



Russian Responsibility, Human Rights, and “Effective Control”

Hayralah Alghorazi

On January 25th, 2023, the European Court of Human Rights (hereinafter ECtHR or European Court) ruled in favor of adjudicating cases brought by the Netherlands and Ukraine against Russia for alleged human rights violations in eastern Ukraine in 2014.¹ Last year, the Council of Europe voted to suspend Russia following the invasion of Ukraine.² However, Article 58 of the ECHR notes that a state that is no longer a member is “not released from the obligations contained in the Convention in respect of any act performed by that State before the date on which it is no longer a Party to the Convention.”³

¹ Akanksh Nail, *European Court of Human Rights: Ukraine and Netherlands cases against Russia are partly admissible*, JURIST (Jan. 26, 2023, 4:50 PM), <https://www.jurist.org/news/2023/01/european-court-of-human-rights-ukraine-and-netherlands-cases-against-russia-are-partly-admissible/#> [https://perma.cc/E42A-BKTM].

² *Id.*

³ *Id.*

This decision only relates to the admissibility of the applications, and now the European Court has to decide if Russia did violate the articles of the ECHR.⁴ This was possible because the ECtHR found that Russia had jurisdiction over the disputed areas in Ukraine via “effective control” over the Donbas region and that the separatists had been “managed and coordinated” by the Russian Government since 2014.⁵

The effective control standard used by the ECtHR was recently fleshed out in *Georgia v. Russia (II)*.⁶ Article 1 of the Convention holds generally that a state’s jurisdiction is limited to its territory.⁷ However, one exception to this principle is whenever a Contracting State exercises ‘effective control’ of an area outside of its territory.⁸ This can be through the Contracting state’s armed forces or a subordinate local administration.⁹ The two main criteria established are “effective control” by the State over an area and “State agent authority and control” over individuals.¹⁰ There will not be effective control over an area when state parties or proxies are still fighting for control.¹¹

While the European Court will primarily look at the strength of the State’s military presence, it could consider other factors, such as the extent to which its military, economic, and political support for the local administration provides it with influence and control.¹² While this seems to be the likely definition of “effective control” in this future decision, it is uncertain

⁴ *Id.*

⁵ *Id.*

⁶ See Press Release ECHR 26, Eastern Ukraine and flight MH17 case declared partly admissible, (Jan. 25, 2023).

⁷ *Georgia v Russia [II]*, App no 38263/08 ¶ 138 (Jan. 21, 2021), <https://hudoc.echr.coe.int/fre?i=001-207757>.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* ¶ 115

¹¹ See *id.* ¶ 126.

¹² *Id.* ¶ 139.

whether that will be the case, as a brief overview of the previous cases shows how this court has been less than consistent in defining “effective control.”¹³

This concept first emerged from the ECtHR’s decision in *Loizidou*.¹⁴ In this case dealing with the connection between Turkey, the Turkish Republic of Northern Cyprus (TRNC), and the human rights violations that had occurred in Cyprus, the court noted that when a state has effective control of an area through military action, there exists “effective control.”¹⁵ It was unnecessary to determine the threshold for Turkey’s effective control when there were at least thirty thousand Turkish soldiers stationed in Northern Cyprus.¹⁶ What the ECtHR suggested in this case and later ones was that: (1) there existed a simple low threshold for “effective control,” and (2) though this control the court could find extraterritorial jurisdiction with any signatory state.¹⁷

With *Banković*, the court rejected a simple view of “effective control” and noted that “the jurisdictional competence of a State is primarily territorial.”¹⁸ Effective control as seen in *Loizidou* was no longer sufficient, as such effective control would have to “be accompanied by the exercise of public power...”¹⁹ Although later cases have undermined the more rigid view

¹³ See Josephine Lett, *The Age of Interventionism: The Extraterritorial Reach of the European Convention on Human Rights*, in PRACTICE AND POLICIES OF MODERN PEACE SUPPORT OPERATIONS UNDER INTERNATIONAL LAW 117,137 (Roberta Arnold & Geert-Jan Alexander Knoop. eds., 2006) [hereinafter Age of Interventionism]

¹⁴ Vassilis P. Tzevelekos, Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility, 36 MICH. J. INT’L L. 129, 136 (2014).

¹⁵ See Age of Interventionism, *supra* note 11, at 124.

¹⁶ *Id.*

¹⁷ *Id.* at 125.

¹⁸ Sarah Miller, Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention, European Journal of International Law, Volume 20, Issue 4, November 2009, Pages 1223–1246 (citing *Banković v. Belgium*, App. No. 52207/99, ¶ 59 (Dec. 12, 2001) (discussing and rejecting the court’s jurisdiction for the a bombing strike of NATO in Yugoslavia.))

¹⁹ See Age of Interventionism, *supra* note 11, at 124 (citing *Banković v. Belgium*, App. No. 52207/99, ¶ 80 (Dec. 12, 2001)).

set in *Banković*, later decisions maintain an unclear standard of “effective control.”²⁰ Instead, the meaning and interpretation of the earlier cases are handled on a case-by-case basis.

Such a lack of consistency can harm future victims of human rights violations.

Regardless, regarding Russia’s involvement in Ukraine between 2014- 2022, there is little doubt that Russia had “effective control.” Russia’s actions by 2014 are such even with the heightened standard found in *Banković*. There was no evidence of fighting for control in the areas of the alleged violations.²¹ Along the way of holding Russia accountable, however, the ECtHR would be wise to finally set a constant standard of “effective control”, rather than the current case-by-case system of exceptions to the exceptions.

²⁰ Conall Mallory, *A second coming of extraterritorial jurisdiction at the European Court of Human Rights?*, 82 QIL, Zoom-in, 31, 32-33 (2006). For more information on the inconsistency of these later cases, see e.g., *id.*, Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers*, 51 HARV. INT’L L. J., 113, 131-134 (2006).

²¹ See Press Release Eastern Ukraine and flight MH17 case declared partly admissible ECHR 026 (2023) 25.01.2023.