, *supra* note 60.

V. JURISDICTION OF THE RUSSIAN FEDERATION FOR EVENTS ON CRIMEA

The Court's decision on interim relief does not answer the question of whether Russia will be held accountable for human rights violations happening in Ukraine. As a general rule, a state is responsible for human rights violations in its territory. The annexation of Crimea and Sevastopol by the Russian Federation was illegal under international law. Yet, neither from Russia's claim to these territories nor from the illegality of the annexation can we draw any final conclusions with regard to Russia's responsibility concerning the Crimean peninsula. The decisive question is if Russia has jurisdiction within the meaning of Art. 1 ECHR, which requires that the state in question "actually exercises effective overall control over a certain area."¹³³ It does not matter how this control is organized; "[t]his control may either be exercised directly, through armed forces, [which might very well be the case by now] or through a subordinate local administration."¹³⁴

In cases in which the area in question is part of the territory of a state that has also ratified ECHR, the Court is more willing to hold the interfering state accountable.¹³⁵ The Court has held states that have ratified the ECHR to be responsible under the Convention for human rights violations abroad. It has done so both in cases in which the human rights violation happened in another COE member state, and in cases in which it did not. "Where the territory of one Convention state is occupied by the armed forces of another, the occupying state should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms they would have enjoyed."¹³⁶

133. GRABENWARTER, *supra* note 86, at 8.

134. GRABENWARTER, *supra* note 86, at 8; *Loizidou v. Turkey*, App. No. 15318/89, Preliminary Objections, EUR. CT. H.R. (1995).

135. GRABENWARTER, *supra* note 86, at 9.

136. GRABENWARTER, *supra* note 86, at 9; *see Loizidou v. Turkey*, App. No. 15318/89, Preliminary Objections, EUR. CT. H.R. (1995); *Bankovic et. al. v. Belgium et. al.*, App. No. 52207/99, EUR. CT. H.R. (2001).

This kind of jurisdiction beyond a state's borders is not the only way for Ukraine to bring Russia to court. While the ECHR is usually perceived through the lens of the individual complaint procedure under Art. 34 ECHR, and constitutes a self-contained regime, the ECHR remains an international treaty. A violation of the ECHR by any state is not only a violation of human rights but a violation of international law obligations to all other parties to the ECHR. While inter-state cases are rare when compared to individual applications, inter-state complaints are the regular way in which the ECHR is given force as an international treaty (while individual applications fulfill this function for the ECHR as a human rights treaty.) Inter-state cases not only serve the interests of states but the protection of European Human rights law. By bringing the Russian Federation to the European Court of Human Rights, Ukraine not only defended its own interests and the rights of its citizens and residents, but also the ECHR.

Article 1 ECHR refers to the factual exercise of jurisdiction.¹³⁷ Under general international law, Crimea and Sevastopol are still part of Ukraine. Ukraine therefore has legal title to the disputed territory but cannot exercise jurisdiction due to the occupation by Russia. This does not mean that Ukraine does not have any responsibility with regard to what happens in its territory. One way in which Ukraine can live up to its responsibilities under the ECHR is to demand the de facto power, Russia, to respect human rights. Ukraine has done so by bringing the case before the European Court of Human Rights under Article 33.¹³⁸ It would be well advised to expand the case to include the ongoing situation in the East and South-East of the country as well.

Russia occupies the territory and exercises jurisdiction there even without having title to the territory. From the moment Russia effectively controlled Crimea and Sevastopol, the Russian Federation had jurisdiction within the meaning of Article 1 ECHR.¹³⁹ Given that Russian covert operatives and later overt Russian armed forces played a role in the breakaway of Crimea and Sevastopol, Russia exercised jurisdiction at least over parts of the peninsula before incorporating Crimea and Sevastopol into the Russian Federation. Even if the self-

137. Council of Europe, *supra* note 74, at art 1.

138. Council of Europe, *supra* note 74, at art 33.

139. Council of Europe, *supra* note 74, at art 1.

declared Republic of Crimea were a state (which it is not due to the collective non-recognition by the international community),¹⁴⁰ though it is not a party to the ECHR, the Convention would still have a residual effect.¹⁴¹

In the conflict with Ukraine, Russia has claimed a need to deploy forces across the border in order to protect Russian-speaking persons who live in Ukraine,¹⁴² essentially considering them to be ethnic Russians. While the protection of nationals abroad has long been a sensitive topic in international relations,¹⁴³ Russia's claim seems to extend to persons of Russian ethnicity who are not necessarily citizens of the Russian Federation. This claim is not only troubling for states with large Russian speaking populations, such as Latvia,¹⁴⁴ Kazakhstan,¹⁴⁵ or Estonia,¹⁴⁶ but is also a departure from international law in this regard. It cannot be ruled out, however, that Russia gives citizenship of the Russian Federation to ethnic Russians who live abroad, thereby instantaneously creating a link between the Russian state and foreign residents.¹⁴⁷ While Crimea's declaration of

140. See JOHN DUGARD, *INTERNATIONAL LAW A SOUTH AFRICAN PERSPECTIVE* 96, 97 (Juta & Co, Ltd, 4th ed. 2011); JOHN DUGARD, *RECOGNITION AND THE UNITED NATIONS* 11 (Grotius Publications Ltd., 1987).

141. GRABENWARTER, *supra* note 86.

142. *Putin: Russian Citizens, Troops Threatened in Ukraine, Need Armed Forces' Protection*, RT ONLINE (Mar. 1, 2014), <http://rt.com/news/russia-troops-ukraine-possible-359/>.

143. Sina Etezazian, *Ukraine Insta-Symposium: The Crisis in Crimea – The Protection of Nationals Abroad and the Legality of Ukraine's Possible Use of Force in Self-Defense*, OPINION JURIS BLOG (Mar. 9, 2014, 9:30 AM), <http://opiniojuris.org/2014/03/09/ukraine-insta-symposium-crisis-crimea-protection-nationals-abroad-legality-ukraines-possible-use-force-self-defense/>.

144. Ian Traynor, *Kazakhstan is Latest Russian Neighbour to Feel Putin's Chilly Nationalist Rhetoric*, THE GUARDIAN (Sept. 1, 2014), <http://www.theguardian.com/world/2014/sep/01/kazakhstan-russian-neighbour-putin-chilly-nationalist-rhetoric>.

145. *Id.*

146. *Id.*

147. This occurred in the Georgian breakaway provinces of Abkhazia and South Ossetia in 2008. Vincent M. Artman, *Annexation by Passport*, AL-JAZEERA AMERICA (Mar. 14, 2012), <http://america.aljazeera.com/opinions/2014/3/ukraine-russia-crimeapassportizationcitizenship.html>; Kristopher Natoli, *Weaponizing Nationality: An Analysis of Russia's Passport Policy in Georgia*, 28 B.U. INT'L L.J. 389 (2010), <http://america.aljazeera.com/opinions/2014/3/ukraine-russia-crimeapassportizationcitizenship.html>.

independence, and consequently Russia's annexation of Crimea, is incompatible with international law, the Russian government also claimed that there was a need to intervene in Crimea in order to protect the ethnic Russians who are living there.¹⁴⁸ This makes it necessary to understand how international law in general addresses the protection of a state's own nationals who live abroad.

In general, states have a right to protect their nationals abroad. Usually this happens through normal diplomatic and consular channels. In extreme cases, states may use a limited amount of force to protect nationals abroad, for example by deploying military assets to evacuate nationals from crisis areas. This right is of course restricted to nationals and, in exceptional cases, nationals of other states, if said third states have consented to such an action.¹⁴⁹ While the target country will usually be asked for its consent, this will not always be possible, and in urgent cases the rescuing state will be able to invoke the doctrine of necessity for this purpose.¹⁵⁰ These rescue operations in extreme circumstances are considered legal under customary international law, in particular because they do not amount to an illegal armed attack against the country concerned.

In the case of Crimea, there was no concrete danger to Russians in Crimea, only an abstract possibility that the new leadership in Kyiv might not be as positively positioned towards ethnic Russians as the last government. Specific human rights violations by the new government against ethnic Russians have not been made public. Therefore, there was no need for Russian military intervention, let alone one of such wide scope as to take over Crimea – not to mention the later annexation of the peninsula. Russia may claim that the persons in question were ethnic Russians, and indeed, Russia had already been handing out passports to inhabitants of the Crimea peninsula prior to the annexation.¹⁵¹ This mirrors Russia's behavior in the Georgian breakaway provinces of Abkhazia and South Ossetia in

148. Traynor, *supra* note 144.

149. Etezazian, *supra* note 143.

150. Etezazian, *supra* note 143.

151. *Russia Issuing Passports in Crimea; Ukraine Introducing Visas for Russians*, RFE/RL (Mar. 19, 2014), <http://www.rferl.org/content/ukraine-crimea-russia-passports/25303107.html>.

2008.¹⁵² While doing so might not be illegal per se, Russia would have to comply with the test laid down in *Nottebohm*,¹⁵³ which requires a genuine link between the state and the individual.¹⁵⁴

Ethnicity could be sufficient to establish such a link. Even if we assume that ethnic Russians or a number of Russian citizens had been at risk, this would not have justified the outright annexation of Crimea. At most, Russia would have been allowed to take measures to protect her citizens. As not even the *Québec*¹⁵⁵ requirements for independence were met, the annexation was incompatible with international law as well. By annexing Crimea and Sevastopol, Russia has also violated Ukraine's territorial integrity. The intervention by the Russian Federation is incompatible with international law and cannot be justified by recourse to the notion of the protection of citizens who reside abroad. From the perspective of Article 1, however, it appears clear that Russia exercises jurisdiction in Crimea and Sevastopol and has every intention to do so in the future.¹⁵⁶

VI. OUTLOOK

At the time of writing in late August 2014, the case between Ukraine and the Russian Federation is still pending before the European Court of Human Rights and the situation continues to develop, in particular in the Eastern and Southeastern parts of Ukraine where fighting has become significantly more intense during the final week of August.¹⁵⁷ The documents submitted by the parties will only be made public after the conclusion of the case by the Court. Until then, press releases by the European Court of Human Rights will form

152. Artman, *supra* note 147; Natoli, *supra* note 147.

153. ALFRED M. BOLL, *MULTIPLE NATIONALITY AND INTERNATIONAL LAW* 110 (Koninklijke Brill NV, 2007).

154. *Affaire Nottebohm (Liechtenstein v. Guatemala), Phase Secondaire*, 1955 I.C.J. 22 (Apr. 6, 2014), <http://www.icj-cij.org/docket/files/18/2674.pdf>.

155. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, ¶ 131 (Can.), available at <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do>.

156. Council of Europe, *supra* note 74, at art. 1.

157. *Ukraine v. Russian Federation*, App. no. 20958/14, EUR. CT. H.R. (Mar. 13 2014), <http://www.echr.coe.int>.

the most reliable official source of information on this case. However, it is possible to put this case into perspective against the background of both the European Convention on Human Rights and earlier interstate cases brought against Russia before the European Court of Human Rights.

In December 2014, Ukraine decided to end its non-aligned status and it is now pursuing NATO membership¹⁵⁸ but while membership in the Western alliance remains unlikely in light of the ongoing dispute with Russia, Ukraine might be well advised to follow the Finnish example and serve as a neutral state and a gateway between Western Europe and Russia,¹⁵⁹ albeit with close ties to the West (Finland is a member of the EU and cooperates with NATO on some security issues.)¹⁶⁰ As the flame of freedom has been carried eastward in the 20th century, it has to be the long-term goal of Europe to fully integrate Russia into the European family of nations. An important step in this direction has been Russia's ratification of the European Convention on Human Rights.¹⁶¹ Recent measures taken by Russian authorities to quell dissent and to limit peace demonstrations, as well as reports of human rights violations against religious minorities and journalists in Crimea, however, indicate that this, too, remains a significant challenge.

This challenge is increased by the apparently growing focus of Russian authorities on self-reliance and isolation. A Russian Federation which is isolated will not only be harder to integrate into the European legal system, but is also more likely to allow violations of the European Convention on Human Rights. Such violations, systematic human rights violations in particular (as seen in Crimea), will need an effective response from other European nations, as well

158. Dmytro Vlasov, *Ukraine Drops Nonaligned Status, May Seek NATO Membership*, THE TIMES OF ISR. (Dec. 29, 2014), <http://www.timesofisrael.com/ukraine-drops-nonaligned-status-may-seek-nato-membership/#ixzz3O1t2nt3d>.

159. René Nyberg, *Finland's Lesson for Ukraine*, N. Y. TIMES, Sept. 2, 2014, <http://www.nytimes.com/2014/09/03/opinion/finlands-lesson-for-ukraine.html?smid=tw-share>.

160. *NATO's relations with Finland*, NATO (June 12, 2014), http://www.nato.int/cps/bu/natohq/topics_49594.htm.

161. Julia Lapitskaya, *ECHR, Russia, and Chechnya: Two is not Company and three is Definitely a Crowd*, 43 N.Y.U. J. INT'L L. & POL. 479, 485 (2011) (noting the Russian Federation ratified the Convention on May 5, 1998).

as from Europe's human rights institutions. The interim measure issued by the European Court of Human Rights on March 13, 2014¹⁶² is an important step in the right direction. It remains to be seen if Russia will comply with this ruling. While the Court has made it clear that interim measures are binding,¹⁶³ "there has been a perceptible increase in the rate of states' non-compliance with rule 39 in recent years."¹⁶⁴

In 1988, the year *Mikhail Gorbachev* argued for human rights to play a role in the legal system of the USSR,¹⁶⁵ the first law school in the Soviet Union opened a department dedicated to human rights.¹⁶⁶ Today's Russia might have abandoned communism but it can be seen in a tradition of Russian attempts to gain geopolitical features, or in other words, an empire. During the occupation of East Germany after World War II, the Soviet Union installed "judges" who were loyal adherents of Soviet ideology but lacked all legal training.¹⁶⁷ It has to be feared that Russian's puppet 'states' will act similarly in the parts of Ukraine now under Russian control.

The declaration of independence of the self-proclaimed Republic of Crimea was incompatible with international law,¹⁶⁸ as is Russia's continued intervention in Ukraine. Both the European Union¹⁶⁹ and the Council of Europe¹⁷⁰ are committed "to secure peace and prosperity in Europe and to achieve an ever closer union among its peoples."¹⁷¹

162. See also Leach, *supra* note 62.

163. Mamatkulov and Askarov v. Turkey, App. No. 46827/99, 46951/99 ¶4, EUR. CT. H.R. (2005).

164. Leach, *supra* note 62.

165. Lynn Hunt, *INVENTING HUMAN RIGHTS – A HISTORY* 207 (2008).

166. *Id.*

167. Uwe Wesel, *GESCHICHTE DES RECHTS – VAN DEN FRÜHFORMEN BIS ZUR GEGENWART* 517 (2006).

168. Anna Stepanowa, *International law and legality of secession in Crimea*, CAMBRIDGE J. OF INT'L AND COMP. L. BLOG (April 20, 2014), <http://cjlcl.org.uk/2014/04/20/international-law-legality-secession-crimea/>.

169. See THE TREATY OF ROME (Mar. 25, 1957); STATUTE OF THE COUNCIL OF EUROPE art. 1, (May 5, 1949); Luis Barrionuevo Arévalo, *ADJUDICATION OF INTERNATIONAL DISPUTES IN EUROPE: THE ROLE OF THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN COURT OF HUMAN RIGHTS* 2.

170. Treaty of London art. 1(a), May 5, 1949, E.T.S. No. 1.

171. Luis Barrionuevo Arévalo, *Adjudication of International Disputes in Europe: The Role of the European Court of Justice and the European Court of Human Rights* 2,

The current Russian government seems to have abandoned this ideal, raising the question whether Russia would comply with an eventual judgment by the European Court of Human Rights. This would seriously undermine the position of the Court, which, so far, has enjoyed a very high rate of compliance with its judgments.¹⁷² The ongoing occupation of the Crimean peninsula shows disrespect for the Court, and the continued fighting in other parts of Ukraine shows a lack of respect for the spirit of the Convention. While the Convention also applies in times of war,¹⁷³ the use of force, especially against civilians, contradicts the goals of the Convention.

After the end of the Cold War, the Soviet Union/ the Russian Federation became a much weaker state.¹⁷⁴ It appears that the current Russian government seems to seek power through both direct and indirect armed force. When Russia joined the Council of Europe in 1996, and subsequently a party to the ECHR,¹⁷⁵ Russia's legal system did not meet the standards required by the Council of Europe.¹⁷⁶ The ECHR serves not only the protection of human rights but also of democratic principles.¹⁷⁷ By suing Russia in Strasbourg, Ukraine can also make a case for the continued preservation of democratic ideals in Eastern Ukraine. Outside efforts to ensure respect for human rights in Crimea and the other parts of Ukraine, which are affected by the current conflict, should not be seen by either side as a form of opposition to Russia, but as support for the Russian people's demand for freedom.

http://www.euc.illinois.edu/_includes/docs/barrionuevo_European_Courts_Article1.pdf

172. *Id.*

173. Council of Europe, *supra* note 74, at art. 15 (by providing specific rules for derogation from the Convention on wartime, it assumes the general applicability of the Convention in times of war).

174. Francis Fukuyama, STATE BUILDING — GOVERNANCE AND WORD ORDER IN THE TWENTY-FIRST CENTURY 17 (2005).

175. COUNCIL OF EUROPE. PARLIAMENTARY ASSEMBLY ET AL., REPORT ON THE CONFORMITY OF THE LEGAL ORDER OF THE RUSSIAN FEDERATION WITH COUNCIL OF EUROPE STANDARDS, ¶ 5 (Oct. 7, 1994).

176. Mark W. Janis, *Russia and the 'Legality' of Strasbourg Law*, EUR. J. OF INTEGRALITY, 1997, at 93; *see also* MARK W. JANIS, RICHARD S. KAY & ANTHONY W. BRADLEY, EUROPEAN HUMAN RIGHTS LAW — TEXT AND MATERIALS 109 (2008).

177. ANNA MARIA GUERRA MARTINS, DIREITO INTERNACIONAL DOS DIEREIOS HUMANOS 192 (2013).