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The extraterritorial application of the European Convention on Human Rights and the United Nations Convention against Torture in frozen conflict regions as a tool of ensuring the prohibition of torture — the cases of Transnistria and Abkhazia

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Abstract

The existence of frozen conflicts in Europe are posing difficulties in the application of international human rights treaties. This is due to, de facto governments of break-away regions not cooperating with international mechanisms and refusing to comply with regional and international instruments. The break-away regions of Transnistria and Abkhazia are such examples. Officially part of Republic of Moldova and Georgia, respectively, the obligations to prevent, investigate, prosecute and punish the perpetrators of torture in these regions are impeded by the loss of effective control. The analysis herein centres on the development of extraterritorial application of the ECHR, generally, and in frozen conflict regions, specifically. Following this, CAT's discourse regarding the extraterritorial application of UNCAT is presented. The research findings show a positive impact caused by the involvement of international mechanisms (ECtHR and CAT) combatting impunity, broadly, and engaging extraterritorial jurisdiction of the parent state over the break-away regions, in particular. As international law is an evolving body of law, reviewing the existing case-law was paramount in speculating the extraterritorial application of the ECtHR and UNCAT in Transnistria and Abkhazia. The analysis illustrates that both bodies guarding the application of their respective instruments, have addressed extraterritoriality; the ECtHR has taken a more practical approach, while the CAT has adopted a more formalistic and theoretical one. This thesis advances the conclusion that the broader human rights movement is shifting away from the territoriality requirement to a paradigm where all States parties *exercising control* or *decisive influence* over these regions regardless of a territorial claim, are held to account. Additionally, this thesis encourages the ECtHR and CAT to more systematically embrace the extraterritoriality principle in their decisions, whether in judgements, individual communications, conclusions and recommendations, and increase their engagement in these two frozen conflict regions, which are examples of grey areas of the international law.

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Abbreviations and acronyms

ARSIWA - Draft articles on Responsibility of States for Internationally Wrongful Acts

CAT, the Committee - the Committee against Torture

CIS - Commonwealth of Independent States (comprised of former Soviet States)

Contracting States, Member States, the States, High Contracting Parties - Member States of the Council of Europe that have ratified the Convention for the Protection of Human Rights and Fundamental Freedoms. For the purposes of this thesis *"Parent State"* refers to Moldova and Georgia and *"Protector State"* refers to Russia, all three States High Contracting Parties to the ECHR.

Throughout the analysis *"de facto governments"* refers to the authorities of the separatist regimes of Transnistria and Abkhazia and is only used as to avoid heavy phrasing and repetition and is in no way to be construed as taking a stance in the recognition or legitimization of these entities.

ECHR, the Convention - Council of Europe, E*uropean Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5

ECtHR, The Court - European Court of Human Rights

GC - the Grand Chamber of the European Court of Human Rights

ICJ - International Court of Justice

ICTY - International Criminal Tribunal for the Former Yugoslavia

ILC - International Law Commission

MRT - Moldovan Republic of Transnistria

OPCAT - Optional Protocol to the Convention against Torture

OSCE - Organization for Security and Co-operation in Europe

SRT - Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

UN - United Nations

UNCAT - UN General Assembly, *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations

Keywords: frozen conflict, grey zones, extraterritoriality, jurisdiction, state responsibility, torture, de facto governments, effective control, Transnistria, Abkhazia

Map no.1 - Soviet Union - December '22 - December '91

Map no.2 - Contemporary Abkhazia within Georgian borders

Map no.3 - Contemporary Transnistria within Moldovan borders

Map no.4 - Contemporary map of Eastern Europe

Chapter 1.

Thesis outline and historical background

1.1. Introduction

The fall of the Soviet Union caused a series of events and actions. In addition to the 15 successor republics that declared their independence, four other entities emerged as peripheries of that dissolution. These entities cannot be found on any map of the Soviet Union (see map 1), as they were and continue to be isolated diplomatically and unrecognized by the international community[1]. They include: the Moldovan Republic of Transnistria (inside Moldovan borders); the Republic of South Ossetia and the Republic of Abkhazia (within Georgian borders); and, the Nagorno - Karabakh Republic (inside Azerbaijan borders, see map no.4). They are often referred to as "frozen conflict" regions (in French "conflits gelés"), but there is still no clear definition as to what that entails in politics, international relations or international law. The expression started appearing after the end of the Cold War and was used by legislators, officials, diplomats and foreign policy makers to describe the regions in which separatists with the support of an external protector State, have created and maintained a local administration against the wishes of the Parent State. Separatism in itself does not suffice to qualify a situation as a frozen conflict, as there exists separatist administrations elsewhere that do not operate in this manner[2]. These conflicts did not reach peaceful settlements. Instead, they remained in a state of stagnation, which renders it challenging to categorize them in terms of statehood.

Nevertheless, in trying to define this phenomena in the international relations scholarship, one can identify several characteristics aimed at describing frozen conflicts. The following best encapsulate the specificities of frozen conflicts:

"*(1) armed hostilities have taken place, parties to which include a State and separatists in the State's territory;*

(2) a change in effective control of territory has resulted from the armed hostilities;

(3) the State and the separatists are divided by lines of separation that have effective stability;

(4) adopted instruments have given the lines of separation (qualified) juridical stability;

(5) the separatists make a self-determination claim on which they base a putative State;

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[1] Dov Lynch, 'Separatist States And Post-Soviet Conflicts' (2002) 78 International Affairs, p.831

[2] Thomas D. Grant, 'Frozen Conflicts and International Law', (2017) 361 CORNELL INT'L L.J., p.362

(6) no State recognizes the putative State;

(7) a settlement process involving outside parties has been sporadic and inconclusive[3]*".*

From an international relations perspective

Transnistria is not recognised by any UN member States and is only recognised as a State by three other disputed territories, namely Abkhazia, Nagorno-Karabakh and South Ossetia. While, Abkhazia was recognised in 2008 after the Russo-Georgian War by five UN member States, namely Russia, Venezuela, Nicaragua, Nauru and Syria. In addition to this, it is also reciprocally recognized by Transnistria, South Ossetia and Nagorno-Karabakh. Since both de facto governments lack wide international recognition they both have little to no international relations with other States.

The economy of both regions is, therefore, significantly dependent on aid and support of the protector and/or parent States. The Transnistrian economy is a mix of the command-and-distribution model inherited from the USSR, with elements of a free-market economy. It is heavily dependent on energy and financial subsidies provided by Russia.[4] In comparison, Abkhazia is substantially integrated in the Russian economy, but since the power of purchase of the Russian ruble decreased, it has started to grow closer to the Georgian economy[5].

The classical requirements for an entity to be qualified as a sovereign state are enshrined in the Montevideo Convention on Rights and Duties of States (1933): a) a permanent population, b) a defined territory, c) a government, d) the capacity to enter into relations with other states[6]. The de facto states in focus meet the first three requirements, and claim to have the ability to achieve the fourth. Nonetheless, these criteria do not legitimize these entities in international fora, as they are not recognized by the UN or by a majority of other States. From an international relations viewpoint, these areas are seen as *"frozen conflict"* regions within the borders of the sovereign parent states (Moldova, Georgia, Azerbaijan).

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[3]Thomas D. Grant, 'Frozen Conflicts and International Law', (2017) 361 CORNELL INT'L L.J., p.390

[4] 'An Aided Economy. The Characteristics Of The Transnistrian Economic Model' (*OSW*, 2019) <https://www.osw.waw.pl/en/publikacje/osw-commentary/2013-05-16/aided-economy-characteristics-transnistrian-economic-model>

[5] 'Socio-Economic System Of Abkhazia And Problems Of Its Development' (*International Alert*, 2019) <https://www.international-alert.org/blogs/socio-economic-system-abkhazia-and-problems-its-development> accessed 16 May 2019.

[6]Montevideo Convention on Rights and Duties of States (1933), art.1, 165 LNTS 19; 49 Stat 3097

From an international human rights law perspective

From an international law (international human rights law in particular) perspective, these regions are viewed as *legal grey zones* as a result of frozen conflicts, where legal instruments are applied sporadically and inconsistently. The de facto states execute state-like functions that are difficult to control or monitor. The set-up of quasi-states are fertile ground for human rights violations, crime and corruption and perfect territory for impunity to thrive. Since, there are no actual governments that would ensure stability and security within these territories, there are fewer journalists, NGOs, human rights organizations or any other monitoring mechanisms of the situation on the ground, which renders the inhabitants of such regions even more vulnerable to torture or ill-treatment. Moreover, it should be noted that States are reluctant to take responsibility within their own territory and jurisdiction (the distinction between the two concepts will be provided shortly), but even more so when it comes to acts perpetrated outside their territory, that's when matters of jurisdiction are being raised in rejecting responsibility.

1.2. Research questions, the motivation of choice and limitations, previous research and contribution to scholarship

The purpose of this thesis is primarily to explore the existing tools that could be applied in two of these legal grey zones - Transnistria and Abkhazia - where rights are in the hands of de facto state-like institutions. Second, the thesis will look for possible solutions to better monitor and improve the human rights situations in these regions, by for instance extra-territorial application of human rights instruments (ECHR, UNCAT), particularly in terms of ensuring the prohibition of torture and other forms of ill-treatment.

The main research questions this thesis will address are as follows:

- To what extent do the ECHR and the UNCAT apply in these territories? On what grounds?
- Which State can be held responsible for instances of torture and other forms of ill-treatment under the ECHR and the UNCAT in these territories?
- What challenges arise or might arise in applying the ECHR and the UNCAT in Transnistria and Abkhazia?
- What could alleviate these challenges?

Motivation of choice

There is a plethora of legal grey zones in international law, including with respect to refugee protection, regulation of artificial intelligence, surveillance, use of drones, airport operations etc. However, generally these do not occur as a result of frozen conflicts. The grey zones resulting from frozen conflicts are rendered all the more important due to the lack of legal redress for individuals detained or ill-treated by the de facto authorities.

The choice of analysis fell on two specific regions - Abkhazia (see map no.2) and Transnistria (see map no.3) for the following reasons:

1. their similarities: they both appeared as result of conflicts following the dissolution of the Soviet Union (Transnistria '92, Abkhazia '93 and later in 2008);
2. their partial recognition (Transnistria by three non-recognized regions and Abkhazia by 5 states, including Russia);
3. they share Russian involvement in the conflicts and in supporting the de facto governments;
4. the parent States are Member States of the Council of Europe that have ratified the ECHR and are parties to the UNCAT;
5. the author is from a post-Soviet country (Moldova); therefore due to reasons of language, it will be easier to access relevant data in regard to both regions. In addition, the author is acquainted with the situation on the ground regarding Moldova/Transnistria and, in order to draw a parallel and ensure objectivity in the research process, decided to compare the Transnistrian frozen conflict with the one in Abkhazia;
6. detention facilities in the given regions are not monitored or scrutinized regularly by any national or international body and,

7. there have been alerts upon harm inflicted on inmates in the form of torture, inhuman or degrading treatment in these two regions and lack of investigation of these cases (procedural limb of art.3 ECHR)[7]

Research limitations

For the purposes of this thesis only two frozen conflict will be examined – Transnistria and Abkhazia. Other frozen conflict entities such as South Ossetia, Nagorno-Karabakh, Crimea, Donetsk and Lugansk were considered for analysis, but due to time constraints will not be examined herein. Also, considering that they fall outside the scope of the present research, matters of ethnicity, nationalism, statehood, repatriation, citizenship and property will not be dealt with in depth and will merely be mentioned in supporting the core arguments set within. Also, due to time constraints the thesis will *only* address the application of the prohibition of torture, inhuman or degrading treatment in the mentioned regions, by analyzing the application of these two instruments - ECHR and UNCAT.

Previous research

Research has been conducted in the area, but the scholarship is scarce and is focused more on statehood, conflict resolution, political and the social dimension of the situations[8]. There has not been much legal interest in these regions due to several factors, possibly

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[7] For more see: Country Reports on Human Rights Practices for 2018, United States Department of State • Bureau of Democracy, Human Rights and Labor:"According to a report by Promo-Lex, there was no mechanism to investigate alleged acts of torture in Transnistria by Transnistrian security forces. Transnistria established an "investigative committee" in 2012. The committee has not initiated any criminal cases for "providing statements under coercion by means of violence, humiliation, or torture." Promo-Lex noted that authorities perpetrated most inhuman and degrading treatment in the Transnistrian region in order to obtain self-incriminating confessions ", pp.4-5 https://www.state.gov/documents/organization/289403.pdf; Committee against Torture considers the report of the Republic of Moldova: "Experts raised concerns about the application of the Convention in Transnistria, the lack of statistics on cases of torture, the high level of impunity for alleged cases of torture, the applicability of the Convention, torture and ill treatment in police detention facilities, the national torture prevention mechanism, and fundamental legal safeguards for persons deprived of their liberty", 8 November 2017, https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22374&LangID=E; FIDH supported report: "Torture and ill-treatment in Moldova including Transnistria: Impunity prevails" by Promo-lex, Mamasaklisi v. Georgia and Russia, Olof Palme International Centre supported report on: Human rights in Abkhazia Today, by Thomas Hammarberg and Magdalena Grono, https://www.palmecenter.se/wp-content/uploads/2017/07/Human-Rights-in-Abkhazia-Today-report-by-Thomas-Hammarberg-and-Magdalena-Grono.pdf

[8] For some examples see: "Separatism and Democracy in the South Caucasus", Nina Caspersen, "Dynamics of de facto Statehood: the South Caucasian de facto states between secession and sovereignty, Pål Kolstø, "The foreign policy options of a small unrecognised state : the case of Abkhazia", Thomas Frear, "Post Soviet de facto states in search of internal and external legitimacy", Anna Fruhstofer, Silvia von Steinsdorff, "Communist and post-communist studies", Anna Fruhstofer, Silvia von Steinsdorff, "Transnitrian conflict resolution at 25th year of impasse: causes, obstacles, and possible solutions", Dumitru Minzarari, Victoria Bucataru, "Frozen ground: Role of the OSCE in protracted conflicts", Klaudia Banaiova, Samuel Goda

because these conflicts are *"frozen"* and not much has changed after the conflicts occurred. Instead, a definite status quo has been maintained, rendering a peaceful settlement improbable and cooperation with the de facto governments hard to establish.

Moreover, research abounds when it comes to the extraterritorial application of the ECHR[9]. Yet, the scholarship regarding the extraterritorial application of UNCAT is not as developed and is limited to the principle of non-refoulement.[10]

Contribution to existing scholarship

As already mentioned, sufficient analysis exists regarding the application of the ECHR outside a State's territory. The contribution of the present thesis will flow from the author's comparison between two instruments prohibiting torture (ECHR/UNCAT) and between two legal grey zones that appeared as a result of a frozen conflict - Transnistria and Abkhazia. The comparisons made in the existing literature focus more on the extraterritorial jurisdiction exercised due to military involvement or other local administrations, but they are not comparing two post-Soviet frozen conflict regions.

1.3. Theory and methodology

The thesis will apply the legal realism theory, which puts an emphasis on the sociological dimensions of *"law in action"*[11]. Its proponents study the sociological and psychological factors that influence judicial decision-making, nevertheless maintaining the positivist concepts as remaining implicit. They attach a greater meaning to the political and moral intuitions about the facts of a case[12]. One of the exponents' claim is that judge's rely

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[9] For some examples see: "Jurisdiction and Responsibility, Trends in the Jurisprudence of the Strasbourg Court, Marko Milanovic, The European Convention on Human Rights and General International Law, Oxford University Press, 2018", Samantha Besson, "The extraterritoriality of the European Convention on Human Rights: Why Human Rights depend on jurisdiction and what jurisdiction amounts to", (2012), Extraterritorial application of the European Convention on Human Rights, Evolution of the Court's Jurisprudence on the Notions of Extraterritorial Jurisdiction and State Responsibility, Işil Karakaş, Hasan Bakirci, The European Convention on Human Rights and General International Law, Oxford University Press, Ralph Wilde, Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties

[10] For examples see: "The principle of non-refoulement under the ECHR and the UN Convention against Torture and other cruel, inhuman or degrading treatment or punishment", International Studies in Human Rights, Vol. 115, 2016, "Non-refoulement under the European Convention on Human Rights and the UN Convention against Torture: the assessment of individual complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee against Torture under article 3 CAT", Fanny de Weck, International refugee law series, Vol. 6, 2017

[11] Raymond Wacks, Understanding Jurisprudence, An Introduction To Legal Theory (2nd edn, Oxford University Press 2009), pp.173-176

[12] Ibid, p.176

more on their political and moral convictions, than on legal norms. In Llewellyn's essay "Some realism about Realism", the author summarized the central tenets of the movement, as follows: the perceived law in motion conception, the conception of law as a means to social ends and not as an end in itself, the perceiving of society in flux being faster than the law, an emphasis on evaluating the law in terms of its effects and the desire to take sustained and programmatic actions in tackling the problems of law[13]. The methods used are going to be but not limited to: case law analysis, data analysis, descriptive and comparative approach to gain new knowledge and literature review.

In pursuing the answers to the proposed research questions, the author will analyse the sources of law, as enumerated by the ICJ in its Statute in art.38 (1), namely treaties, general principles of law, customary law, and case law pertaining to the regions, and relevant legal scholarship. In addition, a case study analysis will be provided, by drawing a parallel between Transnistria and Abkhazia in regard to the application of the prohibition of torture, inhuman or degrading treatment. Comparative analysis of the respective legal frameworks and regions will be offered throughout.

1.4. Historical background

Transnistria

Transnistria is a strip of land caught between Moldova and Ukraine, that demarcated as a result of a military conflict, beginning in March of 1992 and drawn to a close with a ceasefire in July of the same year. The causes of the conflict have been debated, but a generally accepted version is that during the dawn of the Soviet Union in the MSSR (Moldovan Soviet Socialist Republic) a significant national movement rose up, as with other Soviet republics which also turned away from the Soviet narrative. In Moldova, this phenomenon had been particular as in the effort to "revive" the national culture; part of the national movement rallied around Romanian national symbols and not around the Moldovan ones[14]. Even if the national movement promoters weren't strong in numbers, they were still

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[13] Karl N. Llewellyn, 'Some Realism About Realism: Responding To Dean Pound' (1931) 44 Harvard Law Review.

[14] Translation by the author from: Alexandr Voronovici, 'The Year 1924. Justifying Separatism: The Establishment Of The Moldovan ASSR And History Politics In The Transnistrian Moldovan Republic' (2015) 3 History, Culture, Society, p.143

quite active and resonant, thus becoming influential in the late part of the Soviet Union and even in the post-Soviet years[15].

In the early 1990s, when the Soviet Union was collapsing rapidly, some of the leaders of the Moldovan national movement considered, or at least declared, the Moldovan identity, language and culture as a Soviet invention and imposition. Instead, they were fighting for the recognition of the Romanian language and the Latin script, paired with wearing Romanian flags. Some of the more radical political leaders even saw the sovereignty of MSSR and the subsequent independence of the Republic of Moldova only as steps towards the final political unification of the Republic with Romania[16]. Such radical takes on the part of some of the leaders of the Moldovan national movement have encountered a notable opposition on both sides of the Nistru River, which represents the border between Moldova and Transnistria. Some pleaded for the preservation of the Soviet Union and were against national movements as such. Others have alienated themselves from the pro-Romanian character supported by much of the national movement in the MSSR. However, on the left bank (Transnistria) such nationalist attitudes were much stronger[17].

There were different factors that have contributed to such reluctance, as unlike Moldova (called Bessarabia until the 20th century), Transnistria was not a part of the Romanian State, except for a short period of military control during the Second World War . The ethnolinguistic structure of Transnistria was different. The three major ethnic groups: Moldovans, Russians and Ukrainians constituted about one-third of the population of the region, Moldovans outnumbering the other groups by only a few percent only. Meanwhile, on the right bank of the Nistru River, the Romanian-speaking population constituted a clear majority in Moldova. There were also differences when it came to the social dimension of the ethnolinguistic population. On the right bank of the Nistru River, there were many Romanian-

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[15] Translation by the author from: Alexandr Voronovici, 'The Year 1924. Justifying Separatism: The Establishment Of The Moldovan ASSR And History Politics In The Transnistrian Moldovan Republic' (2015) 3 History, Culture, Society, p.143

[16] Ibid, p.143

[17] Ibid, p.143

speaking urban elites, while on the left bank the urban elites were almost exclusively speaking Russian[18].

Therefore, on the left bank of the MSSR, the population was more sensitive to the national symbolic proclamations made and supported in Chisinau. The gradual political separation of the MSSR from the Soviet Union threatened the dominant political and economic positions of the leaders of the left bank of the Nistru River. Hence, they tried to exploit the population's discontent in order to maintain their positions of power, at least in the eastern regions of Moldova. Furthermore, the Transnistrian elite, traditionally dominated in Soviet Moldova, as Moscow often considered it more reliable than the members of the Bessarabian elite[19]. While political conflicts and debates were frequently framed in ethnolinguistic, symbolic and historical terms, behind the rhetoric the struggle for political power can often be seen between at least some elite groups and the control of economic and administrative resources. Eventually, some circles in Moscow supported the pro-Soviet groups in Moldova, especially those on the left bank of the Nistru, seeing them as leverage to continue exercising influence over the independent republic[20]. The combination of these and other factors led to the gradual escalation of the conflict between the two banks of the Nistru, culminating in the proclamation of the Transnistrian Moldovan Soviet Socialist Republic in September 1990, renamed into the Moldovan Republic of Dniester in November 1991. These tensions resulted in a war starting in March 1992, causing approximately 1,000 victims. The hostilities ended with the intervention of the 14th Russian Army, which was predominantly stationed in Transnistria since the Soviet period, and which, after the war, assumed the role of "peacekeepers" on the Nistru. The war reconfirmed the unrecognized legal status of Transnistria, and the virtual impossibility of the authorities in Chisinau to control the region. As such, the Moldovan Republic of Transnistria (MRT) has existed for more than 26 years,

[18]Translation by the author from: Alexandr Voronovici, 'The Year 1924. Justifying Separatism: The Establishment Of The Moldovan ASSR And History Politics In The Transnistrian Moldovan Republic' (2015) 3 History, Culture, Society, p.145

[19] Ibid, p.143

[20] Ibid, p.143

benefiting from strong support from the Russian Federation, the leftovers of the Soviet industry and a semi-legal economy with porous borders[21].

Initially, the main justification for the creation and existence of this separatist republic was to maintain its affiliation to the Soviet Union, which is indicative by its original name of the Soviet Socialist Republic of Moldavia in Nistru, in the context when Chisinau leaders intensified their anti-Soviet positions. Signs of official distinction can still be seen with the sickle and the hammer, and Lenin's monuments are present throughout the region, as Soviet symbols still play an important role in the policy of the Transnistrian region. The flag of the Transnistrian Moldovan Republic is, in principle, the Moldovan SSR only with a different coat of arms[22]. However, with the dissolution and finally the collapse of the Soviet Union, it became clear that the references to the Soviet system, which had rapidly transformed into the Soviet history were no longer sufficient to justify the existence and legitimacy of the separatist republic and its administration. Unlike the leadership of the Moldavian SSR, the authorities of the Transnistrian Moldovan Republic were unable to rely on the right to self-determination which was reserved exclusively for the Soviet republics in the Soviet system. Consequently, Transnistrian actors gradually developed additional reasoning for the existence of the separatist republic[23]. The change of direction has found its reflection in changing the name of the republic of the Soviet Socialist Moldavian Republic of Nistru into the Moldavian Republic of Nistru. Historical references have also played an important role in the development of the left-wing country's ideology[24].Throughout Eastern Europe the appeal to history has gained special political importance during and after the fall of the socialist system. Politicians, intellectuals, academics, journalists and other public figures use history to consolidate their political positions, undermine their opponents, gather support for their cause, etc. In the case of the Transnistrian Moldovan Republic, the

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[21] Translation by the author from: Alexandr Voronovici, 'The Year 1924. Justifying Separatism: The Establishment Of The Moldovan ASSR And History Politics In The Transnistrian Moldovan Republic' (2015) 3 History, Culture, Society, p.144

[22] Ibid, p.143

[23] Ibid, p.143

[24] Ibid, p.143

references to history were crucial, as the unrecognized republic needed to justify its disputed existence internally, as well as externally.[25]

Currently, this region is construed as a de facto state and has the attributes characteristic to a state, such as a president, parliament, governmental authorities (with about 11 ministries), its own currency (Transnistrian ruble), customs, constitution, its own laws and regulations, national anthem and flag[26].There have been many attempts to reach a settlement of the conflict, including countless meetings under the aegis of the OSCE, whom since 1991 has been overseeing a conflict resolution process (5+2 format), including 7 parties, Moldova, Transnistria as belligerents, OSCE as mediators, the US and the EU as observers and Romania and Russia as guarantors[27].

Some progress has been registered on the settlement of disputes after concluding the Vienna protocols[28], which tackled issues related to the apostillation of educational documents issued in the Transnistrian region, the operation of Romanian schools on the left bank, the renewal of access to land for Moldovan farmers in the Dubasari district and the reopening of the Gura Bicului-Bychok Bridge in November 2017[29].

Nevertheless, when it comes to core differences between the de facto government of Transnistria and Moldova, little progress can be noticed. Despite numerous negotiations, the situation has not changed substantially, as the Russian 14th Army is still on Transnistrian soil, despite demands on part of Moldova, NATO and other partners to withdraw them, as well as the recent adoption of the Resolution *"Complete and unconditional withdrawal of foreign*

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[25]Translation by the author from: Alexandr Voronovici, 'The Year 1924. Justifying Separatism: The Establishment Of The Moldovan ASSR And History Politics In The Transnistrian Moldovan Republic' (2015) 3 History, Culture, Society, p.145

[26]Translation by the author - Composition of Government, 'Состав Правительства'(*Gov-pmr.org*, 2019) <http://gov-pmr.org/government>

[27] Pallavi Dehari and others, 'Moldova – Transnistria Conflict Report – World Mediation Organization' (*Worldmediation.org*, 2019) <https://worldmediation.org/moldova-transnistria-conflict-report/>

[28] Protocol Of The Official Meeting Of The Permanent Conference For Political Questions In The Framework Of The Negotiating Process On The Transdniestrian Settlement (2017), Protocol

[29] Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe, 'Information Note By The Co-rapporteurs On Their Fact-Finding Visit To Chisinau And Comrat' (Parliament Assembly, CoE 2018)

military forces from the territory of the Republic of Moldova" (document A/72/L.58) by the UN General Assembly , adopted with 65 votes in June 2018[30].

Some even go as far as to argue that the involvement of international partners that tried to achieve a settlement of the dispute was either half-hearted or tainted by confined self-interest[31]. Very often, the take of the outside world in regard to the conflict was that of complacency, which was aided by the indifference of public opinion in the West and absence of significant interests of Western powers in Moldova. Moreover, the continuous attempts to reach a settlement over two decades, under the supervision of OSCE only increased the skepticism on all sides regarding the prospects of a sustainable resolution in the near future.[32]

The Moldovan based NGO Promolex, records that the conditions in the MRT prisons could be equated with torture[33]. In the consideration of the third periodic report of the Republic of Moldova, the Deputy Minister for Internal Affairs reported the death of Andrei Braguta, *"who had been detained for having exceeded the legal speed limit, and who due to the existing systemic deficiencies had died in the penitentiary"*[34]. Momentarily, Moldovan authorities or the police force have no access to the penitentiary in the Transnistrian region, even though it is Moldova who reports to CAT. Only 3 detention facilities out of 13 are under the supervision of Moldovan authorities (prison no.3, 8 and 12). In addition to prisons the MRT authorities have other facilities for deprivation of liberty, such as psychiatric or correctional facilities[35].

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[30] 'General Assembly Adopts Texts Urging Troop Withdraw From Republic Of Moldova, Strengthening Cooperation In Central Asia | Meetings Coverage And Press Releases' (*Un.org*, 2019) <https://www.un.org/press/en/2018/ga12030.doc.htm>

[31] Institute for Development and Social Initiatives "Viitorul", 'Transnistrian Conflict After 20 Years , A Report By An International Expert Group' (Center for Eastern Studies)

[32] Ibid

[33] Ibid

[34] 'CAT/C/MDA/3 - E - CAT/C/MDA/3' (*Undocs.org*, 2019) <https://undocs.org/en/CAT/C/MDA/3>

[35](Places of detention in Transnistria) 'Места Несвободы В Приднестровье » Пыткам – Нет!' (*Pitkamnet.mediacenter.md*, 2019) <http://pitkamnet.mediacenter.md/mesta-ne-svobodi-v-pridnestrovie.html>

Abkhazia

Abkhazia was an independent Soviet Socialist Republic until 1931, a status equal to that of Georgia, with which it formed a kind of confederation[36]. At the end of the year, however it lost this status through the Union Treaty, which annexed Abkhazia to the Georgian Soviet Socialist Republic. It remained an autonomous republic within the Georgian Soviet Socialist Republic throughout the Cold War. Later, when the Soviet Union started to unravel, tensions grew as Abkhaz people started requesting the status of pre-1931 Abkhazia[37]. Abkhaz intellectuals started to question the legitimacy of Abkhazia's autonomous status within Georgia, claiming that: *"The formation of the Abkhaz Autonomous Republic within the framework of Georgia [in 1931] was the outcome not of the supposed granting of autonomous status to one of Georgia's minorities, as is not infrequently stated, but rather of the forcible convergence of two neighboring states through the incorporation of one of them, Abkhazia, into the other, Georgia."*[38]. This continues to be the popular viewpoint amongst Abkhazians. Gorbachev's perestroika policy, which fell short of societal repression left space for nationalist ideology, which until then had been restrained. In diverse regions of the Soviet empire, this process was paired with overthrowing of the established ethno-administrative hierarchy in place, which weren't in line with the evolving political situation and with the requests for "historical justice"[39]. This was especially heightened in the ethnic groups that enjoyed political and territorial autonomy within the framework of the Soviet Republics, such as in the case of Abkhazia[40].

The year of 1866 is considered to be an important one by many Abkhazian intellectuals, due to mass anti-Russian uprisings, punished *inter alia* with the deportation to Turkey of thousands of Muslim Abkhazians who partook in the rebellion. As a result, the percentage of Abkhazians professing Islam, whom until then were predominant in the

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[36] Emil Souleimanov, *Understanding Ethnopolitical Conflict. Karabakh, South Ossetia And Abkhazia Wars Reconsidered* (Palgrave Macmillan 2013) <http://search.ebscohost.com/login.aspx?direct=true&db=cat07147a&AN=lub.4281325&site=eds-live&scope=site>, p.114

[37] Noelle M. Shanahan Cutts, 'Enemies Through The Gates: Russian Violations Of International Law In The Georgia/Abkhazia Conflict' [2007] 40 Case W. Res. J. Int'l L., p.288

[38] Emil Souleimanov, *Understanding Ethnopolitical Conflict. Karabakh, South Ossetia And Abkhazia Wars Reconsidered* (Palgrave Macmillan 2013) <http://search.ebscohost.com/login.aspx?direct=true&db=cat07147a&AN=lub.4281325&site=eds-live&scope=site> p.115

[39] Ibid, p.115

[40] Ibid, p.115

country, fell below the number of Orthodox Abkhazians. More importantly was the resettling of ethnic Armenians, Greeks, Jews and Georgians into the depopulated regions by the Russian administration. These practices went on throughout the Soviet era, which by consequence resulted in the number of Abkhazians constituting only a fifth of the population Abkhazian land. This increased their fear of assimilation and domination by Georgians. The belief of being the victims of historical injustice is therefore strong amongst Abkhazians[41].

In the midst of the diverse ethnic-wise Georgia, that was seeking independence with three autonomous units, for the KGB was easy to direct “counter-movements” against the break up of the Soviet Empire initiatives. In this way in Abkhazia arose movements such as the National Forum of Abkhazia and the Russian Society House of Slavs. Put differently, it came as no surprise that the minorities, perceived as disloyal to Georgia to be associated as accomplices of Russia[42].

After the declaration of independence from the USSR, Abkhazia requested the federalization of the State, which was not accepted by the Georgian government, which instead decided to handle the situation by sending troops into the two regions, upon which war erupted[43]. The following ethnic and military conflicts of 1992-1993 between Georgia and Abkhazia led to the latter to declare its independence, which due to no international recognition, remained to be only de facto independence[44]. In the course of the conflict there were several cease-fire agreements concluded between Georgia and Abkhazia, as both sides were breaching them, causing need for a new agreement. After the cease-fire agreement made in July 1993 was breached, the Russian foreign minister pressured the belligerents into agreeing to another cease-fire and suggested that the only way of ending the conflict was for the Georgian military forces to withdraw from Abkhazia. After that suggestion was accepted and carried out, the Russian military organized a surprise attack supporting the Abkhazian

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[41] Emil Souleimanov, *Understanding Ethnopolitical Conflict. Karabakh, South Ossetia And Abkhazia Wars Reconsidered* (Palgrave Macmillan 2013) <http://search.ebscohost.com/login.aspx?direct=true&db=cat07147a&AN=lub.4281325&site=eds-live&scope=site>, pag.119-120

[42] Ibid, pag.116

[43] Noelle M. Shanahan Cutts, 'Enemies Through The Gates: Russian Violations Of International Law In The Georgia/Abkhazia Conflict' [2007] 40 Case W. Res. J. Int’l L., p.282

[44] Susanna Bagdasaryan and Svetlana Petrova, 'The Republic Of Abkhazia As An Unrecognized State' (2017) 5 Russian Law Journal, p.100

forces in taking Sukhumi and other lands[45]. This was followed by the then President of Georgia - Shevardnadze, accepting CIS membership and allowing Russian forces to be stationed in Georgia. Afterwards, the UN Observer Mission in Georgia, that contained eighty-eight military observers was stationed to secure compliance with the cease-fire agreement[46]. By March 1994, the CIS forces were granted observer status by the UN General Assembly. Both sides of the Inguri River, separating the Abkhazian territory from the Metropolitan Georgia were demilitarized and the agreement on a cease-fire and separation of forces was signed[47]. As a repercussion of the 70 years of Soviet hegemony, the Abkhazians regard Moscow as the power that would safeguard Abkhazia from Georgia[48].

Even though Russia claims that it supports the territorial integrity of Georgia, its course of action indicates otherwise. The trade in Abkhazia conducted in Russian rubles and the economy is tightly linked to the Russian economy. Russia also offers practical support, for instance it provides pensions and railway infrastructure, as well as Russian passports to a large number of Abkhazians[49]. Despite the formal arbitrator role that Russia alleges, its ulterior motive is exposed by the degree of assistance its "peacekeepers" provided Abkhazia in the course of the Georgia/Abkhazia conflict and the support it continues to offer to this region to this day[50].

Despite the 1994 cease-fire agreement and on-going negotiations, the dispute remains unsolved, as it reignited again in 2008 (Russo-Georgian war), resulting in Russia recognising Abkhazia's sovereignty, along with a few other States[51]. The conflict also resulted

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[45] Noelle M. Shanahan Cutts, 'Enemies Through The Gates: Russian Violations Of International Law In The Georgia/Abkhazia Conflict' [2007] 40 Case W. Res. J. Int'l L., p.289

[46] Ibid, p.289

[47] Ibid, p.289

[48] Emil Souleimanov, *Understanding Ethnopolitical Conflict. Karabakh, South Ossetia And Abkhazia Wars Reconsidered* (Palgrave Macmillan 2013) <http://search.ebscohost.com/login.aspx?direct=true&db=cat07147a&AN=lub.4281325&site=eds-live&scope=site>, pag.121

[49] Noelle M. Shanahan Cutts, 'Enemies Through The Gates: Russian Violations Of International Law In The Georgia/Abkhazia Conflict' [2007] 40 Case W. Res. J. Int'l L., p.293

[50] Ibid, p.294

[51] States that recognized Abkhazia: Russia, Venezuela, Nicaragua, Nauru, Syria and by the self-proclaimed Nagorno-Karabakh, South Ossetia and Transnistria

in the filing of a new inter-state claim[52] before the ECtHR and countless individual applications concerning the same war.

Abkhazia is a presidential republic, run by a government, composed of 14 ministers and 3 vice-ministers[53]. The prison facilities are insufficient[54] and not compliant with any standards, including sanitary and epidemiological ones. An investment project is planned for 2019 for a new prison to be built covered financially by Russia[55].

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[52] Georgia v. Russia (II), App. no. 38263/08, ECtHR

[53] Translated by he author ‘Members of the Government’, ’Члены Правительства' (*Km-ra.org*, 2019) <https://www.km-ra.org/office-of-the-cabinet-of-ministers/>

[54] 'Abkhazia' (*Freedomhouse.org*, 2019) <https://freedomhouse.org/report/freedom-world/2018/abkhazia>

[55] Tatia Nikoladze, 'Prison Authorities In Abkhazia Fired After Inmate Party' (*JAMnews*, 2019) <https://jam-news.net/prison-authorities-in-abkhazia-fired-after-inmate-party/>

Chapter 2. Jurisdiction and responsibility of States for activities perpetrated outside their territory

2.1. The notion of jurisdiction and general reflections on jurisdiction

The U.N. Human Rights Committee ("HRC") has defined jurisdiction as being "the power or effective control" over a person exercised by a State within or outside its own territory, de jure or de facto. And it substantiated that *"a State party has an obligation to respect and to ensure the rights of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control".*[56]

As classically understood the exercise of jurisdiction comes under the purview of international law when it involves activities outside the State's territory, that usually engage another's State territory and authority. The law of jurisdiction is perceived to operate on the basis of the territorial and extraterritorial binary, where territorial jurisdiction is seen as valid and proper, while extraterritorial jurisdiction is viewed to be the anomaly that needs specific justification[57]. The territorial and extraterritorial binary over time came to reflect the division of the world into separate territorial entities that are constitutionally autonomous from one another. As some scholars suggest this separation was made in a historical and political context and subject to change considering the contemporary understanding of international law and society[58]. Moreover, the classic approach to the role of jurisdiction has resulted in ignoring certain scopes of justice, such as dealing with the potential under-regulation of global governance problems, including fight against impunity for gross human rights violations, foreign corrupt practices, cyber crime or climate change challenges. The law of jurisdiction has rooted itself for too long in the common practices of linking jurisdiction to territory, instead of focusing on the mutual goals of States, such as prohibition of torture. A concept of jurisdiction that has appeared and developed solely to keep other States out of their sovereign affairs might fail to address the major problems of our time, and it might not identify that States have approved common substantive provisions and have established joint

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[56] General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life 2018, para.65

[57] Jean D'Aspremont and Sahib Singh, Concepts For International Law, Contributions To Disciplinary Thought (Edward Elgar Publishing 2019), pp.578-581

[58] Ibid, pp.578-581

goals[59]. Such an approach to jurisdiction is more in line with the realities of contemporary world as it highlights that, even if the concept of jurisdiction once appeared to stress the non-intervention rule and limit the ability of outside States to interfere with the internal affairs of another State, a lot has changes since then, with the increase of migration, creation of regional organizations, technology, terrorism, foreign military activities and military involvement presented as peace-keeping operations etc. Therefore, the concept of jurisdiction cannot remain unchanged and unaffected and must develop in order to cover all spheres of State involvement in order to ensure protection of human rights and responsibility for their violations. And the extraterritorial application of human rights treaties on a more systemic basis would be a first step in doing that.

Before delving into the matter of extraterritorial jurisdiction, it is crucial to explore and understand the evolution of extraterritorial application of treaties and attribution of acts conducted outside the State's territory by the ICJ and ICTY. For this purpose, a brief overview of 'control tests' applied in determining State responsibility will first be presented. Following this, the divergent approach developed and applied by the ECtHR in the process of establishment of jurisdiction of states under the ECHR will be considered.

In several cases, the ECtHR has made reference to the "*relevant rules of international law that determine State responsibility"*, causing confusion between attribution of conduct for the purposes of establishing State responsibility and the concept of jurisdiction within the meaning of art.1 under the ECHR.

In Bankovic the Court held that it:*"must take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law, although it must remain mindful of the Conventions's special character as a human rights treaty."*[60] Thus, even though the test applied in establishing jurisdiction and the ones applied in order to attribute conduct to a State outside its territory are quite different, they latter served as inspiration for the ECtHR in developing its "effective control test" in establishing jurisdiction earlier cases regarding extraterritoriality.

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[59]Jean D'Aspremont and Sahib Singh, Concepts For International Law, Contributions To Disciplinary Thought (Edward Elgar Publishing 2019), pp.578-581

[60] Bankovic and Others v. Belgium and Others [GC], ECtHR, no. 52207/99, 12 Dec. 2001, para.57

Milanovic has found that in up to 99 percent of the cases heard by the ECtHR the issue of attribution is not raised explicitly by the parties or by the Court, due to the question of attribution being quite obvious: *the conduct that breaches human rights is that of the State's de jure organs, according to art.4 from the International Law Commission's Articles on State responsibility of States for International Wrongful Acts (ARSIWA)*[61]. He had also observed that the attribution inquiry is done *sub silencio,* since without it there can be no State responsibility for an internationally wrongful act[62].

Development and application of control tests

Holding the States responsible for their direct or indirect support provided outside their territory to secessionist entities in violating international law is one way of ensuring the victim's rights and freedoms. However, in order to trigger international responsibility of an outside power for the internationally wrongful act of the breakaway entity, the fact that the obligation of the power applies outside its territory would have to be proven, namely that the international obligation is applicable extraterritorially. Additionally, the wrongful conduct of the entity needs to be attributable to the State supporting the secessionist entity. The rules on the attribution of the acts or omissions of the entity to an outside power in order to engage its international responsibility are listed in articles 4, 9 and 11 of the ARSIWA, a document purporting to express customary international law. Even if the outside power may allow or approve the international wrongful act, it is very unlikely for it to recognize its involvement as it would usually underline the entity's de facto independence in order to elude any responsibility[63].

Therefore, to establish the international responsibility of an outside State for the international wrongful act/omission committed outside the State's territory, international mechanisms usually test if the perpetrating authorities were under the outside state's control, at the time of the wrongful act.[64] The challenge arises in defining *"control,"* as the

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[61] Marko Milanovic, The European Convention On Human Rights And General International Law, Jurisdiction and Responsibility, Trends in the Jurisprudence of the Strasbourg Court (Oxford University Press 2018), p.105

[62] Ibid, p.105

[63]Stefan Talmon, The Responsibility Of Outside Powers For Acts Of Secessionist Entities (Cambridge University Press 2009), pp.493-494

[64] Ibid, p.496

interpretation varies from court to court and serves manifests the fragmentation of international law.

2.2. International Court of Justice (ICJ) - attribution of conduct under the strict and effective control test

The ICJ introduced the notion of control test in the *Case Concerning the Military and Paramilitary Activities in and against Nicaragua*, 1986, also known as Nicaragua v. United States of America. There, the ICJ applied two tests: the "strict control" and "effective control" test. These tests were applied in assessing whether the US bore responsibility for the acts of *contras* (an armed group that acted against Nicaragua).

The strict control test, also called the agency test is a standard of control, where the armed group would be assimilated with the organs of the outside State, being considered almost acting on its behalf, because of the strong dependency of the armed group to the outside State[65].

The requirements for the *strict control* test are threefold:

- The secessionist entity has to be entirely dependent on the outside state
- The dependence has to be present in all fields of activity of the entity
- The outside state actually used its potential for control over the entity[66]

The Court could not apply this test in the Nicaraguan case, because it held that despite the critical support the US accorded to the contras, it deemed it "insufficient to demonstrate their complete dependence on the United States aid"[67].

The Court applied the *effective control* test instead, which is used when the strict control test cannot be proven. The ICJ does not apply the effective control test in order to establish whether a person or group of individuals are the de facto organ of the state, instead it is applied in cases were there are sufficient grounds to believe that there is a strong "dependency" between the secessionist entity and the outside State. Partial dependency may refer to financial aid, logistic and military support, intelligence provision , etc. The relevant norm in applying this test is art.8 ARSIWA, as it refers to wrongful acts committed under the

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[65] Nicaragua v.USA, ICJ, para.102

[66] Stefan Talmon, The Responsibility Of Outside Powers For Acts Of Secessionist Entities (Cambridge University Press 2009), p.498

[67] Nicaragua v. USA,ICJ, para.110

direction or control of another State[68]. Even if the effective control test is looser than the strict control and requires a lower degree of dependency, the latter still remains a demanding test, difficult to satisfy in holding States accountable for their extraterritorial activities.

2.3. International Criminal Tribunal for the Former Yugoslavia (ICTY) - attribution of conduct under the overall control test

The ICTY developed its own control test in Tadic[69], where the Appeals Chamber of the Tribunal substantiated that the acts of the armed forces of Republika Srpska, a Bosnian Serb secessionist entity on the territory of Bosnia and Herzegovina fighting the recognized Government of Bosnia could be attributed to the Federal Republic of Yugoslavia (FRY). While the Trial Chamber, seemingly applied ICJ's effective control test, found that the FRY could be found guilty of the grave breaches committed by the armed forces of Republika Srpska, the Appeals Chamber overturned that rationale based on the fact that the said armed forces,*"as an entirety",* were under the overall control of FRY. By doing so, the Appeals Chamber rejected ICJ's effective control test as not being compelling enough in cases of organized groups and decided to apply its own overall control test[70].

The Appeals Chamber argued that one should differentiate between individuals acting on behalf of the state without directions and those that are organized and hierarchically structured, as the *"organised group has structure, a chain of command and a set of rules"*[71]. Usually a member of the group conforms to the standards set within the group and does not act on its own. Therefore, *"for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State"*[72]. In order to attribute the acts committed by the secessionist entity to an outside State it must be shown that that State maintains *overall control* over the entity, meaning it provides finances, training, equipment, operational support and participates in the organization, coordination, planning or directing the entity's military activities. However, this test is met even when the entity acts

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[68] Stefan Talmon, The Responsibility Of Outside Powers For Acts Of Secessionist Entities (Cambridge University Press 2009), p.502

[69] Prosecutor v. Duiko Tadic, the Appeals Chamber of the ICTY, IT-94-1-A-AR77, 27.02.2001

[70] Stefan Talmon, The Responsibility Of Outside Powers For Acts Of Secessionist Entities (Cambridge University Press 2009), pp.504-505

[71] Prosecutor v. Duiko Tadic, the Appeals Chamber of the ICTY, IT-94-1-A-AR77, para.120

[72] Ibid, para.120

ultra vires and takes autonomous choices of means and tactics in formulating the common strategy together with the State operating outside its territory. This, indicates the conspicuously less strict nature of the overall control test in comparison to the effective control test developed by the ICJ in Nicaragua case[73].

The level of dependency and control between the State acting outside its territory over the secessionist entity has been loosened by the ICTY in contrast to the ones used by the ICJ. Despite the fact that ECtHR applied the effective overall test in establishing jurisdiction, it also stretched the test and made it easier to satisfy. The test for establishing jurisdiction under the ECHR requires a looser level of control over a "local administration" that survives by virtue of the support provided by the State, as will be substantiated in the following section and in Chapter 3.

2.4. The European Court of Human Rights (ECtHR) establishment of jurisdiction under the effective overall control test

The ECtHR applied the *effective control test* in its leading case Loizidou v. Turkey in assessing the State's control over the right holder necessary for jurisdiction. This control test is different from the control test over individual agents needed for the attribution of their actions to the State, both in assessing State's jurisdiction or State responsibility under ARSIWA[74]. In applying its effective overall control test, the ECtHR had to answer two questions:

1) whether due to the large number of Turkish troops in Northern Cyprus, that territory came into Turkey's jurisdiction; and
2) whether the conduct of the authorities of the Northern Cyprus were attributable to Turkey and as a consequence engaged responsibility for Turkey[75].

The Court has on several occasions confused or at least not clearly explained the distinction between the two concepts (attribution of conduct tests and establishment of jurisdiction test) of control in judgements (see Loizidou and Ilascu), but later stated in response to the Russian Government's argument that the Court's reasoning in Mozer was at

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[73] Stefan Talmon, The Responsibility Of Outside Powers For Acts Of Secessionist Entities (Cambridge University Press 2009), p.506

[74] Samantha Besson, The European Convention On Human Rights And General International Law, Concurrent Responsibilities under the European Convention on Human Rights, The Concurrence of Human Rights Jurisdictions, Duties and Responsibilities, (Oxford University Press 2018), p.158

[75] Loizidou v. Turkey [GC], no.15318/89, 18.12.1996, ECtHR, para.56

variance with international law[76], that it never equated the test for establishing the existence of "jurisdiction" under Article 1 of the Convention with the test for establishing a State's responsibility for an internationally wrongful act under international law[77].

The tests developed by the ICJ and the ICTY also engage different outcomes to that of the ECtHR; the former were assessing merely whether the breach could be attributable to the State, whereas the test applied by the ECtHR, in addition to the imputability question, is concerned with establishing whether, as a result of the protector State's influence or military presence the breach came into its jurisdiction. Irrespective of whether or not the Court equated the two tests or not, it definitely used their rationale and was conceivably inspired by some components from it in elaborating the extraterritorial jurisdiction test. If anything this test is looser than the ones used by the ICJ and ICTY and provides a broader breadth of application. For the ICJ and the ICTY, the requirement that the local administration only 'survives by virtue of the military, economic, financial and political support given to it' by the protector State is a less stringent standard than the ones imposed in attributing conduct[78]. Also, as will be explained in the following chapter, the ECtHR has had a more relaxed approach, as it was not very difficult to persuade the Court that Russia exercised effective control over Transnistria in Ilascu and others v. Moldova and Russia or that Armenia controlled Nagorno-Karabakh[79].

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[76] Mozer v. Moldova and Russia [GC], no.11138/10, ECtHR, 23.02.2016, para.93

[77] Catan and others v. Moldova and Russia [GC], nos.43370/04, 8252/05, 18454/06, ECtHR, 19.10.2012, para. 115

[78] Stefan Talmon, The Responsibility Of Outside Powers For Acts Of Secessionist Entities (Cambridge University Press 2009), p.511

[79] Marko Milanovic, The European Convention On Human Rights And General International Law, Jurisdiction and Responsibility, Trends in the Jurisprudence of the Strasbourg Court (Oxford University Press 2018), p.99

Chapter 3.

Legal considerations regarding the extraterritoriality of the European Convention on Human Rights (ECHR)

In the following chapter the ECtHR's take on extraterritoriality will be overviewed and how its view has evolved over time. This will be done by looking over the general case-law that developed the extraterritorial application of the Convention as well in later specific case-law concerning frozen conflict regions. Also, the State's submissions in regard to their alleged jurisdiction will be examined, in order to see how the jurisdiction is denied or accepted by the parties involved.

The ECtHR hears alleged violations of the rights enshrined in the ECHR and its protocols. The requirements to be met in order to trigger the jurisdiction of the Court are twofold: the alleged breach has to be conducted by a High Contracting Party and the victim of the violation is under its jurisdiction in the meaning of article 1 of the Convention. In order to hold a High Contracting Party responsible for actions (in regard to the negative obligations of the State) committed by a secessionist entity, the breaches must be attributable to the High Contracting Party and it must exercise extraterritorial jurisdiction over the individuals in the secessionist entities [80]. Jurisdiction is "territorial" when it applies within the State's national borders and on its territory, but it can be extraterritorial when it's applied outside its borders and on another State's territory[81]. The extraterritoriality of the ECHR implies the duties of States parties to ensure the rights of individuals or group of individuals located outside their territory. The active promoters of the restrictive "territorial" view of the ECHR's jurisdiction are States Parties, who claim, especially in response to human rights violations perpetrated extraterritorially, that the nature of jurisdiction is "essentially territorial" and that the notion of jurisdiction should not be developed, rejecting the 'living instrument' doctrine application to the jurisdiction clause of the Convention[82]. These arguments have been used by the UK in

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[80] Stefan Talmon, The Responsibility Of Outside Powers For Acts Of Secessionist Entities (Cambridge University Press 2009), p.508

[81] Samantha Besson, The European Convention On Human Rights And General International Law, Concurrent Responsibilities under the European Convention on Human Rights, The Concurrence of Human Rights Jurisdictions, Duties and Responsibilities, (Oxford University Press 2018), p.160

[82] Işil Karakaş, Hasan Bakirci, The European Convention On Human Rights And General International Law, Extraterritorial application of the European Convention on Human Rights, Evolution of the Court's Jurisprudence on the Notions of Extraterritorial Jurisdiction and State Responsibility, (Oxford University Press 2018), p.113

rejecting their jurisdiction for their activities in Iraq as well as Russia for its support of Transnistria and human rights violations perpetrated there, along with the exceptionality nature of the extraterritorial application of the Convention. It can be concluded that States use the essentially territorial nature of jurisdiction to shield themselves from obligations arising from the Convention outside their territories.

The concept of extraterritoriality presupposes that the territorial application of human rights is the rule, while there can be exceptions. Human rights are usually applicable to individuals located within the territorial boundaries of the state, however there are circumstances when they could and should apply outside those territorial limits. To establish the ECHR´s scope and whether it can or should extend over its territorial limits, the main resort is to the art.1 non-geographical clause. Which provides the obligation to respect human rights and reads as follows: *"The High Contracting parties shall secure everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention"*. The threshold criterion for the application of the Convention is therefore State jurisdiction. Intriguingly, the ECHR criterion of application is not territorial as such, but rather more functional. Jurisdiction has many dimensions (territorial, temporal, personal), but these are the consequences of the jurisdiction. Therefore, when territorial jurisdiction is mentioned it is not necessarily referring to the territory, as territory was used as shorthand for the function of jurisdiction. The same can be said about personal jurisdiction (nationality). Initially, States were exercising jurisdiction on their territory on their nationals, but the situation has changed over time and States now exercise jurisdiction outside their territorial limits as well as at home on foreign nationals. In brief, the scopes of the Convention have developed and extended with the evolution of jurisdiction itself[83].

It is paramount to bear in mind that the Convention could have been drafted in a way to limit its applicability to a given territory, to nationals or a period, just as some domestic constitutions provide for. Conversely, the drafters preferred to refer only to the normative relationship that binds States parties to their subjects. It is known from the preparatory work that the term 'residents' was avoided on purpose as to not shift from one restriction criterion

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[83] Samantha Besson, The Extraterritoriality Of The European Convention On Human Rights: Why Human Rights Depend On Jurisdiction And What Jurisdiction Amounts To <https://core.ac.uk/download/pdf/20660691.pdf>

to another (from the nationality to residence)[84]. It is therefore obvious that the drafters of the Convention did not envision jurisdiction to be strictly territorial and left room for its application regardless of territory, as long as jurisdiction over individuals is exercised. Many States might have refrained from ratifying the Convention if they were fully aware of its extraterritorial implications.

3.1. General case-law that developed the extraterritoriality nature of the ECHR

In order to understand how the ECHR is applied in frozen conflict context and on what grounds it does so, we must first see how it developed its extraterritorial case-law, with a particular view to cases in Transnistria and Nagorno-Karabakh that could potentially be replicated in Abkhazia as well.

Bankovic

In the controversial Bankovic case, the Court had to establish whether the NATO led air strikes over Radio Televizije Srbije fell within the jurisdiction of the Contracting States involved in the bombings[85]. The Court held that the killings of individuals by aerial bombs outside an area under the effective overall control of a state did not fall within the state's jurisdiction. In addition, the Court rejected the rationale proposed by the applicants "*that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention"*[86]. Put differently, the power to kill does not necessarily results in the act falling within the jurisdiction of the Contracting States.

Subsequently, the Court stated that: *"its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or*

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[84] Samantha Besson, The Extraterritoriality Of The European Convention On Human Rights: Why Human Rights Depend On Jurisdiction And What Jurisdiction Amounts To <https://core.ac.uk/download/pdf/20660691.pdf>

[85] Bankovic and Others v. Belgium and Others [GC], no. 52207/99, ECtHR, 12.12.2001, paras.7 , 54

[86] Ibid, para.75

acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government"[87].

It then concluded by saying that the Convention is applicable in a regional context, namely the *espace juridique* of the Contracting Parties, which clearly don't include FRY, even if the acts perpetrated were conducted by the Contracting States, because the ECHR was not designed in such a way[88]. The Court further concluded that the jurisdictional link was not satisfied between the victims of the violation and the respondent States on account of the extra-territorial act[89]. This take on the extraterritorial application was widely criticized and accused of human rights imperialism[90].

Al-Skeini

Some ten years later, the Court parted from its Bankovic reasoning and laid down the general principles of extraterritorial jurisdiction in Al-Skeini and others v. UK, which concerned the deaths of six Iraqis as a result of British troops involvement in Basra, a region in southern Iraq. The Court had to establish whether the UK had an obligation to investigate their deaths under art.2 and 3 of the ECHR[91].

It asserted that as an exception to the principle of territoriality, a Contracting Party's jurisdiction might extend to the actions of its state agents that produce effects outside the State's own territory[92], specifically, where there was *"state agent authority and control"*. These situations were classified into three categories:

1. where acts of diplomatic and consular agents present on foreign territory amounted to an exercise of jurisdiction when these agents exert authority and control over others[93];

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[87] Bankovic and Others v. Belgium and Others [GC], no. 52207/99, ECtHR, 12.12.2001, para.71

[88] Ibid, para.80

[89] Ibid, para.82

[90] Alasdair Henderson, 'War, Power And Control: The Problem Of Jurisdiction - UK Human Rights Blog' (*UK Human Rights Blog*, 2019) <https://ukhumanrightsblog.com/2011/07/14/war-power-and-control-the-problem-of-jurisdiction/>

[91] Al-Skeini and others v. The United Kingdom, no.55721/07, ECtHR, 07.07. 2011, para.8

[92] Ibid, para.133

[93] Ibid, para.134

2. when, through the *“consent, invitation or acquiescence”* of the government of a foreign territory, a contracting State *“exercises all or some of the public powers normally exercised by that government”*[94]; and,

3. *“in certain circumstances, the use of force by a State’s agents operating outside its territory may bring the individual thereby brought under the control of the State’s authorities into the State’s art.1 jurisdiction.”*[95]

In also held that art.1 applied *“as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory”,* regardless if such control is exercised directly, through the State’s own armed forces or through a local administration. In addition, if such control is established, it doesn’t necessarily require the State to have detailed control over the policies and actions of the local administration, but merely for the subordinate local administration to survive by virtue of the Contracting State’s military or other support in order to engage its jurisdiction[96].

The Court elaborated on the two basic models of State jurisdiction: *the personal model*, jurisdiction as a consequence of authority or control by State agents over an individual and *the spatial model*, which gives rise to jurisdiction as effective overall control by a State over an area or territory[97]. The former basis of jurisdiction is not applicable in regard to cases originating from Transnistria and Abkhazia, but could be applied, if the individuals subjected to harm under art.3 would find themselves in the hands of State agents of a Contracting State’s outside its territory. The latter, however, is applicable, due to Russia providing financial, economic and military support to Transnistria, therefore exercising effective overall control by virtue of sustaining the local administration. It could be argued that *inter alia* Ilascu and others v. Moldova and Russia, Catan and others v. Moldova and Russia, Mozer v. Moldova and Russia are examples of spatial jurisdiction applied by the ECtHR involving the control Russia has over the territory of Transnistria by virtue of its decisive influence.

Extraterritorial jurisdiction perceived spatially frames obligations as originating from the mere fact of territorial control. That is, if there is control over territory, the State is

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[94] Al-Skeini and others v. The United Kingdom, no.55721/07, ECtHR, 07.07. 2011, para.135

[95] Ibid, para.136

[96] Ibid, para.138

[97] Marko Milanovic, The European Convention On Human Rights And General International Law, Jurisdiction and Responsibility, Trends in the Jurisprudence of the Strasbourg Court (Oxford University Press 2018), p.98

responsible for what is going on in it, regardless, of whether or not the State has title over that territory, and/or if its presence there lawful or not.[98] Spatial jurisdiction is therefore triggered by "*effective control of an area"* and consequently it generates an "*obligation to secure the rights"* in the area in question[99].

Loizidou

For the first time in Loizidou v. Turkey, the spatial model was further developed along with an elaboration of the extraterritoriality application in the context of a secessionist entity. This has since become the leading case on extraterritorial application of the Convention. The case concerned a woman, Mrs Loizidou, living and owning property (land) in Northern Cyprus before the Turkish occupation of the region. She lodged an application claiming that the Turkish forces had prevented and continued to prevent her from returning to Northern Cyprus and peacefully enjoy her property, violating article 1 of Protocol No. 1 and article 8 of the Convention as a result[100]. The Court had to decide whether Turkey could be held responsible for the alleged breaches as it reached the ground-breaking decision holding that the concept of 'jurisdiction' as laid down in article 1 is not restricted to the national territory of the High Contracting Parties[101]. The Court then produced a conceptual confusion by invoking the pertinent principles of international law concerning State responsibility in stating that the responsibility of a High Contracting Party could also arise "when as a consequence of military action — whether lawful or unlawful - it exercises effective control of an area outside its national territory". In doing so, it confused the *"Article 1 jurisdiction as the pre-requisite for the Convention's application and attribution of conduct as a matter of State responsibility".*[102] The Court conflated jurisdiction with State responsibility in Loizidou and then followed the same line of thought in the Ilascu case[103]. As Milanovic puts it, attribution and jurisdiction may often use the same vocabulary, such as effective control, but

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[98] Ralph Wilde, 'Triggering State Obligations Extraterritoriality: The Spatial Test In Certain Human Rights Treaties' (2007) 40 Israel Law Review, p.508

[99] Ibid, p.508

[100] Loizidou v. Turkey [GC], no.15318/89, ECtHR, 18.12.1996, para.11-12

[101]Ibid, para.52

[102] Marko Milanovic, The European Convention On Human Rights And General International Law, Jurisdiction and Responsibility, Trends in the Jurisprudence of the Strasbourg Court (Oxford University Press 2018), p.103

[103] Ibid, p.103

the questions asked through the ILC's perspective are different. In the case of attribution, art.2 (a) of the ILC Draft Articles on State responsibility - asks the question whether the conduct is attributable to a given State, whereas jurisdiction is a matter of Art.2 (b) and is concerned with whether the conduct is in breach with an obligation of the State.[104] Jurisdiction is therefore a preliminary threshold issue before any questions of State responsibility, a pre-requisite in engaging State responsibility. Thus, *"the test for establishing the existence of "jurisdiction" under Art.1 of the Convention cannot be equated with the test for establishing a State's responsibility for an internationally wrongful act under general international law"*[105].

The Court held in Loizidou that as a result of such control (exercised directly, through its armed forces, or through a subordinate local administration) there arose an obligation to ensure the rights set forth in the Convention in Northern Cyprus[106]. The Court took notice of the fact-finding Commission's report which held that Mrs. Loizidou was continuously denied access to the northern part of Cyprus, as a consequence of the Turkish forces exerting an overall control in the area of the border. The Commission regarded the limited extent of this "control" in light of the applicant's complaint of not being able to move across the buffer zone. The Court, conversely, looked into the imputability of the continuous denial of access to her land and the subsequent loss of all control over the land to Turkey. The Court deemed unnecessary to establish whether Turkey exercises *"detailed control over the policies and actions of the authorities of the Turkish Republic of Northern Cyprus"*, stating that the numerous troops engaged in active duties in Northern Cyprus indicated that Turkey exercises effective overall control over that part of the island and that this control entailed Turkey's responsibility for the policies and actions of the Northern Cyprus. Subsequently, the victims of these policies or actions fall within the "jurisdiction" of Turkey in the sense of

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[104] Marko Milanovic, The European Convention On Human Rights And General International Law, Jurisdiction and Responsibility, Trends in the Jurisprudence of the Strasbourg Court (Oxford University Press 2018), p.104

[105] Işil Karakaş, Hasan Bakirci, The European Convention On Human Rights And General International Law, Extraterritorial application of the European Convention on Human Rights, Evolution of the Court's Jurisprudence on the Notions of Extraterritorial Jurisdiction and State Responsibility, (Oxford University Press 2018), pp.132-133

[106] Loizidou v. Turkey [GC], no.15318/89, ECtHR, 18.12.1996, para.52

Article 1 and its obligation to secure the applicant's rights and freedoms enshrined in the Convention thus extends to the Northern Cyprus[107].

This case was groundbreaking regarding the application of the Convention in territories under the effective control over another State and developed the concept of 'effective overall control' without the requirement to have detailed control over the policies and actions of the authorities of Northern Cyprus. This made engaging Turkey's jurisdiction easier to achieve, switching the focus from control over actions and policies to the number of troops stationed in Northern Cyprus, that was considered significant enough to trigger Turkey's obligations under the ECHR and apply it extraterritorially.

3.2. Specific ECtHR case-law concerning frozen conflict regions of Transnistria and Abkhazia

After having analyzed the general case-law that developed the extraterritorial nature of the ECHR, it is necessary to look at particular cases concerning frozen conflict regions in order to note the States that were held responsible under the Convention the obligations entailed for each State involved and the basis on which jurisdiction was established.

Ilascu and others

In Ilascu and others v. Moldova and Russia, the Court examined the matter of jurisdiction of a Member State which had lost effective control over a separatist area that is part of its territory (Moldova) and the extraterritorial jurisdiction exercised by another Member State over the same separatist area (Russia)[108]. The case was lodged by four applicants against Republic of Moldova and the Russian Federation, claiming inter alia that they had been convicted by a Transnistrian court contrary to art.6 and that the conditions of the detention contravened art.3 and 8. They alleged that Russia shared responsibility for these breaches, due to the troops and equipment stationed on Transnistrian soil and the support provided to the separatist regime[109].

In Ilascu and others v. Moldova and Russia the Court stated that it has accepted that *"in exceptional circumstances the acts of Contracting States performed outside their*

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[107] Loizidou v. Turkey [GC], no.15318/89, ECtHR, 18.12.1996, para.56

[108] Işil Karakaş, Hasan Bakirci, The European Convention On Human Rights And General International Law, Extraterritorial application of the European Convention on Human Rights, Evolution of the Court's Jurisprudence on the Notions of Extraterritorial Jurisdiction and State Responsibility, (Oxford University Press 2018), p.122

[109] Ilascu and others v. Moldova and Russia [GC], no.48787/99, ECtHR, 08.07.04, para.3

territory, or which produce effects there, may amount to exercise by them of their jurisdiction within the meaning of Article 1 of the Convention"[110]. It then used the same rationale as in Loizidou, and held that in accordance with the pertinent principles of international law, a State's responsibility may be triggered where, as a result of military action (lawful or unlawful), it exercises overall effective control over an area situated outside its national territory. Such control (whether it be exercised directly, through its armed forces, or through a subordinate local administration) triggers the obligation to secure, in that area, the rights and freedoms provided in the Convention[111]. Thereby, the Court conflated the concept of jurisdiction with the concept of State responsibility for an internationally wrongful act and made reference to a control test, which until then was applied in attributing State responsibility and not extraterritorial jurisdiction.

The Court held that Russian's jurisdiction was engaged in regard to the unlawful acts committed by the MRT, due to the military and political support it provided enabling the separatist regime. In doing so, the authorities of the Russian Federation contributed (militarily and politically) to the creation of a separatist regime. The Court also stated that even after the ceasefire agreement (from 21 July 1992) the Russian Federation prolonged its military, political and economic support, which strengthened the regime and allowed it to gain a degree of autonomy with respect to Moldova[112].

This case was the first where the applicants, detained and ill-treated by the MRT authorities were found to be under the jurisdiction of the Russian Federation within the meaning of art.1 of the Convention. The Court focused on the fact that it were Russian agents that arrested, detained and transferred the applicants to the MRT police and regime, and who ultimately ill-treated them. Therefore, Russia was not deemed responsible for ill-treating the applicants, but for not taking any actions to prevent the violations likely to occur, despite its decisive influence over the region[113]. This case opened the door for other cases that were lodged and won by applicants subsequently, where both States' jurisdiction was engaged

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[110] Ilascu and others v. Moldova and Russia [GC], no.48787/99, ECtHR, para.314

[111] Ibid, para.314

[112] Ibid, para.382

[113] Stefan Talmon, The Responsibility Of Outside Powers For Acts Of Secessionist Entities (Cambridge University Press 2009), p.509

following more or less the principles and reasoning developed in this case[114]. This was an important step, not only in the engaging of an outside State's jurisdiction for the activities of a local administration, but to the extraterritoriality of the ECHR in general. As it expanded beyond control or direction to focusing on the support provided to the local administration and to the fact that without this support the region, the parent State (Moldova) could have succeeded in regaining its effective control over it and ensure the rights set forth in the Convention.

Parties' submission and the Court's assessment of jurisdiction of Moldova and Russia over Transnistria

In this important case, the Moldovan Government denied it had jurisdiction, holding that it had no de facto control over the region and that the application was incompatible *ratione personae*. It stated that MRT had its own institutions, armed forces, a police force and customs officers, and that that has been the very reason why when ratifying the Convention a declaration had been made in order to exclude Moldova's responsibility for violations perpetrated on Transnistrian soil. Additionally, Moldova argued that it had discharged its positive obligations to take measures as to regain control over the territory in question, in general, and to ensure the rights of the applicants in particular[115]. However, in the subsequent case of Catan and others v. Moldova and Russia, the Moldovan Government did not challenge its jurisdiction and instead accepted the Court's line of reasoning set up in Ilascu and others,. There, the Government submitted that, in accordance with Ilascu, the applicants fell within its jurisdiction by claiming the territory of Transnistria and by taking measures as to protect their rights. Furthermore, although it still lacked jurisdiction in the sense of exercising control over Transnistria, the Moldovan Government continued to fulfill its positive obligations developed in Ilascu[116]. Following these judgements the Moldovan Government maintained it had jurisdiction over Transnistria in regard to its positive obligations and reasserted this point in Apcov v. Russia and Moldova, Soyma v. Moldova, Russia and Ukraine, Ivantoc v. Moldova and Russia and Mozer v. Moldova and Russia.

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[114] See inter alia: Apcov v. Russia and Moldova, no.13463/07, ECtHR, 30.05.17, Soyma v. Moldova, Russia and Ukraine, no.1203/05, ECtHR, 30.05.17, Ivantoc v. Moldova and Russia, no.23687/05, ECtHR, 15.11.11, Mozer v. Moldova and Russia, no.11338/10, ECtHR, 23.02.2016

[115] Ilascu and others v. Moldova and Russia [GC], no.48787/99, ECtHR, 08.07.04, para.300-304

[116] Catan and others v. Moldova and Russia [GC], nos.43370/04, 8252/05, 18454/06, ECtHR, 19.10.2012, para. 89

The Russian Government, however, stated in Ilascu and others v. Moldova and Russia that since the Transnistrian territory is an integral part of the Republic of Moldova, only the Moldovan Government could be held responsible for the violations occurring in Transnistria[117]. Thus, Russia rejected the implication that it had any jurisdiction in that territory. And later in the Mozer case it contested the *"effective control"* as applied by the Court when establishing whether a State exercised extraterritorial jurisdiction, arguing that the Court was conflicting with its meaning in public international law, referring to ICJ and ICTY use of effective/overall control[118]. Moreover, Russia claimed it had never engaged in the occupation of any part of Moldovan territory nor that it ever exercised jurisdiction since the territory was controlled by a *de facto* government which was not an organ or instrument of Russia and which did not depend on Russia in any way. Additionally, Russia claimed that its military presence on the territory in question was limited solely to peacekeeping purposes and, as such, that there were no grounds for concluding that it exercised control through the strength of its military presence[119].

When it comes to extraterritorial jurisdiction, loss of control simply means loss of jurisdiction and loss of the extraterritorial obligations which arise. By contrast, territorial jurisdiction is not lost via the loss of effective control, although the human rights obligations may suffer as a result. According to the ECtHR, these obligations instead are *"narrowed"* to the positive duties to re-establish effective control over the territory in order to bear again the other human rights obligations again and the positive obligation to protect other individual human rights[120].

Ultimately, the ECtHR found Moldova to have jurisdiction only in regard to its positive obligations. A natural outcome of a State's loss of control over territory is loss of authority and control over public institutions, such as the judiciary, local administrations, customs, prisons, medical facilities and State-run schools. As a result, the question remains of how a State can fulfill its positive obligations regarding the residents of that territory, since

[117] Ilascu and others v. Moldova and Russia [GC], no.48787/99, ECtHR, 08.07.04, para.305

[118] Mozer v. Moldova and Russia [GC], no.11138/10, ECtHR, 23.02.2016, para.92-93

[119] Ibid, para.94

[120] Samantha Besson, The European Convention On Human Rights And General International Law, Concurrent Responsibilities under the European Convention on Human Rights, The Concurrence of Human Rights Jurisdictions, Duties and Responsibilities, (Oxford University Press 2018), p.161

the State does not have any control over these establishments. ECtHR's precedent underlined in multiple instances that the said State should take all legal and diplomatic means to continue to ensure the fulfillment of rights and freedoms in the Convention. Such efforts may refer to measures necessary to re-instate the State's control over its territory, including the protection and securing the rights and freedoms of individuals. The Court therefore established in Ilașcu and others the obligation on part of Moldova to abstain from supporting the MRT separatist regime and to take all political, judicial and other available measures to re-establish control over Transnistria[121]. Even if regaining control over the territory is challenging, this will not be seen as an excuse in the scenario where a minimum effort could have secured the protection of rights and freedoms of persons in that territory[122].

Therefore, in claiming that States can be held responsible extraterritorially, does in no way implies that the State on the *"territory"* of which the torture occurred is absolved of responsibility. So, even though Moldova has lost its control over Transnistria, it still has positive obligations to try and solve the conflict, by taking political, judicial and diplomatic measures in order to regain control over the territory and to try to ensure the rights and fundamental freedoms of individuals in the region.

Pocasovschi and Mihaila v. Moldova and Russia - the exception to the "rule"

Remarkably, the Court does not apply the spatial model and the rationale developed in Ilascu and others automatically to all cases originating from Transnistria. This was evidenced in its ruling Pocasovschi and Mihaila v. Moldova and Russia. There the Court held Moldova responsible for the disconnection of utilities from a penitentiary called 'Prison no.8' as located in Tighina (Transnistria). The Court considered it conceivable for Moldovan authorities to solve the issue and provide a temporary solution or to transfer the inmates to another detention facility, since the prison in question, despite its location, is under the exclusive control of the Moldovan authorities[123]. The Court stated that even if the Moldovan government had no control over the local authorities in Tighina, whom disconnected the

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[121] Ilascu and others v. Moldova and Russia [GC], no.48787/99, ECtHR, 08.07.04, para.340

[122] Tatyana Eatwell, 'State Responsibility For Human Rights Violations Committed In The State'S Territory By Armed Non-State Actors' [2018] Geneva Academy of International Humanitarian Law and Human Rights, pp. 19-20

[123] The city's local administration is subordinated to Transnistrian authorities, however the prison in question is under the direct supervision of the Ministry of Justice of Republic of Moldova, translation by the author: Structure of the National Authority of the Penitentiary 'Structura ANP | ANP - Administraţia Naţională A Penitenciarelor' (*Anp.gov.md*, 2019) <http://anp.gov.md/structura-anp>

utilities from prison, the Moldovan authorities were considered to exercise full control over the prison itself and the people detained there for the relevant time and could therefore take the appropriate measures in addressing the violation. The Court held Moldova responsible, for to its lack of immediate action to ensure minimum acceptable conditions of detention, by either improving the conditions or transfer from prison no.8 and by not doing so the Moldovan authorities “knowingly exposed” the applicants to dire conditions. Moreover, the ECtHR stressed that the Moldovan authorities had the obligation to prevent or redress the alleged violation of the applicants’ rights in that prison[124].

Concluding remarks on Transnistria

Accordingly, the Court has ruled in several cases that Russia’s influence over Transnistria is decisive and the separatist regime survived by virtue of Russia’s support. However, the effective control over the region argument is not the rule in engaging Russia’s responsibility under the Convention for every human rights violation arising in Transnistria, but it is rather an exercise test that the Court applies to determine whether Russia’s influence over the region resulted in the violation and whether the Republic of Moldova was in a position to cease the violation or not. So, Moldova’s jurisdiction is not formal or non-existent. The Pocasovschi case proved that the jurisdiction determination in Transnistrian cases could be conferred to either or both States, to Moldova and Russia, to solely Russia or solely Moldova, based on the individual circumstances of each case.

Jurisdiction of Georgia and Russia over Abkhazia

When it comes to Abkhazia, there has been substantially less attention given to the ECHR’s extraterritorial application. This is due to there being, only one case having been brought before the ECtHR that could potentially engage both countries’ jurisdiction (Georgia and Russia). Mamasakhlisi v. Georgia and Russia concerns a Georgian student (the first applicant) detained in the Abkhazian Dranda prison for charges of terrorism. He was imprisoned after a hand-made grenade exploded in his hands. The applicant alleges art.3 (prohibition of torture), art.5 (right to liberty and security), art.6 (right to a fair trial) and art.8 (right to respect for private and family life) violations[125].

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[124] Pocasovschi and Mihaila v.Moldova and Russia, no.1089/09, ECtHR, 29.05.2018, para.46

[125] United Refugees, 'Refworld | Third Party Intervention By The Commissioner For Human Rights Under Article 36 Para 2 Of The European Convention On Human Rights: Application No. 29999/04 Mamasakhlisi V. Georgia And Russia' (*Refworld*, 2019) <https://www.refworld.org/docid/4ecccf702.html>

The case is still pending before the Court at the time of the writing. Russian Ministry of Justice, however, has made public a press-release informing that the Deputy Minister of Justice has sent additional observations to the Court, stating that the applicants did not comply with the six month period admissibility requirement when filing the complaint, and that Russia rejects "*any insinuations related to attempts made as to impose responsibility on the Russian Federation (extraterritorial jurisdiction) for the actions of the official authorities of the Republic of Abkhazia in the framework of the so-called doctrine of "effective control"*[126].

This press-release was issued on 31 May 2017 on the Ministry of Justice website and circulated widely throughout Russian media, which is an indication that the Russian Government is very reluctant to accept jurisdiction over the violations perpetrated by Abkhazian authorities and is strongly trying to avoid replicating the rationale developed in regard to Transnistrian cases and is thus taking actions to stop such an expansion of their jurisdiction over Abkhazia as well.

From this dynamic we can observe that the Russian government is looking for counter-arguments to reject their jurisdiction and preclude their responsibility. This case will unveil whether the Court will apply the same line of reasoning as the one used in Transnistria and recognize jurisdiction of Russia and Georgia over violations in Abkhazia. If it does, the extraterritorial application of the ECHR could develop from an exceptional concept to a steadier exercise, applied on a more systemic basis in frozen conflict regions. It is likely that Georgia will be found to have jurisdiction, at least in regard to its positive obligations, as Abkhazia is officially still an integral part of Georgia. Furthermore, since territorial jurisdiction is not fully lost after losing effective control over the territory, it is probable that Georgia will be seen to have jurisdiction over Abkhazia. When it comes to the Russian Federation's jurisdiction, it comes by no surprise that the case is taking so long, as it contains politically sensitive ramifications. Russia already rejected its jurisdiction via the additional comments submitted in the proceedings of this case and will probably continue to do so for the entire course of the case. However if the Court finds Russia to have jurisdiction over Abkhazia, it will be the first time the Court finds a protector State to have jurisdiction over a

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[126] Excerpt translated by the author from the Press release of the Ministry of Justice of the Russian Federation (2017) <https://minjust.ru/ru/novosti/o-zhalobah-mamasahlisi-nanava-mehuzla-sanaya-dvali-i-gogiya-protiv-gruzii-i-rossii>

territory which it supports as sovereign by recognizing its independence. Pro memoria, the then President of the Russian Federation, Dmitry Medvedev, recognized the independence and sovereignty of Abkhazia and South Ossetia on 26 August 2008.

In addition to this individual application, the outcome of which is much awaited, there are other cases concerning Georgia and Russia before the ECtHR. These were lodged by Georgia against the Russian Federation under art.33 of the Convention as inter-State applications. Since 2007, there have been lodged four inter-State applications of Georgia against Russia. The first inter-State application concerned the arrest, detention and expulsion from the Russian Federation of Georgians in 2006. The case resulted in the Court finding a violation of art.4 Protocol no.4 (collective expulsion of aliens), art.3 (prohibition of torture), art.5 (right to liberty and security) and art.13 (right to an effective remedy)[127]. The second application concerned the 2008 armed conflict between Georgia and Russia and its aftermath, which is still pending before the Court[128]. The third application was regarding the detention of four Georgian minors by the de facto government of South Ossetia, which was struck out in 2010[129]. The final and most relevant for the purposes of this thesis is the application lodged on 22 August 2018. In this application Georgia claims that Russia is harassing, arresting, detaining, assaulting, torturing, murdering and intimidating ethnic Georgians trying to cross or living close to the administrative border that separates the Georgian controlled territory from Abkhazia and South Ossetia. Additionally, the claim contained one complain about failing to investigate in this regard and investigate the unlawful arrest and murders of Davit Basharuli, Giga Otkhozoria and Archil Tatunashvili[130]. Milanovic held that a key-question in potentially applying the spatial model in this case will be whether Russia controls the separatist entity of Abkhazia[131].

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[127] Georgia v. Russia (I), no.13255/07, ECtHR, 03.07.2014, para.1-3

[128] 'Cases Pending Before The Grand Chamber-Pending Cases' (*Echr.coe.int*, 2019) <https://www.echr.coe.int/Pages/home.aspx?p=hearings/gcpending&c>

[129] 'Inter-State Applications' (*Echr.coe.int*, 2019) <https://www.echr.coe.int/Documents/InterStates_applications_ENG.pdf>

[130]Registrar of the European Court of Human Rights, 'New Inter-State Application Brought By Georgia Against Russia' (2018) <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-6176209-8005403&filename=New%20inter-state%20application%20brought%20by%20Georgia%20against%20Russia.pdf.>

[131] Marko Milanovic, The European Convention On Human Rights And General International Law, Jurisdiction and Responsibility, Trends in the Jurisprudence of the Strasbourg Court (Oxford University Press 2018), p.99

This last case is of major importance, as the Court has the possibility to address systemic issues on a different scale beyond individual cases, and might for the first time identify the responsible parties for these systemic violations. Such a conclusion could, therefore have a tremendous impact in regard to legislation changes and other measures meant to redress the violations. Moreover, this case can pave the road for future individual cases originating from Abkhazia.

Another outcome may be absolving Georgia of jurisdiction over Abkhazia whatsoever and only find Russia to exercise jurisdiction over it. The last prognosis is however unlikely, as the Court usually holds that loss of control does not result in loss of jurisdiction. The development of this case may build upon Cyprus v. Turkey[132] line of reasoning and recognize Georgia as the official legitimate government of Abkhazia, while the matters complained of fall within Russia's jurisdiction under art.1 of the Convention on account on its effective overall control of Abkhazia. Of course this assertion is merely speculative as one can never be certain if the Court will follow its previous case-law zealously or take another approach contrary to existing expectations.

Concluding remarks on Abkhazia

Both pending cases concerning Abkhazia (Mamasakhlisi v. Georgia and Russia and Georgia v. Russia IV) will be crucial and will determine the course of direction for cases coming from the region and whichever comes first will influence the other. The Court may as well rule first in the inter-State application and then build upon in the individual application, as it proceeded to do so in Cyprus v. Turkey, which was in turn followed in Loizidou v. Turkey.

Moreover, the Court has already followed the principles established in Ilascu and others in regard to another frozen conflict that emerged at the demise of the Soviet Union, when it ruled in Chiragov and others v. Armenia. This case involved the flight of essentially the entire Azerbaijani population residing in Nagorno-Karabakh and the surrounding territories, and their inability to return to these territories[133]. The ECtHR reasserted that in assessing the effective control of a State over an outside entity military involvement would be a primary factor, but other factors such as economic and political support may also be

[132] Cyprus v. Turkey, no.25781/94, ECtHR, 10.05.2001, para.61 and 80

[133] Chiragov and others v. Armenia [GC], no.13216/05, ECtHR, 16.06.2015, para.220

relevant[134]. Based on this rationale, when it analyzed Armenia's involvement in Nagorno-Karabakh Republic (NKR), the Court established that Armenia has had a decisive influence over the NKR and that the local administration survives by virtue of the military, political, financial and other support provided by Armenia, which exercises effective control and bears responsibility under the ECHR[135]. Taking into account that the Court remained consistent with the approach taken in Ilascu and others and reapplied it to a region very similar in nature to Transnistria, reflects that it may remain within this line of reasoning for other cases originating from other frozen conflict regions, including Abkhazia. Therefore, the chances that the Court will rule that Russia and Georgia have jurisdiction under art.1 of the Convention over Abkhazia are quite high or at least likely. This case also has the potential of influencing the Court's view and future rulings in regard to Abkhazian cases.

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[134] Chiragov and others v. Armenia [GC], no.13216/05, ECtHR, 16.06.2015, para.168-169

[135] Ibid, para.186

Chapter 4.

Extraterritorial jurisdiction under the United Nations Convention against Torture (UNCAT)

4.1. Jurisdiction under the UNCAT

After having explored the implications of extraterritorial jurisdiction regarding the ECHR, an analysis of the extraterritoriality under the UNCAT will be presented in contrast. This is equally important, as it has been observed in many instances that international mechanisms, even though under no obligation to do so, take into account the findings and assertions of other mechanisms in applying international human rights law instruments. Therefore indirectly influencing each other's course of action in regard to challenging topics.

The connection between jurisdiction and territory poses a complex question in the UNCAT context, as that link is required in order to trigger its application. Under UNCAT States have the obligation to take effective legislative, administrative, judicial or other measures to prevent acts of torture *in any territory under its jurisdiction*[136]. Even if this formulation underlines the jurisdiction over a territory and not a person, it is implied that State control over the person is the requirement that must be met in making the Convention binding upon a State[137]. Even though the formulation seems to indicate another requirement, that jurisdiction over the victim be combined with jurisdiction over a territory, that is not a second requirement. Put differently, UNCAT is binding upon a State if it exercises jurisdiction over a territory under its jurisdiction[138]. The mere formulation of the jurisdiction clause is designed in such a way as to not limit the application of the UNCAT to the State's territory, as the drafters intended to extend that to *any territory* under its jurisdiction. Therefore, the focus is not territorial, but jurisdictional. That is if the State exercises jurisdiction over a person in a territory under its control, then the UNCAT is applicable to that State, regardless if the State is the official sovereign of that territory or not. This widens the possibility of application of the UNCAT and makes it possible for it to be applied

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[136] UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, art.2

[137] Walter Kalin, 'Extraterritorial Applicability To The Convention Against Torture Remarks' (2008) 11 CUNY Law Review, pag.300

[138] Ibid, pag.300

extraterritorially. This is in line with the jus cogens nature of the prohibition of torture, or else linking the application to territory would be absurd.

The Committee elaborated on the meaning of *"any territory under its jurisdiction"* in General Comment No.2 on the implementation of article 2, clarifying that *"linked as it is with the principle of non-derogability, it includes any territory or facilities and must be applied to protect any person, citizen or non-citizen without discrimination subject to the de jure or de facto control of a State party. The Committee emphasizes that the State's obligation to prevent torture also applies to all persons who act, de jure or de facto, in the name of, in conjunction with, or at the behest of the State party"*[139].

It then held that "any territory" includes all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law[140].

This authority or effective control has to nevertheless be direct and immediate. As the ECtHR ruled in Bankovic, regarding the air attack on a tv studio in Belgrade, such jurisdiction does not exist in the case of military air strikes on a hostile country where the perpetrating State does not exercise control over the population and public authorities. Determining if an act committed by a State affecting an individual is falling under the State's jurisdiction is challenging. Yet, these difficulties do not occur in the torture context, as torture can only be committed if the victim is under the direct and effective control of the perpetrator. Article 1 of the UNCAT requires that torture be inflicted on a person *"by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."* The element of control over the victim and the attribution of the act to the State qualify torture as proscribed by the Convention an exercise of jurisdiction by default. Bearing in mind the seriousness of this violation and the high degree of control maintained over the victim, one could even speculate that torture is the ultimate (even though acutely illegal and immoral), exercise of State authority[141].

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[139] Committee against Torture, 'General Comment No.2, Implementation Of Article 2, CAT/C/GC/2' (2008), para.7

[140] Ibid, para.16

[141] Walter Kalin, 'Extraterritorial Applicability To The Convention Against Torture Remarks' (2008) 11 CUNY Law Review, pp.296-297

This line of thought has also been taken by the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SRT). He approached extraterritorial obligations in light of the *"transnational trend"* employed by States and to *"ensure that there is no vacuum of human rights protection that is due to inappropriate and artificial limits on territorial jurisdiction"*. This he held might encourage States to *"avoid absolute legal obligations and give rise to serious breaches of international law"*.[142] The SRT also underlined that under present international legal provisions, the peremptory prohibition of torture and other ill-treatment is applicable every time a State *"brings a person within its jurisdiction by exercising power, control or authority over territory, persons or transactions outside its borders,"* irrespective of the victim's citizenship, the territorial location of the action and the nature of the breach, be it an action or inaction. Furthermore, he held that the State's responsibility to protect human rights extraterritorially is presumed, partly for the reason that international law does not emphasize territorial jurisdiction as a basis of jurisdiction any longer. This presumption comes from the evolution of human rights regimes and understanding the obligations as *erga omnes partes*. As examples of actions committed by States extraterritorially the SRT gave these instances: cross-border military operations, the occupation of foreign territories, anti-migration and anti-piracy operations, peacekeeping, covert operations in foreign territories, detaining persons abroad, extraditions and of special interest for the purposes of this thesis: *the exercise of de facto control or influence over non-State actors operating in foreign territories*[143]. The situation of Transnistria and Abkhazia fall within the last example, which describes actions committed extraterritorially by exercising de facto control or influence over a non-State actor, that being the local administrations of the two regions in question. The SRT based his views on the decisions of the ICJ, ECtHR, HRC, Inter-American Court of Human Rights and concluded that allowing States to commit human rights violations on the territory of another State, that it would not commit on its territory would lead to unconscionable and absurd results at odds with fundamental legal obligations[144].

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[142] UN Secretary-General & Juan E. Méndez, 'Interim Report Of The Special Rapporteur On Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment, Juan E. Méndez, Submitted In Accordance With General Assembly Resolution 68/156.' (A/70/303 2015), para.13

[143] Ibid, para.14, 15, emphasis added

[144] Ibid, para.14

Moreover, the SRT asserted that in contrast to traditional notions of jurisdiction, the clauses concerning jurisdiction in human rights treaties are finest understood as referring to the degree of a State's factual authority or control over territory or people[145]. This again underlines the departure from the classical reading of jurisdiction to the one where factual realities matter in ascertaining jurisdiction. He also stressed that the prohibition of torture, which is a *jus cogens* non-derogable norm cannot be limited territorially and that the jurisdictional provisions enshrined in the Convention cannot be interpreted as to limit States' obligations to uphold all persons' rights to be free from torture throughout the world[146].

In conclusions and recommendations, the SRT issued the recommendation to ensure the fundamental right of victims to have a remedy that would be accessible irrespective of the locus of the violation. Then he encouraged States to guarantee civil remedies and rehabilitation for victims of alien acts of torture or other ill-treatment and to ensure that victims of torture can find redress within their legal system irrespective of where the act occurred or which State or entity is responsible for the act[147].

Although the CAT operates often with the notion of "effective control" in its concluding observations or recommendations[148], it has never clarified what it means or what is its take on the concept and how it is determined under the UNCAT. Thus, despite the fact that the concept is being widely used, the requirements for the assertion of the "effective control" threshold being met by a State over a territory outside its territorial boundaries remains unclear.

4.2. Republic of Moldova's submissions in regard to its compliance under UNCAT

In light of the underlined prescriptions of the UNCAT and SRT, this analysis will continue to scrutinize how these apply in practice to the cases of Transnistria and Abkhazia.

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[145] UN Secretary-General & Juan E. Méndez, 'Interim Report Of The Special Rapporteur On Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment, Juan E. Méndez, Submitted In Accordance With General Assembly Resolution 68/156.' (A/70/303 2015), para.17

[146] Ibid, para.27

[147] Ibid, para.72

[148] For some examples see: Concluding observations: Republic of Moldova (CAT/C/MDA/CO/3 (CAT, 2017), Concluding observations: Austria (CAT/C/AUS/CO/4-5 (CAT, 2014), Concluding observations: Ukraine (CAT/C/CO/6 (CAT, 2014), Concluding observations: Sweden (CAT/C/SWE/CO/5 (CAT, 2008)

The Republic of Moldova ratified the UNCAT on 31 May 1995 and entered into force on 28 December of 1995 and the Optional Protocol of the UNCAT on 24 July 2006. Since its ratification Moldova has been subjected to review three times[149].

The initial report of Republic of Moldova was submitted with a five year delay and did not contain much information in regard to the situation in Transnistria. It merely mentioned several cases of torture and inhuman treatment identified by the Helsinki Committee for Human Rights. One such case involved a combatant that took part in the Transnistrian War and resided in the territory controlled by the Republic of Moldova, when he was arrested and extradited to Transnistria despite knowledge of serious violations of human rights and the use of capital punishment.[150]

Subsequently, in its second periodic report, the Moldovan Government reported that it did not have the opportunity to ensure the application of international or its national law on the territory of Transnistria and underlined the impossibility of the central government to enjoy full jurisdiction over the region. It also claimed that Moldova's Government is trying to settle the conflict through diplomatic measures. The Government then paid attention to the fact that the lack of full jurisdiction has been addressed by the ECtHR in Ilascu and others v. Republic of Moldova and Russia.[151] It also mentioned that the Transnistrian authorities were trying through various means to prevent the central government authorities from managing the penitentiary institutions, under the jurisdiction of the Republic of Moldova that are situated in Bender (on territory of Transnistria, detention facilities no.12 and 8). The government also stressed that the problem is: *"much more complicated at the institutional level, as the penitentiary administration of Transnistria is reluctant to accept and refuses any cooperation with the penitentiary system of the Republic of Moldova"*[152].

In the third and last periodic report in answering the list of issues prepared by the Committee prior to the submission of the periodic report, the Republic of Moldova was asked to indicate amongst other things, the measures that it is taking or has taken to ensure full respect for the UNCAT in Transnistria. Interestingly enough, the request has been left

[149] 'Treaty Bodies Treaties' (*Tbinternet.ohchr.org*, 2019) <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=142&Lang=EN>

[150] Committee against Torture, 'Initial Report Of States Parties Due In 1996', (CAT/C/32/Add.4 2002), para.71

[151] Committee against Torture, 'Second Periodic Report Of States Parties Due In 2004' (2007), para.109

[152] Ibid, para.109

answered, as it was simply mentioned in the report without providing any information or explanation for its negligence[153]. It should be noted, that it answered other inquiries on the list of issues duly, while when it came to the measures taken in regard to ensuring compliance with UNCAT in Transnistria, no information was offered.

4.3. The CAT's conclusions and recommendations regarding Republic of Moldova (including Transnistria)

In the process of considering Republic of Moldova's initial report, the Committee did not comment, nor did it give any recommendations with respect to Transnistria.

Subsequently, in the consideration of the second periodic review, the Committee took note of the State party's statement that it cannot be held responsible for human rights violations perpetrated in Transnistria, as it does not exercise real jurisdiction and in response to this argument reasserted that the State party has a continuous obligation to secure the prohibition of torture and other forms of ill-treatment in all parts of its territory[154]. Therefore, the fact that Republic of Moldova does not exercise *"real"* control was not perceived as legitimate excuse in the view of the Committee, which underlined that Moldova has an ongoing obligation to ensure the prohibition of torture throughout its territory and that that obligation does not cease, nor is it suspended with loss of control.

Finally, in its Concluding Observations on the third periodic report of the Republic of Moldova, amongst the principal subjects of concern and pending follow-up issues from the previous reporting cycle, the matter of the inability of the State party to comply with the Convention was mentioned. The Committee took note and expressed its concern regarding*"the State party's lack of ability to exercise effective control in the territory of Transnistria, which impedes the application of the Convention in this region"*[155].

There is a notable evolution in the Committee's approach in handling the application of the Convention in Transnistria. It has shifted from not mentioning Transnistria at all to reasserting that the State party is still expected to fulfill its obligations under the UNCAT

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[153] Committee against Torture, 'Consideration Of Reports Submitted By States Parties Under Article 19 Of The Convention Pursuant To The Optional Reporting Procedure' (2013), following para.115

[154] Committee against Torture, 'Concluding Observations Of The Committee Against Torture' (CAT/C/MDA/CO/2 2010), para.4, emphasis added

[155] Committee against Torture, 'Concluding Observations On The Third Periodic Report Of Republic Of Moldova' (CAT/C/MDA/3 2010), para.6!

throughout its territory, including Transnistria. Then it requested the Republic of Moldova to demonstrate by indicating the measures taken that it was still taking all the actions possible to ensure compliance with the Convention. The Republic of Moldova failed to satisfy this request. Finally, the Committee paid attention to the lack of exercise of effective control of the State party as a matter of concern. The Committee's observations indicate that the Committee is not inclined to relieve Moldova of its obligations under the UNCAT regarding Transnistria and the lack of effective control the territory, as it remained unconvinced that Moldova was doing everything in its power in order to ensure the prohibition of torture in Transnistria. Since the SRT recommended that States parties should secure the fundamental rights of victims regardless of the locus of the violation or the entity responsible for the act, it would mean that all the States involved should take measures to ensure the fundamental right to be free from torture and offer redress to the victims caught up in these regions. It would then mean that both Moldova and Russia have to report on the ongoing situation in Transnistria and take the necessary measures to protect detainees' rights. Even though the Committee acknowledged the lack of effective control of Moldova over Transnistria, which precludes it to comply with Convention rights'. The Committee did not address this matter any further with recommendations of any kind, nor did it discuss the possibility of triggering Russia's positive obligations in the present context.

The next periodic report will be submitted in December 2021 and it will give answers in what lies ahead for Transnistria before the CAT. The Committee could take ECtHR's approach, which was welcomed by the Moldovan authorities and recognize Moldova to only have positive obligations when it comes to Transnistria and recognize Russia as a responsible party for this region. Yet, this is unlikely to be the case, since the ECHR is safeguarded by a judicial mechanism - the ECtHR, whose judgements are enforceable, while the UNCAT is safeguarded by a quasi-judicial body - the Committee against Torture, that is reliant on cooperation and reporting of States Parties. These institutional differences could render the Committee reluctant to follow such a progressive approach and render it more careful as a result, so as to not dissuade State dialogue.

Also, taken into account that Russia is not willing to recognize its jurisdiction over Transnistria and denies any effective control over it under the ECHR, dressing its

involvement as a peace keeping operation, the chances of Russia reporting for Transnistria to the CAT are even slimmer.

4.4. Georgia's submissions regarding its compliance under UNCAT

Georgia acceded to the UNCAT on 22 September 1994 (entered into force on 22 November 1994) and OPCAT on 09 August 2005 and since then has been subjected to review three times, in the 1996, 2001 and 2006 sessions.

In the initial report of States parties due in 1996, the Georgian government submitted that torture was criminalized under the Criminal Code of Georgia, while the Constitution guarantees generally recognized human rights and freedoms. The State party then enumerated the authorities responsible for the enforcement of the Convention and looked over inter alia at the rights and guarantees for persons deprived of liberty, but made no reference to Abkhazia or South Ossetia, as regions outside the control of the central government of Georgia[156].

However, in the second periodic report, the government mentioned the situation in Abkhazia by stating that the political authorities and law enforcement institutions of Georgia are conveying serious concern about the conditions on the territory of Abkhazia, a self-declared republic, de facto existing beyond the jurisdiction of Georgia.[157] The State party submitted that the data gathered in regard to Abkhazia demonstrated a continuous practice of mass and flagrant violations of human rights, committed under the orders of the separatist authorities. Georgia's report also made reference to Amnesty International data that indicated that capital punishment was still in force in Abkhazia and that several people were expecting to be executed, while ethnic Georgians were amongst the ones the most arrested and abused[158]. The legislative situation, presented in the initial report still remain in force; however, its extension over the whole territory is complicated in practice by the existence of the self-declared republics of Abkhazia and South Ossetia. With respect to jurisdiction, Georgia communicated that: *"The jurisdiction of our State is not exercised over these*

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[156] 'Initial Report Of States Parties Due In 1996', (CAT/C/28/Add.1 1996), paras. 3, 6, 15, 128

[157] Committee against Torture, 'Second Periodic Report Of States Parties Due In 1999' (CAT/C/48/Add.1 2000), para.31

[158] Ibid, para.32

regions. However, these circumstances do not allow the State to avoid the responsibility determined by the Convention against Torture"[159].

In the list of issues to be considered during the examination of the third periodic report of Georgia, the State Party was asked to update the Committee on any progress registered between 2003-2005 in securing the rights set in the Convention in all territories under the State's jurisdiction, including Abkhazia[160]. To this request, the State party reiterated that legal provisions are prevented from being enforced throughout the territory of Georgia, a situation caused by the existence of two self-proclaimed republics within Georgia's internationally recognized borders (Abkhazia and South Ossetia), over which State jurisdictions is de facto non-existent. The State party then expressed its regret in informing the Committee that no progress was made over the reporting period. Nevertheless, the Government of Georgia stressed again that these circumstances do not relieve the State of its obligations under the UNCAT, which remain applicable over the Georgia's territory in its entirety[161].

Therefore, in contrast to the Republic of Moldova, Georgia is not trying to avoid the fulfillment of its obligations under the Convention in Abkhazia, even though it admits that Georgia does not exercise jurisdiction over the region and faces difficulties in applying the Convention provisions over that territory.

Based on all the publicly available data, we can notice that Georgia was due for another reporting cycle on 24 November 2011 initially and then again on 15 July 2015, but no reports for the respective time frames are accessible at the time of the writing[162].

4.5. The CAT's conclusions and recommendations regarding Georgia (including Abkhazia)

In the first review of Georgia, the Committee noted the positive aspects observed on part of the Government and the factors and difficulties impeding the application of the

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[159] Committee against Torture, 'Second Periodic Report Of States Parties Due In 1999' (CAT/C/48/Add.1 2000), para.46

[160] Committee against Torture, 'List Of Issues To Be Considered During The Examination Of The Third Periodic Report Of Georgia' (CAT/C/GEO/Q 2006), para.12

[161] Committee against Torture, 'Third Periodic Report Due In 2003' (CAT/C/73/Add1 2005), para.35

[162] 'Late And Non-Reporting States' (*Tbinternet.ohchr.org*, 2019) <https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/LateReporting.aspx>

provisions of the Convention, along with the subjects of concern, but none of these concerns addressed the situation in Abkhazia[163].

In the second periodic review, however, the Committee took note of the challenges and difficulties encountered by the State party as a consequence of the secessionist conflicts in Abkhazia and South Ossetia seeking independence and causing internal and external mass displacement, which has created a high risk of human rights violations in that part of territory[164], but did elaborate in that respect further.

Finally, in the third periodic review report on Georgia, the Committee took note that after the State's independence in 1991 internal conflict has continued in part of its territory. Moreover it held that the situation of Abkhazia is a matter of serious concern and reminded Georgia that no exceptional circumstances may be invoked in respect of the absolute nature of the prohibition of torture[165].

This again demonstrates the progressive nature of international law and its mechanisms, as the Committee slowly shifts from not mentioning Abkhazia at all to taking note of the problematic aspects in the region that increases the number of human rights violations to recalling the territorial State it still has obligations in respect to Abkhazia and that no exceptional circumstances shall be raised in order to relieve Georgia of its obligations. It might take significant amount of time before the Committee acknowledges the effective control based jurisdiction extraterritorially for outside powers exercising decisive influence over separatist regions.

The SRT visited Georgia from 12 to 19 March 2015, during which he also attempted to visit the Georgian regions of Abkhazia and the Tskhinvali region (South Ossetia) but to no avail. The authorities that exercise de facto control over these regions, either denied him access from the territory controlled by the central government of Georgia or did not respond to his requests[166].

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[163] General Assembly official records, 'Report Of The Committee Against Torture' (A/52/44 1997), para.111-121

[164] Ibid, para.80

[165] Committee against Torture, 'Conclusions And Recommendations Of The Committee Against Torture' (CA T/C/GEO/CO/3 2006), para.3

[166] UN Human Rights Council, 'Report Of The Special Rapporteur On Torture And Other Cruel, Inhuman Or Degrading Treatment Of Punishment On His Mission To Georgia' (UN Human Rights Council 2015), para.4

Individual communications under art.22 of the UNCAT addressing 'non-State actors'

The Committee against Torture addressed the "effective control" based jurisdiction in its Concluding observations on a number of occasions, discussed herein at section 2.4, but it also mentioned it through its individual complaints mechanism, where CAT may consider complaints alleging violations of the rights set out in the UNCAT by States parties that made the corresponding declaration under art.22 of the Convention[167].

In Sadiq Shek Elmi v. Australia, the CAT examined the degree to which the actions of non-State actors triggered an obligation under the UNCAT. Mr. Sadiq Elmi, a Somali asylum seeker and member of a historically persecuted ethnic minority claimed that if he was to return to Somalia, he would be identified as a member of the minority and subsequently tortured, which would constitute a violation of art.3 of the Convention against Torture[168]. Mr. Elmi further substantiated that he would be tortured by the "armed groups" that controlled various parts of Somalia, since the fallout of Somalia's central government, responsible for the death of his father and brother and the rape of his sister[169].

In regard to Somalia both parties agreed that there had been no recognized government at least since 1991. Furthermore, both parties claimed that since then in some regions the factions (clans) were exercising quasi-State attributions similar to those of legitimate government authorities, such as passing and enforcing their own laws, provide education and health services and tax systems[170]. The CAT took into account that the factions were exercising effective control and that there was an absence of a central government capable of offering protection[171]. For these reasons, the clans (non-State actors) were recognised as being sufficiently "State-like" to fall under the phrase "public officials or other persons acting in official capacity" prescribed by art.1 and decided that there arose an obligation under art.3 on part of the Australian government[172].

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[167] 'OHCHR Complaints Procedures' (*Ohchr.org*, 2019) <https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx>

[168] Sadiq Shek Elmi v. Australia, CAT/C/22/D/120/1998, UN Committee Against Torture (CAT), 25 May 1999, available at: https://www.refworld.org/cases,CAT,3f588eda0.html, para.1

[169] Ibid, para.2.2, 2.3

[170] Ibid, para.5.5

[171] Ibid para.5.2

[172] Ibid, para.6.5

This case remains important primarily because it recognises non-State actors to fall within the ambit of *"public officials or other persons acting in an official capacity"*. It must be noted that CAT only reached that conclusion due to the lack of Somalian central government, which wouldn't have happened in States where there were functioning governments in place that exercise effective control over the majority of their territory, as in the case of Moldova or Georgia. However, equating de facto institutions to State institutions due to their effective control over certain territories, is an interesting trend and a departure from the classic understanding of public officials and other persons acting in an official capacity. Even if it was applied only in an art.3 claim (non-refoulement), where the status of non-State actors was reviewed in order to establish whether it met the criteria provided for the acts to amount to torture under art.1 UNCAT (act inflicted by a public official or other person acting in an official capacity), and not in determining jurisdiction or responsibility of non-State actors. It was still a step forward in terms of perception of non-State entities in general. This could also mean that international law will be more inclusive of non-State actors in the future and not disregard them, as they are seen to gain more and more prominence in the contemporary world.

Chapter 5.

Alternatives that might alleviate the challenges in dealing with these legal grey zones

International order has been secured through various mechanisms, ones more successful than others. Throughout the years the array of those measures varied from sanction imposing Courts, recommendation setting Committees, ad-hoc Tribunals, truth commissions, quasi-judicial bodies, monitoring working groups , etc. Insofar it is still quite unclear which one is more effective.

5.1. NGO and public pressure, blaming and shaming — as a strategy of holding States' responsible

The general discourse encountered in the media, NGOs local or international reports in regard to Russia's involvement in Transnistria and Abkhazia is negative[173] and blames Russia for its continuous support of the de facto governments.

However, as much as accusing and seeking to hold States responsible is necessary and gives a sense of justice to victims, we must acknowledge that in the long run, that might not be the most suited strategy. Because it does not necessarily improve the conditions of individuals in these grey zones. Sanctions and public scrutiny can potentially incite defensiveness, anger and bitterness on part of the accused State. The feeling of being blamed unfairly and the general discontent of being found responsible for actions outside the State's territory can antagonize the actors involved in the long term. This could potentially encourage the blamed State to denounce the Conventions it is party to altogether. That would ultimately affect the people detained in these regions, as they would be the ones suffering the consequences. This might be the case of Russia, that expressed its discontent with the ECtHR's jurisprudence in its regard and has threatened to leave the Council of Europe. The reason behind the threat is that it deems it is being treated unfairly in Strasbourg.

Therefore, as much as accusing Russia for its involvement in other States' territories is justified and reasonable, it might trigger it to denounce the CoE, which ultimately would make matters worse for the individuals from Transnistria and Abkhazia. If it does so the

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[173] For some examples see: Promo-Lex advancing human rights and democracy, 'Alternative Report On The Sixth Periodic Report Of The Russian Federation Under UNCAT' (2018), "Torture and ill-treatment in Moldova including Transnistria: Impunity prevails" by Promo-lex, Olof Palme International Centre supported report on: Human rights in Abkhazia Today, by Thomas Hammarberg and Magdalena Grono

option to rely on the ECHR in engaging the obligations of Russia will disappear. The scope of the human rights narrative should be to advance human rights in these areas, and not to hold States' responsible. The latter is only one tool of ensuring protection through enforcement, but not the only one by far. An underlying element in these regions (Transnistria and Abkhazia) is that they are highly politicized, and a definite conflict resolution is unlikely to occur in the near future. This is why solutions for the improvement of detention conditions and monitoring of torture and ill-treatment should be sought with or without the conflict settlement.

The Russian Federation is the leading country in the Council of Europe space, when it comes to the number of complaints lodged against it. It is also the only country that endorsed by law the right of authorities not to enforce ECHR judgements[174] and in the last years has expressed its discontent with the ECtHR by withholding payments for the membership fee[175]. These are strong indicators that the Russian government is not taking ECtHR's judgements constructively, but rather bitterly. For the reasons stated above, in ruling in Transnistrian or potential Abkhazian cases, Courts and quasi-judicial bodies should be aware of all these factors and try to mitigate the competing interests that arise in issuing judgements or observations regarding Russia.

5.2. Courts and quasi-judicial mechanisms

Declaring the Conventions provisions inapplicable

Judge Kovler in his dissenting opinion to the notorious Ilascu and others v. Moldova and Russia, proposed that the application be declared inadmissible *ratione loci* and *ratione personae* regarding Russia, while recognizing jurisdiction in regard to Moldova. Furthermore, the judge suggested that since Moldova has no de facto control over Transnistria, the Court could have declared this situation as a "legal vacuum" or a "lawless area" and declare the provisions of the Convention inapplicable[176]. While this scenario might ease the Courts' task in dealing with such complex cases originating from a contested area, it fails to prove any

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[174] Translation by the author: 'Russia to implement ECtHR's rulings optionally', 'Россия Будет Исполнять Решения ЕСПЧ Факультативно: Что Это Значит | DW | 15.12.2015' (*DW.COM*, 2019) <https://www.dw.com/ru/россия-будет-исполнять-решения-еспч-факультативно-что-это-значит/a-18919287>

[175] 'Russia Withholds Payments To The Council Of Europe | DW | 01.03.2018' (*DW.COM*, 2019) <https://www.dw.com/en/russia-withholds-payments-to-the-council-of-europe/a-42792673>

[176] Dissenting opinion of Judge Kovler to Ilascu and others v. Moldova and Russia [GC], no.48787/99, ECtHR, 08.07.04, section III, para.2-3

efficiency in securing the rights of the detainees in these regions. This approach does not really solve anything, except accept the status quo. To accept or militate for the acceptance of a lawless regime is to give up on offering any kind of redress to the residents of these regions, that are caught up in limbo systems. Promoting the “legal vacuum” method is almost like the indirectly endorsing impunity for the commission of human rights violations.This approach would only benefit the Court, and would hardly be compatible with the principles the Court stands by. To say that the Convention doesn’t apply in this region, would mean to accept the dire conditions in the penitentiary system of the de facto government of these regions and not even try to improve them, which is against the principle of universality of human rights.

Cumulative shared responsibility — as a tool of ensuring the prohibition of torture

Situations of shared responsibility can be divided in two categories: cooperative or cumulative. The cooperative responsibility occurs as a result of joint or concerted action, (such as coalition warfare, aid in committing a wrongful act , etc.), whereas the cumulative responsibility refers to instances where there is no concerted action. In the latter case, victims can claim reparation from different actors, even though these actors acted independently and without coordination with each other[177].

This is another possibility of dealing with violations in Transnistria and Abkhazia, where in each region there are three actors involved — the parent State (Moldova, Georgia), the protector State (Russia) and the de facto governments (MRT and Republic of Abkhazia). Since, the violations are either caused, encouraged or permitted by multiple actors, it is quite difficult to establish which party is to blame or should bear responsibility. This is why the approach taken by the ECtHR to identify which State had the actual authority to redress the violation seems logical, since that appears to be a viable solution in cases of inter-twined actions, where the perpetrator is not singular. It is counter-intuitive to ascertain that only one party is responsible for the appearance of the conflicts or their continuous frozen status. For this reason, a viable strategy would be to work with all the actors involved in trying to compel the improvement of the application of art.3 of the ECHR and UNCAT in these regions.

The approach taken by the ECtHR that entails obligations for both the parent State and the protector State in Transnistrian cases may be the most suited strategy. It encompasses the political aspect of it, by pressuring Moldova not to give up on settling the conflict with

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[177] Andre Nollkaemper and Dov Jacobs, 'Shared Responsibility In International Law: A Conceptual Framework' [2011] SSRN Electronic Journal, pp. 361-362

Transnistria and regain its control over the region. While at the same time engaging Russia's jurisdiction and responsibility for human rights violations in Transnistria, that in truth would not survive without its constant support.

When it comes to the CAT, the starting point was recognizing that both Moldova and Georgia lack effective control over Transnistria and Abkhazia, respectively, which impedes the States ability to be compliant with the UNCAT. However, a next step would be to issue region specific recommendations, that could eventually push for changes at the local level and cooperation between the de facto governments with the parent States (Moldova and Georgia). Another step, would be to address the matter of 'effective control' in its individual communications, that tend to be less political and wight more legal value.

5.3. States and the international community

Along the years the international community has tried to take measures in order to solve the on-going status of these two legal grey zones, even if the situation has prevailed for many years, some attempts to bring some certainty to Transnistria and Abkhazia have been registered in the last years. In the case of Transnistria, it has been brought to attention by the UN General Assembly, that in June 2018 heard and adopted the Resolution on the *"Complete and unconditional withdrawal of foreign military forces from the territory of the Republic of Moldova"* (document A/72/L.58) urging Russia to withdraw its troops that are stationed on Transnistrian soil since the conflict. Moldova's Foreign Minister accentuated that they were there without the State's consent, therefore the principles of sovereignty and territorial integrity were at stake[178]. The Assembly: *"expressed its deep concern about the continued stationing of the Operational Group of Russian Forces on the territory of the Republic of Moldova without the consent of that State or of the United Nations. It also urged the Russian Federation to complete, unconditionally and without further delay, the orderly withdrawal of the Operational Group"*[179]. Russia, however asked for the matter to be delayed, claiming the proposal was counter-productive and a political solution should be sought through a 5+2 [180]process. The resolution was brought forth by Moldova, Georgia, Canada, Lithuania, Latvia,

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178 'General Assembly Adopts Texts Urging Troop Withdraw From Republic Of Moldova, Strengthening Cooperation In Central Asia | Meetings Coverage And Press Releases' (*Un.org*, 2019) <https://www.un.org/press/en/2018/ga12030.doc.htm>

179 Ibid

180 Explanatory note: Talks format between seven parties: Republic Moldova, Transnistria as belligerents, OSCE as mediators, the US and the EU as observers and Romania and Russia as guarantors

Romania, Ukraine and Estonia. Thus, the matter of Russia's troops on Transnistrian soil is still discussed in authoritative bodies, that proves that the parent State (Moldova) is trying to take measures and regain the effective control over Transnistria.

The case of Abkhazia was discussed in the European Parliament in June 2018, when a Joint motion for a Resolution on Georgian occupied territories ten years after the Russian invasion was brought forward and adopted on the 14th of the same month[181]. In the Resolution, the drafters refer to Russia as a power exercising effective control over the Georgian territories of Abkhazia and Tskhinvali Region/South Ossetia and considers it to bear full responsibility for severe violations of human rights and for the humanitarian situation on the ground[182]. In the Resolution amongst other things the European Parliament reminded Russia, that as an occupying power, it has obligations towards the population of the Georgian territories and that it must cease the violations of human rights, restrictions on freedom of movement and residence, discrimination on grounds of ethnicity, and infringement of the right to property and access to education in the native language in the occupied territories of Georgia[183].

Since the international and regional fora are interested in the situation in these regions, it highlights the pressing need for other institutions to follow that same path and take measures as to cease human rights violations in Transnistria and Abkhazia. One could hope that after these regions reached the European Parliament, the ECtHR would be compelled to give the matter of extraterritorial jurisdiction of ECHR in Abkhazia a similar view as it did for Transnistria and rule as it did in Ilascu and others in regard to Abkhazia. That could have significant implications for future cases raising similar issues in frozen conflict regions. Since, the ECtHR and CAT exercise a certain degree of influence, an interest in Transnistria and Abkhazia could push for change in these regions.

However, it is self-evident that the easiest solution would be for the States involved to come to an agreement and solve the matter politically. Even an agreement on allowing more process transparency and monitoring of prisons from Transnistria and Abkhazia by the parent states would improve the situation tremendously.

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[181] European Parliament, 'European Parliament Resolution On Georgian Occupied Territories 10 Years After The Russian Invasion' (2018/2741 (RSP) 2018), k)

[182] Ibid, k)

[183] Ibid, para.13

Chapter 6.

6.1. Conclusions

In carrying out this analysis two international bodies were examined (ECtHR, CAT) in the way they guard their founding treaties (ECHR, UNCAT) and their take on jurisdiction; In doing so it can be noted that the ECtHR is more progressive and has since Bankovic stretched its view on jurisdiction. The existing case-law accentuated that the Court no longer stresses territory as a basis for jurisdiction and shifted to a threshold of jurisdiction that is based on another State's military presence, support or decisive influence over a territory outside its borders. This approach resulted in a flow of cases concerning the spatial model of jurisdiction and a prognosis could be asserted that it will further develop and extend to other territories. The existing ECtHR case-law engaging jointly the jurisdiction of Russia and Moldova, could serve as inspiration and grounds for applying the same rationale in Abkhazia. This would increase scrutiny over Abkhazia and apply pressure on the States involved (Georgia and Russia) to take measures for ensuring the prohibition of torture in the region.

In contrast, after observing the jurisprudence and reporting mechanisms of the CAT, a noticeable disparity is registered. The CAT does not yet tackle actively the issue of extraterritorial application of the Convention against Torture in Abkhazia and Transnistria. Even if it acknowledged the lack of effective control of parent States that impedes the application of the Convention in the regions, it did little to elaborate on how to proceed in order to improve the situation.

The extraterritorial application of human rights treaties is not a new concept. However, in practice it takes time for Courts and international mechanisms to shift from the classical ways of reading jurisdiction to the emerging stretched interpretation of jurisdiction, that is extraterritorial. Nevertheless, it is expected that this exercise will be developed further, as outside territory activities are encountered more often. Also, due to new unconventional and non-military means being using in waging conflict (terrorism, insurgencies, political influence and support) the lines of jurisdiction are blurred and are not the way they once were. Following the need to adjust to these developments, Courts and quasi-judicial bodies have the possibility to establish jurisdiction for States that would otherwise elude their obligations with the pretext of territory and lack of effective control. So this could be a new

tool of ensuring international or regional accountability that is over-arching and does not end with territory.

What is imperative to take note of is that in these regions, the de facto governments are dysfunctional and the court system is very flawed and rarely offers fair redress for human rights violations. For this reason unlike other CoE States, international mechanisms available could be the victims' only option in claiming protection of the rights and equitable relief when they are breached. Hence, the extraterritorial application of the ECHR and UNCAT in Transnistria and Abkhazia, could be a viable means for the individuals living within these grey legal zones to access fair legal proceedings and also claim compensation. Therefore, the extraterritorial application of the ECHR and UNCAT could be a tool of closing the legal gaps in human rights protection in Transnistria and Abkhazia.

It is clear that there is plenty to be done in both regions in order to improve the detention conditions and to ensure the prohibition of torture. Political solutions for the conflicts and regaining effective control over the regions are the obvious choices to be sought. However, the extraterritorial application of the ECHR and the UNCAT on a more systemic basis could be a good starting point.

6.2. Recommendations

1) The Committee against Torture should take a more proactive approach and scrutinize the possibility of actually applying the extraterritoriality of the UNCAT, as art.I permits and suggests and as it is championed by the SRT. The disparity between the case-law of the ECtHR and that of the CAT is remarkable, when it comes to extraterritoriality. Thus, the CAT could take the example of the ECtHR and apply extra-territorially the UNCAT in its individual communications, as well as in the reporting mechanisms enshrined under the Convention. Despite their institutional differences, if the Committee would follow the ECtHR's progressive approach in applying and developing the extraterritorial application principles this could have a great impact.The UNCAT is an international instrument and offers a broader protection, and its reach goes beyond any regional mechanisms. In addition, it would show that the international human rights law bodies is not only applied selectively, but even in "grey legal zones", where no other redress is available and reassert the erga omnes partes nature of the Convention against Torture.

2) The Committee should not accept any loopholes in the application of the Convention, in accepting that the Convention provisions are impeded by frozen conflicts is contrary to the universality and jus cogens nature of the prohibition of torture.

3) Apply the same line of reasoning as expressed in Ilascu and others to cases originating from Abkhazia, both in individual cases and in inter-State applications.

4) Depart from the territorial requirement as a nexus to jurisdiction, as in the contemporary world that is not over-reaching and conflicts with the notion of universality and jus cogens character of the prohibition of torture. As international law is evolving, so are the challenges posed. Therefore jurisdiction cannot be perceived to be an exclusive territorial concept. The extraterritorial application of the ECtHR and UNCAT needs to be engaged on a more systemic basis.

5) Since both regions are trapped in a geo-political quest for power, any change is unlikely to appear in regard to upholding human rights, unless the conflicts are not settled or at least some diplomatic efforts are made on the part of all actors involved (parent States - Moldova and Georgia, protector State - Russia and de facto governments of Transnistria and Abkhazia). Thus, ways of communicating between the parties as to provide better prison conditions and ensure the prohibition of torture are needed. Put in other words, diplomacy needs to pave the way and the law will follow.

6) Develop and encourage more legal scholarship on the topic of the protection of human rights in frozen conflict regions in trying to understand the situation better and seek sustainable solutions.

7) Apply the same reasoning as applied in Ilascu and others v. Moldova and Russia and Chiragov and others v. Armenia in the pending case before the ECtHR potentially engaging the jurisdiction of both Georgia and Russia - Mamasakhlisi v. Georgia and Russia. In doing so, the ECtHR would send a powerful message to the protector State involved (Russia) and possibly open the door for other cases originating from Abkhazia, or even from the Ukrainian Lugansk and Donetsk.

8) Encourage parent State to take small steps in ensuring human rights in the territories were they lost effective control, by for instance offering small grants for improving prison conditions. Such initiatives could include providing ventilation or

heating systems, that could potentially open the dialogue and serve as a bridge for bigger projects and cooperation.

9) Raising awareness concerning the lack of legal redress present in these legal grey zones, whose people are trapped in a Soviet Union inertia.

10) Maintaining an open dialogue with the de facto governments that would not be focused on political issues solely, but have a “cleaner agenda” and actually try to implement projects that could improve the human rights situation in those territories.

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