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# Bridging the Lacuna: Enhancing Victim Protection through the Extra-Territorial Applicability of the European Convention during the Active Phase of Hostilities

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## Summary

This thesis argues that the European Convention on Human Rights (hereinafter 'ECHR' or 'Convention') should apply extra-territorially during the active phase of hostilities to protect victims of the armed conflict. In this regard three main issues need to be discussed separately. Firstly, the applicability of the Convention in the hostilities and norm conflict with International Humanitarian Law (hereinafter 'IHL'). Secondly, the issue of extra-territoriality. Thirdly, the issue of practical applicability and difficulties for the Court to deal with the international armed conflicts (hereinafter 'IAC').

Building on the above, the thesis reviews all the main rulings of the European Court of Human Rights (hereinafter 'ECtHR' or 'Court') to illustrate the main understanding of the jurisdiction and Art. 1 of the Convention. Analysing the Court's understanding of the general approaches to the jurisdiction leads the thesis to argue that the Court was not coherent with its findings on the conduct of hostilities.

After defining jurisdiction with the meaning of Art. 1 of the ECHR, the thesis argues that norm conflict cannot be used as the pretext to confine the applicability of the Convention. Based on the norm interpretation, reviewing jurisprudence of the International Court of Justice ('ICJ') and the European Court, it proves that Conventional provisions do not cease applicability in armed conflicts and particularly in the active phase of confrontation. The thesis further endeavours to show what are the practical difficulties for the Court to litigate allegations with respect to the hostilities.

The major part of the paper is based on the pilot judgment delivered by the Grand Chamber of the European Court on the inter-state case of *Georgia v. Russia (II)*.[1] The case concerns allegations regarding the armed conflict and its consequences that occurred between Georgia and Russia in 2008. The ECtHR held that during the conduct of hostilities, parties could not exercise jurisdiction and the Court did not assess allegations regarding the active phase of hostilities. Since this is the first judgment in which the Court assessed full-scale armed conflict, the main findings of the thesis are related to the judgment. The thesis argues that the European Court failed in the interpretation of the Convention. On the contrary, it presents examples, which indicate that the Court could and should have stated extra-territorial jurisdiction of the Russian Federation in the active phase, which would make the Convention applicable during the conduct of hostilities.

Finally, the thesis demonstrates the necessity of overruling the approach, that confines the Convention in the extra-territorial applicability.


[1] *Georgia v. Russia (II)* App no. 38263/08, (ECHR [GC] 21 January 2021).

# Preface

The idea of the thesis is built on the question provoked by the intervention in Ukraine. The existence of the foundation of the international legal order that we have been striving to acquire got under threat. The threat of returning pre-World War II reality in which military superiority could gain the aim.

A year before the full-scale armed conflict in Ukraine, the European Court of Human Rights delivered an inter-state judgment on the case of *Georgia v. Russia (II)* for the first time in its existence and thirteen years later the armed conflict occurred in 2008 between Georgia and Russia. In addition to Ukraine and Georgia, the escalation in Nagorno-Karabakh generating a number of inter-state applications involving Armenia, Azerbaijan, and Turkey. Thereby, all of the issues rendered my interest in researching the topic to underline the importance of the European Convention in human rights protection.

Initially, I would like to thank my supervisor Karol Nowak for not only his valuable, thorough and great notes and pieces of advice but also for the excellent working environment that he has been ensuring throughout my studies. Most importantly, I am so grateful for his values which have been repleted in the lectures and his implacable support towards Georgia, Ukraine and the region itself.

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# Abbreviations

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| CoE | Council of Europe |
| Convention | Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950. |
| Court | European Court of Human Rights |
| ECHR | Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950. |
| ECtHR | European Court of Human Rights |
| EU Fact-finding Mission | Independent International Fact-Finding Mission on the Conflict in Georgia |
| GC | Geneva Conventions of 12 August 1949 |
| Grand Chamber | Grand Chamber of the European Court of Human Rights |
| HRW | Human Rights Watch |
| IAC | International Armed Conflict |
| IACHR | Inter-American Court of Human Rights |
| ICC | International Criminal Court |
| ICCPR | International Covenant on Civil and Political Rights, 16 December 1966. |
| ICJ | International Court of Justice |
| ICRC | International Committee of the Red Cross |
| IHL | International Humanitarian Law |
| IHRL | International Human Rights Law |
| LOAC | Law of the Armed Conflict |
| PACE | Parliamentary Assembly of the Council of Europe |
| NATO | The North Atlantic Treaty Organization |
| OSCE | Organization for Security and Co-operation in Europe |
| UN | United Nations |
| UNGA | United Nations General Assembly |
| UNSC | United Nations Security Council |

## I. Aim and Research Question

The thesis strives to illustrate the possibility and necessity of the European Convention's extra-territorial applicability during the active phase of hostilities. It further tries to explore what is the gap, generated by the recent precedent-setting jurisprudence of the European Court of Human Rights and what its consequences can be in the absence of the extra-territorial applicability of the ECHR. Eventually, it opines that the Court created a vacuum in human rights applications. Moreover, it endeavours to inquire whether the ECtHR comprehensively justified its hesitation in assessing the conduct of hostilities. Thus, the leading research question is presented as follows:

> *Should the European Convention on Human Rights apply extraterritorially during the active phase of hostilities?*

The thesis strives to prove that the European Convention should apply in the active phase of international armed conflict, even though the ECtHR has never confirmed formally the idea. It further illustrates the importance of the applicability from the victims' perspective. Thus, it aims to illustrate the Achilles' heel of the jurisprudence, the test of *'Chaos'* as the main obstacle to human rights applicability. The reasoning provided by the Court allows the discussion further to assert that none of the legal arguments, stated by the Court can credibly exclude the applicability of human rights.

## II. Methodology and Sources

The inquiry is based on legal-dogmatic research as a way of conducting comprehensive and thorough legal reasoning as it is based on the legal interpretation of international treaty law, precisely the European Convention on Human Rights and the Court's jurisprudence. Hence, the method is used not only to present legal research within the law but predominately as a jurisprudential analyse of the European Convention. Legal-dogmatic research ensures exploring current legal standards written in the Convention and interpreted in jurisprudence. As long as the definition of the scope of the provision predominantly depends on the Court's opinions, the importance of the case law is paramount. Therefore, chosen research methodology makes it feasible to answer the research question based on the main argument of the thesis.

The relevant materials are essential for accomplishing the objectives set afore including both primary and secondary sources of determining the rules of international law. Such as the European Convention, relevant international legal materials, treaty law and jurisprudence. Research is based on the European Court's rulings as the major way of interpretation of the Convention. Albeit, in supporting the argument there are used ICJ, ICC and IACtHR cases.

Research is mainly based on the findings of the pilot judgment on the case of *Georgia v. Russia (II)*. However, in regard to analysing implications for the forthcoming cases, the inquiry actively uses the case of *Ukraine and the Netherlands v. Russia.* The decision in the case of *Bankovic and Others v. Belgium and Others*[2] will be used as one of the main precedents for assessing the Court's approach. In regard to analysing the main findings, the research is based on the landmark judgments mainly with respect to *Northern Cyprus, Moldova, Nagorno-Karabakh, Iraq and Afghanistan.* The significant building block of this inquiry applies to reports from various international organizations, such as the Human Rights Watch, the Amnesty International, the EU fact-finding mission and OSCE. Since one of the main critics of the research argues that the Court had enough tangible pieces of evidence to apply the Convention in the active phase the contribution from the mentioned organisations is paramount. Generally, they are used in regard to providing facts for the findings of the thesis. The applicability of the reports does not necessarily imply agreement on all the conclusions of the organizations mentioned above.

Legal doctrine consists of numerous textbooks and legal articles regarding the matter. Among others, there shall be underlined scholars, who contributed a lot. Precisely: Alexander Orakhelashvili, Cedric Ryngaert, Marco Longobardo and Stuart Wallace, Marko Milanovic, Philip Leach, Costas Paraskeva and Gordana Uzelac.

Last but not least, the thesis will use binding and non-binding resolutions for supporting certain facts or assisting additionally the main findings. There are used UN Security Council's resolutions, as well as the ones adopted by the General Assembly and Parliamentary Assembly of the Council of Europe.

## III. Central Argument of the Thesis

The European Court as the main actor in the interpretation of the Convention is the major institution which applies provisions and therefore sets forth their scopes, areas of applicability and standards which should be applied precisely by the parties involved. Even though delivered judgment is binding predominately for the respondent state(s), in the adjudicating procedures, the Court is based mainly on its already stipulated standards. *Georgia v. Russia (II)* has already been widely applied in many judgments. The inquiry highlights that the European Court of Human Rights as one of the most effective regional institutions has a duty-bound in human rights protection and therefore promotes peace in Europe and everywhere, where high-contracting parties' jurisdiction is exercised.

Hence, that being mentioned, the thesis argues how the ECHR should be interpreted in accordance with its true meaning. In other words, by giving examples, analysing Grand

[2] *Bankovic and Others v. Belgium and Others,* App no. 52207/99, (ECHR [GC] 12 December 2001).

Chamber's reasoning, and assessing previous jurisprudence it strives to prove that, the Court failed to interpret the human rights provisions properly and adequately. By presenting cases related to the right to live; freedom from torture, inhuman or degrading treatment and right to liberty it asserts that the Convention has been applied during the active phase of hostilities, even though the Court tried to state the opposite.

Therefore, the thesis develops a de lege lata (lex lata) argument. It argues that the Convention should apply in the active phase of hostilities to protect victims of the armed conflict. The thesis does not provide an alternative approach to the applicability, but it argues that based on the interpretation of the Convention and the jurisprudence, there is a window left for the application during the conduct of hostilities. It strives to illustrate the importance of such an interpretation, which is the protection of the victims. In regard to supporting the argument, first part refutes of the reasoning of the Court, while the second part provides examples of the extra-territorial applicability.

## IV. Delimitations

The scope of the research is limited to a few conditions. Firstly, as it has been illustrated, research is based on the operation of the European Convention. However, to illustrate commonalities or differences in regard to supporting the argument, other treaties are used.

Secondly, the thesis is based on the predominantly jurisprudence of the European Court as a main interpreter of the Convention. Whereas, the rulings of the other jurisdictions, such as ICJ, ICC and IACtHR are used to support the main findings.

Thirdly, there cannot be discussed human rights in armed conflicts broadly, but the Convention's applicability particularly in the active phase of hostilities. Moreover, due to the research question, armed conflict is also limited and it discusses the international armed conflicts only.

Fourthly, even though, *Georgia v. Russia (II)* is a landmark, very important judgment from various angles, it is analysed from a certain perspective and unfortunately, its general implications cannot be discussed. The main argument will be limited by the absence of effective remedies for the victims of the active phase of hostilities.

## V. Outline

Chapter 2 provides a general overview of the jurisdiction under the European Convention on Human Rights. It shows the difference between territorial and extra-territorial concepts. It underlines *spatial* and *personal* models of extra-territorial jurisdiction. The chapter clarifies

what is the role of the jurisdiction in establishing accountability in international law. Eventually, it ensures the basis for the following chapters to illustrate the main highlights of the jurisprudence.

The first part of Chapter 3 demonstrates the Court's existing view on dealing with the issues of the armed conflict regarding either the active phase or its consequences, generally, occupation. It reviews all main armed conflicts, which have been discussed before the European Court. It further strives to show the issue from a different angle and illustrate practical difficulties for the ECtHR to deal with allegations concerning the active phase of confrontation. Predominantly, the part argues that IHL norms can be compatible with the conventional provisions, which should not cease to apply.

The second part of Chapter 3 analyses the main findings of *Georgia v. Russia (II)* and its implications on the case of *Ukraine and The Netherlands v. Russia*.[3] The sub-chapters demonstrate the argument that the European Court had enough tangible pieces of evidence to state that Russia had effective control and therefore exercised extra-territorial jurisdiction in the conduct of hostilities, which would render application of the conventional provisions.

Chapter 4 asserts that some human rights provisions are unavoidable and applicable. It provides two main examples, which are presented in the pilot judgment. Precisely, illegal detentions, ill-treatment and procedural limb of the right to life. Under these examples, the chapter concludes that regardless of the Court's formal rejection, it *de facto* confirmed the applicability of these rights.

Chapter 5 finally claims that, without the effective applicability of the convention in the active phase of hostilities, victims of the armed conflict will be left without international human rights remedy, which would undermine the effectiveness of the Convention. The chapter illustrates why the pilot judgment will be precedent-setting for individual applications. Which creates a *lacuna* in human rights application.

[3] *Ukraine and the Netherlands v. Russia* (Admisibility decision) App. nos. 8019/16, 43800/14 and 28525/20, (ECtHR [GC] 30 November 2022).

# 1. Introduction

February 24th, 2022, the day which quaked the pillars of the modern international legal order, which has been building after World War II, left its wake with profound implications. It questioned the existence of the fundamental values that Europe has determinedly strived to attain for decades. While it was believed that a rifle would not need any more to solve the issues,[4] the invasion of Europe's biggest country timely undermined the notion. Timely, because injustice has been revealed through military superiority even before the Ukrainian invasion.[5] These cases question the position of the international human rights law, would it apply if the victims are hurt during the war?

Antonio Cassese in his article '*The Wolf That Ate Georgia*'[6] recalls Phaedru's well-known fable of the Wolf and the Lamb. Even though the wolf does not need a reason to eat the lamb, he still decides to justify it and starts giving reasoning. The moral of the fable is simple – The tyrant can always find an excuse for his tyranny and the unjust will not listen to the reasoning of the innocent. Generalising the concept would rise a fundamental question for the human rights remedy – Shall it protect the weak from the unjust? Thus, the rhetorical question gives the foundation of the predominant principle of the European Convention. Traumatised European society, which had been witnessing an enormous brutality of mankind decided to frame the legal order which would prevent the same. Therefore, the drafters of the Convention aimed to set forth a constitutional instrument of European public order.[7] The Convention's effectiveness has been challenged throughout these times. Nevertheless, from nowadays' perspective the ECHR has significantly impacted the human rights developments in Europe.

Human Rights treaties have been one of the most successful legal instruments. It can be explained without difficulty, human rights law is established on values which, if not universally shared, command very wide acceptance throughout most of the world. It may be said that no other field of law, perhaps, rests so directly on a moral foundation, the belief that every human being, simply by virtue of their existence, is entitled to certain very basic, and in some instances

[4] Francis Fukuyama three decades ago argued the end of the cold war would be a significant signal in establishing liberal democracies. increasing liberal democracies, would diminish armed conflicts. See Francis Fukuyama, *The End of History and the Last Man* (20th anniversary ed, Hamish Hamilton 2012). The unprovoked war in Ukraine demonstrated that neither liberal democracy nor respecting state sovereignty could be accessible to all.

[5] First armed conflict of the millennium in Europe erupted when Russia started full-scale military intervention in Georgia in 2008. Illegal use of force, violation of the UN Charter, humanitarian law and human rights were not enough grounds to take threats to the existence of international law seriously. For more see 'Europe's forgotten war: The Georgia-Russia conflict explained a decade on' (7 August 2008). Available at https://www.euronews.com/2018/08/07/europe-s-forgotten-war-the-georgia-russia-conflict-explained-a-decade-on Accessed 12 May 2023. After the armed conflict in Georgia, the annexation of Crimea was the second milestone which should have been taken into consideration as a threat towards the fundamental values of Europe.

[6] Antonio Cassese, 'The Wolf that Ate Georgia' (1 September 2008). Available at https://www.theguardian.com/commentisfree/2008/sep/01/georgia.russia1#comments Accessed 11 May 2023.

[7] *Al-skeini and others v. The United Kingdom,* App no. 55721/07, (ECHR [GC] 7 July 2011), para 141.

unqualified, rights and freedoms.[8] Although all countries but Belarus,[9] obey the Convention, dealing with some very sensitive issues still requires a bit more effort. Among others, international armed conflicts as the main threat to peace in Europe became one of the most caustic challenges for the Convention.

Peace as a primary purpose of the ECHR should be achieved through straightforward steps taken by the European Court. Albeit, international armed conflicts have rendered various contradictory opinions under the Court's jurisprudence. Officially, the ECtHR has never been asked to assess the use of force in international armed conflicts and decide whether a contracting state violate UN Charter and used force lawfully or unlawfully. However, armed confrontations in Cyprus, the Western Balkans region, Moldova, South Caucasus and Ukraine generated a plethora of issues of human rights and touched on the issue of the use of force indirectly. Due to the high sensitivity of the topic, the Court has always been very careful with its mandate. The engagement of the ECHR in armed conflict is analysed further in the following chapters.

It is understandable that due to the high sensitivity of the armed conflict, the ECtHR should be careful with the assessments, albeit does it mean be absent once the human rights and predominant value of the Convention – peace are under great risk? As Judge Albuquerque opines it looks as though the Court is intentionally running away from trouble, forgetting that the maintenance of peace was one of the most important, if not the most important goal of the founding fathers of the Convention in Rome, as its preamble so forcefully shows.[10]

The European Court has stated the same approach regarding extra-territorial jurisdiction in all landmark judgments. All cases, but the *Bankovic* case[11] and *Georgia v. Russia (II),*[12] which it was asked to assess the extra-territorial applicability of the Convention in the active phase of hostilities. Unlike from bombing TV tower in Belgrade (*Bankovic case*), the Russian intervention was presented as full-scale in Georgia. Moreover, it has been opined that as far as the latter case concerns armed conflict between two contracting states of the European Convention it is principle different from the NATO intervention in Belgrade.[13] The main argument for failing to assess human rights violations, in this case, was the absence of the CoE's legal space. So practically, *Georgia v. Russia (II)* is the first case where the Court

[8] Tom Bingham, *The Rule of Law* (2010) 116.

[9] European Convention requires abolishing the death penalty in any circumstances. Since Belarus keeps remaining it as a punishment, it cannot become a contracting part of the Convention and therefore cannot join the Council of Europe.

[10] partly dissenting opinion of Judge Pinto De Albuquerque in *Georgia v. Russia (II)* (n 1), para 28.

[11] See the case detailed at p. 23.

[12] See the case detailed at p. 23-24.

[13] Moreover, Judge Grozev opined that when armed conflict occurs between two high-contracting parties, the Convention should be applied, unlike from the case when the party of the armed confrontation is not member of the Convention. So practically, he states that, as a regional instrument, the Convention should prioritise legal space of the CoE. See partly dissenting opinion of Judge Grozev in *Georgia v. Russia (II)* (n 1).

needed to piece together all the standards regarding the extra-territorial applicability of the European Convention during the conduct of hostilities. Unfortunately, neither *Bankovic* nor *Georgia v. Russia (II)* regarding parts on hostilities can be seen as the logical, coherent successor of the previous landmark judgments, which have had a significant impact on enhancing human rights protection. In sum, as Lord Rodger of Earlsferry clarified in the House of Lords 'the judgments and decisions of the European Court do not speak with one voice'[14] which is extremely dangerous.

Despite the concerns, *Georgia v. Russia (II)* cannot be overruled wholly as pernicious for further international armed conflict cases since it has great findings in various ways. Even though it rejected the applicability of the European Convention in the conduct of hostilities, it held numerous violations and therefore tried to serve justice at least for everyone but victims of the active phase of confrontation. All in all, it tried to achieve the *golden ratio.* As Judge Keller highlighted seventy-five years after the establishment of the Convention, the judgment demonstrated unanimity or near-unanimity towards the significant contribution that the Convention system can make to realising the Charter's dream of peace throughout Europe.[15] Meanwhile, the same Judge further noted, that conclusions which would find Russia responsible for the violations in the active phase of hostilities would require a full assessment of the conduct of hostilities which would be ultimately founded on an overly expansive vision of the Court as an adjudicator of the totality of armed conflict.'[16] This is the honest position that the Grand Chamber could not say in the main text. This is the *golden ratio* that the Court endeavours to achieve. Whereas, having King Solomon's role in striving for the *golden ratio* should not imply abandoning victims of the armed confrontation, who need effective remedy the most.

Applicability and the concept of jurisdiction are two interplayed concepts. Without normative applicability of the Convention (*ratione materie*) a state cannot have a jurisdiction and therefore remedy of human rights protection cannot be effective. Meanwhile, holding jurisdiction without applicability does not make any sense as far as jurisdiction is the threshold criterion for accountability. Therefore, these two concepts are discussed together throughout the thesis.

# 2. Concept of Jurisdiction

## 2.1 Introduction

This chapter defines the notion of jurisdiction and the jurisprudence of the ECtHR mainly. It has been illustrated that there is a plethora of caustic issues, which could be argued, albeit this

[14] See Concurring opinion of Judge Bonello in *Al-skeini and others v. The United Kingdom* (n 7), para 6.
[15] Concurring opinion of Judge Keller in *Georgia v. Russia (II) Georgia v. Russia (II)* (n 1), para 3.
[16] ibid para 4.

thesis cannot reflect on all of them, and it mainly addresses the *ratione loci* and *ratione personae* models in human rights law.

The first part of the chapter analyses the understanding of jurisdiction as a concept in general international law and human rights treaty law, particularly in conjunction with responsibility issues. In order to answer the research question, it is vital to clarify the basics of jurisdiction initially. The inquiry argues that without exercising jurisdiction, there is no feasibility for the protection. The second part addresses the distinction of the concept under the ECHR jurisprudence, which clarifies the meaning of the procedural and substantive aspects of Art. 1 of the Convention. Finally, the last part addresses territorial and extra-territorial concepts. The jurisprudence illustrates the flow of what the ECtHR has stated in cases dealing with armed conflicts. It aims to indicate the Court's robust, rigid approach towards the extra-territorial jurisdictional clauses stated case by case. Chapter 2.5 strives to illustrate the main vectors of the Court's approach. It reveales the main concerns regarding ECtHR's current approach concerning the extra-territorial applicability of the Convention in the active phase of hostilities. None of these paragraphs applies concepts of newly stated standards in the case of *Georgia v. Russia (II),* as it is discussed separately in the following chapters. Furthermore, the following chapter uses the jurisprudence of the ECtHR, UN treaty bodies and IACHR to illustrate commonalities regarding understanding the issue.

## 2.2 The Way from Jurisdiction to State Responsibility

The European Convention on Human Rights' applicability is tightly linked with the concept of jurisdiction.[17] A common meaning of jurisdiction has been widely argued in international law. One of the cetral questions is what jurisdiction implies with respect to the human rights treaty and how it is related to responsibility. To answer the question, it is essential to clarify the meaning of the clause in general international law. The *fons et origo* is the state's ability to rule within its own territory as it decides and hence tightly related to the principle of state's sovereignty.[18] There are two main concepts of jurisdiction. *Prescriptive* gives a state the power to issue laws, judgments, or rules and then have the feasibility to *enforce* them.[19]

[17] William Schabas, *The European Convention on Human Rights: A Commentary* (First edition, Oxford University Press 2015) 92.

[18] Regarding the meaning of the jurisdiction in general international law, see James Crawford, *Brownlie's Principles of Public International Law* (Ninth edition, Oxford University Press 2019) 440;. Jan Klabbers, *International Law* (3rd edn, Cambridge University Press 2020) 99 Martin Dixon and others, *Cases & Materials on International Law* (Sixth edition, Oxford University Press 2016) 281–285. Anthony Aust, 'Handbook of International Law, Second Edition' 42–44.

[19] James Crawford, *Brownlie's Principles of Public International Law* (Ninth edition, Oxford University Press 2019) 440.

In the *Lotus* case, the Permanent International Court of Justice stated that the state could not exercise its power outside its territory,[20] albeit meanwhile, it stated that states could set rules for persons, property and acts outside their territory in the absence of prohibitive rule to the contrary, agreed that they exercise these rules within the sovereign boundaries.[21] Modern international law recognises five main principles of claiming jurisdiction. First, the territorial principle means that a state is able to legislate, enforce, prosecute and control effectively within its own sovereign territory.[22] Second, the nationality principle gives the person freedoms and obligations. By virtue of nationality, an individual becomes entitled to a series of rights ranging from obtaining a valid passport enabling travel abroad to being able to vote.[23] Third, the passive nationality principle allows the state to have criminal jurisdiction abroad over the person.[24] Fourth, the protective principle gives the state power to prosecute an individual, which committed a crime against the national interest of the state and who is not a national of that state.[25] And last, the universality principle is the most arguable. Under the principle, a state is able to prosecute someone in the absence of the previous principles. So, this is the possibility to prosecute a non-national, who commits a crime, which is reprehensible from the global perspective.[26]

General international law clearly defines jurisdiction respecting the principle of non-intervention to prevent states from external interference in internal affairs. It, therefore, determines the limits of the state's authority, whether it is a legislative or enforcement authority.[27] However, since the chapter strives to indicate the importance of the jurisdiction from different angles further discussions regarding the collision of claiming jurisdiction by more than one state are out of the research scope.

The ECHR was one of the first human rights treaties that set forth jurisdiction as a clause for applicability in 1950. It stipulated that a high-contracting party shall secure everyone within its jurisdiction.[28] By saying that firstly, it has been agreed that the Convention does not protect people based solely on the active personality principle, and everyone who falls under the party's jurisdiction shall enjoy rights and freedoms enshrined under the Convention regardless of citizenship. Secondly, the treaty is not bound by territoriality, and parties must ensure their obligations regardless of their sovereign boundaries. Therefore, it may be said that the term of

[20] PCIJ, *SSLotus* (France v. Turkey), PCIJ Reports, Series A, No10, (1927).

[21] Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press 2008) 23.

[22] Malcolm Nathan Shaw, *International Law* (9th ed, Cambridge university press 2021) 561.

[23] ibid 567.

[24] ibid 571.

[25] ibid 573.

[26] ibid 574–591. Even though the principle is not commonly accepted, Antonio Cassese argues that the principle has an increasing tendency of accepted by the states in regard to protecting universal values. See Antonio Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case' (2002) 13 European Journal of International Law 853, 862.

[27] Jan Klabbers, *International Law* (3rd edn, Cambridge University Press 2020) 117.

[28] ECHR art. 1.

the jurisdiction in regard to the human rights treaty is implied to denote a sort of factual power that a state exercises over persons or territory solely.[29]

Basically, jurisdiction is perceived as territorial by various institutions. In the *Wall* case, the International Court of Justice opined that jurisdiction is primarily territorial.[30] Moreover, by the *Bankovic* decision, ECtHR has also stated that conventional provision shall be interpreted with the general international law, which perceives jurisdiction as territorial.[31] Furthermore, under customary international law extra-territorial prescriptive clause has been widely arguably prohibited without a permissive rule.[32] On the contrary, there has been clearly stated a rigid standard of extra-territorial applicability of the European Convention in the case of *Loizidou.*[33] The Grand Chamber held that Turkey exercised jurisdiction extra-territorially, and hence the Turkish government was responsible for violating the Convention.[34] Taking into consideration the interpretation of the general international law, there may be wrongly stated that Turkey had a prescriptive jurisdiction over North Cyprus. This is not the case as far as Turkish authorities could not, *inter alia,* issue any laws under their sovereignty even though they had effective control over the territory exercised by the military presence. In the case of *Al-skeini,*[35] the UK was found responsible by the Court for violating the right to life in Iraq during the military operation, not because of exercising jurisdiction in the sovereign boundaries of the United Kingdom but for failing to ensure negative obligation, not to breach a Convention while having a control over either the territory or persons. Thus, jurisdiction in human rights law is way different from the general international law.

The Grand Chamber has rigidly stipulated that exercising jurisdiction is a threshold criterion for the Court and an indispensable condition for a party to be able to be held responsible for acts or omissions imputable to the allegations. As it has been revealed, jurisdiction is not a unitary concept, and it encompasses different sets of power.[36] Consequently, it shall be stated that for the purpose of Art. 1 of ECHR, the meaning of jurisdiction is not equal to the understanding of the general international law. At the same time, it does not imply an explicit contradiction with customary international law.[37] On the one hand, the meaning of Art. 1 is a standard for the European Court to adjudicate the case, on the other hand, most importantly, it

[29] Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 Human Rights Law Review 411-448, 418.

[30] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (*Advisory Opinion, ICJ Rep* 2004, para 109.

[31] *Bankovic and Others v. Belgium and Others,* (n 2), para 57.

[32] Ryngaert (n 20) 27.

[33] *Loizidou v. Turkey* (Preliminary Objections) App. no 15318/89 (ECHR [GC] 23 March 1995).

[34] *Loizidou v. Turkey* App. no 15318/89 (ECHR [GC] 18 December 1996).

[35] *Al-skeini and others v. The United Kingdom,* (n 7).

[36] O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept', (2004) 2 Journal of International Criminal Justice 735, 736.

[37] *Inter alia Ukraine v. Russia (re Crimea)* App. nos 20958/14 and 38334/18, (ECHR [GC] 16 December 2020).

is the possibility of attributability for the party. Consequently, it is a path towards effective human rights protection.

One can logically presume that extra-territorial jurisdiction stipulated in the *Loizidou* case is tightly linked with responsibility and immutability. As Turkey held effective control over the territory, it was eventually responsible for the human rights violations that occurred in North Cyprus. Notwithstanding, there cannot be said that those three terms are synonymous, whereas exercising jurisdiction extra-territorially is a way to immutability. Having effective control itself does not necessarily mean being responsible for the violation. *Inter alia*, in the case of *Hassan v. The UK,*[38] it was stated that the British military had jurisdiction over the person, but responsibility could not be held due to a lack of pieces of evidence. The Court has explicitly differentiated attributability from exercising extra-territorial jurisdiction. Even when it undoubtedly concerns the respondent State's *ratione loci* jurisdiction, that State will ultimately only be responsible for violations of the alleged rights if the alleged acts or omissions are attributable to it.[39] Hence, it is clear that solely exercising jurisdiction is not enough for holding responsibility. Moreover, the test for establishing the existence of jurisdiction is not the same as the test for establishing a state's responsibility for an internationally wrongful act under international law, now codified in ARSIWA.[40]

Applicability requires *ratione materie* which is interplayed with the jurisdiction. Without applicability, a state cannot have jurisdiction under Art. 1 of the ECHR, and therefore, the protective remedy cannot be effective. To illustrate, some social rights do not fall under the Convention. Therefore, states cannot have jurisdiction over allegations regarding such rights due to a lack of conventional provisions. Meanwhile, legally applicable norms without holding jurisdiction shall be useless as the path to determining responsibility for the human rights violation will go towards the deadlock.

That is to say, practically, jurisdiction is a quasi-threshold for the practical applicability of the Convention, which seeks to eschew the *lacuna* in human rights protection.[41] The thesis, therefore, will further argue in the following paragraphs the consequences of the absence of jurisdiction when it comes to the convention's applicability. All in all, it renders a vacuum in human rights protection and therefore makes remedies ineffective, which practically means no applicability of the convention with the absence of jurisdiction. In other words, applicability and jurisdiction are interrelated; interplayed concepts and effectiveness require both of them.

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[38] *Hassan v. The United Kingdom* App. no 29750/09 (ECHR [GC] 16 September 2014).

[39] *Ukraine and the Netherlands v. Russia* (Admisibility decision) (n 3), para 564.

[40] *Catan and Others v. The Republic of Moldova and Russia* App. nos 43370/04, 8252/05 and 18454/06, (ECHR [GC] 19 October 2022), para 115.

[41] Anastasiia Moiseieva, 'The ECtHR in Georgia v. Russia – a Farewell to Arms? The Effects of the Court's Judgment on the Conflict in Eastern Ukraine' (*EJIL: Talk*, 24 february 2021) https://www.ejiltalk.org/the-ecthr-in-georgia-v-russia-a-farewell-to-arms-the-effects-of-the-courts-judgment-on-the-conflict-in-eastern-ukraine/ accessed 7 March 2023.

Therefore, a party can exercise power over the person or a territory, albeit the Court cannot examine the case due to the absence of *ratione materie* once allegations do not fall under the conventional provisions. Whereby, the first stage of the proceedings is examining the Convention's applicability and assessing the party's jurisdiction. Afterwards, the Court is able to go for the merits and hold a responsibility which requires prior assessing the two concepts of attributability and immutability together as a rule.[42]

In conclusion, it is noticeable that jurisdiction has a plethora of definitions. Existing of a different, extended definition in human rights law from the general international law does not mean necessarily contradictions. Even more, by the applicability of the general international law definitions, a number of wrongful acts committed by the states outside their sovereign territories may be left without international human rights protection. At the same time, it should be underlined that jurisdiction does not *per se* mean attribution in the sense that anything that occurs within a state's jurisdiction is attributable to it.[43] Jurisdiction basically means having control over the victims or territory, while attribution is a matter of control over the perpetrator. That being said, it is a threshold which must be fulfilled in order for conventional obligations to arise in the first place[44] and for the Court to be able to go further on merits. In other words, having jurisdiction is at a grassroots level in the way of holding responsibility.

## 2.3 Difference between Jurisdiction and the Court's Competence.

That being mentioned, jurisdiction has several meanings in international law and has been used with different definitions. For the purpose of the thesis, there shall be clarified meaning with respect to the Convention. Jurisdiction contains two different but very interplayed concepts,[45] such as High Contracting Party's control either on the person or on the territory and the Court's *competence* to adjudicate the case. The latter is a starting point where the Court needs to decide the case's admissibility. Art. 19 and 32 establish the Court's ability to receive an application before finding out of the state's jurisdiction. Among others, there is a matter of *ratione materie* when the European Court needs to decide whether Convention can be applicable in the case. ECtHR has stated that examining its jurisdiction, in any case, is mandatory.[46] The second concept is ensured under Art. 1 of the Convention.

[42] *Assanidze v. Georgia* App no. 71503/01, (ECHR [GC] 8 April 2004), para 144.
[43] Milanovic, 'From Compromise to Principle' (n 28) 447.
[44] O'Boyle,'The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on 'Life After Bankovic', in Coomans and Kamminga, (eds), Extraterritorial Application of Human Rights Treaties (Antwerp, Oxford: Intersentia, 2004), 125.
[45] *Ukraine and the Netherlands v. Russia* (Admisibility decision) (n 3), para 503.
[46] *Blecic v. Croatia* App. no. 59532/00, (ECHR [GC] 8 March 2006), para 67.

In order for an alleged violation to fall under the Court's jurisdiction, it must initially be illustrated to fall under the Article 1 jurisdiction of a High Contracting Party.[47] It has been shown that jurisdiction clauses are tightly related to each other. In order to have a *competence* (court's jurisdiction) to adjudicate the case, the Convention must be applicable, which means *ratione materie* applicability under Art. 19 and 32. At the same time, in the absence of the allegations falling under the respondent state's jurisdiction, the case cannot be ruled due to lack of the Court's jurisdiction respectively.

Whether the term jurisdiction can be used as a substitute for the Court's *competence* has been raised at different times. Since the ECtHR's subject-matter jurisdiction is limited to interpreting and applying the ECHR, it will undeviatingly lack jurisdiction if the treaty itself does not apply.[48] It is correctly underlined that *competence* came from the *ratione materie,* and the absence of the party's jurisdiction renders a lack of the Court's ability to rule the case. Albeit, using the term jurisdiction in regard to the procedural nature should not be wrong. The proceedings are separated into two main stages, addressed to the *admissibility* and *merits.* For example, in the decision on the case of *Georgia v. Russia (II),* the Chamber rejected assessing aspects of jurisdiction tightly related to the merits.[49]

By declaring the case admissible on the one hand and separating merits' stage aspects of jurisdiction on the other hand, the Court explicitly differentiated the concept of the jurisdiction of the European Court and the party, respectively. It stated that examining the admissibility stage allows the ECtHR to go further on the merits stage. At the admissibility, phase the Court needs to assess the *prima facie* capability of the case to fulfil the requirements of Art. 1.[50] Thereby, Strasbourg sets forth a standard similar to the assessing credibility of the pieces of evidence at the pre-trial proceedings. In other words, while deliberating the admissibility of the case, the Court is not able to thoroughly decide all aspects of the jurisdiction. Based on the facts, it decides the feasibility of addressing merit-based aspects in an affirmative vein. The ECtHR tries to detach aspects regarding jurisdiction that may be addressed at the first stage, and the rest of them unseparated from the merits at the last part of the proceedings. At the same time, it does not prevent the Court from applying rulings by international tribunals concerning jurisdiction.[51]

Whether allegations fall under the jurisdiction of the respondent state and holding responsibility is two different concepts and need to be separated, and the latter must be determined at the merits stage. Subsequently, even in the absence of procedural grounds, jurisdiction written in Art.1 still exists when the state has physical power over the person

[47] *Ukraine and the Netherlands v. Russia* (Admisibility decision) (n 3), para 506.

[48] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011) 20.

[49] *Georgia v. Russia (II)* (Admisibility decision) App no. 38263/08, (ECHR 13 December 2011), para 63.

[50] ibid para 64.

[51] *Cyprus v. Turkey* App no. 25781/94, (ECtHR [GC] 10 May 2001).

(*ratione personae*) or the territory (*ratione loci*). Hence, jurisdiction ensured under Art. 1 belongs to the state only. However, the Convention's applicability has to be practical through exercising jurisdiction by the ECtHR itself to ensure the effectiveness of the Convention. Otherwise, neither exclusive applicability of the *ratione materie* nor having jurisdiction by the state will be enough to strive for the conventional predominant aim – protecting the rights and freedoms.

## 2.4 Concept of Territoriality

In order to clarify to what extent, the European Convention should be applied effectively in the armed conflict, the critical interpretation of the extra-territorial jurisdiction in the Court's jurisprudence has paramount importance. The aim cannot be achieved without differentiating territorial and extra-territorial concepts. Therefore, this chapter aims to discuss the Court's approach to territorial jurisdiction as such, which logically shall be prior to discussing the following chapter about the exceptional rule from the territorial jurisdiction.

That being mentioned above, prescriptive jurisdiction is merely territorial in the sense that a state, by definition, has the exclusive power to legislate for persons present in its own territory.[52] The argument of sovereignty comes to light and requires limitations of the jurisdiction. Therefore, the *fons et origo* of the jurisdiction of states is the principle of territoriality, signifying that sovereignty and territory go hand in hand.[53] It can be inferred from the interpretation pursuant to the general international law that jurisdiction is primarily territorial.[54] Interpretation of the Convention in conjunction with general international law is a recognised standard by the European Court.[55] Harmonious interpretation does not exclude extending aspects to the definition which is required by the nature of human rights protection. More precisely, while territorial jurisdiction binds a state within its sovereign boundaries and gives the power to prescribe or enforce the power, there is extended meaning of the jurisdiction in human rights law, namely, negative obligations imposed extra-territorially. It is worth mentioning that, unlike the American Convention,[56] ECHR does not have a concept of a federal organisation. It held unitary obligations over all the high contracting parties.

According to the argument of sovereignty, within sovereign territories, a country has jurisdiction, which means a whole catalogue of obligations under the Convention. Pursuant to the *prima facie* standard, there is no necessity to examine the state's jurisdiction unless the state party proves the opposite by raising the preliminary objection. For instance, there can be a case when the country has declared an absence of control over a particular territory within its

[52] Crawford (n 17) 297.

[53] Klabbers (n 17) 100.

[54] see discussions about *Wall* (para 109) and *Bankovic* (para 57) cases.

[55] *Al-skeini and others v. The United Kingdom*, (n 3), para 55.

[56] Art. 28 of the American Convention on Human Rights of 22 November 1969.

sovereign boundaries.[57] The lack of capability to exercise control over the territory makes holding responsibility for the human rights violations unable.

Furthermore, back to the discussion regarding terms, the territorial clause is one more example in favour of differentiating jurisdiction from responsibility. Generally, a state's jurisdiction is usually exercised throughout its territory.[58] However, holding responsibility for the alleged violation is not *per se* attributable to the state. It is a subject-matter issue and must be addressed appropriately.[59] Therefore, if having control within the sovereign boundaries cannot be enough ground for being responsible for all the violations in the country, exercising extra-territorial jurisdiction would neither be sufficient for the test of responsibility. All in all, jurisdiction is primarily territorial, however, a state still may exercise extra-territorial jurisdiction in exceptional circumstances.

## 2.5 Concept of Extra-territoriality

The jurisdiction concept is built on territoriality for various reasons. Unavoidable exceptions from the general rule came to light due to caustic challenges of human rights. International military lawful or unlawful operations, migration crises and challenges of terrorism generated the necessity to establish an exceptional rule of the concept of territoriality, which could not respond to all the flagrant breaches committed by the states outside of their sovereign borders.

Extra-territorial jurisdiction comes from Art. 1 of the Convention, which imposes human rights protection obligations on states '*within their jurisdiction*' instead of their territory. According to the *travaux préparatoires* of the Convention, the assembly initiated Art. 1 as follows: 'all persons residing within the territories of the signatory States.'[60] Albeit, the founder article framed as 'everyone' instead of 'all persons residing' and 'within the jurisdiction' instead of 'territory'. The drafters' initial intent was revealed clearly. The changing Convention explicitly rejected its limitations over individuals residing in the high-contracting parties and covered everyone. The second important, interplayed change is using jurisdiction instead of territory. By doing so, the Convention explicitly stands in favour of acknowledging extra-territoriality as an absolute inevitable standard for adequate protection. Thus, exceptional provision from the general concept of jurisdiction makes it feasible to impose responsibility for the wrongful acts committed outside of the national territories.

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[57] See cases with respect to Moldova, Georgia. Among others: *Ilascu and Others v. Moldova and Russia* App no. 48787/99, (ECHR [GC] 8 July 2004), para 312; *Shavlokhova and Others v. Georggia* (Admisibility decision) App no. 45431/08, , (ECHR 5 October 2021), para29.

[58] *Assanidze v. Georgia* (n 42), para 139.

[59] *Chagos Islanders v. The United Kingdom* App no. 35622/04 (ECHR 11 December 2012), para 63.

[60] Preparatory work of the European Convention on Human Rights. https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART1-COUR(77)9-EN1290551.PDF Accessed 7 March.

Whereas, in *Bankovic* the Grand Chamber established the concept of legal space, which is merely CoE territory.[61] Even though the Court itself recalled *travaux préparatoires* unclearly opined that extra-territorial applicability does not imply exercising jurisdiction under Art. 1 everywhere. Thus, the Court itself dubiously noted that since the Federal Republic of Yugoslavia was not a member of the Council of Europe, the Convention could not have protected those in wars who were not given the rights even during peacetime.[62] On the other hand, the Court's striving towards effectiveness can be seen. For the sake of fairness, it is worth mentioning that territorial effectiveness must be ensured under the ECHR, and regional human rights institutions have no mandate to cover all of the world regardless of the territories of the high-contracting parties. However, the standard itself is at some point ambivalent since extra-territorial jurisdiction aiming to exercise power regardless of boundaries was shown as territorial.

While respecting another state's territorial integrity and political sovereignty ties jurisdictional concept's hands in general international law, it must be mentioned that human rights treaties do not give power to the states but obligations on how to act and how not to during the exercising physical power abroad. The contracting state exercises effective control over an area outside its territory as a consequence of either lawful or unlawful military operation—the establishment of extra-territorial jurisdiction targets to bind states instead of deliberating the lawfulness of military action. More precisely, one that can be successful under the human rights treaty is not to extend sovereignty but to bind states not to act wrongly while they have power. Therefore, addressing issues of the lawfulness of the military operation is not under the Convention's mandate. Extra-territorial jurisdictional concept strives for the effectiveness of human rights protection, therefore, assessing the legality of the use of force cannot be relevant in this regard.

The extraterritorial concept of jurisdiction is not limited under European law since it is recognised by the Inter-American Court of Human Rights ('IACtHR'). In the *Serrano Cruz Sisters* case[63] the American Court upheld the violation of the IACHR as the respondent state failed to protect the right to life and physical integrity in the armed conflict. American Court stated that even though allegations occurred outside the territory of the respondent state, it had extra-territorial jurisdiction over the conduct of agents. Besides the substantive limbs of the rights, IACHR has also declared that procedural obligations do not cease applicability regardless of territoriality. The American Court underlined that parties should ensure that

[61] *Bankovic and Others v. Belgium and Others,* (n 2), paras 19-20.

[62] Ibid paras 75-80.

[63] I/A Court H.R., Case of the Serrano Cruz Sisters v. El Salvador. Interpretation of the Judgment of Merits, Reparations and Costs. Judgment of September 9, 2005. Series C No. 131.

officials in the name of the states do not violate conventional provisions even if they are operating outside the national territory.[64]

Besides regional human rights institutions, the mandate of the UN human rights committee has stated that extraterritorial protection also applies when a state acts outside its territory.[65] In the case of *Congo v. Uganda, the* International Court of Justice held that Uganda violated humanitarian law and human rights on the Congo's territory, which caused Uganda's responsibility.[66] Even though ICJ did not use the term extra-territorial jurisdiction, it should be underlined that it could not be possible without exercising physical control over the territory of Congo, which implicitly means recognition of the concept of extra-territoriality.

Getting back to the European Convention, extra-territorial jurisdiction is built on having physical power. Precisely, it is either an effective control over the territory (spatial concept of jurisdiction, or jurisdiction *ratione loci*) or control over individuals exercised by the state agency (personal concept of jurisdiction, or jurisdiction *ratione personae*).[67]

Initially, the spatial model could be analysed, which unites two feasible ways of having effective control over the territory, either directly by the military presence or indirectly through military economic and political support to the subordinate local administration, which provides its influence and control over the region. Where the principal argument is that the respondent state exercised effective control over an area, the issue is whether the area falls within the *ratione loci* jurisdiction of the party.[68]

For assessing the effective control under the military presence strength of the forces will be taken into consideration. The ICJ has pointed out that effective control can also be exercised over the part of the territory, and military presence within the entire sovereign borders is not necessary.[69] The occupation of Northern Cyprus became the very first precedent for the ECtHR to stipulate the standard. The landmark judgment on the case of *Loizidou* test of the military presence was built on the number of troops in regard to the area.[70] By presenting the large number of troops engaged in active duties in Northern Cyprus, there was an undoubted indication that the Turkish army exercised effective control over that part of Cyprus. The standard was recalled in the Ukrainian case when assessing the Russian military's direct

[64] I/A Court H.R., Case of Barrios Altos v. Peru. Reparations and Costs. Judgment of November 30, 2001. Series C No. 87.

[65] OHCHR 'International Legal Protection of Human Rights in Armed Conflict' (2011) 43. https://www.ohchr.org/sites/default/files/Documents/Publications/HR_in_armed_conflict.pdf Accessed 5 March.

[66] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) [2005] ICJ Rep 168, para 216.

[67] *Georgia v. Russia (II)* (n 1), para 115.

[68] *Ukraine and the Netherlands v. Russia* (Admisibility decision) (n 3), para 548.

[69] advisory opinion of 9 July 2004 on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (*Advisory Opinion, ICJ Reports* 2004, para 119.

[70] *Loizidou v. Turkey* (n 34), paras 16 and 56.

engagement by the presence. In contrast, due to a lack of evidentiary-based information on the exact number of the *de jure* Russian soldiers, ECtHR considered that it could not consider beyond reasonable doubt strong enough to satisfy the test of exercising effective control through the military presence in eastern Ukraine.[71]

The military presence is a way of controlling land, which shall be achieved through troops. By way of explanation, types of military power matter. For instance, in the case of NATO joint forces bombing of the Former Republic of Yugoslavia, the Grand Chamber drew parallels with Cyprus cases with respect to the military presence with a large number of troops and eventually upheld that air forces and bombing could not have enough ground to exercise control over the land.[72] By saying that, the Court implicitly stated that controlling air space cannot be enough to meet the requirements of *ratione loci,* which requires a compulsory component of controlling land by troops specifically. Assessing *Bankovic* and Cyrpus's cases, spatial jurisdiction is suggested as control through military forces on the land once they block the sovereign state's capability of ensuring conventional provisions, which eventually shifts such negative or positive obligations over them. In other words, if exercising jurisdiction is a threshold for holding responsibility, there should be a party with effective control over the territory. Alleging the opposite would create a *lacuna* in human rights protection, which undermines the spirit of the ECHR.[73]

Following the above-mentioned, the Court suggests that if air space control is not enough ground for the *ratione loci* jurisdiction, meanwhile of bombing state under the attack may still have the feasibility to control the land. Besides, ICJ has clarified that the existence of a certain number of troops does not necessarily imply effective control as it needs the ability to organise, make and enforce decisions, control lines of communication etc.[74] Furthermore, as the Court rejected Russian military presence in Eastern Europe due to insufficient tangible evidence on the exact number of troops, it should be underlined that military presence should be understood through the troops and the crucial amount component. In conclusion, exercising extra-territorial jurisdiction as a *spatial* concept through military presence requires establishment control over the territory by troops with large numbers enough to control the land effectively.

The absence of direct presence of military forces does not exclude the possibility of having effective control, as a second test can be used. The state can still exercise extra-territorial jurisdiction through solid military, economic or political support to the subordinate local administration.[75] In the case of Ukraine, there was turned in pieces of evidence that for the

[71] *Ukraine and the Netherlands v. Russia* (Admisibility decision) (n 3), para 611.

[72] *Bankovic and Others v. Belgium and Others,* (n 2).

[73] It is further discussed in the chapters three and five. They argue that in the case of the absence of exercising extra-territorial jurisdiction, human rights law gets a vacuum in protecting victims of the armed conflicts.

[74] advisory opinion of 9 July 2004 on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (*Advisory Opinion, ICJ Reports* 2004, para 117.

[75] *Ilascu and Others v. Moldova and Russia* (n 57), paras 388-394.

planning, the sequence of the actions was agreed upon with Moscow, which made the existence of a political hierarchy on military strategy clear.[76] Moreover, another critical point for the test was found, such as supplying weapons and other military equipment. Sending weapons systematically to support separatists was another element of stating military aid from the Russian Federation.[77]

Another indicator was using the Russian military to provide artillery cover in the hostilities.[78] All of the components clearly illustrated Russian military support to the separatists, which shows that military participation by participating in the decision-making process and actually deciding; on funding, training, equipping etc., indicates military support. In the case of *Nagorno-Kharabakh,* unlike in the Ukrainian case, the ECtHR could not have the opportunity to examine highly detailed information on either composition of the armed forces or the precise amount of military aid. Albeit, it opined that without substantial military support from Armenia, the region with 150 000 Ethnic Armenian population could not fight Azerbaijan with a population of seven million, which eventually illustrated Armenian forces supporting this process.[79]

Another aspect of the test is political support. In the case of *Nagorno-Kharabakh*, political dependence on Armenia is evident not only from the interchange of prominent politicians but also from the fact that its residents of the region acquire Armenian passports for travelling abroad.[80] In the case of *Ukraine,* it was stated that nominations for the official positions were either agreed upon or subordinated by Kremlin.[81] Additionally, Russia as a permanent member of the UNSC, used the veto to prevent the establishment of the special criminal tribunal from prosecuting those responsible for downing Flight MH17 under the UN.[82] Thus the main point of political dependence is the absence or lack of a sovereign decision-making process as far as another party subordinates it. The same applies in the case of economic dependence, which predominately implies direct financial support from another state. In conclusion, the state can exercise effective control over the territory without direct military engagement under the conditions described above.

Control over the individual is the second type of extra-territorial jurisdiction. Where the point is that a victim fell under a state agent's authority and control in the territory that the state did not control, the principal question will be whether the respondent state exercised *ratione personae* jurisdiction.[83] Having control over the individuals through state agency sets forth the additional opportunity for exercising extra-territorial jurisdiction and eventually holding

[76] *Ukraine and the Netherlands v. Russia* (Admisibility decision) (n 3), para 619-621.
[77] ibid para 630.
[78] ibid para 654.
[79] *Chiragov and Others v. Armenia* App no. 13216/05, , (ECHR [GC] 12 December 2017), para 174.
[80] ibid 182.
[81] *Ukraine and the Netherlands v. Russia* (Admisibility decision) (n 3), para 671.
[82] ibid 674.
[83] ibid para 548.

responsibility when the official agent has physical power over the individual. It can be established with the *ratione loci* during the conduct of hostilities. Albeit, having control over the territory is not crucial. To illustrate, it had held that person beaten to death by members of the Turkish armed forces and police in the UN buffer zone in Cyprus had been under the authority and control of Turkey.[84] Extra-territorial jurisdiction will be held when lethal force is used from the controlled territory.

In other words, a person can be injured or killed over a territory not controlled by the state, albeit if the state's-controlled agents used the force, victims shall fall under the extra-territorial jurisdiction.[85] The extra-territorial jurisdiction concept is simple – preventing individuals over the territory from human rights violations while the sovereign state has no power. To illustrate, there are a number of concerning cases related to the Iraq mission. For instance, the Grand Chamber held that the Netherlands exercised extra-territorial jurisdiction as it controlled persons passing through the checkpoint.[86]

## 2.6 Concluding Remarks

The chapter defines the general meaning of the jurisdiction and its relation to human rights law. It illustrated differences in terms of jurisdiction, attributability, imputability and responsibility. Based on the case law, it has been shown that jurisdiction has been used as a substitute for the competence of the Court as far as there is a procedural concept of the term, which gives the Court feasibility to adjudicate the case and which is unavoidable attached to the Art. 1 meaning – high-contracting party's jurisdiction. The chapter showed the coherence of the Court's case law and its standards regarding tests of the extra-territorial jurisdiction, such as effective control over the territory by either the military presence or military, political and economic dependence and effective control over the person through the state agent. As far as none of these cases is about the active phase of hostilities, the findings will be merely used for the following chapters to comprehensively analyse recent jurisprudence and the Court's logic in the applicability of the standards in the conduct of hostilities.

[84] *Issa and Others v. Turkey* Appno. 31821/96, (ECHR 16 November 2004).
[85] *Solomou and Others v. Turkey* App no. 36832/97, (ECHR 24 June 2008).
[86] *Jaloud v. The Netherlands* App no. 47708/08, (ECHR [GC] 20 November 2014), para 152.

# 3. ECHR in International Armed Conflicts

## 3.1 Introduction

In *Georgia v. Russia (II)*, the Grand Chamber tried to list all the obstacles that it faces in dealing with the allegations concerning the active phase of hostilities. Following chapters analyse all of them. The European Court stated:

> 'However, having regard in particular to a large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances and the fact that such situations are predominantly regulated by legal norms other than those of the Convention (specifically, international humanitarian law or the law of armed conflict), the Court considers that it is not in a position to develop its case-law beyond the understanding of the notion of "jurisdiction" as established to date.'[87]

The European Court has dealt with IAC in different cases. Most of them have illustrated a very progressive approach to human rights, effective application, and protection of the individuals within the jurisdiction of the state parties. The Court stipulated clear, rigid standards on extra-territorial applicability either through 'effective control' or 'state agency' tests. Albeit, for some reason, once it was asked to adjudicate full-scale military intervention in Georgia, it denied its mandate to at least assess the compatibility of the case circumstances with the tests applied before. Even though paragraph 141 tried to provide potential reasons, it does not give any clear clue what was the exact decisive factor for the inadmissibility of this part of the application. The reason is unknown, whether it was norm conflict, insufficient grounds for the extra-territorial jurisdiction, logistical difficulties, or all of them. The unclarity is even more problematic since the standard may be used further on ongoing Ukrainian cases, which will have a very dangerous impact. Abandoning victims of the hostilities without effective remedies absolutely undermines the spirit of the Convention and clearly supports the idea that military superiority works even in the modern international legal order.

Armed conflict case litigation generates a number of difficulties opined by the Court, either explicitly or implicitly. This chapter analyses how the European Court dealt with Armed conflict cases. The first part addresses the historical background and coherence of the Convention's interpretation. The second part describes practical difficulties, merely logistical issues, for the Court in dealing with armed conflict cases. The third part analyses one of the most important legal aspects of adjudicating hostilities cases, the interaction of the humanitarian law and human rights law norms based on the historical background, derogation institute, legal norms and jurisprudence. The second half of the chapter (Ch. 3.5) addresses the current understanding of extra-territorial jurisdiction in the active phase. The analyses are mainly based on *Georgia v. Russia (II)* as the only existing judgment on full-scale military intervention.

[87] *Georgia v. Russia (II)* (n 1), para 141.

Therefore, chapter 3 aims to identify all the aspects described by the ECtHR and illustrate its incredibility to reject conduct of hostilities cases. To support the argument that ECHR should apply during the conduct of hostilities, it is important to respond to the Court's reasoning and rebut its main arguments on these difficulties and their decisive importance in rejecting the admissibility of such cases.

## 3.2 *Inter Arma Enim Silent Leges*?[88]

The moral foundation of human rights is the recognition of the inherent value of the human person.[89] European Convention, as a guarantee of the public safety and integrity of the European values based on the rule of law, democracy and human rights, should respond to all the caustic challenges modern international society faces. Conventional provisions were developed during times of normalcy.[90] However, the possibility of ruling cases in sole peacetime has changed since several armed conflicts erupted in Europe and abroad. The Court has witnessed mass human rights violations for the last three decades through international or non-international armed conflicts. Significant geopolitical milestones in the early 90s destroyed the peace in Eastern Europe and the Western Balkans for a while, which forced the Court to deal with questions which had not been revealed before.

This chapter analyses the Court's coherence on the consequences of hostilities by dividing it into two parts – occupation and active phase. Finally, it argues that despite the ECtHR's legal justifications, reading between the lines, it may be seen that the Court has demonstrated an approach which may be perceived as everything but being in service of human rights by rejecting dealing with some points the assessing armed conflicts.

For the sake of fairness, it should be indicated that, even though the European Court is a legal institution, unlike the national judiciary, it is still indeed an international treaty body and does not have the opportunity to be fully distanced from the international political context. The European Court is founded within the Council of Europe's purview, which is an international governmental organisation, and even though the Court is an independent body, a number of aspects, from the composition of the Court to the enforcement of judgments, are tightly related to the political bodies, such as Parliamentary Assembly and Committee of Ministers.

Therefore, one thing is legal discussion, explicitly outlined in the jurisprudence, but another is non-legal implications expressed implicitly. The *Bankovic* case did not achieve the goal of being a barrier for applications concerning military interventions. The ever-mounting tendency

[88] In times of war, law falls silent, Cicero.

[89] Ronen, Yaël, 'International Human Rights Law and Extraterritorial Hostilities', in Robin Geiß, and Heike Krieger (eds), *The 'Legal Pluriverse' Surrounding Multinational Military Operations* (Oxford University Press 2019) 204.

[90] Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 47) 111.

of bringing cases to the Court regarding the consequences of the occupation in Iraq, Cyprus and Moldova finally ended up with cases on the full-scale military intervention in Georgia and Ukraine. In this turbulent time, Strasbourg was eventually forced to make it clear how distanced the Court could be from raising its voice on flagrant breach of human rights during the hostilities.

Unlike universal international organisations, which have an almost unlimited geographical area of competence, regional institutions are targeted at the areas covered by the member states.[91] The nature of regionality causes dubious understanding in some cases, whether the extra-territorial application can be felled under the Convention outside member states' territory. The endless discussion of universality generates the question itself, where understanding human rights is relative and cannot be applied universally. As the far scope of the research does not leave the possibility for further discussion on the universality vs relativism, concerning supporting the discussion in this paper, it shall be briefly stated that international human rights are universal and they derive from the order of nature and not from a particular society or historic milestone, not relative to any specific social or historical culture.[92] Moreover, it is clear that the European Convention non-arguably recognizes human rights' universal nature.[93]

After the *Bankovic* decision, the European Court stated that Convention was not designed to be applied throughout the world, even in respect of the conduct of hostilities carried out by the Contracting States.[94] By saying that, the Court explicitly supported the idea of regionalism, which limits the Convention's purview out of its legal space and thus sets the member parties free to act without the possibility of responsibility for human rights violations abroad.

Before analysing jurisprudence in this regard, it is essential to clarify what regionalism means under the Convention. The state's capacity to violate or protect human rights in a given territory does not depend on whether it possesses title or *de jure* sovereignty.[95] States are capable of taking measures over another state, even though that one can be under the effective control of the sovereign government. For example, it has been stated that Israel managed to violate the sovereignty of Argentina when it took measures to ensure the transportation of Adolf Eichman to Jerusalem.[96] It proves that boundaries do not limit state authorities' ability to take particular measures.

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[91] While UN bodies do not generally limit its boundries continentaly, *inter alia,* European Convention, African Charter or American convention are merely based on the continentaly operation.

[92] David Sidorsky, 'Contemporary Reinterpretations of the Concept of Human Rights' in D Sidorsky (ed), *Essays on Human Rights: Contemporary Issues and Jewish Perspectives* (Jewish Publication Society of America 1979) 89.

[93] The preamble of the ECHR is merely based on the Universal Declaration and shares its values and aims to ensure protection of the human rights universally.

[94] *Bankovic and Others v. Belgium and Others,* (n 2), para 80.

[95] Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 47) 106.

[96] UNSC Res 138 (23 June 1960) UN Doc S/RES/138.

Whereas, the substance of the remedy is to be effective which is practically more affordable within regional borders rather than universally everywhere. The Convention is a multi-lateral treaty based on the Art.56 of the Convention, which sets forth territorial application in a principal regional context and notably in the legal space of the contracting parties. It has already been discussed the primary intent of replacing the word 'territory' with 'jurisdiction' during the *travaux préparatoires*.[97] Initial terms 'residing' and 'territory' changing into 'jurisdiction' and 'all persons' indicate that the nature of regional institutions does not limit the Convention to protect everyone from their parties' wrongful acts. It limits countries obliged under the Convention to ensure everyone within their jurisdiction.

Therefore, regionalism should not apply to prevent individuals outside the *legal space* of the CoE territory from being protected. Interpreting regionalism in favour of limited extra-territorial applicability of the Convention would allow state parties to violate conventional provisions outside of their borders, which undermines the spirit of the onvention to protect everyone within the state party's jurisdiction and not the territory. The Convention does not encourage parties to act outside its territories as they wish but prevents them from violating human rights, despite the Court doing so in *Bankovic*.

Moreover, the former president of the Grand Chamber stated that the Convention is not able to cure all ills of the planet,[98] which practically implies the obligation of the contracting parties to treat everyone pursuant to the Convention in the CoE legal space. At the same time, they will not be responsible under the ECHR for actions which are taken abroad. Even though the Court overruled this approach in occupation cases with respect to Iraq and held accountability standards for the violations outside the member states territories, it remained silent on the human rights violations related to the active phase of hostilities. Therefore, there are following discussions regarding the Court's approach during the occupation and the conduct of hostilities.

### 3.2.1 Occupation Phase

Dealing with the extra-territorial jurisdiction with the meaning of Art. 1, the ECHR jurisprudence Strasbourg differentiated actions taken during the military operation carried out in the active phase of hostilities and other events, which it was required to assess the consequences of the international armed conflict[99] which generally implies occupation. With respect to the latter, the ECtHR has been very coherent despite a few complaints. However, it illustrated a clear, logical flow which stipulated the extra-territorial applicability of the Convention to respond to the allegations during the occupation. In juxtaposition, the Court was

[97] See Ch. 2.5

[98] M. O'Boyle, 'The European Convention on Human Rights and Extraterritorial Jurisdic- tion: A Comment on "Life After Bankovic" in F. Coomans and M. Kamminga (eds), Extraterritorial Application of Human Rights Treaties (Inter- sentia, 2004), 125.

[99] *Ukraine and the Netherlands v. Russia* (Admissibility decision) (n 3), para 557.

asked twice to assess active phase consequences, and in both cases, it eschewed deliberation cases under a few pretexts, which will be examined in the following paragraphs.

### A. Northern Cyprus

The first time the ECtHR delivered a landmark judgment on the case of *Louzidou v. Turkey* concerning the occupation of Northern Cyprus. The Grand Chamber set forth a test of 'effective control' based on Turkish military presence over the internationally recognised borders of Cyprus, which led the European Court to declare that Turkey exercised extra-territorial jurisdiction, which rendered its responsibility for human rights violations. By rejecting the Government's preliminary objection, the Court stated that even though it was not Turkish *de jure* territory, the significant presence of troops ensured Cyprus's inability to control its territory effectively. Notably, the ECtHR stated that control could be established by two cumulative elements: 1. Controlling the land; 2. and the number of troops. In sum, the Occupying Power should be able to block the *de jure* government's controlling mechanisms over the territory to meet the test of 'effective control' requirements. Following *Loizidou* the Court reiterated the test on the inter-state judgment on the case of *Cyprus v. Turkey*. After dealing with the same armed conflict, the Court went further on the *Varnava* case. It stated[100] that the party is obliged to protect the lives of those who have no longer engaged in the hostilities, which must include a list of positive obligations and medical treatment, for instance.

### B. Transnistria

Dealing with cases concerning the occupation of the Moldovian territories, the European Court followed its approach of extra-territorial applicability, established in the Northern Cyprus cases. The *Ilascu* case affirmed that a state could be responsible for acts committed outside its internationally recognised borders if it exercises jurisdiction through effective control. The military presence and significant political, economic and military support, which is ensured by the local governments subordinated under the occupier power, can be enough ground to hold effective control.[101] Therefore, predominantly Russia was found responsible for the violations that occurred over the occupied territories of Moldova as it exercised effective control over the region of Transnistria.

[100] *Varnava and others v. Turkey* App nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECHR [GC] 18 September 2009) para 185.
[101] *Ilascu and Others v. Moldova and Russia* (n 57), paras 388-394.

C. Nagorno-Karabakh

Armed conflict in the Nagorno-Karabakh region once more revitalised the need to review the standards as mentioned earlier stipulated a decade before on those cases. Strasbourg not only applied the same standards for adjudication but also went further. If military presence was non-arguable, confirmed by the parties in the *Cyprus* case,[102] there was no evidence-based tangible piece of proof of Armenian military presence in the region. However, the Grand Chamber deduced that a region with 150 000 population, which has a close link with Armenia, could not fight against Azerbaijan without significant assistance.[103] Thus, examining other additional indicators, such as economic, political and military assistance,[104] finally allowed the ECtHR to find effective Armenian control over Nagorno-Karabakh. It could be stressed that after many years of firstly highlighting occupation issues, *Chiragov* practically gathered all standards used before and affirmed the Court's active engagement in dealing with human rights issues as consequences of armed conflict.

D. Iraq and Afghanistan

Allied operations in Iraq and Afghanistan generated a number of allegations concerning measures taken by the joint forces. The sequence of the jurisprudence on interventions indicates Strasbourg's straightforward approach to the convention's applicability whenever a member state exercises effective control. It should be stressed that in Afghanistan and Iraq, cases of extra-territorial jurisdiction mostly were based on the *ratione personae* principle, which enhanced Strasbourg's requirement towards parties on human rights protection. In *Al-skeini,* the UK was found responsible[105] for violating the right to life as it had effective control over the persons.

The case overruled the *Bankovic* test, which rejected a ruling case concerning allegations that occurred out of the legal space of the CoE. *Al-skeini* stipulated that the Convention's applicability does cover the territory which is not within the territory of the member state. Similar to the *Hanan* case,[106] where the Court affirmed that Germany had a special duty in Afghanistan while exercising exclusive jurisdiction over its troops deployed within International Security Assistance Force. Moreover, in the *Al-jedda* case,[107] the ECtHR enhanced the area of the human rights catalogue. It stated that the British army had effective control over the area where the applicant was detained, which was not compatible with the requirements of Art. 5. This case significantly approved the obligation not only right to life but also to secure the right to liberty, which is one of the caustic issues during the armed conflict.

[102] *Louzudou v. Turkey* (n 34), paras 16-17.
[103] *Chiragov and Others v. Armenia* (n 79), para 174.
[104] ibid paras 175-187.
[105] *Al-skeini and others v. The United Kingdom,* (n 3).
[106] *Hanan v. Germany* App no. 4871/16 (ECHR [GC] 16 February 2021).
[107] *Al-Jedda v. The United Kingdom* App no. 27021/08 (ECHR [GC] 7 July 2021).

In conclusion, it can be said that ECtHR has illustrated its apparent, thorough and coherent approach to conventional provisions' applicability through its parties' extra-territorial jurisdiction to the consequences of the armed conflicts in all cases brought before the Court. It affirmed all the main principles in occupation cases, which leaves no space for hesitation on the Convention's extra-territorial applicability.

### 3.2.2 Active Phase

In juxtaposition, the active phase of hostilities requires assessment not only of the consequences of the conduct of hostilities *post-factum* but also the issue of the use of force, compatibility with IHL norms and practical difficulties, which are discussed in the following chapters. The unity of the *prima facie* coherent jurisprudence was disrupted by two cases that entreated the Court to assess claims relating to the conduct of hostilities. Hence, both of them will be discussed separately.

#### A. Belgrade

During the Kosovo crisis, NATO joint forces carried out military operations and bombed the TV tower in Belgrade, which caused causalities. In *Bankovic,*[108] the applicant, as a relative, alleged that seventeen member states of the Convention were responsible for the human rights violations as part of the operation. The Court declared the application inadmissible under the pretext of the lack of competence on allegations which did not fall under the legal space of the Convention. Beyond that, the question of exercising effective control came to light as the ECtHR implicitly stressed that air forces bombing could not have enough ground to exercise control over the land. By saying so the Grand Chamber reiterated that *spatial* jurisdiction requires troop presence over the land. It rejected the application formally on the *'legal space'* argument.

However, if the requirement had been satisfied, the ECtHR would have applied the test of the necessity of the troops for controlling the land since, pursuant to the well-established jurisprudence, *ratione loci* requires controlling the land. Albeit, that being said, dealing with Turkish cases the Court made a manifestly different standard by saying that persons who find themselves within the jurisdiction of a state party, even if they are in the territory of a non-party state, are within the *'legal space'* of the Convention.[109] Later the *Al-skeini* case finally overruled the *Bankovic* standard and stipulated that the Court does have the competence to rule

[108] *Bankovic and Others v. Belgium and Others,* (n 2).

[109] Andrea Gioia, 'E Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict' 212.

the case on allegations which are not about events that occurred within the member states territories.

## B. Georgia

Armed conflicts in the early 90s between Georgian authorities and separatist groups, funded and supported by Russian Federation generated two breakaway regions in Georgia.[110] Ever-mounting escalation reached the pick around 7-8 August 2008 in the Tskhinvali region, the territory, which is *de jure* Georgian territory, however, *de facto* controlled by Russia.[111] Russian forces entered Georgia under the pretext of protecting peacekeepers and 'South Ossetian' nationals. The armed confrontation lasted for five days, which ended on the 12th of August with the cease-fire agreement. Russia occupied not only disputable territories but non-disputable ones until October. However, they dislocated military forces on the disputable territories, and they have been occupying 20% of Georgia.[112]

The ECtHR was asked to respond to allegations on the active phase of hostilities of the international armed conflict, including full-scale military potential very first time in the case of *Georgia v. Russia (II)*. Unlike *Bankovic*, IAC occurred between contracting parties within the legal space and requirements of effective control regarding all the way military presence were fulfilled. However, the Court referred to *Bankovic* and rejected part of the application with respect to the active phase of hostilities.

Georgia alleged that Russia violated Convention during the armed conflict. Due to the case's complexity, the Court divided the application into two parts.[113] Allegations on events during the conduct of hostilities 8-12 August and the rest of the parts, basically the occupation phase. Since the European Court had already stipulated Conventions' extra-territorial applicability, jurisdictional tests and responsibility in many cases, it was not onerous for the European Court to piece together all these standards and almost unanimously hold the responsibility of the Russian Federation for the mass human rights violations mostly in the occupation phase. Structurally, it gave the Court feasibility to reject parts of the application regarding the active

[110] On the effective control over Abkhazia before 2008, see *Mamasakhlisi and Others v. Russia* App nos. 29999/04 and 41424/04 (ECHR 7 March 2023). On the escalations and armed conflicts see Human Rights Watch (Formerly Helsinki Watch), 'Bloodshed in the Caucasus: Violations of Humanitarian Law and Human Rights in the Georgia-South Ossetia Conflict' (March 1992); Human Rights Watch (Formerly Helsinki Watch), 'Georgia/Abkhazia: Violations of the Laws of War and Russia's Role in the Conflict' (March 1995) Vol. 7, No. 7.

[111] Independent International Fact-Finding Mission on the Conflict in Georgia, Volume I, 5. Available at https://www.echr.coe.int/Documents/HUDOC_38263_08_Annexes_ENG.pdf accessed 13 March 2023.

[112] European Parliament Res 2021/C 385/05 (16 September 2020) Implementation of the EU Association Agreement with Georgia, 2020/2200(INI); U.S. Mission to the United Nations, Joint Statement on the Continued Russian Occupation of Georgia (via VTC), New York, New York, August 5, 2020. Available at https://usun.usmission.gov/joint-statement-on-the-continued-russian-occupation-of-georgia-via-vtc/ Accessed 14 May 2023.

[113] *Georgia v. Russia (II)* (n 1), para 83.

phase for various reasons. Substantively, the Grand Chamber opined that in the *'Chaos'* during the conduct of hostilities, when all parties strive to obtain control, it is impossible to have effective control either over the land or over a person. It further noted that measures taken during the period are regulated under the IHL.

Furthermore, the Court stated that practical difficulties, such as a large number of victims, evidence etc. make it way more complicated for the case to be decided by the ECtHR. Therefore, the Grand Chamber stated that Russia did not have jurisdiction over the events during the 8-12 August, while it found Russia responsible for the rest of the violations.

After thoroughly examining the jurisprudence, it can be retrospectively asked if the territory of the member states of CoE were bombed, would the Court declare the application admissible according to the *Bankovic*? After *Georgia v. Russia (II),* even though the Court tried to make a clear link with *Bankovic,* it is evident that legal ground is different as far as IAC occurred within the CoE legal space. The armed conflict included not only air strikes but full-scale military intervention. Thus, there can be found no similarity between these two cases, but the Court's striving to find justifications to avoid ruling cases concerning the active phase of hostilities. The legal reasoning in *Georgia v. Russia (II)* is not strong enough to withstand criticism, which has left ECtHR with limited capacity to prove the opposite.

While regarding the active phase the Grand Chamber opined that it is a regional institution and cannot operate challenges everywhere, regarding occupation, it did practically the opposite. While the Court takes cases of IHL regarding occupation, it said that the IHL mandate is out of the Court's purview when it comes active phase. Therefore, it is clear that the European Court is not coherent on the applicability of the same standards, which indicates that there is something more rather than legal.

### 3.3 International Armed Conflict Litigation Difficulties

Unique characteristics of international litigation render several challenges for human rights protection. The principle of subsidiarity binds the Court in many ways. Most importantly, it sets forth limitation of the Court's competence not to be the substitute for the national judiciary.[114] Strasbourg always seeks to prevent being perceived as a "fourth instance" or equipped with the power to revise facts examined by the domestic courts.[115] However, armed conflicts require an extraordinary approach to gathering and assessing facts and a large number of human and financial recourses and expertise. This paragraph strives to underline the issues of logistics before the European Court. Among others, the most important ones will be analysed

[114] Samantha Besson, 'Subsidiarity in International Human Rights Law—What Is Subsidiary about Human Rights?' (2016) 61 The American Journal of Jurisprudence 69.

[115] D.J. Harris and others, *Law of the European Convention on Human Rights* (Second, 2009) 14–15.

as follow: lack of capability to gather evidence, absence of exceptional expertise in the military and inability to call relevant experts before the Court.

Initially, it is essential to highlight general policy with respect to the evidence and facts. In most cases, decisive facts of the case are not disputable and can be determined based on the findings of national courts.[116] An exception the ECtHR may find the domestic Court's examination insufficient, but it does not give the power to the Court to replace the national judiciary to investigate facts. Primarily it uses the approach when it comes to cases where the reverse of the burden of proof is acceptable, allegations regarding provisions which protect physical integrity, such as the right to life, freedom from torture etc. The Court applies the 'beyond the reasonable doubt standard' in those cases and imposes responsibility on the states to present sufficient tangible evidence before the European Court. Otherwise, the presumption shall be held in favour of the applicant.[117] Moreover, when it is undauntable that government intently failed to provide requested information, the Court shall hold a violation of Art. 38.[118]

Therefore, it is clear that, in general, the ECtHR is based on the facts and pieces of evidence provided by the parties. In case of insufficient material, the Court hence either consider assumptions by the applicant as a fact or hold a violation of Art. 38. In the individual applications the Court's approach is merely based on the facts that governments are always in a better position to turn in information, unlike individuals, who do not have accessibility to state-protected material. Albeit, dealing with international armed conflict cases is way different, and the same approach cannot be taken into consideration. Examination of the battlefields, gathering a plethora of information which requires, among others, military expertise and hearing witnesses are of the essence of determining the facts of the case.

The European Court explicitly stated that it does not have the capability of dealing with the inter-state application on the international armed conflict due to a number of logistical difficulties.[119] Judge Lemmens correctly mentioned that the Court's suggestion on the practical challenges implies its position to refrain from giving effect to the Convention provisions and therefore abandon a large number of victims without protection.[120] As far as the ECtHR does not provide the list, it is vital to explore the practical difficulties that make the ECtHR unable to deal with IAC cases.

Firstly, the absence of an investigative nature can be mentioned. To illustrate the comparison, an example of international criminal law may be relevant. Under the mandate, ICC can send its investigators, lawyers, prosecutors and the rest of the staff for the spot investigation to see

[116] Philip Leach, Costas Paraskeva & Gordana Uzelac, 'Human Rights Fact-Finding - The European Court of Human Rights at a Crossroads' (2010) 28 Neth Q Hum Rts 41.

[117] *El Masri v. "the former Yugoslav Republic of Macedonia*" App no. 39630/09, (ECHR [GC] 13 December 2012) para. 151.

[118] *Georgia v. Russia (I)* App no. 13255/07, (ECHR [GC] 3 July 2014) paras 100-109.

[119] *Georgia v. Russia (II)* (n 1), para 141.

[120] Partly dissenting opinion of judge Lemmens on the case of *Georgia v. Russia (II)* (n 1), para 2.

the crime scene at first glance, gather relevant information, obtain evidence, analyse and turn them in before the chambers. On the contrary, the ECtHR cannot ensure such an investigation, and practically it depends on the information provided by the parties, which cannot always be sufficient and comprehensive as parties are not always willing to do so.[121] Thereby, it seems that adjudication of the IAC cases depends on the state's desire to provide information, which potentially can be ground for imposing responsibility on them, which pushes them to eschew providing such information. Therefore, the importance of obtaining material from the ECtHR itself is paramount to guarantee independent, impartial and thorough litigation on the facts obtained, gathered and pieced together comprehensively.

The absence of a comprehensive investigation nature does not entirely exclude ECtHR's feasibility in gathering information. Rules of the Court give it the power to take investigative measures, although much more restricted rather than ICC. However, some provisions can ensure the Court's direct engagement in obtaining evidence. Two main measures can be taken – hearing the witnesses by the Court delegation and sending the delegation to the place to examine the spot of the alleged violations. Delegation is composed of the chamber's president and includes a judge or a few.

That being said, in the vast preponderance of the cases adjudicated before the ECtHR, facts are no longer in dispute. However, the Court may find it necessary to apply an on-spot-investigation measure, which is very rare.[122] The ECtHR delegated power to the fact-finding mission only in a hundred cases out of tens of thousands, which indicates how rare the applicability of the mechanism can be, which is explained by the fact that the fact-finding process is costly and time-consuming for the European Court.[123] Albeit, time and financial recourses are not solely issues of the mechanism. One of the main problems faced by the Court is its inability to compel the attendance of witnesses and the production of the documents.[124] Moreover, even in the existence of the delegation on the battlefield, it is so clear that the European Court needs very particular expertise in the military, which lawyers cannot cover. Even though there were precedents when the delegation included non-lawyers,[125] mainly the delegation visited prisons or places linked with the allegations regarding non-armed conflict cases.

Once, when the Court used the mechanism to hear witnesses *Georgia v. Russia (II)*[126] to hold hearings of the victims of the armed conflict, testimonies were about casualties and either

[121] *Inter alia,* see *Ukraine and the Netherlands v. Russia* (Admisibility decision) (n 3). Para 607.

[122] Mark W Janis, Richard S Kay and AW Bradley, *European Human Rights Law: Text and Materials* (3rd ed, Oxford University Press 2008) 66.

[123] Philip Leach, Costas Paraskeva & Gordana Uzelac, 'Human Rights Fact-Finding - The European Court of Human Rights at a Crossroads' (2010) 28 Neth Q Hum Rts 51.

[124] D.J. Harris and others (n 114) 848.

[125] Philip Leach, Costas Paraskeva & Gordana Uzelac, 'Human Rights Fact-Finding - The European Court of Human Rights at a Crossroads' (2010) 28 Neth Q Hum Rts 73.

[126] *Georgia v. Russia (II)* (n 1), paras 23-25.

property or human losses. They did not touch crucial details such as types of used weapons, missiles, shelling, bombing etc. In this case, there was an issue of using widely prohibited cluster bombs and the *Iskander* missiles, which Russia allegedly used in the town of Gori.[127] Assessing the trajectory of launching a missile, its parameters etc., requires knowledge broader than the legal one and which cannot be addressed by the judges. To illustrate the opposite, the ICC delegation is composed of lawyers and predominantly experts who can record and assess precise details with respective accurate expertise. Consequently, the limited mandate of the fact-finding missions binds the Court to use the mechanism as effective for obtaining information from the battlefield instead of relying on the parties, which cannot be in favour of providing proof against themselves in some cases.

As Judge Keller stated by way of example, his involvement in the delegation of hearing the witness rendered the opinion that the Court's usual fact-finding methodology is ill-suited, in its flexibility and forbearance, particularly in inter-State applications, in which neither party is subject to the difficulties in gathering tangible pieces of evidence that confronts individual applicants.[128] Furthermore, factors of time and enormous financial recourses can be pointed out additionally, which eventually leads the court to face practical difficulty in dealing with armed conflict cases.

Secondly, the following point is logically linked to the latter one. Armed conflict requires very particular expertise. Unlike the ICC the European Court registry is composed of professional lawyers, and neither judges nor staff can deal with aspects such as for example parameters of the missiles, and indiscriminate weapons, cluster bombs. The Court has proved that while it does not have a duty bound on the factual findings, it will require 'cogent elements' to assess the facts. Notwithstanding, even in the case of providing comprehensive material on the conduct of hostilities, assessment of the parameters of the used weapon, shelling distance and cluster bombs area or targetings can be way tricky without professional expertise. Thirdly, that being mentioned, the specially appointed delegation is able to hear the witness provided by the parties. However, the Court cannot call experts on the case to get information, which is crucially essential for litigation to fill the gap of military expertise.

In conclusion, unlike the ICC, which has a broader possibility to send the delegation to the spots of the hostilities to investigate crimes committed during the armed conflict, ECtHR has no practical opportunity to piece together and then analyse information concerning the process and casualties of the hostilities. All in all, presumably, lack of accessibility to all material and absence of particular expertise could be the decisive factors for the Court in armed conflict

[127] Human Rights Watch report "A Dying Practice: Use of Cluster Munitions by Russia and Georgia in August 2008 https://www.hrw.org/report/2009/04/14/dying-practice/use-cluster-munitions-russia-and-georgia-august-2008 accessed 25 March 2023. Netherlands government was offocially claimed that Russia used 'Iscander' in the town of Gori.
https://www.researchgate.net/publication/296811650_Russia_used_%27Iskander%27_missiles_in_Georgia_conflict_claims_Dutch_report accessed 25 March 2023.

[128] Concurring opinion of Judge Keller in *Georgia v. Russia (II)* (n 1), para 11.

cases. Despite the fact that this paragraph illustrated practical difficulties for the ECtHR to deal with armed conflict cases, *Georgia v. Russia (II)* cannot be the case, where these factors could be decisive. The Grand Chamber used various reports from the EU fact-finding mission, the HRW, and the Amnesty, held a hearing to testify witnesses, judgments and decisions of different Courts, resolutions from a number of institutions and piece together material provided by parties. Analysing the judgment, particularly in Ch. 3.5 proves that the Court had enough tangible pieces of evidence to deal with this case.

Philip Leach fairly questioned years ago into continuous situations of armed conflicts in Europe what would be the Court's role when CoE member states are not able or willing to carry out the essential role of adjudicating fundamental factual disputes.[129] Unfortunately, *Georgia v. Russia (II)* failed to respond to the question in a positive way. As a result, back to Judge Lemmens, even if all afore-mentioned circumstances, such as litigation difficulties, are taken into account as an excuse by the Court, leaving a plethora of victims without effective protection will be officially approved by the ECtHR. It seems that The Court's reference to 'a large number of alleged victims and contested incidents' and 'the magnitude of evidence produced' implies an unwillingness to deal with cases that are too big or too difficult or would require too much work.[130]

## 3.4 *Ratione Materiae* and the Normative Area of Applicability

### 3.4.1 Legal Interpretation of IHL and IHRL

The grassroots level of the Convention's applicability begins with the *ratione materiae* component. Art. 1 of the Convention sets forth an obligation for the contracting parties to secure rights and freedoms defined in the Convention. Moreover, Art. 32 clarifies that the Court shall have jurisdiction over the issues related to the application and interpretation of the Convention. Therefore, to adjudicate armed conflict cases and establish extra-territorial jurisdiction, it is essential to prove that armed allegations raised from the armed conflict can be felled under the Convention. While jurisdiction is about having physical power over the territory or a person, the issue of jurisdiction cannot be exercised if the Convention is not applicable at all. Applicability depends on the *ratione materiae* which comes from Art. 1. Therefore, it is essential to clarify whether there are two independent legal regimes and IHL as *lex specialis* excludes human rights applicability or it is not manifestly impossible to deny legal fragmentation to support harmonisation and cooperative interpretation of the norms of the two fields.

[129] Philip Leach, Costas Paraskeva & Gordana Uzelac, 'Human Rights Fact-Finding - The European Court of Human Rights at a Crossroads' (2010) 28 Neth Q Hum Rts 69.

[130] Tatyana Eatwell, 'Adjudicating armed conflicts: Georgia v Russia (II), jurisdiction and the right to life in "'contexts of chaos' European Human Rights Law Review, 2021, (3) 300.

The scope of this paragraph is limited. This subchapter cannot fully address a truly hard and everlasting topic regarding the relationship between humanitarian law and international human rights law. However, it argues that there is no clear rule which would expel human rights applicability from armed conflicts.

The essence of war is violence. The war's aim cannot be considering the adversary's healthy living conditions. It is even said that moderation in war is imbecility. Hit first, hit hard, and hit everywhere.[131] As General MacArthur said, you could not control war, you can abolish it.[132] Thereby, the maximum that can be done through legal regimes is to reduce the brutality even though hostile parties strive opposite. Humanitarian law is based on balancing the military necessity of humanitarian considerations.[133] Thus, in principle, human rights provisions can only assist in ensuring better protection of particularly victims and civilians in many ways.

The principal question is simple, whether these two fields of law develop in the way of fragmentation protection of individuals, whether their requirements conflict with each other or whether they develop towards forming the common legal ground for the protection of individuals in armed conflicts.[134] As Orakhelashvili argues, even though, in some cases, IHL is perceived as less protective, there are examples which prove the opposite. Among others, he considers the case when Geneva Conventions complements Art. 6 of the ICCPR and indicates parameters of targeting, which are not stipulated under the human rights law to avoid civilian casualties.[135] He argues that if IHL is *lex specialis*, it is so for limited purposes and, in a way, complements – not curtails – the level of protection under human rights law.[136] Albeit, Milanovic argues that there are examples of unavoidable norm conflict, such as targeting killing and detentions during armed conflict and occupation.[137] However, he concludes that the ultimate goal of the discussion is the further humanization of humanitarian law through the application of human rights.

On the other hand, there is a pragmatic opinion that state parties cannot fulfil obligations defined under human rights treaties. It has been opined that the IHRL paradigm is ill-suited to situations of extraterritorial hostilities. Not only IHL exclude it, but the mechanism of IHRL

[131] Emily Crawford and Alison Pert, *International Humanitarian Law* (Cambridge University Press 2020) 31.

[132] Chris af Jochnick & Roger Normand, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) 35 Harv Int'l L J 49, 55.

[133] Alexander Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' (2008) 19 European Journal of International Law 161, 165.

[134] ibid 163.

[135] ibid 169.

[136] ibid 182.

[137] Marko Milanovic, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2009) 14 Journal of Conflict and Security Law 459, 477–481.

was not designed for situations in which a government, or a coalition of governments, exercises powers over persons who do not in any way form a part of the society which it governs.[138]

Human rights are universal, eternal and supreme human values. Post-World War II experience made it clear that the necessity of the existence of the legal protection of these values was paramount. The tendency to develop human rights treaties and enhance scopes of provisions[139] has illustrated that human rights are not limited, and their developments depend on the societies, political, economic and cultural norms. In this regard, to ensure effectiveness, it is crucial to have remedies which do not abandon legal words on the paper without effective enforcement. In this sense, human rights law makes a compromise and relinquishes its mandate when the feasibility of ensuring effective protective mechanisms is limited. To illustrate, these conditions may be ground for derogation from the obligations in a state of emergency or war.

Thus, one of the arguments for fragmentation can be ensuring effectiveness. Human rights requirements cannot be fully fulfilled during the armed conflict as the threat of existence for the state gives it the possibility not to apply human rights law. However, derogation, which will be discussed further in the following chapter, clarifies that there are some non-derogable provisions.

Most importantly, fragmentation or separatist argument is not capable of responding to victims of the armed conflict. One main character is a lack of a uniform and specific committee or a Court to deal with IHL norms' breaches.[140] Therefore, if human rights provisions are not applicable at all, in the absence of a permanent humanitarian legal body, victims are practically unable to raise their voices and access effective remedies.

Secondly, it should be referred to the argument of harmonization and non-fragmentation, which Orakhelashvili uses. Some provisions are equally crucial for IHL and human rights law. The core of fundamental guarantees cannot be suspended. These are basic rights inherent to all human beings' dignity. Such as the right to life, freedom from torture, inhuman or degrading treatment or punishment, freedom from slavery or serfdom, as well as basic judicial principles, which must be respected at all times by both the IHRL and.[141] Thereby, this discourse can be perceived from different angles, depending either perspectives of 'integrationist' or 'separatist'. In both cases, it should be stressed that armed conflict cannot entirely avoid human

[138] Ronen, Yaël, 'International Human Rights Law and Extraterritorial Hostilities', in Robin Geiß, and Heike Krieger (eds), *The 'Legal Pluriverse' Surrounding Multinational Military Operations* (Oxford University Press 2019), 220.

[139] For examlpe see the concept of ECHR as a living instrument. George Letsas, 'The ECHR as a living instrument: Its meaning and legitimacy' in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European, and Global Context* (Cambridge University Press 2013) 106–141.

[140] Roberta Arnold and Noëlle NR Quénivet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff Publishers 2008) 274.

[141] ibid 273.

rights applicability. At least, occupation requires human rights provisions at a plethora of points.[142]

As ICRC clarifies, human rights apply to everyone everywhere because of the philosophical axiom driving them. As they are concerned with all aspects of human life, they have a much more significant impact on public opinion and international politics than IHL, which is applicable only in armed conflicts that are themselves to be avoided. IHL is, therefore, increasingly influenced by human rights-like thinking.[143]

*Lex specialis derogate legi generali*[144] principles can be widely acknowledged. However, it is even more problematic when it comes to case-based questions about what is specific and what is general.[145] That being mentioned many times, IHL rules are drafted for armed conflicts, however, does it necessarily mean that in all circumstances, there is no more particular and concrete way of dealing with the issue? Once more, to get back to Orakhelashvili, several examples have been presented proving that human rights may have a specific solution to the case rather than IHL. Speciality or generality cannot be static but changeable depending on circumstances and context. Thereby IHL can be as much *lex specialis* as human rights law.[146]

Art. 31 of the Vienna Convention on the Law of the Treaties sets forth the general rule for the interpretation. It does not give superiority to solve the possible norm conflict, but the oposite. Reading between lines indicates that both norms should taken into accaunt. The legal interpretation of the treaties by the various political bodies in discussing some aspects of the armed conflict has been implicitly addressed to the interaction between the IHL and human rights. According to the European Union guideline, IHL applies in armed conflicts and occupation, while human rights apply to everyone within State's jurisdiction in times of peace and in times of war.[147] There shall be recalled the UN security council's call upon the parties in the Democratic Republic of Congo that all military actions should have been taken under

[142] See for instance *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 168.

[143] ICRC report on IHL and Human Rights, available at https://casebook.icrc.org/law/ihl-and-human-rights accessed 24 April 2023

[144] A principle according to which *lex specialis* norm has a priority over the general principles of international law. The priority given *to lex specialis* is considered justified by the fact that the *lex specialis* is intended to apply in specific circumstances regardless of the rules apply more generally where those circumstances may be absent. Aaron Xavier Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (Oxford University Press 2011). Available at https://www.oxfordreference.com/display/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-1303;jsessionid=4B380DB1ADF18860C0B004DFBF56B0A9 accessed 23 April 2023.

[145] Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015) 88.

[146] ibid 95.

[147] European Union Guidelines on promoting complience with international humanitarian law [2005] OJ C327/04, para 12.

humanitarian and human rights law requirements.[148] While General Assembly's resolution is not binding, there still shall be its findings regarding East Jerusalem, which stated that human rights instruments must be respected in the Occupied Palestinian Territories (OPT), including East Jerusalem and the occupied Syrian Golan.[149]

EU Fact-Finding Mission in Georgia indicated that international armed conflict going on different levels is particularly prone to violations of IHL and human rights.[150] Furthermore, the Parliamentary Assembly of the Council of Europe (PACE) has explicitly stated that human rights must be taken into consideration in armed conflicts. For example, regarding the recent escalation in Nagorno-Karabakh, the PACE stated that it is concerned due to mass human rights violations, including war crimes and calls parties to cooperate with human rights institutions, primarily the ECtHR.[151] Even though the Assembly does not openly refer to human rights applicability in the armed conflict, its approach obviously includes human rights institutions' active participation in dealing with the consequences of the armed conflict. Unlike the resolution, in the Georgian case, the PACE explicitly stated its concerns regarding human rights and humanitarian law norms violations in the war.[152]

Universal institutions, such as UN treaty bodies, have way limited feasibility to stipulate commonly agreed points, rather than the regional institution, which is less diverse and has much more opportunity to go further in the interpretations. It is worth stressing those universal institutional clarifications, such as ICJ, may not be sufficient for the regional human rights remedies, which might require a stricter approach to human rights protection. Even if, from the broader perspective of international law, humanitarian law is to be perceived as superior to human rights law, it remains to be seen whether or not this general characterization is acceptable from the narrower perspective of a judicial institution, such as the European Court, specifically created in order to ensure compliance with specific IHRL rules, such as the ECHR and the protocols thereto.[153]

Based on the jurisprudence, it has been opined that regardless of whether a party to the conflict is acting within or beyond its state borders, the human rights obligations remain in force and have to be observed wherever the State exercises its activities,[154] thereby, without applicability, it is impossible to impose obligations on the states for the measures taken extra-territorially during the conduct of hostilities. Another argument favouring the harmonious interpretation, which will be discussed later, is procedural. Beyond the substantive part of the interpretation,

[148] UNSC Res 1906 (23 December 2009) UN Doc S/RES/1906.

[149] UNGA Res 64/185 (29 January 2010) UN Doc A/RES/64/185.

[150] Independent International Fact-Finding Mission on the Conflict in Georgia, Volume I, 10-11 (n 111).

[151] PACE Res 2391 (27 September 2009) Humanitarian consequences of the conflict between Armenia and Azerbaijan / Nagorno-Karabakh conflict.

[152] PACE Res 1633 (2 October 2008) The consequences of the war between Georgia and Russia.

[153] Gioia (n 108) 214.

[154] Ilia Siatitsa and Maia Titberidze, 'Human Rights in Armed Conflict from the Perspective of the Contemporary State Practice in the United Nations: Factual Answers to Certain Hypothetical Challenges', 13.

it should be highlighted that the absence of a permanent IHL tribunal renders the victims' inability to access justice.

Consequently, as Lubell concluded by reviewing several scholarly opinions, the direction is clear, as the majority of opinion nowadays clearly concludes that we have some parallel application.[155] Moreover, no unequivocal opinion from any international institution would expel human rights applicability from the armed conflict. Nevertheless, the opposite has been illustrated by academia and political and legal institutions.

### 3.4.2 The Institute of Derogation in Times of War

Discussing the Convention's applicability in the armed conflict methodologically requires analysing the drafters' intent and underlying founding spirit of the Convention. The *travaux préparatoires,* and initial wording is crucially essential to interpret the Convention. Art. 15 of the ECHR, similar to the other human rights treaties,[156] allows high-contracting parties to suspend the applicability of specific provisions and derogate from obligations. They seem to reflect the idea of a defence of the necessity of international law and transpose it into human rights.[157] They are escape clauses, which give the feasibility to states to suspend some human rights obligation while facing the threat of existence.[158] By way of explanation, it can be called a realistic approach since chances to fulfil human rights obligations in times of war, as it would be demanded in times of normalcy, are rudimentary.

On the one hand, derogation institute indicates extraordinary conditions in times of war, which needs a unique approach. Demanding protection of human rights when the right to self-defence is applied and states striving to destroy adversaries may look illusory and theoretical. Thus, as the human rights remedy's inherent part is being practical, the derogation institute openly underlines that there are conditions when total fulfilling human rights obligations is impossible. As Judge Grozev argues the fact that drafters made a special provision for the derogable rights in the times of war indicates that they intended, beyond any doubt, to ensure the most fundamental rights applicability during the war.[159]

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[155] Noam Lubell, 'Parallel Application of International Humanitarian Law and International Human Rights Law: an Examination of the Debate' (2007) 40 660.

[156] Derogation is guaranteed under the, *inter alia,* International Covenant on Civil and Political Rights and American Convention on Human Rights.

[157] Frédéric Mégret 'Nature of Obligation' in Daniel Moeckli, Sangeeta and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edn, Oxford 2018), 92-93.

[158] Oberleitner (n 144) 169.

[159] Partly dissenting opinion of Judge Grozev on the case of *Georgia v. Russia (II)* App no. 38263/08, (ECHR [GC] 21 January 2021), 171.

On the other hand, some scholars argue that it is also a sign that human rights treaties relinquish jurisdiction in favour of laws which are explicitly drafted for the armed conflict.[160] It is partially true as long as the Convention divides provisions into two parts: derogable and non-derogable ones. It is evident that for those rights, which are derogated, the Convention relinquishes its mandate. Whereas, under the same logic, it is also clear that some rights and freedoms are not derogable. That can imply simply that these rights do not cease applicability in the conduct of hostilities, the same as the ICJ found in *Nuclear Weapon* AO. Derogation Institute perfectly illustrates that there shall be no single case when the Convention would cease applicability wholly.

Derogation institute has been seen in a different manner by the ECtHR. It has stated:

> 'practice of the High Contracting Parties in not derogating under Article 15 of the Convention in situations where they have engaged in an international armed conflict outside their territory" means that the Contracting Parties are, in fact, "considering that in such situations, they do not exercise jurisdiction within the meaning of Article 1 of the Convention.'[161]

This is a very dangerous and pernicious opinion since the choice of the government not to derogate from the Conventional provisions could, may serve as a military or political strategy to eschew international repercussions or the 'embarrassment of negative public opinion.'[162] It is unclear why it is self-evidentiary that parties intend to use derogation institute under the Conventional principles and purposes. The Court practically led the party to find a way out to avoid responsibility for violating human rights.

The existence of negative and positive obligations protects individuals from the member states. However, the institute allows the parties to derogate under the conditions of emergency or war when they cannot fulfil obligations. In other words, when a party is unable to protect the Conventional provision. Albeit, such understanding of the derogation institute allows states not to derogate while they are breaching human rights, and it can be the pretext for the Court to avoid the case. States may allege that without derogation, they intend not to apply Convention in the armed conflict but IHL norms. Since there is no permanent international humanitarian law tribunal,[163] the strategy can be used to avoid responsibility for the violations at all international fora, which means *legal lacuna* for victims of the armed conflict, leaving them without access to justice. In sum, under the logic, states can just not notify the CoE about derogation and be safe from responsibility.

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[160] Oberleitner (n 144) 170.

[161] *Georgia v. Russia (II)* (n 1) para 139.

[162] Alexander Orakhelashvili, "Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights", 14 *European Journal of International Law* 529, 541.

[163] Christian Tomuschat, 'Human Rights and International Humanitarian Law' (2010) 21 European Journal of International Law 15, 22.

### 3.4.3. Jurisprudence

#### 3.4.3.1 ICJ

The International Court of Justice has addressed the relationship between humanitarian law and international human rights law in three different cases. For the first time, on *The Legality of the Threat or Use of Nuclear Weapons,*[164] ICJ addressed the issue of the right to life applicability in the armed conflict. It explicitly affirmed that ICCPR does not cease applicability in times of war, except for Art. 4. it noted that a precise understanding of the scope of the meaning of 'arbitrarily deprivation' shall be determined by the applicable *lex specialis* norms in the conduct of hostilities. That is to say, the exact scope of Art. 6 of the covenant and precisely examining what can be perceived as arbitrary deprivation should be interpreted with the IHL norms. Furthermore, setting forth such clarification in conjunction with the link to Art. 4 implicitly gives a clue that the ICJ stipulated that non-derogable rights do not cease applicability in many cases. However, their scopes shall be interpreted with the *lex specialis* norms, which depend on the particular circumstances.

In the *Wall* case,[165] the ICJ went further following the previous standard. While IHL was perceived as *lex specialis* to IHRL in a particular provision, namely the right to life, in this case, the court stated that IHL application is *lex specialis* in any situation when both of them are applicable. Moreover, the court clarified the three feasible conditions of application.[166] Precisely, when there are just IHL provisions exclusively applicable, or just IHRL ones, or most importantly and arguable conditions when both branches could have a mandate of application. Moreover, it recalls the Secretary-General's statement which declared that IHL is the protection in the armed conflict situation. In contrast, human rights treaties were intended to protect citizens from their own government during peacetime.[167] One can reasonably presume that by delivering such clarification, ICJ could resolve the issue of norm conflict by saying that IHL should be taken as *lex specialis,* which may prove superior to IHRL. Albeit, the court further noted that both of them shall be taken into account concerning dealing with the issue.

Thus, even though IHL norms are drafted for dealing with specifically armed conflicts, human rights provisions' applicability cannot be excluded. It should be stressed that, in the *Wall* case, ICJ's reasoning was merely based on the occupation phase. Considering the very different nature of the conduct of hostilities in armed conflict, it should be noted that *Wall's* case clarifications cannot be generalized and applied without the court's further jurisprudence. Differentiating these two IHL conditions from each other gave the court feasibility to explicitly held that not only non-derogable rights are applicable as was stipulated in *Nuclear Weapon*

[164] *The legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.
[165] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 2004.
[166] *Ibid.* p. 136.
[167] *Ibid.* p. 177.

before, but beyond that, also the Convention on the Rights of the Child, in this particular case, is applicable over the occupied Palestinian Territory.[168] Thereby, the *Wall* clarification still would not be perceived as a response to the relationship between IHL and IHRL.

In the case of *Armed Activities on the Territory of the Congo,*[169] following the Wall case standard by mentioning IHL *lex specialis*, ICJ reiterated that both branches must be considered. Notwithstanding, there shall be noted that during the occupation, human rights norms applied as *lex specialis* in many cases, as illustrated in the Child Convention's case in the *Wall*. Most importantly, in this case, the court set forth extra-territorial applicability of the human rights provisions in armed conflicts.[170]

In sum, the ICJ has never stated a clear answer on the relationship between IHL and IHRL norms in the case of collision. Nonetheless, IHL as *lex specialis* does not substitute human rights norms. Furthermore, it has been shown that, in some cases, human rights norms are not always *lex generalis.* However, addressing derogation norms, the court indeed opined that the applicability of the human rights norms, which are non-derogate, is not under question.

#### 3.4.3.2 European Court of Human Rights

Strasbourg has dealt with international as well as non-international armed conflicts. However, it has never thoroughly clarified the interaction of the IHL and Convention provisions. One of the main questions is whether these two branches of international law are legal regimes with different boundaries, limitations and independent purview of applicability or are part of the entire legal regime with different provisions under the same aim. In *Georgia v. Russia (II)* the Court stated it needed to examine the interrelation between these two legal regimes.[171]

Furthermore, giving reasoning for the inability to address allegations regarding the active phase of hostilities, it further noted that 'such situations are predominantly regulated by legal norms other than those of Convention (specifically international humanitarian law and law of the armed conflict).'[172] It seems that Strasbourg differentiated IHL and IHRL as two independent legal regimes and rejected deliberation issues regulated by the IHL norms. This part of the paragraph argues that this assessment is not fully compatible with the existing jurisprudence, and the Court had stipulated the opposite in various cases.

[168] *Ibid.* p. 181.

[169] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) [2005] ICJ Rep 168.

[170] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) [2005] ICJ Rep 168, paras 107-113.

[171] *Georgia v. Russia (II)* (n 1), para 95.

[172] *Georgia v. Russia (II)* (n 1), para 141.

Initially, the European Court faced a duty to deal with the interrelation in the inter-state application of *Cyprus v. Turkey*.[173] As Turkey exercised effective control over the territory outside its sovereign borders, the Grand Chamber found out that it carried out a military operation on the island and therefore held the responsibility of Turkish authorities for a number of provisions. However, as long as the armed conflict in Cyprus was one of the first in Europe, due to the sensitivity of the issue, the Court tried not to engage in the assessment of the occupation and name it as such, even though the UNSC had already used the term.[174] Similar to the *Ergi* case,[175] where the ECtHR practically assessed Turkish military operations under the IHL principles without actually naming them. Turkish intervention eventually opened Pandora's box for the Court and activated the importance of discussing the interrelation of these two branches under the Strasbourg mandate.

The pretty opposite approach was shown in the *Isayeva* case,[176] where the ECtHR carefully examined all the decisive components of the scope of the right to life, assessed Russian authorities' measures and eventually held violations of Art. 2. It should be stressed that, even though the case was not IAC, it still included bombing during the operation, which cannot be perceived as a regular police force. Thus, it can be said that assessment has strong foundations in human rights law, but most probably, it cannot be the same as it would be in the case of the active phase of hostilities.[177]

However, the Court explicitly applied IHL in a few cases, significantly impacting jurisprudence. Among others, there can be highlighted *Varnava* case, where the Court underlined that the Convention should be interpreted in harmony with other international law sources.[178] However, before applying the standard specifically for the Convention's interpretation with IHL, Strasbourg had already clarified the term afore. As the Court has observed, the Convention cannot be interpreted in a vacuum and should, so far as possible, be interpreted in harmony with other rules of international law of which it forms part.[179]

Eventually, the *Hassan* case gathered all the pieces together and harmonised the human rights and humanitarian law standard of applicability.[180] During the litigation, the respondent government did not argue that generally, once state agents are operating extra-territorially to take an individual into custody, the requirement of extra-territorial jurisdiction is satisfied. Albeit, it submitted that the general extra-territorial basis of jurisdiction could not be applied in the active phase of hostilities in the international armed conflict in Iraq, where the agents of

[173] *Cyprus v. Turkey* (n 51).
[174] UNSC Res 550 (11 May 1984) UN Doc S/550/1984, preamble.
[175] *Ergi v. Turkey* App. no 66/1997/850/1057 (ECHR, 28 July 1998).
[176] *Isayeva v. Russia* App. No 57950/00 (ECHR, 24 February 2005).
[177] Noam Lubell, 'Challenges in applying human rights law to armed conflict' (2005) 87 Int'l Rev Red Cross 737, 743
[178] *Varnava and others v. Turkey* (n 100), para 102.
[179] *Al-Adsani v. The UK* App no. 35763/97, (ECHR [GC] 21 November 2001) para 55.
[180] *Hassan v. The United Kingdom* (n 38), para 77.

the member states were operating in the territory of which they were not occupying power and where the conduct of the State would instead be subject to the requirements of international humanitarian law.[181] The grand chamber rejected the objection and, by calling the ICJ case law, pointed out that IHL and human rights norms may apply concurrently. Such interpretation as a response to the objection, specifically with regard to the conduct of hostilities, makes it clear that the Court openly rejected the idea that extra-territorial jurisdiction, and therefore Art. 1 of the convention, cannot be used in the active phase of hostilities.

Even though the Grand Chamber stated that the Court's competence could not cover aspects regulated by mainly humanitarian law, jurisprudence indicates that ECtHR deals with issues which are indeed structured under Geneva Conventions. It proves that the Court is practically unable to reject all the interrelated issues to the IHL. To illustrate the practical inability to detach IHL from IHRL in IAC cases, there are illustrated few examples which prove that the European Court is incapable of rejecting ruling issues within its competence, which are exclusively under the IHL mandate.

Firstly, occupation as an example of the LOAC mandate can be highlighted. It goes beyond human rights law and is regulated under the armed conflict provisions. Pursuant to the Hague Regulations (IV), Art. 42 (1), a territory can be considered occupied when it is practically placed under the authority of the hostile army. Besides the founding norms of the occupation, there is a list of obligations under the Fourth Geneva Convention, as well as an Additional Protocol which the occupying power should fulfil. ECtHR acknowledges that in the case of occupation, international humanitarian law generally applies.[182] In juxtaposition, no single provision under the ECHR regulates occupation specifically.

Nevertheless, in the case of Georgia, by distinguishing the active phase from the ceasefire agreement,[183] the European Court stated the absence of competence on issues regarding the active phase. However, it went deeper on merits with respect to the allegations after the cease-fire agreement. Occupation may last decades.[184] On recently delivered judgment on the case of Russian occupation in Georgia, the Court stated that Russia had effective control over the region even before the hostilities in 2008.[185] It would be an obstruction of the effectiveness of the Convention if the ECtHR stated that it could not adjudicate human rights violations as the occupation is regulated under the LOAC norms. The ECtHR could not simply leave the victims without protection for decades. That practical challenge forced Strasbourg to have competence on allegations, which are generated by the actions of occupying power.

[181] ibid para 76.

[182] *Georgia v. Russia (II)* (n 1), para 196.

[183] 12 August 2008, under French President Sarkozy's mediation Georgia and Russia, signed the cease-fire agreement, which is perceived as the end of the hostilities. See agreement https://www.peaceagreements.org/view/724 accessed 20 April 2023.

[184] See the example of Cyprus, which is occupied since the Turkish intervention in 1974.

[185] *Mamasakhlisi and Others v. Russia* App nos. 29999/04 and 41424/04 (ECHR 7 March 2023), paras 323-329.

The special relationship between occupying power and individuals over the territory renders it an unavoidable necessity to apply human rights, and the idea itself finds widespread support.[186] All in all, all the cases mentioned earlier regarding the consequences of the armed conflict in Cyprus, Moldova, Azerbaijan, and Georgia were merely based on an assessment of the occupation phase. Occupation is one more clear example that human rights and humanitarian law can both be considered '*special'* in some circumstances.[187]

The second aspect is the case of detention of prisoners of war.[188] Thirteen Georgian prisoners of war were captured and tortured under effective Russian control between 8-17 August. The Court noted:

> '[t]hose acts are particularly serious given that they were perpetrated against prisoners of war, who have a special protected status under international humanitarian law.[189]

Freedom from torture is a non-derogable provision, which is a *jus cogens* norm and has the same understanding either under the Convention or IHL. However, what was the aim of recalling IHL norms and its special protection in armed conflict? Presumably, it was an aggravating factor[190] for the application of the Convention. The Court did not reject the assessment of the detention of prisoners of war due to the absence of the IHL mandate but held a violation.

The third example can be the applicability of interim measures in armed conflicts. Art. 39 of the Rules of the Court[191] allows Strasbourg to issue an interim measure and order the party action, generally as a negative obligation not to do anything before delivering final judgment on the case. The primary aim of the institute is to ensure the effectiveness of human rights adjudication.[192] In other words, avoid the consequences that could not be restored after the litigation. The vast majority of cases are related to treatment in prison, deportation and extradition, which indicates the Court's approach, which strives to be effective. The interim measure cannot be used on cases *prima facie* out of the Court's competence. It shall not be used once it is evident that the ECtHR cannot go further on merits and adjudicate the case. The opposite would not make sense of applicability to the institute as it strives to ensure the Court's rulings are enforceable. Based on the logic, rendering interim measures on armed conflict cases does not justify the Court's decision to avoid deliberation allegations regarding the active

[186] Noam Lubell, 'Human Rights Obligations in Military Occupation' (2012) 94 International Review of the Red Cross 317, 337.
[187] Oberleitner (n 144) 223.
[188] *Georgia v. Russia (II)* (n 1), paras 257-281.
[189] *Georgia v. Russia (II)* (n 1), para 278.
[190] Isabella Risini, 'Georgia v Russia (II) before the European Court of Human Rights' https://verfassungsblog.de/human-rights-in-the-line-of-fire/ accessed 20 April 2023.
[191] Council of Europe, Rules of the Court of Human Rights, 23 March 2023, available at https://www.echr.coe.int/Pages/home.aspx?p=basictexts/rules&c Accessed 20 April 2023.
[192] Kanstantsin Dzehtsiarou and Vassilis P. Tzevelekos, "Interim Measures: Are Some Opportunities Worth Missing?" (2021) 2 *European Convention on Human Rights Law Review 1.,* 6.

phase, but the opposite. If the European Court does not have competence on the allegations of the conduct of hostilities, it is not clear what is the aim of applying interim measures.

On 12 August, on the last day of the active phase of hostilities in Georgia, the Court's president issued an interim measure and called on the parties to cease the fire.[193] The interim measure was used in the case of *Armenia v. Azerbaijan (IV)* RE Nagorno-Karabakh when it called up both parties to ensure the obligation taken by them afore.[194] The Court went further on the *Crimea* case and called upon parties to take measures, particularly military actions, which might violate the human rights of civilians, especially Art. 2 and 3.[195] Strasbourg specifically used the term *'human rights in military actions'* instead of considering the Court's limited mandate in armed conflict. Instead, by delivering interim measures, the ECtHR clarified that parties should have ensured conventional provisions' protection in the armed conflict, especially the right to life and freedom from torture.

As stated before, the Court deals with *ratione materiae* issues at the admissibility stage.[196] The issue of whether allegations fell under the conventional provisions is not a point which can be considered on the merits stage. *Ratione materiae* issues should be decided at the admissibility stage. In a similar vein, the ICJ has stated that interim measures can be used if the provisions relied on by the applicant appear *prima facie* to afford a basis on which its jurisdiction could be founded.[197] Therefore, whether allegations regarding armed conflict are protected under the Convention or IHL norms, which are not under the Court's competence, should be clarified at the admissibility stage. Otherwise, as it has been said in the partly dissenting opinion, by applying interim measure, the Court admitted the existence of at least *prima facie* jurisdiction of the states involved during the conduct of hostilities.[198]

Considering these cases, when allegations regarding armed conflict come to the Court, one can ask why the Court does not reject the application from the admissibility stage and goes further. In another scenario, why does it apply interim measures in armed conflict cases instead of stating that the European Court will not have competence on the aspects exclusively regulated under the IHL? That being said, *ratione materiae* is the ground of the litigation. If aspects which are regulated under the IHL go beyond the Court's mandate, it is well known from the beginning, and there is no point in using the interim measure as the ECtHR will not be feasible

[193] Isabella Risini, 'Georgia v Russia (II) before the European Court of Human Rights' https://verfassungsblog.de/human-rights-in-the-line-of-fire/ accessed 20 April 2023.

[194] See more Isabella Risini 'Armenia v Azerbaijan before the European Court of Human Rights' October 1, 2020 https://www.ejiltalk.org/armenia-v-azerbaijan-before-the-european-court-of-human-rights/ accessed 20 April 2023.

[195] Interim measure granted in inter-State case brought by Ukraine against Russia https://hudoc.echr.coe.int/eng-press?i=003-4699472-5703982#{%22itemid%22:[%22003-4699472-5703982%22]} accessed 21 April 2023.

[196] *Georgia v. Russia (II)* (Admisibility decision) (n 49), para 63.

[197] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, ICJ Rep 2009, para 40.

[198] Partly dissenting opinion of judges Yudkivska, Wojtyczek and Chanturia on the case of *Georgia v. Russia (II)* (n 1), para 12.

to deal with this case anyways. Afterwards, the Court should simply reject any applications regarding the active phase of hostilities at the admissibility stage and clarify that the ECtHR cannot interpret IHL norms or apply Convention with respect to the conduct of hostilities. Whereas the Court applied interim measures in the case of *Georgia, Ukraine* and *Armenia-Azerbaijan,* particularly stating that parties should protect human rights in armed conflicts. Consequently, it shall imply only one interpretation of the issue. The Court cannot reject cases regarding the active phase of hostilities as there is no legal ground to justify doing so.

Subsequently, it has been illustrated that despite the formal notion that the Court cannot adjudicate allegations regulated by the IHL norms the European Court has indicated the opposite through various cases. IHL and Convention are interpreted in harmony in many cases, and the Court applies humanitarian law and conventional provisions in armed conflict. Therefore, hesitation on human rights manifestly applicability during the active phase of hostilities does not have legal ground, which would be read in the jurisprudence.

### 3.4.4 Concluding Remarks

In conclusion, while deliberating allegations regarding the active phase of hostilities the Court opined that it is a regional institution and cannot operate against challenges everywhere, regarding occupation, it did practically the opposite. Even though, after *Bankovic* before *Georgia v. Russia (II),* there was no case regarding the active phase of hostilities, *Al-skeini,* changed the approach in principle. It has been revealed that the Court made clarifications on all the aspects which are inherent in the establishment of extra-territorial jurisdiction. Therefore, it is clear that the ECtHR is not coherent in the applicability of the same standards, which indicates that there is something more to reasoning rather than legal.

Furthermore, as it has been argued, the fragmentation approach in dealing with norm conflict cannot achieve the aim – of protecting individuals as much as possible. Regarding the primary question on the relationship between human rights and humanitarian law, harmonious interpretation is the only way approved by legal or political bodies and the ECtHR itself.

Thus, in this part, it has been illustrated that there is no legal argumentation on the absence of human rights applicability in the active phase of hostilities. Only practical difficulties may be taken into consideration as it was evident that armed conflict litigation renders a number of practical difficulties for the Court. However, no practical difficulty can be enough to justify abandoning without protective mechanisms, even a single victim of the armed conflict in the name of the human rights institution.

## 3.5 Issues of the Extra-territorial Jurisdiction in the Active Phase of Hostilities

### 3.5.1 Introduction

This part of the thesis aims to rebut the European Court's main reasoning for rejecting the Convention's extra-territorial applicability in the active phase of hostilities. Exercising jurisdiction extra-territorially as a threshold criterion is of the essence of the applicability. Without holding jurisdiction under the meaning of the Art. 1 Convention cannot be applied effectively, which means the absence of effective human rights remedies for the victims. Strasbourg has dealt with the case concerning the active phase of hostilities of full-scale armed conflict in the case of *Georgia v. Russia (II).* Based on the case, the following sub-chapters argue that the Court failed to give robust, coherent, lucid reasoning. This part of the chapter further analyses particularly aspects of the active phase of hostilities. How did the ECtHR deal with them in respect of the extra-territorial jurisdiction? It eventually argues that Court failed in interpreting Art. 1 and applying tests of the extra-territoriality. Furthermore, there are illustrated how the Court should and could have examined the case and given an assessment on the extra-territorial jurisdiction through both models, precisely 'effective control' and 'state agency' tests. One of the sub-chapters especially criticises the test of *'Chaos',* the main obstacle to human rights applicability and draws parallels with IAC in Ukraine.

In regard to proving that the European Convention on Human Rights should be applicable in the active phase of hostilities, the main opposite reasoning provided by the Court should be criticised, which is tried in the following chapters. That being mentioned, the Court divided the case into two parts. It separated parts of the application with respect to the events that occurred before the cease-fire agreement, which was signed on the 12$^{th}$ of August. Therefore, the following sub-chapters will address merely the most arguable parts of the active phase of hostilities.

### 3.5.2. *Georgia v. Russia (II)* – Back to the Opacity? Or Striving for the *Golden Ratio*?

*Georgia v. Russia (II)* is a highly ambivalent judgment for various reasons.[199] During more than 70 years of existence, the ECtHR faced assessment of the full-scale conduct of hostilities very first time in this case. Echo of the inter-state judgment will last a long time, as there is another pending case[200] against Russia lodged by the Georgia government, and there is a plethora of forthcoming applications regarding the active phase of hostilities and its

[199] Konstantin Dzehtsiarou, "Georgia v. Russia (II)" (2021) 115 American Journal of International Law 288, 4.

[200] See *Georgia v. Russia (IV)* App no. 39611/18, which presents allegations regarding deterioration of the human rights situation along the administrative boundary lines between Georgian-controlled territory and Abkhazia and South Ossetia, the regions of Georgia which are currently occupied by Russia. See Press release issued by the registry of the ECtHR, 110 (2023), 12 April 2023, 2.

consequences in Ukraine[201] and Nagorno-Karabakh,[202] which may be felled under the impact of the ruling. With respect to most aspects (Especially regarding the consequences of the hostilities, merely in the occupation phase), judgment is rendered either unanimously or sixteen to one.[203] The main dissenting point was caused by the Convention's extra-territorial applicability in the active phase of confrontation, which eventually made the judgment conclusions or/and reasoning highly arguable. The topic is tightly interrelated with the extra-territorial jurisdictional concept as long as the practical applicability of the ECHR specifically depends on exercising jurisdiction by the party.

In the principal[204] judgment, the Grand Chamber ruled that Convention does not apply during the conduct of hostilities as, *inter alia*, there is no possibility to exercise extra-territorial jurisdiction within the active phase. Consequently, those who have suffered the most in the armed conflict face superior military power with no viable means to pursue justice. That is to say, the Convention is not applicable once it is crucially needed. Alternatively, more broadly, '*inter arma enim silent leges*.' Whereas, there are opinions that the Court's overcautious approach to adjudicating the incidents of war is quite understandable since the number of armed conflicts it has to consider is growing. The judges also seem to fear that the unrestricted application of the extra-territorial jurisdiction may transform a regional human rights court into an institution considering the conduct of hostilities worldwide,[205] which would undermine the effectiveness of the regional institution.

That being concluded, territoriality does not bind the European Convention. The jurisdiction clause includes high-contracting parties' responsibility out of the Council of Europe's territory. ECtHR rejected the application as inadmissible in the case of *Bankovic's*[206] very first time

[201] There are four pending applications regarding Russia, lodged by Ukraine with respect to several episodes, including ongoing administrative practice by the Russian Federation consisting of State-authorised targeted assassination operations against perceived opponents of the Russian Federation in Russia and on the territory of other States. (App no. no. 10691/21); Joint Ukrainian and Dutch allegations on the crash of Malaysian Airlines flight MH17, which was shot down in July 2014. (App nos. applications nos. 8019/16, 43800/14 and 28525/20); The case referring to Crimea alleges that Russia should be responsible for the administrative practice comprising numerous human rights violations. (App nos. 20958/14 and 38334/18). See Press release issued by the registry of the ECtHR, 069 (2021), 23 February 2021, 1. There is one pending case against Ukraine brought by the Russian government, which alleges a number of violations by Ukraine (App no. 36958/2) See the Press release issued by the registry of the ECtHR, 240 (2021), 23 July 2021.

[202] With respect to the conduct of hostilities in Nagorno-Karabakh, there are five applications lodged by the Armenian Government, four against Azerbaijan and one against Turkey. On the other hand, two applications against Armenia are lodged by Azerbaijan. See details on list of the inter-state cases before the ECtHR at https://www.echr.coe.int/Pages/home.aspx?p=caselaw/interstate&c= accessed 1 May 2023.

[203] *Georgia v. Russia (II)* (n 1), paras 142-144.

[204] The European Court has delivered principle (declaratory) judgment on merits in 2021 and two years later judgment on the just satisfaction. *Georgia v. Russia (II)* (Just satisfaction) App no. 38263/08 (ECHR [GC] 28 April 2023).

[205] Moiseieva (n 40) 2. Available at https://www.ejiltalk.org/the-ecthr-in-georgia-v-russia-a-farewell-to-arms-the-effects-of-the-courts-judgment-on-the-conflict-in-eastern-ukraine/ accessed 7 March 2023.

[206] *Bankovic and Others v. Belgium and Others,* (n 2).

regarding the active phase of hostilities. The Court's struggle to distinguish between two regimes – humanitarian law and human rights law is perceived as an endeavour to stay an effective institution by some scholars.[207] Whereas it has been fairly said that the European Court tried to make a clear distinction between humanitarian law and human rights law, the distinction that this very Court has been blurring for years.[208] The view is not, *per se*, manifestly unlogical. Albeit, it once more proves that legal justifications are based on the politically sensitive decision not to engage in the assessment of the armed conflicts.

To support this statement, there shall be recalled one of the main arguments of *Bankovic* about the inability to exercise effective control – Airstrikes cannot be perceived as having enough power to exercise jurisdiction over the land.[209] On the contrary, in the case of Georgia, Russia used air strikes and a regular army to take control of the land and sea. Despite referring *Bankovic* standard, the Grand Chamber did not explain the difference between exercising effective control in different manners, which may be the indicator, that locomotive is not a legal component but political to avoid assessment of full-scale military interventions.[210]

Revitalising *Bankovic* required justifications for doing so. In other words, the Court should have explained all the similarities between these two cases. Among others, there can be defined one example. While the Grand Chamber recalled the *Bankovic* case, it should have indicated a test of 'military presence', which is one of the main aspects of exercising effective control by the Grand Chamber's judgment on the case of *Loizidou v. Turkey*,[211] which has never been overruled. By the standard used concerning the cases of Cyprus, Iraq, Moldova, and Nagorno-Kharabakh, Russian military presence during the conduct of hostilities was enough to exercise effective control as far as it had all the feasibility to control all the main entities over the buffer zone and block land, sky, and sea,[212] Albeit the Court did not discuss on that point which differentiates bombing Belgrade from the full-scale military intervention in Georgia.

On the other hand, the ECtHR held that Russian Federation has effective control over the occupied territories and therefore exercises extra-territorial jurisdiction, which caused the attributability of the administrative practice[213] of numerous flagrant breaches of human rights.

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[207] Richard Ekins, Jonathan Morgan and Tom Tugendhat, 'Saving Our Armed Forces from Defeat by Judicial Diktat' 11–12.Available at https://policyexchange.org.uk/publication/clearing-the-fog-of-law-saving-our-armed-forces-from-defeat-by-judicial-diktat/ accessed 27 April 2023.

[208] Kanstantsin Dzehtsiarou, 'The Judgement of Solomon that went wrong: Georgia v. Russia (II) by the European Court of Human Rights' (*Völkerrechtsblog*, 26 January 2021). Available at https://voelkerrechtsblog.org/the-judgement-of-solomon-that-went-wrong-georgia-v-russia-ii-by-the-european-court-of-human-rights/ (Accessed 12 January)

[209] Ibid paras 75-81

[210] See more Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 47) 183–187.

[211] Loizidou v. Turkey (Preliminary Objections) (n 33).

[212] Independent International Fact-Finding Mission on the Conflict in Georgia, Volume I, pp. 21-22. Available at https://www.echr.coe.int/Documents/HUDOC_38263_08_Annexes_ENG.pdf accessed 13 March.

[213] *Adimitrative practice* is rarely used with very strict standard, which gives the Court feasibility of making an exception from the admissibility policy and does not ask the applicant party to exhaust domestic remedies. It

Two years later, after rendering principal judgment, it delivered judgment on the just satisfaction on the 28th of April 2023,[214] which granted one hundred thirty million Euros as compensation for more than 23,600 civilians who get suffered from the consequences of the armed confrontation.

Therefore, it seems the Court tried to reach the *golden ratio*, or Solomon's judgment, as Konstantin Dzehtsiarou calls it.[215] On the one hand, it tried to stay an effective regional human rights institution by avoiding assessment of the active phase of confrontation, which may open a new Pandora's box. On the other hand, the first international armed conflict in Europe in the XXI century could not be ignored entirely. Thus, it applied very hardcore standards of human rights violations in the occupation phase. There is no clear legal answer to denying adjudicating allegations with respect to the active phase. Para 141 of the judgment concludes with reasons and lists them. However, it does not explain legally what ties the court's hands exactly in adjudicating allegations on the conduct of hostilities, which renders an opinion that the court intentionally eschews to be engaged in assessing armed confrontation due to political sensitivity and logistical or technical difficulties.

Even though the court tried to render Solomon's judgment, it doubtfully ensured its predominant function, the very fundament value of the Convention – the protection of individuals. That being said, in the previous chapter, the only valid argument for rejecting the assessment of the active phase parts of the application can be the difficulties of the armed conflict litigation. However, the complexity of the case, the number of victims and the magnitude of the evidence cannot be a valid justification for the victims being abandoned without effective remedies.

Striving to have a *golden ratio* cannot respond to the people who are get suffered from the armed conflict and who cannot claim before any international institutions. Referring to the norm conflict of IHL and human rights; the practical difficulties of the litigation; the inability to exercise all the elements of the extra-territorial jurisdiction, and the rest of the points of the laments could look like crocodile tears to victims and their relatives.[216]

The Court failed to draw the line of similarities with *Bankovic* for two main reasons. Firstly, the main argumentation of *Bankovic* (absence of the legal space) cannot be valid in the present case as both of the hostile parties were part of the Convention. Secondly, the main concern was

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implies that a high contracting party has an administrative practice when two elements are fulfilled: the 'repetition of acts' and 'official tolerance.' See *France, Norway, Denmark, Sweden and the Netherlands v. Turkey* nos. 9940-9944/82, Commission decision of 6 December 1983, Decisions and Reports 35, p. 163, § 19. However, despite the administrative practice's general approach, no particular and specific actions are listed, which would be applicable in all cases. The Court shall individually check and assess conditions to hold administrative practice in a single case. See *Georgia v. Russia (II)* (Just satisfaction) App no. 38263/08 (ECHR [GC] 28 April 2023) para 103.

[214] *Georgia v. Russia (II)* (Just satisfaction) App no. 38263/08 (ECHR [GC] 28 April 2023).

[215] Konstantin Dzehtsiarou, "Georgia v. Russia (II)" (2021) 115 American Journal of International Law 288.

[216] See the partly dissenting opinion of Judge Pinto De Albuquerque in *Georgia v. Russia (II)* (n 1), para 30.

whether air strikes could be enough for exercising effective control over the land was also the opposite as there was a full-scale war in Georgia. Notwithstanding, one commonality of these two cases has been clearly illustrated. Both of them lack valid legal argumentation. *Bankovic* test was overruled in all cases regarding international armed conflict delivered afterwards. However, after courageous and protective steps taken in the case of Iraq, Afganistan, and the rest of the Armed conflict regions, *Georgia v. Russia (II)* got back to the opacity, where the court itself does not have clear flow and coherence.

Disappointingly, Strasbourg failed to seize a remarkable opportunity to ultimately delineate the limitations of the European Convention in relation to armed conflicts, elucidate its interplay with international humanitarian law, set forth benchmarks for extraterritorial jurisdiction, and above all, exhibit its unwavering and rigorous commitment to safeguarding the victims of armed conflicts.

### 3.5.3 Test of '*Chaos*.' – The Main Handicap for Human Rights

The European Court establishes the test of '*Chaos'* as a threshold criterion of the extra-territorial jurisdiction in the active phase of hostilities. Court stated:

> 'The very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos means that there is no control over an area.'[217]

It does not give comprehensive reasoning, whether the test of '*Chaos*' is a legal concept or a factual statement. Due to the lack of lucidity and overly constrictive approach in the application of human rights, the test has emerged as a significant factor in rendering scourge on the judgment.[218] This paragraph argues that *'Chaos'* implies a factual statement and cannot be valid legal reasoning based on a few points. The first one is the absence of a definition of the term as far as it is absolutely unclear what Chaos means. Secondly, legal certainty is of the essence of the rule of law, however, there is no possibility of anticipating how the test will be applied. The third point illustrates that based on the example of Ukraine the test could not be applicable to human rights law.

[217] *Georgia v. Russia (II)* (n 1), paras 126

[218] Floris Tan and Marten Zwanenburg, 'One Step Forward, Two Steps Back? Georgia v Russia (II), European Court of Human Rights, App NO 38263/08' Melbourne Journal of International Law, 22. 136-155; Marco Longobardo and Stuart Wallace, 'The 2021 ECtHR Decision in *Georgia v Russia (II)* and the Application of Human Rights Law to Extraterritorial Hostilities' (2022) 55 Israel Law Review 145. Moiseieva (n 40). Marko Milanovic, 'Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos' 4; Isabella Risini, 'Georgia v Russia (II) before the European Court of Human Rights'; Christina M Cerna, 'Georgia v. Russia (II) (Eur. Ct. H.R. (Grand Chamber))' (2021) 60 International Legal Materials 713. Konstantin Dzehtsiarou, "Georgia v. Russia (II)" (2021) 115 American Journal of International Law, 288.

As the Court stated in the newly delivered *Ukraine and The Netherlands v. Russia,* the first question to be addressed in cases dealing with the armed conflict is whether the allegations concern 'military operations carried out during an active phase of hostilities', in the sense of 'armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos'.[219] From now on, '*Chaos'* is the standard for dealing with IAC cases. It is perceived as a threshold for deliberating tests of the 'effective control' or 'state agency'. Whereas, Grand Chamber does not clarify if the condition of '*Chaos*' is absence of the control due to the armed confrontation, why does it exclusively belong to the IAC? Armed confrontations replete with artillery shelling can occur within the state borders between the government and rebels or some particular groups. Although, Non-International Armed Conflict is excluded from the discourse for no reason.[220]

The Court's new approach is the cornerstone of the critics. *'Chaos',* as a new threshold for the extra-territorial jurisdiction, protects the conventional provisions back to the opacity when *Bankovic* retrograded the Court's significantly progressive jurisprudence outlined in the *Cyprus* cases. If Strasbourg establishes extraterritorial jurisdiction through standards of effective control prior to the *Bankovic* ruling, the latter decision can be perceived as contributing to the confusion surrounding the concept of jurisdiction. Nevertheless, if the *Al-Skeini* judgment overruled *Bankovic* and set forth new, more courageous standards for protecting human rights extra-territorially, the Court's decision to rely on the *'Chaos'* test in the Georgian case is a regression.

More precisely, as Floris Tan and Marten Zwanerburg call, the ECtHR makes one step forward by delivering a number of extra-ordinary judgments (*Loizidou, Al-skeini*) at the same time two steps back afterwards by delivering *Georgia v. Russia (II).*[221] Alternatively, as Judge Bonello simplified in the concurring opinion in *Al-skeini* case, up until deliberating the case, the Court had spawned matters concerning the extraterritorial jurisdiction of Contracting Parties a number of 'leading' judgments based on a need-to-decide basis, patchwork case-law at best.[222] Comparing all the judgments discussed afore in favour of protecting human rights extra-territorially, the test of *Chaos* as legal reasoning of rejecting the application of the Convention in the conduct of hostilities indeed looks patchwork.

In the beginning, back to the difficulties for the Court to adjudicate armed conflict cases, '*Chaos'* still revives a question of whether Strasbourg claims about legal doctrine and endeavours to frame extra-territorial jurisdictional exceptions during the '*Chaos'* or it is all about again logistics and difficulties in obtaining pieces of evidence in unrest. The concept is indeed empty from legality. The standard cannot be a legal concept but a factual statement when difficulties examining the clarity of the armed confrontation come to light. Otherwise, if

[219] *Ukraine and the Netherlands v. Russia* (Admissibility decision) (n 3), para 576.
[220] Tan and Zwanenburg (n 217) 144.
[221] Tan and Zwanenburg (n 217).
[222] See Concurring opinion of Judge Bonello in *Al-skeini and others v. The United Kingdom*, (n 7).

one opines that *'Chaos'* can be understood as a legal concept, it can be inferred that Convention does not apply in the case of the use of massive lethal force while it does in the case of killing a person. The logic indicates that an extra-territorial assassination, such as the case of Litvinenko or the Salisbury attacks, or even potential drone strikes is more deserving of protection than a massive, systematic use of lethal force.[223] A few months later during the adjudicating individual applications the Court reiterated the standards based on the inter-state judgments, however, it further opined:

> '[T]he Russian and Georgian armed forces, resorted to massive bombing and shelling of the territories within the same period of time, it would be impossible to track either direct and immediate cause or even sufficiently close proximity between the actions of the Georgian army proper and the effects produced on the applicants.'[224]

There are no clear indications of what *'Chaos'* implies, when it starts and when it ends. As a restrictive approach to the extra-territorial jurisdiction, it is crucial to know the exact definition of the concept precisely. Albeit, the Court did not clarify anything but cited above. Two years later, during dealing with Ukrainian cases, the ECtHR grand chamber tried to give more clues. The Court stated:

> 'First, the Chaos that may exist on the ground as large numbers of advancing forces seek to take control of territory under cover of a barrage of artillery fire does not inevitably exist in the context of the use of surface-to-air missiles. Such missiles are used to attack specific targets in the air. They may be used in circumstances where there is no armed confrontation on the ground below between enemy military forces seeking to establish control over an area.'[225]

In a similar vein on the same day, the Court delivered another decision and stated that the effects of those actions on individual victims can be explained by a significant complexity as the exceptionally large number of victims, the magnitude of the pieces of evidence produced, the difficulty in establishing the relevant circumstances properly.[226] In Dealing with the individual applications, the Court openly admitted that actions that occurred within the active phase of confrontation cannot be addressed due to the inability of the Court.

There should be separated the definition into a few parts. Firstly, the Court defines that missiles launched from the ground for the targets in the air cannot be enough solely to cause '*Chaos'* on the land without a barrage of artillery fire. Thereby, striving to obtain control over the area through artillery fire on the land seems a requirement. Secondly, those missiles can be used

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[223] Marko Milanovic, 'Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos' 4. Available at https://www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/ accessed 28 April 2023.

[224] *Bekoyeva and Others v. Georgia Georgia* (Admissibility decision) App no. 48347/08, (ECHR, 5 October 2021), para 36.

[225] *Ukraine and the Netherlands v. Russia* (Admissibility decision) (n 2), para 704.

[226] *Shavlokhova and Others v. Georgia* (Admissibility decision) (n 57), para 32.

even in cases where hostile armies are not engaged in the active phase of confrontation. Due to the logic of launching missiles, in the Ukrainian case, shooting down civil aviation aircraft does not mean '*Chaos'*.

Moreover, as the European Court stated in the *Isayeva* case bombing land from the air can cause victims to fall under the effective control and jurisdiction of the Russian Federation.[227] Piecing together these standards seem that '*Chaos*' shall be generated neither by bombing from the air nor by launching missiles from the ground, and the only way to get it is actual artillery fire and confrontation over the land. It has been stated by Court[228] and acknowledged by the various organisations[229] that Georgian forces have been withdrawn from the spots of the confrontation by the 10th of August, so the right middle of the conduct of hostilities (prior to the cease-fire agreement would be concluded). It is absolutely unclear how the victims of the 10-12th August do not fall under the jurisdiction because of *'Chaos'* since there were no such conditions at least after the 10th of August, which would generate '*Chaos.'*

Once again, if neither launching missiles from surface to air inevitably causes Chaos nor bombing from air to ground, as in *Isayeva's* case, there is something between what produces '*Chaos'*, presumably artillery fire. The ECtHR does not give any clue whether all these territories from the 8th of August (starting point of hostilities allegedly) till the cease-fire agreement were equally barraged with artillery fire. The Court made a crucial mistake when it equated the assessment of all disputable and non-disputable territories without differentiating the conditions of the confrontation. On the one hand, it acknowledges that Georgian forces have been withdrawn from the confrontation area. On the other hand, it claims that victims cannot fall under the jurisdiction of the respondent state as both parties were seeking to establish control, which caused '*Chaos*'. This is simply an oxymoron.

Another critical point is the time period of *'Chaos',* which does not *per se* match starting and ending points of the armed conflict. So, whether the '*Chaos'* ends, does it necessarily mean armed conflict is over? Spirit of the case of *Ukraine and The Netherlands v. Russia* answers the question in a refuted way. Even occupation, controlling the territories and launching missiles for the air targets cannot generate *'Chaos.'* Therefore, the Court admits that human rights shall apply in hostilities without Chaos in Ukraine. '*Chaos'* cannot be equated with the conduct of hostilities itself. The opposite would argue that human rights are not applicable during the conduct of hostilities at all, which is profoundly wrong.

The issue is even more clear regarding the Ukrainian example. In the case of Ukraine, the active phase of hostilities has not been lasting precisely five days, similar to Georgia (Which lasted allegedly during five days). It has been lasting since 2014. Despite Minsk agreements on the

[227] *Isayeva v. Russia* App. No 57950/00 (ECHR, 24 February 2005) para 201.

[228] *Georgia v. Russia (II)* (n 1), paras 153-154,188, 190, 193.

[229] Independent International Fact-Finding Mission on the Conflict in Georgia, Volume I, p 21-22. (n 111); Human Rights Watch 'Up in flames: Humanitarian Law Violations and Civilian Victims in the Conflict Zone over South-Ossetia' (22 January 2009), 123-164.

cease-fire, hostilities reopened many times.[230] Civilians had been living under the threat of shelling and bombing for years.[231] Some of the territories have been under the parties' control occasionally. For example, Ukraine lost control over the city of Debaltseve in 2015, captured by the separatists, although a few days later, Ukrainian forces took control back.[232] However, the city is currently still under Russian control. Due to the test of '*Chaos,*' parties are seeking to establish control over the city, which has been under regular shelling by both parties from time to time. It should be stressed that there are a number of towns and villages similar to Debaltseve and many more civilians, respectively. Can one actually claim that individuals living in Debaltseve are not protected under the European Convention? Suppose neither party to the conflict exercised control over those settlements for a significant period during the hostilities. Would it create a 'vacuum of protection,' precisely the type of lacuna the Court seeks to avoid?[233]

In *Solomou's* case, Strasbourg stated that Turkey exercised extra-territorial jurisdiction when the shooting of a state agent of Turkey caused the victim's death. Interestingly, the victim was in the UN-neutral buffer zone.[234] Even though the victim died in the buffer zone, it was non-disputable that the Turkish authority used lethal force. Thus, Turkey was responsible not only for the territory that fell under its effective control but also for the acts committed outside its *ratione loci* control. In the case of *Andreou,* the Court accepted that the victims fell within Turkey's extraterritorial jurisdiction, although the shooting of the victims had occurred in Cyprus.[235] These judgments assert that even distance shooting from the controlled territory can generate extra-territorial jurisdiction. These judgments again render the question of killing a person, regardless of territory, more reprehensible under human rights law rather than massive killing.

Back to the importance of the artillery fire. As the Court underlined, it was persuaded in the Ukrainian case by the evidence that the separatists relied on the Russian military to provide artillery cover and that it was provided.[236] Thus, without further arguing, it has been stated that

[230] Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Ukraine, A/HRC/36/CRP.2 (16 May to 15 August 2017), para 22.
[231] Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Ukraine, A/HRC/36/CRP.2 (16 May to 15 August 2017), para 23.
[232] Human Rights 'Watch Studying Under Fire Attacks on Schools, Military Use of Schools During the Armed Conflict in Eastern Ukraine' (11 February 2016). Available at https://www.hrw.org/report/2016/02/11/studying-under-fire/attacks-schools-military-use-schools-during-armed-conflict accessed 8 May 2023. Amnesty International 'Ukraine: Horror of civilian bloodshed in indiscriminate attacks.' (2 February 2015). Available at https://www.amnesty.org/en/latest/news/2015/02/ukraine-horror-civilian-bloodshed-indiscriminate-attacks/ accessed 8 May 2023.
[233] Moiseieva (n 40) 3.
[234] *Solomou and Others v. Turkey* App no. 36832/97, (ECHR 24 June 2008), paras 41-51.
[235] *Andreou v. Turkey* App no. 45653/99 (ECHR 27 October 2009) para 25.
[236] *Ukraine and the Netherlands v. Russia* (Admissibility decision) (n 3), para 654.

Russia provided artillery shelling in eastern Ukraine.[237] By contrast, the active phase of hostilities, which the Court is required to examine in the case in the context of an international armed conflict, is very different, as it concerns bombing and artillery shelling by Russian armed forces seeking to put the Georgian army *hors de combat* and to establish control over areas forming part of Georgia.[238]

The ECtHR clarified that the vast majority of allegations advanced in the Ukrainian case[239] could not be said to fall into the category of '*Chaos'*. However, it does not explain the differences. In both cases, the barrage of artillery fire is clearly significant in the confrontation. As far as '*Chaos'* is the condition when hostile parties seek to obtain control, which is merely caused by the bombing and shelling (As the Court clarified in the *Georgian case*), according to the logic, conditions in Ukraine fell under the concept indeed. Defining '*Chaos*' must not be dependent on the owner of the artillery. In other words, shelling either directly launched by Russian forces (in Georgia) or indirectly supported separatists to do so (in Ukraine) should cause '*Chaos'* due to the Court's logic. All in all, shelling in Georgia established '*Chaos'* while shelling in Ukraine did not.

The European Court further links with the IHL as it underlines that actions taken in the conditions should be regulated under humanitarian law. If '*Chaos*' is the condition of inability to establish control and, for example, protect someone from torture, it is not clear how the GCs are capable of providing such protection. As International Criminal Tribunal for Yugoslavia ('ICTY') highlighted:

> 'International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.'[240]

The ICTY underlines that ceasing fire does not necessarily mean getting back to normalcy when there is no more need for the IHL. This implies that a cease-fire – whether temporary or definitive – or even an armistice cannot be enough to equate '*Chaos*' with the armed conflict, which can be way broader. Suppose the very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of Chaos makes it necessary to exclude any form of 'State agent authority and control' over individuals. In that case, applying international humanitarian law is impossible, either.[241] It is vital to

[237] The Court stated that there are many indicators which prove that weapon transportation to Easter Ukraine is ensured by the Russian government. See *Ukraine and the Netherlands v. Russia* (Admissibility decision) (n 3), para 630. Besides, through military, political and economic dependence on Russian Federation, ECtHR declared that Russia has effective control over the disputable territories.

[238] *Georgia v. Russia (II)* (n 1), paras 133.

[239] *Ukraine and the Netherlands v. Russia* (Admissibility decision) (n 1), paras 373-382.

[240] Prosecutor v Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (IT-94-1), [1995] ICTY 2 (2 October 1995), para 64.

[241] Partly dissenting opinion of judges Yudkivska, Wojtyczek and Chanturia on the case of *Georgia v. Russia (II)* (n 1), para 9.

establish a sense of normality and stability, and meanwhile the process, the Convention cannot postpone its responsibility to protect human values and wait for total peace to start applicability. The ECHR was drafted notably to uphold peace and should not shirk its primary duty by avoiding its application during the unrest.

In conclusion, this ambiguous standard limiting the application's scope is the main obstacle for armed conflict victims to access justice. The definition of the concept is absolutely unclear, and there are no hints of what can exactly cause, when and to what extent '*Chaos*'. All in all, the concept seems a way-out card for the Court, which can be played once avoiding adjudicating too complicated and sensitive cases is needed. As Milanovic said, the Court had no intention of applying the *'Chaos'* test in the Ukrainian case, yet did not want to overrule it – that awaits some future judgment.[242]

### 3.5.4 Effective Control – Military Presence

The Court indicated that in the context of '*Chaos*' when both hostile parties seek to take control over the territory, it simply implies no control at all.[243] The approach, therefore, lacks the Court's ability to hold extra-territorial jurisdiction based on the test of 'military presence' and could not exercise effective control through *ratione loci,* spatial jurisdiction. Based on the tests of the military presence, which have never been overruled, within the ECtHR's jurisprudence, this part asserts that the Court should and could have exercised effective control of Russian authorities through military presence. There are presented two significant points. Firstly, the following paragraphs prove that enough ground was presented before the Court to hold exercising effective control by the Russian military forces. Secondly, the ECtHR assessed the test generally, which is profoundly wrong as long as the Russian military presence was different from time to time, and it is not possible to either hold or reject the existence of military forces entirely.

Initially, it should be recalled what the test of 'military presence' means. (Detailed see sub-chapter 2.5 on extra-territorial jurisdiction) In dealing with the allegations concerning the Turkish occupation of Northern Cyprus, the ECtHR stated that a state exercises effective control once its troops take control over the land.[244] The test is rigid, and it was also applicable to the newly delivered judgment on Crimea.[245] '*Boots on the ground*' standard requires a certain (enough) number of troops over the land to have the capability of controlling a specific area.

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[242] Marko Milanovic, The European Court's Admissibility Decision in Ukraine and the Netherlands v Russia: The Good, the Bad and the Ugly – Part I, 26 January 2023, 7. Available at https://www.ejiltalk.org/the-european-courts-admissibility-decision-in-ukraine-and-the-netherlands-v-russia-the-good-the-bad-and-the-ugly-part-i/ accessed 7 May.

[243] *Georgia v. Russia (II)* (n 1), paras 126; 136-37.

[244] *Louzudou v. Turkey* (n 34), paras 16 and 56; *Cyprus v. Turkey* (n 51), paras 76-77.

[245] *Ukraine v. Russia (re Crimea)* (n 37), paras 308-352.

The EU fact-finding mission, which concluded comprehensively armed conflict and which was an essential document for examining the facts, states that it is evidentiary that the 58th Army charged with the task of carrying out the mission in South Ossetia through the Roki tunnel (Connects Georgia and Russia through Caucasus mountains) and began to move into South Ossetia. According to the report, Russian authorities affirmed that they aimed to restrict movements of the enemy reserves, disrupt its communications, incapacitate base airfields, destroy warehouses and bases containing fuel and lubricants and seal off the areas of hostilities by attacking crucial points by the air force and artillery.[246] Since the founding principle of effective control is blocking the adversary's feasibility to control the area, the aim of the Russian army fulfils the requirement. It should be further noted that the main targets of the bombing were well away from the main spots of the hostilities. Even though armed confrontation was going around the town of Tskhinvali (Middle-North Georgia), at the beginning of the intervention, attacks were launched against the cities of Marneuli, Vazianı and Bolnisi (South-West part of Georgia). Hence, it is evident that rather than provide close air support to ground forces in contact in South Ossetia, the Russian air forces intentionally attacked strategically important broader military objectives to deprive the Georgian forces of any support, mainly through the air.[247]

Moreover, regarding the specific number of troops, it has been stated that Russia deployed up to 25 000 - 30 000, supported by more than 1 200 pieces of armour and heavy artillery. Also involved in the action were up to 200 aircraft and 40 helicopters.[248] Beyond the air and the land, Russia entered the Georgia territorial water with around 13 vessels, including its flagship - guided missile cruiser 'Moskva' - as well as landing, antisubmarine and patrol ship, and minesweepers.[249]

Consequently, based on the '*Boots on the ground*' principle as a requirement of the establishment of effective control, it should be inferred from the tangible pieces of evidence that Russia intentionally blocked the sea and controlled western parts of Georgia, bombed military runways and airports in western, and eastern Georgia, deployed troops in the town of Gori, which was also bombed and shelled to block the highway which connects east and west Georgian parts. Russian forces entered in towns of Zugdidi, Senaki and Poti (Western major Georgian towns). The aim was to ensure the Georgian authorities' inability the control the country.

The second crucial point is the timeline. As it has been illustrated, effective control was obtained in different conditions. The ECtHR practically concluded that parties could not have effective control over the area without differentiating singular conditions. In other words, the Court did not pay attention to the point that some cities or villages were not under bombing or

[246] Independent International Fact-Finding Mission on the Conflict in Georgia, Volume II, p 215. (n 111).
[247] ibid 217.
[248] ibid 216.
[249] ibid 217.

shelling right before the cease-fire agreement. The Human Rights Watch concluded that Tskhinvali and the rest of South Ossetia must be considered under Russian control from August 10, when Georgian forces officially retreated, through the present.[250] The HRW further states that:

> 'Villages in the Gori district fell under Russian control as Russian forces moved through them on August 12. Gori city must be considered under effective Russian control from August 12 or 13 until August 22, when Russian troops pulled back further north toward South Ossetia. Russia's occupation of the area adjacent to South Ossetia ended when its forces withdrew to the South Ossetia administrative border on October 10.'[251]

Thus, it is evident that different villages and cities were under Russian control within different periods of time. One more essential point is the decision of the president of Georgia to withdraw forces from the conflict zone on the 10th of August. Thereby by the night of 9 to 10 August, most of the Georgian forces had withdrawn from the territory of South Ossetia. Moreover, at the end of the final phase of military hostilities, Abkhaz (Breakaway region of Georgia) units supported by Russian forces attacked the Georgian positions in the upper Kodori Valley and seized this territory, which had been vacated by the Georgian forces and most of the local Georgian population by 12 August 2008.[252] Abkhazia is on the western edge of Georgia and does not connect to the central conflict zone. Even more, as mentioned before, the towns of Zugdidi Senaki and Poti, located between South Ossetia and Abkhazia, had already been controlled by the Russian forces. Therefore, for the moment of attacking Kodori Valley, Russian forces were already controlling the buffer zone between South Ossetia and Abkhazia, which practically implies controlling half of the country.

Consequently, Russia had effective control over western and central Georgia at that moment. Furthermore, the satellite images from the 'High-Resolution Satellite Imagery and the Conflict in Georgia' illustrated that most of the houses were burnt and damaged by the 10th of August.[253] During the hearing of the witnesses, one of them stated that the town of Tskhinvali had sustained the most damage up to the morning of 10 August 2008.[254]

In conclusion, the indiscriminative distinction between the active phase and occupation is manifestly wrong. Deliberating events from 8-12 August entirely without separating the events, territories and time periods is a simplification. It cannot be said that if hostile parties were seeking to establish control at the beginning of the confrontation, none of them would be able to have control over certain areas till the end of the conflict. There is no example that a village or a town under the control of Russian forces turned into one under the control of Georgian

[250] Human Rights Watch 'Up in flames: Humanitarian Law Violations and Civilian Victims in the Conflict Zone over South-Ossetia' (22 January 2009), 123.
[251] ibid 123-164.
[252] Independent International Fact-Finding Mission on the Conflict in Georgia, Volume I, p 21. (n 111).
[253] *Georgia v. Russia (II)*, (n 1), para 188.
[254] *Georgia v. Russia (II)*, (n 1), para 193.

ones. Since the night of the 9th of August, Russia established effective control not only over the conflict zone but also over the broader territories in Georgia. Reports by the EU fact-finding independent mission; The HRW; the Amnesty, and testimonies by the witness should have been enough for the Court to go deep into the issue and examine Russian military presence comprehensively, which obviously rendered its effective control at least from the 10th of August. Therefore, Russia clearly had extra-territorial jurisdiction based on the *ratione loci* before the cease-fire agreement.

### 3.5.5 Effective Control – State Agency

Despite the Court's findings, this part illustrates that effective control over the persons has been established before the cease-fire agreement. It argues that pursuant to the case law of the Court, control of the state agent authority can be established even within the active phase of hostilities.

The main findings and definitions of the personal model of the extra-territorial jurisdiction have been made in sub-chapter 2.5 of the extra-territorial jurisdiction. Therefore, this sub-chapter does not discuss the personal model of the jurisdiction in general, but it underlines the main features, which are essential for the discourse in the following paragraphs. The Strasbourg jurisprudence law demonstrates that, under certain conditions, the use of force by a state's agents operating extra-territorially may bring the individual under the control of the high contracting party's authorities into the State's Article 1 jurisdiction. This principle is applied when the individual is taken into the custody of State agents abroad.[255] The Court has stipulated that two Iraqi nationals detained in British-controlled military prisons in Iraq fell within the jurisdiction of the UK because of exercising effective control over the prisons and the individuals detained in them.[256] In *Hassan*[257], even though the Court did not impose responsibility over the respondent government, it found that the victim fell under the jurisdiction of the UK as Mr Hassan was under the physical control of the British Army. It indicates that effective control over the person is a concept of having physical power over the person, and it is not necessarily linked with the responsibility as a result of the legal assessment. That is to say, the lawfulness of the person's physical power does not change the fact that power over the person exists.

All in all, being under the party's physical control matters in establishing the personal jurisdiction model. No case would overrule the standard and declare that having physical power over a person who cannot take steps independently (a detained person, for example) is insufficient to exercise effective control over the person.

[255] *Öcalan v. Turkey* App no. 46221/99 (ECHR [GC] 12 May 2005), para 91
[256] *Al-Saadoon and Mufdhi v. the United Kingdom* App no. 61498/08 (ECHR [GC] 2 March 2010), paras 86-89.
[257] *Hassan v. The United Kingdom* (n 38), paras 75-80.

The Human Rights Watch and the Amnesty turn in a plethora of cases of people under the control of a hostile army during the active phase of hostilities, and a few of them are presented as follows to assert that individuals were under the effective control of Russian forces before the cease-fire agreement. In the town of Gori, a civilian was detained, and as he described, Ossetian forces used ill-treatment upon his arrival at the Ministry of Interior building in Tskhinvali on August 10.[258] It should be stressed that, as it has been non-arguable stated, the town of Gori was under the control of Russian forces as the Georgian ones had withdrawn by the 10th of August. The person, therefore, was detained under Russian control. Moreover, three Georgian servicemen interviewed by Human Rights Watch—Davit Malachini, Imeda Kutashvili, and Kakha Zirakishvili—were detained together by adversary forces at the beginning of the hostilities on the 8th of August.[259] The HRW further reports that beyond civilians, the Georgian soldiers were also detained in Tskhinvali, and they were tortured and degraded. Russia exercised effective control from August 9 and therefore is regarded as having fallen into Russia's power.[260] Consequently, the HRW concludes that civilians, soldiers and police officers were detained, *inter alia,* by the 10th of August, which is the middle of the active phase.

Regarding civilians, the Amnesty reports that the earliest civilian detainees were taken captive around 10 August while the hostilities were ongoing.[261] During the hearing before the delegation of the ECtHR, three Georgian civilians stated that they had been captured by South Ossetian fighters on the 10th of August and placed in the basement of the "Ministry of Internal Affairs of South Ossetia" in Tskhinvali.[262] Therefore, there were more than enough tangible pieces of evidence obtained by the ECtHR itself or through international organisations, which proved that civilians and military service individuals had been under the physical control of the hostile army.

The Court clarified that the complex and volatile situations prevailing during the *'Chaos'* made it difficult to establish a single interpretation of the meaning of Art. 1 of the ECHR, given that all parties were striving to establish effective control over the area. This approach is not compatible neither understanding the jurisdiction of the parties nor the jurisprudence of the European Court. Initially, it should be strictly mentioned that generalising all the conditions throughout the five days of hostilities is profoundly wrong. The last sub-chapter has already illustrated that conditions of the beginning of the hostilities cannot be equated with the last phase of confrontation. Numerous areas had already been under Russian effective control by the 10th of August. Therefore, taking individuals into custody from the areas of Tskhinvali or Gori cannot be understood as a circumstance of '*Chaos'* as long as these territories were not

[258] Human Rights Watch 'Up in flames: Humanitarian Law Violations and Civilian Victims in the Conflict Zone over South-Ossetia' (22 January 2009), 175.
[259] ibid 186.
[260] ibid 185.
[261] Amnesty International Civilians in the line of fire: the Georgia-Russia conflict' EUR 04/005/2008, (November 2008), 46.
[262] *Georgia v. Russia (II)*, (n 1), para 232.

spots of hostilities since the 10th and Russia was effectively controlling the areas. Thus, the argument that under '*Chaos*' effective control over the person could not be established to examine allegations regarding detention, ill-treatment, killing, or any other human rights violations cannot be valid.

Nonetheless, based on the case law described before, effective control over the person does not require having control over the land. In other words, the difference between spatial and personal models of jurisdiction is physical power over the land or the person, respectively. Therefore, even in the absence of *ratione loci* effective control, taking control over the person shall render extra-territorial jurisdiction due to the *Al-skeini* standard. It set the threshold for the extra-territorial applicability of the Convention relatively low as it implies that a Party's jurisdiction may be engaged whenever it assumes authority over a foreign territory, even if it does not exercise effective control on the ground.[263] In other words, in regard to establishing effective control through a 'State agent', it solely matters whether the official has physical control over the person. That is why it has been argued that conceiving state jurisdiction within the meaning of human rights treaties in personal rather than spatial terms would appear to solve most of the policy problems with the spatial model[264] since it is way easier to prove to have control over the person rather than over the land.

Unlike the Court, the Prosecutor of the ICC stated,[265] that at least three people were responsible for the numerous crimes committed during the, *inter alia*, 10-12 August period. Initially, it should be stressed that even though International Criminal Court is another jurisdiction with a different mandate, the decisions should be taken into account not for its legal assessments, which could be shared by the ECtHR but for stating a fact of the existence of effective control over the individuals. ICC *propio motu* authorised an investigation in 2016 into the situation in Georgia.[266] Additionally, calling different international legal institutions' findings or litigations is commonly accepted by Strasbourg. The Court used ICC's material several times to deal with this case.[267] Even though the pre-trial chamber's decision was delivered after *Georgia v. Russia (II)*, it should be mentioned that the pre-trial chamber applied facts that came out for the Court before. Thus, facts stated by the prosecutor's office could have been applied by the ECtHR as additional material to state a personal model of the extra-territorial jurisdiction.

Precisely, ICC stated that Mikhail Mindzaev, as a Minister of Internal Affairs of the *de facto* South Ossetian administration, allegedly took part in massive detentions of ethnic Georgians on the 10th of August. These arrests took place mainly in the context of looting and burning

[263] Marek Szydło, 'Extra-Territorial Application of the European Convention on Human Rights after Al-Skeini and Al-Jedda' (2012) 12 International Criminal Law Review 271, 296.

[264] Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 47) 173.

[265] The Prosecutor of the International Criminal Court, Karim A.A. Khan KC's conclusion of the investigation phase in the Situation in Georgia, 16 December 2022. Available at https://www.icc-cpi.int/news/prosecutor-international-criminal-court-karim-aa-khan-kc-announces-conclusion-investigation accessed 3 May 2023.

[266] The situation in Georgia, (ICC-01/15-12) Decision, (27 January 2016) Pre-Trial Chamber I.

[267] *Georgia v. Russia (II)*, (n 1), paras 67, 160, 173, 187, 205, 208.

houses, and the detainees were generally isolated in the detention Centre in Tskhinvali.[268] In the case of Gamlet Guchmazov, the head of the detention centre in Tskhinvali and David Sanakoev, a public ombudsman, they were called before the Court as a witness. Regarding allegations that conditions were incompatible with the Convention, particularly having two toilets for 160 people, they confirmed that the detention centre was not big enough for many people.[269] Regarding the allegation that detainees were forced to clean streets to they also acknowledged that fact, however, they noted that it was voluntary.[270] Whereby ICC issued two more decisions for the arrest of Gamlet Guchmazov and David Sanakoev. The acknowledgements confirm that both of them have effective physical control over the detainees, which caused illegal detention torture, degrading and inhuman treatment.[271]

In conclusion, it has been shown that concrete individuals took a plethora of persons into custody and therefore had effective control over them. Under the very rigid standards of the personal model of the extra-territorial jurisdiction stipulated in the *Al-skeini* case, effective control over the person implies having physical power and hence the person being unable to take action independently, which may include ill-treatment elements, killings or other violations of human rights. If *'Chaos'* implies hostile armies seeking to establish control, which excludes the possibility of having control over the person, it has indeed proved that, at least by the 10th of August, Russian forces had exclusive control over the territories where many people were detained. In the conduct of hostilities, many people were under effective Russian control. Therefore, the Court's argumentation on the absence of feasibility to establish effective control through state agents in the '*Chaos*' cannot be valid.

### 3.5.6 *Ukraine and The Netherlands v. Russia* – Striving for Clarity?

*Ukraine and The Netherlands v. Russia*[272] is an important application which concerns a plethora of vital points in international law. However, due to the limitation of the research scope, this sub-paragraph addresses only the parts that interplay with the inter-state case of *Georgia v. Russia (II),* in which case the Court is required to assess the consequences of the armed confrontation in Eastern Ukraine. Furthermore, the Grand Chamber returned to the armed conflict in Georgia while deliberating Russian aggression in Ukraine, and its findings will genuinely impact the forthcoming cases. Therefore, the importance of addressing the case is paramount.

[268] Arrest warrant for Mikhail Mayramovich Mindzaev, (ICC-01/15) [2022] Pre-Trial Chamber I Decision, Situation in Georgia, para 12.
[269] *Georgia v. Russia (II)*, (n 1), paras 232-233.
[270] *Georgia v. Russia (II)*, (n 1), para 245.
[271] Arrest warrant for David Georgiyevich Sanakoev, (ICC-01/15) [2022] Pre-Trial Chamber I Decision, Situation in Georgia.
[272] *Ukraine and the Netherlands v. Russia* (Admissibility decision) (n 3).

The case concerns allegations with respect to the human rights violations in Eastern Ukraine beginning in 2014[273] and, with the abduction and transfer to Russia of three groups of children and accompanying adults,[274] and an application filed by the Netherlands that deals with the 2014 downing of the MH17 airliner over Ukraine.[275] The Grand Chamber declared the case admissible in most principal parts of the application. The Court held that Russia had had effective control over all areas in the hands of separatists from 11 May 2014. The Court found that the Russian military presence in eastern Ukraine was visible, even though it was not feasible to identify the number of troops.[276] Furthermore, decisive Russian influence over the separatists was also evident. It found beyond any reasonable doubt that Russian military personnel had been present in an operational capacity in Donbas from April 2014 and that there had been a large-scale deployment of Russian troops from, at the very latest, August 2014. It further declared that Russia had a significant impact on the separatists' military strategy and that it had provided weapons and other military equipment to the separatists.[277] There was indeed a tangible piece of evidence that Russian financial aid was essential for the separatist groups in Eastern Ukraine. Consequently, the ECtHR held that Russia had effective control over these regions.

Most importantly, the Court stated:

> 'Since it found jurisdiction to exist in respect of the detention and treatment of civilians and prisoners of war even during the "five-day war" (see §§ 238-39 and 268-69 of the judgment), there can be no doubt that a State may have extraterritorial jurisdiction in respect of complaints concerning events which occurred while active hostilities were taking place. Therefore, Georgia v. Russia (II) judgment cannot be seen as the authority to exclude entirely from a State's Article 1 jurisdiction a specific temporal phase of an international armed conflict.'[278]

All of a sudden, the Court practically overruled the test of *'Chaos'* and admitted that human rights are applicable even during the conduct of hostilities. It should be stressed that the European Court *de facto* did so without clarification that *Georgia v. Russia (II)* cannot be applied anymore. That being concluded before, the incoherent, ambiguous and dubious standard of the '*Chaos*' is incompatible with the legal principles since it lacks the opportunity to anticipate the consequences of the test. Therefore, lack or even absence of clarity gives the Court feasibility to apply once it is needed, once the complexity and sensitivity of the case will come to light. It is stressed that the ECtHR had no intention of applying *Georgia v. Russia (II)* in this case, yet did not want to overrule it – that awaits some future judgment.[279]

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[273] ibid para 373.

[274] ibid paras 374-75.

[275] ibid paras 376-82.

[276] ibid para 611.

[277] ibid para 639.

[278] ibid para 558.

[279] Marko Milanovic, The European Court's Admissibility Decision in Ukraine and the Netherlands v Russia: The Good, the Bad and the Ugly – Part I, 26 January 2023, 7. Available at https://www.ejiltalk.org/the-european-

*Ukraine and The Netherlands v. Russia* should have explicitly overruled *Georgia v. Russia (II)* to have open possibilities for the forthcoming cases. However, that would be expecting too much, especially considering the specific institutional context. Instead of overruling *Georgia v. Russia (II),* the Court starts to qualify it somehow.[280] The Grand Chamber meanwhile stated that the context of '*Chaos*' should also be considered for further deliberation on merit in dealing with exercising jurisdiction by Russian Federation.[281] Hence, it seems that the Court does not (cannot) want to be rigid in rejecting prior findings and strives to cohabitate the standard with the new challenges somehow.

It is worth mentioning that while Strasbourg's central reasoning in *Georgia v. Russia (II)* was linked with not the recent judgments but the revitalised pernicious the *Bankovic* case, the Grand Chamber in *Ukraine* stated that *Bankovic* is no longer an accurate statement regarding extra-territorial applicability of the Convention.[282] The sequence of the Court's logic anticipates that there will be a judgment soon, which will explicitly annul the '*Chaos*' test as the present case rejected *Bankovic.*

Last but not least point:

> 'The question whether there was State agent authority and control in respect of acts of shelling in the present case, such as to give rise to the respondent State's jurisdiction in respect of them, requires a careful examination of whether these incidents fell within the exception identified in Georgia v. Russia (II).'[283]

*'Exception identified in Georgia v. Russia (II)'* is the test of '*Chaos*', and it is absolutely unclear what careful examinations mean when the test itself is so dubious. The issue is merit-based and could not be deliberated at the admissibility stage. Meanwhile, it should be highlighted that while the Court strictly rejected any possibilities of exercising a personal model of the jurisdiction in *Georgia v. Russia (II)*, in the presented case, it actually left the door for applying *ratione personae.*[284] Hopefully, the test will not be applied further, and the Court just strives to maintain the golden ratio. On the one hand, not admitting its fault and reiterating the 'Chaos'

courts-admissibility-decision-in-ukraine-and-the-netherlands-v-russia-the-good-the-bad-and-the-ugly-part-i/ accessed 7 May.

[280] Marko Milanovic, The European Court's Admissibility Decision in Ukraine and the Netherlands v Russia: The Good, the Bad and the Ugly – Part I, 26 January 2023, 6. Available at https://www.ejiltalk.org/the-european-courts-admissibility-decision-in-ukraine-and-the-netherlands-v-russia-the-good-the-bad-and-the-ugly-part-i/ accessed 7 May.

[281] *Ukraine and the Netherlands v. Russia* (Admissibility decision) (n 3), para 698.

[282] ibid para 571.

[283] ibid para 700.

[284] Marko Milanovic, The European Court's Admissibility Decision in Ukraine and the Netherlands v Russia: The Good, the Bad and the Ugly – Part I, 26 January 2023, 12. Available at https://www.ejiltalk.org/the-european-courts-admissibility-decision-in-ukraine-and-the-netherlands-v-russia-the-good-the-bad-and-the-ugly-part-i/ accessed 7 May.

standard is crucial. On the other hand, it implicitly realises that it may have undermined the Convention's spirit.

*Ukraine and The Netherlands v. Russia* obviously look very promising. The ECtHR endeavours to go back on the right path to clarity. It is hard to imagine what can be the worse grave human rights violation, rather than what we have witnessed in Bucha, Mariupol and many other places.[285] Running away from the consequences of these flagrant breaches would make the Court responding minor violations while the existence of the values of the Convention's founding principles will be under question.

### 3.5.7 Concluding Remarks

In conclusion, this part of the thesis illustrated that despite very progressive and brave findings made in *Georgia v. Russia (II),* the Court failed to thoroughly assess the active phase of hostilities. Mainly, the test of '*Chaos*' as a factual condition is not very detailed and comprehensively explained, which always makes gap possible to apply the test politically instead of legally. Bombing or launching strikes towards the air targets cannot cause *'Chaos'.* However, one of the main clarifications is that it basically includes shelling, and a barrage of artillery fire cannot endure any critics, as it has been revealed that the European Court stated the opposite in the case of Ukraine. Furthermore, generalising the conduct of hostilities without assessing areas and periods separately was also a fatal mistake. On the other hand, it has been indicated that many indicators proved that the Court could have held effective control over the territories through the 'military presence' of the Russian Federation and personal model of jurisdiction through the 'state agency.'

# 4. *De Facto* Recognition of Extra-territorial Jurisdiction for Certain Rights

## 4.1 Introduction

Previous chapters indicated obstacles to the extra-territorial application of the European Convention. Predominately, this is a member state's inability to exercise jurisdiction in the context of '*Chaos.*' However, norm conflict and practical difficulties are less important. It has

[285] OHCHR 'Killing of Civilians: Summary Executions and Attacks on Individual Civilians in Kyie, Chernihiv, and Sumy Regions in the Context of the Russian Federation's Armed Attack Against Ukraine' (7 December 2022). Available at https://www.ohchr.org/sites/default/files/documents/countries/ukraine/2022/2022-12-07-OHCHR-Thematic-Report-Killings-EN.pdf Accessed 8 May 2023; Human Rights Watch 'Ukraine: Russian Forces' Trail of Death in Bucha' (21 April 2022). Available at https://www.hrw.org/news/2022/04/21/ukraine-russian-forces-trail-death-bucha accessed 8 May 2023.

been illustrated that none of the reasons could justify the rejection of the assessment allegations regarding the conduct of hostilities. Moreover, the last chapter based on the pilot judgment showed that the Court's reasoning is not capable of being legally valid. Wherefore, once existed interpretation of Art. 1 of the Convention with respect to the conduct of hostilities is rebutted, this chapter provides two major examples, which prove that despite formal rejection on application, there are at least two examples of rights, which unavoidable confirms human rights applicability in the active phase of hostilities. Precisely, rights to life and rights to liberty *de facto* recognize the extra-territorial applicability of the Convention.

## 4.2 Right to Life

The jurisprudence of human rights bodies, as well as the ICJ, is clear that within the effectively controlled territory, the human rights treaty applies. How so, is a different matter.[286] Human Rights superiority was challenged particularly in armed conflict cases, especially in *Bankovic.* Since then, identifying the scope of the right to life was requested many times. Right to life stipulates generally three main aspects: the negative obligation to refrain from unlawful killing through the state agents; the obligation to investigate crime and the positive obligation to take measures to prevent avoidable loss of life.[287] This part cannot discuss the right to life as such, but its procedural limb, the obligation to ensure effective investigation.

Strasbourg stated that Russia was responsible for the effective investigation of the actions taken in the active phase of hostilities in Georgia.[288] So even though effective investigation should have been ensured after the confrontation, the merit of the criminal proceedings are killings during the conduct of hostilities. Practically, the Grand Chamber demanded from Russia to investigate and therefore punish perpetrators for alleged killings during the hostilities. It is not clear, how the party is responsible to ensure a single component of the right if the rights are not applicable at all. So, if there was no jurisdiction in the active phase, how the respondent state is obliged to fulfil the requirements of the right to life? This part argues that, by doing so, the Court admits that despite formal rejection, conventional provisions are applicable extra-territorially even in the conduct of hostilities. The Court states:

> 'However, it points out that in Güzelyurtlu and Others (cited above, §§ 188-90) it indicated that a jurisdictional link in relation to the obligation to investigate under Article 2 could be established if the Contracting State had instituted an investigation or proceedings in accordance with its domestic law in respect of a death which had occurred outside its jurisdiction, or if there were "special features" in a given case.'[289]

[286] Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 47) 120.
[287] Robin CA White, Clare Ovey and Francis Geoffrey Jacobs, *Jacobs, White and Ovey: The European Convention on Human Rights* (5th ed, Oxford University Press 2010) 143.
[288] *Georgia v. Russia (II)* (n 1), para 337.
[289] *Georgia v. Russia (II)* (n 1), para 330.

*'Special feature'* – one more test of ambiguity. It leaves an impression that similar to the '*Chaos*' lack of clarity is a great tool for avoiding sensitive or less desirable aspects of the case. The Court admits that it is not feasible to set out an exhaustive list of '*special features*' since they will necessarily depend on the particular circumstances of each case and may vary considerably from one case to another.[290] Consequently, even if there is no jurisdiction, which means that rights are not applicable at all, there still can be some extra-ordinary circumstances, so-called '*Special features*' which can cause jurisdictional links. These factors can indeed exist and the Court cannot list all of them. The issue with this kind of multi-factorial, 'special features' analysis is precisely that there is no way of anticipating how important any of these factors is individually, and how they would translate to other contexts.[291] Consequently, even though the right to life was not applicable during the conduct of hostilities, Strasbourg stated:

> 'Accordingly, having regard to the seriousness of the crimes allegedly committed during the active phase of the hostilities, and the scale and nature of the violations found during the period of occupation, the Court considers that the investigations carried out by the Russian authorities were neither prompt nor effective nor independent, and accordingly did not satisfy the requirements of Article 2 of the Convention.'[292]

let's compound the puzzle. Russia allegedly uses massive systematic lethal force. Although, due to the absence of jurisdiction, responsibility cannot be held. Meanwhile, again Russian authorities are obliged to ensure an effective investigation of the using lethal force, which is used by them. If it makes sense, then the logic of the '*special feature*' may be understood. However, it does not seem very credible, that a party which allegedly used lethal force, effectively investigates massive and systematic killings.

That being said, procedural limb solely (obligation on effective investigation) can exist when the state party has not violated the substantive limb of the right.[293] In other words, when neither the state agent killed the person nor the state party violated the positive obligation to prevent avoidable loss of life substantive limb of the right to life cannot be violated and only procedural obligations are left to fulfil.

As it has been widely stated, jurisdiction is a threshold criterion, which is a starting point for the adjudication of the case. Hence, without the jurisdiction of the state party, the Court cannot go further and start deliberating on merits, and hence cannot state any kind of responsibilities. Whereas, even though there was no jurisdiction in the active phase of hostilities, Russia is still responsible for the failure of the investigation. Customary International Law stipulates that the belligerent party is obliged to ensure an investigation of war crimes if allegations arose. So,

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[290] *Güzelyurtlu and Others v. Cyprus and Turkey* App no. 36925/07 (ECHR [GC] 29 January 2019) para 190.

[291] Marko Milanovic, 'Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos' 10.

[292] *Georgia v. Russia (II)* (n 1), para 336.

[293] See *mutatis mutandis, Hanan v. Germany* App no. 4871/16 (ECHR [GC] 16 February 2021); *Enukidze and Girgvliani v. Georgia* App no. 25091/07 (ECHR 6 April 2011).

yes Russia was obliged to investigate war crimes under the Geneva Conventions[294] and it is not explained how the European Court applied these rules for the purpose of Art. 1 of the Convention and its meaning of the jurisdiction, which is unique. Whereby, obligations under the IHL cannot trigger ones under the Convention when the absence of the jurisdiction under Art. 1 of the ECHR is stated.

The ECtHR indicates that effective investigation in the armed conflict does not mean that there is no jurisdiction, but a '*special feature*' can trigger a jurisdictional link.[295] In other words, even though, a member state cannot exercise jurisdiction (e.g. in the context of '*Chaos*'), '*special features*' of the investigation can trigger an obligation on the procedural limb of the right to life. Therefore, it eventually causes a jurisdictional link which obliges the state to investigate the killing, even though it was not responsible for the death. All in all, this paragraph does not allege that the Court is not right when saying that Russia was responsible for the ensuring effective investigation, but the opposite. Russia did violate the procedural limb of the right to life, because of having jurisdiction with the meaning of Art. 1. Despite the formal rejection, the Court's finding simply affirms that there are human rights obligations which cannot be overridden.

Another aspect is the aim and results of the investigation. What does the investigation aim for in this case? Generally, the purpose of the investigation is effectiveness, which, *inter alia,* implies punishment of those who are responsible for the death.[296] So the aim could be to identify and bring the perpetrators to justice for the use of lethal force. It seems that the result would lead not only to procedural obligations but also reveal substantive violations too. If Russian authorities would investigate everything properly and independently, they would obviously face unlawful acts which were committed by the state authorities.[297] That being mentioned, the state can violate only procedural limbs, when the killing is caused by a non-state actor or third person. Albeit, when state authorities use force, investigation can only reveal perpetrators, which are state agents, and therefore held the responsibility of the state for the violation of the right to life.

Hence, taking into account jurisprudence of the right to life, it is evidentiary, that effective investigation in this case also implies revealing state authorities' atrocities. Any alleged crimes, considered by the Court, were committed during the conduct of hostilities, which was carried out by the official authorities, not non-state actors. Wherefore, it illustrates that procedural

[294] Rule 158 of the Costumary International Humanitarian Law sets forth that 'States must exercise the criminal jurisdiction which their national legislation confers upon their courts, be it limited to territorial and personal jurisdiction, or include universal jurisdiction, which is obligatory for grave breaches.' See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, International Committee of the Red Cross, (ICRC study of customary international law, Cambridge, 2005) 607.

[295] *Ukraine and the Netherlands v. Russia* (Admissibility decision) (n 3), para 575.

[296] Ian David Park, *The Right to Life in Armed Conflict* (First Edition, Oxford University Press 2018) 57.

[297] See decisions and arrest orders of the International Criminal Court on the situation in Georgia. (n 264-265).

limbs and substantive limbs are not separable in this case. Without exercising extra-territorial jurisdiction on the massive killings, requesting an investigation does not make any sense.

Consequently, stating that due to the '*special features*' Russia was responsible for the effective investigation clearly confirms that, Russia exercised extra-territorial jurisdiction in the conduct of hostilities. Despite the Court's rejection, it is obvious, that there are some human rights provisions, such as the right to life, which do not cease applicability and cannot be eschewed in the active phase of hostilities. This example, once more asserts, that ECtHR was not able to examine all the details of the armed confrontation due to litigation difficulties and just tried to avoid assessment of the allegations.[298] However, there are some aspects of the armed conflict which are unavoidable, which self-evidentiary confirms the extra-territorial applicability of the Convention.

### 4.3 Right to Liberty

Detention is one of the most widespread human rights issues in the armed conflict. But should it be protected under the human right at all? On the one hand, it is generally doubtful in theory whether the right to liberty should be applicable in the active phase of hostilities. On the other hand, its applicability has already been excluded by the Court.[299] This sub-paragraph illustrates examples, which proves that Art. 5 is applicable in the conduct of hostilities. Moreover, similar to the right to life, it shows Strasbourg's *de facto* confirmation that Russia exercised extra-territorial jurisdiction within the conduct of hostilities based on the illegal detention example.

Claiming the applicability of non-derogable rights can be the easy way out.[300] It has been widely agreed that freedom from torture or slavery should be absolutely protected in any scenario.[301] ECHR has made an interesting statement regarding the ranking of human rights. The Grand Chamber stated that the right to liberty together with Articles 2, 3 and 4 of the ECHR is in the first rank of the fundamental rights that protect the physical security of the individual, and as such its importance is paramount.[302] It is not said that the right to liberty is more important than freedom of expression, for example. However, it is obvious that physical integrity as a starting point of the human rights catalogue is especially vulnerable in armed

[298] Park (n 294) 55.

[299] *Georgia v. Russia (II)* (n 1), para 126.

[300] As that being mentioned afore in the *Wall* case ICJ confirmed that human rights do not cease applicability in the armed conflict. Even though, it has not listed particular provisions, it drew the line with the institute of derogation (Art. 4 of the ICCPR), therefore, it can be inferred that applicability of the non-derogable rights can be the less arguable.

[301] *A. and Others v. The United Kingdom* App no. 3455/05, (ECHR [GC] 19 February 2009) para 126.

[302] *Merabishvili v. Georgia* App no. 72508/13, (ECHR [GC] 28 November 2017) para 181.

conflict. Detention of the civilians makes the provision crucially important. The key purpose of Art. 5 is to prevent arbitrary or unjustified deprivations of liberty.[303]

Before analysing example of the *Georgia v. Russia (II),* it is essential to clarify the scope of the right to liberty in the hostilities. Human rights and IHL have commonalities in the applicable areas when it comes to life, physical integrity and liberty.[304] However, norm conflict is unavoidable in some cases. Precisely purposes of the detentions are not the same under the human rights law and IHL. Art. 5 of the Convention states that the detention of the person should be assessed by the tribunal as soon as possible. In juxtaposition, Art. 5 of the Third Geneva Convention does not require indicating the necessity of the POW's detention. Furthermore, Art. 43(1) of the Fourth Geneva Convention stipulates periodic review by the European Court of the appropriate administrative board in case of detention of civilians.[305] Despite the imperial demand on bringing detainees before the tribunal derogation institute indeed leaves the door open for the operation effectively.[306]

As argued afore, derogation provisions aim to ensure the effectiveness of the human rights treaty and give members the feasibility to derogate from the obligations when are not capable of protecting human rights fully and properly. As Strasbourg stated in *Hassan* during the deliberation on the issue of detentions in the occupation phase, harmonious interpretation of the treaty is of the essence of the law.[307] Thus, excluding the applicability of the right to liberty under the pretext of norm conflict cannot be bear in mind, especially when there is no such possibility, which is proved by the examples in the following paragraph.

Based on the testimonies and the HRW reports the Court stated that once Russian and Ossetian forces entered Georgian villages in South Ossetia and the Gori district, they detained at least 159 people. Most of them the elder women and one child.[308] Under the same pieces of evidence, Russian forces entered the territories on the 8-9$^{th}$ of August. According to the Amnesty, the earliest civilian detainees took place around 10 August.[309]

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[303] *Buzadji v. the Republic of Moldova* App no. 23755/07, (ECHR [GC] 5 July 2016) para 84.

[304] Yaël Ronen, '10 International Human Rights Law and Extraterritorial Hostilities' in Robin Geiß, and Heike Krieger (eds), *The 'Legal Pluriverse' Surrounding Multinational Military Operations* (Oxford University Press 2019). 202.

[305] Marko Milanovic, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2009) 14 Journal of Conflict and Security Law 459, 477.

[306] DJ Harris and others, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (Third edition, Oxford University Press 2014) 829. N.B some scholars, for example, Milanovic in 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2009) argues that derogation still cannot solve the problem.

[307] *Hassan v. The United Kingdom* (n 38), para 77.

[308] *Georgia v. Russia (II)* (n 1), para 126.

[309] Amnesty International 'Civilians in the line of fire: the Georgia-Russia conflict' EUR 04/005/2008, (November 2008), 46-47.

Wherefore, according to different sources of proof, detentions took place before the cease-fire agreement, while there was no jurisdiction of the Russian Federation. Initially, it is worth mentioning that, the ECtHR assessed potential norm conflict with the Geneva Conventions and stated that civilians were detained because of their safety. The Court noted that neither Art. 5 of the ECHR nor the Geneva Conventions gave the state feasibility to detain civilians in these circumstances.[310] Therefore, the applicability of the right to liberty, in this case, is clearly stated, which led the Court to hold a violation of Art. 5.[311] Besides the reason for detention looks so cynical as far as if the party detains persons for their safety, it does not ill-threat then. Regarding civilians' detention, the Court stated:

> 'In so far as the Georgian civilians were mostly detained after the hostilities had ceased, the Court concludes that they fell within the jurisdiction of the Russian Federation within the meaning of Article 1 of the Convention[312]

'*Mostly'* is a manifestly ill-founded word here. The Court admits that some of the civilians were detained before hostilities ceased, but mostly they were detained after the 12th of August. So, does it mean that if all of them were detained before the ending confrontation the right would not be applicable then? The word '*Mostly'* regards the greater number. Hence, if it were a single person, applicability would be different? That is a simple loophole.

The second example is POW's case. Thirteen prisoners of war were tortured during the detention from the 8th of August.[313] Similar to the right to life, the Court faced the gargantuan task again. It simply could not avoid cases of torture; ill-treatment and illegal detentions which took place continuously from the beginning of conduct of hostilities till the end of August. Even though the Court simply detached the active phase of hostilities from occupation via the cease-fire agreement, it seems that there were some actions which could not be separated that easily and took place contentiously in the occupation phase too. Since, Russia did not have jurisdiction before the 12th of August, imposing responsibility for the acts which occurred before the ceasing of hostilities is impossible. However, on the one hand, Strasbourg could not reject the assessment of the facts which occurred after the 12th of August. On the other hand, these illegal acts started during the conduct of hostilities. Hence, the Grand Chamber created an unearthly standard and stated:

> 'Given that they were detained, *inter alia*, after the cessation of hostilities, the Court concludes that they fell within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention.'[314]

Again, what does, '*inter alia',* imply in this context? It is obviously confirmation that similar to the civilians, they were indeed detained during the conduct of hostilities. Since the Court

[310] *Georgia v. Russia (II)* (n 1), para 236.
[311] ibid para 256.
[312] *Georgia v. Russia (II)* (n 1), para 239.
[313] ibid para 260.
[314] ibid para 269.

had already stated the absence of the jurisdiction, it created *'inter alia'* and '*mostly*' concepts to somehow justify covering victims under the protection. For sure, this is the right result it would be entirely arbitrary to state that in a detention facility brimming with individuals only those who were detained after the 12th of August were protected by the Convention, but those detained earlier were not.[315]

Thereby, these examples of detention of the individuals either civilians or POWs prove that the Court *de facto* admitted extra-territorial jurisdiction of the Russian Federation in the conduct of hostilities. It has been illustrated that, even under the formal rejection by the Court, there are human rights, which are unavoidable and necessary in the active phase of hostilities. Strasbourg made a profoundly wrong decision and indiscriminately distinct active phase and occupation. Afterwards, it explicitly and categorially rejected stating the extra-territorial jurisdiction in the active phase of hostilities. Albeit, within the deliberation of the same case, the Court *de facto* stated contradictory opinions and admit extra-territorial applicability of certain human rights.

### 4.4 Concluding Remarks

Assessments of the absence of effective adequate investigation and illegal detention, and ill-treatment in the active phase of hostilities illustrate that the Court is not capable of running away from the human rights applicability in the conduct of hostilities entirely. The pretext which was used for stating that there was no jurisdiction within these 5 days of confrontation has been shown as less legally credible. The fact, that the Court held a violation of certain human rights provisions even though they started in the '*Chaos*', proves that the latter one is not a legal concept, which would entirely exclude jurisdiction in the five days, but it is a gargantuan task, which renders difficulties for the Court to adjudicate armed conflict case. Giving the conclusion that Russia is responsible for the effective investigation of the acts, which were occurred in the active phase, as well as for the illegal detention started from the beginning of hostilities undoubtedly proves that, human rights cannot be fully excluded from the applicability in the international armed conflict.

## 5. *Lacuna* in Victims' Protection

### 5.1 Impact on Individual Applications

The importance of the inter-state judgment delivered by the Grand Chamber is paramount for various reasons. Essentially, is a *de facto* legally binding precedent for the forthcoming

[315] Milanovic, 'Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos' (n 289) 9.

individual applications. Victims of the armed conflict either against Russia or Georgia shall be influenced. It implies impact on the not only victims, mentioned in *Georgia v. Russia (II)*, but also the ones who will bring the case concerning international armed conflict.

Initially, there must be clarified procedural reasons for the impact. There shall be indicated two main aspects: firstly, as the judgment has been held by the Grand Chamber and secondly as it has been delivered on the inter-state application. By interpreting the Convention, even though there is no legally directly binding conventional rule, the grand chamber's judgments' superiority is obvious. To clarify the lack of possibilities for the chambers not to follow its ruling, there shall be looked at circumstances in which the case may be granted to the Grand Chamber.

Since the Convention is based on the clarifications and interpretations by the Court, scrutiny, and consistency of the case law are paramount. The ECtHR's judgments serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention.[316] Whereby, once chambers did not follow the Court's well-established clarifications, the case shall be re-assessed by the Grand Chamber as it occurred *inter alia* in the case of *Bouyid v. Belgium*.[317] The second condition shall be the case, which might have a significant influence on the development of the case-law[318] or give more clarifications for the principle outlined in the case law.[319]

Another condition may be when it comes general importance of the issue or a very new aspect of the protection, which should be decided.[320] Another condition may be the importance of changing the state practice.[321] The absence of the legal norm does not make chambers allowed to reject Grand Chamber's clarification, especially on the same topic, which is already ruled. Jurisdiction is the key point for holding the responsibility against the respondent party.[322] As long as the Grand Chamber has already held that there was no possibility to exercise jurisdiction during the conduct of hostilities, it practically binds all forthcoming individual applications with respect to the armed conflict to rule issues differently regarding jurisdiction.

Inter-State applicability shall be the second point of the judgment to be another obstacle for the individual applicants to protect their rights, allegedly violated during the conduct of hostilities. As a rule, due to the importance of the litigation between high-contracting parties chambers relinquish jurisdiction in favour of the Grand Chamber in regard to inter-state applications.

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[316] *Ireland v. The United Kingdom,* App no. 5310/71, (ECHR, 18 January 1978, Series A no. 25), para 154.

[317] *Bouyid v. Belgium*, App no. 23380/09, (ECHR [GC] 28 September 2015).

[318] *S.M. v. Croatia,* App no. 60561/14, (ECHR [GC] 25 June 2020).

[319] *Guðmundur Andri Ástráðsson v. Iceland,* App no. 26374/18 (ECHR [GC] 1 December 2020).

[320] *Big Brother Watch and Others v. the United Kingdom,* App nos. 58170/13, 62322/14 and 24960/15, (ECHR [GC] 25 May 2021).

[321] *Merabishvili v. Georgia,* App no. 72508/13, (ECHR [GC] 28 November 2017).

[322] *Catan and Others v. The Republic of Moldova and Russia*, App nos. 43370/04, 8252/05 and 18454/06, (ECHR [GC], 19 October 2012) para 103.

Thereby, all the important and founding issues, such as preliminary objections, parties' jurisdictions, assessment of the evidence etc. are deliberated under the inter-state litigation and all the individual applications are ruled following the Grand Chamber's findings.

## 5.2 Jurisprudence

This part reviews particular examples of individual applications, which have been ruled following *Georgia v. Russia (II).* After delivering, the case the Court started deliberating long-waited individual thousands of applications against Georgia, which were allocated into a few groups due to similarities. By the decisions, all of them are declared inadmissible based on the inter-state case, where the Grand Chamber imposed responsibility for the human rights violation on Russia during the occupation and meanwhile clarified that none of the parties could exercise jurisdiction during the active phase of hostilities. Thereby, during the adjudication of individual applications against Georgia, the ECtHR noted, that chamber cannot clarify the issue further.[323] Strasbourg stated that it has already comprehensively examined all the details and given an assessment of the jurisdictional links in the active phase of the hostilities[324] the Court specifically made clear that any further conclusions on the issue which would go against the Grand Chamber's ruling could not be rendered.[325]

That being mentioned above during the dealing with the allegations by the individual applicants, the Court openly admitted that actions that occurred within the active phase of confrontation which caused such consequences cannot be addressed due to the inability of the Court. Regardless nature of the individual allegations, since the main findings are already made in the inter-state judgment, it is practically impossible to overrule them. Especially, when the reasoning of the conclusions is predominantly difficulties of the litigation, and related issues admitted explicitly or implicitly.

Whereby, giving clarifications to the individual applicants, the European Court stated that even the Grand Chamber with the extended feasibilities during the litigation was not capable of solving the difficulties of the armed conflict case, nor chamber would be able to go further. Therefore, jurisprudence illustrates that there is neither willingness nor feasibility to overrule the Grand Chamber's findings on the individual cases.

[323] *Bekoyeva and Others v. Georgia Georgia* (Admissibility decision) (n 224), para 36.
[324] ibid para 36; *Shavlokhova and Others v. Georgia* (Admissibility decision) (n 57) para 31; *Jioshvili v. Russia* (Admissibility decision) App no. 8090/09 (ECHR 19 October 2021), para 12.
[325] *Bekoyeva and Others v. Georgia,* (n 224), para 38.

## 5.3 Abandoned and Voiceless

At the end of the day, individuals, victims of armed conflicts are the ones who suffer the most. Those, who need effective international remedy. The ones who need to be protected from military superiority, however in the case when the opposite occurs the ones who need an institution which would serve justice. Unfortunately, the European Court created a vacuum for the victims. This is especially problematic in Ukraine, where there are far more victims of armed conflict than in Georgia.

Parliamentary Assembly of the Council of Europe declares that all individuals in the Council of Europe area, specifically those living in conflict zones, are equally entitled to full protection under the European Convention.[326] Furthermore, in dealing with the Turkish occupation of Northern Cyprus the Court stated:

> 'The Court has emphasised that, where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a 'vacuum' of protection within the 'legal space of the Convention.'[327]

The Court indeed made the statement regarding occupation, however, in conjunction with the PACE resolution, the spirit of the remark is to avoid legal *lacuna* within the Convention's operating area. There are fifteen pending inter-state applications and more than ten thousand individual associated applications.[328] Most of the cases are related to the armed conflicts in Georgia, Nagorno-Karabakh and Ukraine. As long as hostilities are keeping taking place in the latter case, applications may be increased. If the ECtHR does not overrule its findings concerning the active phase of hostilities, thousands of applicants who revealed a willingness to find the truth via the European the Court will be left without effective remedies.

The European Court has had an enormous impact on human rights protection. It has taken fearless, brave steps regarding individual protection in the armed conflict. All the main cited judgments, such as *Loizidou; Al-skeini; Isayeva; Solomou* and many others ensured very effective human rights guarantees. However, as Judge Albuquerque opines if detaining, injuring or killing a person triggers extra-territorial jurisdiction, killing many more people cannot state the opposite, regardless of any element of proximity between the state agents and the targeted population.[329]

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[326] PACE Res 2391 (27 September 2009) Humanitarian consequences of the conflict between Armenia and Azerbaijan / Nagorno-Karabakh conflict, para 12.2.

[327] *Cyprus v. Turkey* (n 51), para 78.

[328] European Court of Human Rights, Annual Report 2022 (2023) 17.

[329] partly dissenting opinion of Judge Pinto De Albuquerque in *Georgia v. Russia (II)*, (n 1), para 27.

In fact, The Court declared that using lethal force in an armed conflict against an individual is reprehensible and can cause a violation of the right to life, albeit massive shelling, bombing and killing of a hundred individuals cannot do so. There should be shared Judge Lemmens' concern that the majority have taken a step back and restricted the scope of the Convention in situations where human rights are at great risk.[330]

It has been illustrated that the echo of the judgment will not let individuals get protected and claim regarding allegations by the active phase of confrontation. Moreover, in the absence of a special tribunal, victims are just abandoned without any international remedies, which would adjudicate their claims. Let's hope that the European Court generated the consequence unintentionally, even though, the Convention is a constitutional instrument of European public order,[331] and therefore the Court is a guarantor of safety. In this regard, Judge Chanturia correctly questioned how can the ECtHR act as the guarantor of peace and public order in Europe if it turns its back on an armed conflict occurring within the member States' legal space. Who else, if not the Court, should carry out supervision of human-rights protection during armed conflicts occurring on the European continent?[332]

In conclusion, European Court eventually got the *lacuna* in human rights, which it has been seeking to avoid.[333] By giving the incoherent interpretation of the Convention and especially previous jurisprudence the Court somehow expressed its condolence for the inability of being effective regarding the protection of the victims of confrontation. Nevertheless, is that what can be the response for the thousands of victims waiting their time before the Court?

The 24th of February in 2022 questioned not only several victims' faith before the ECtHR but the existence of the modern international legal order. No institution can deny its mandate to protect values of the humanity. Ukraine has reactivated the question, are we all well protected or values that have been obtained so far still can be under threat? At this time, the Court needs to be coherent and brave as never before. Victims of armed conflicts, who perceive the European Court as an effective remedy in serving justice should not be left faced with military superiority. The ECtHR should not left them voiceless. It does have enough examples to interpret Convention properly and protect its predominant value in Europe – Peace. The Court just needs coherence. As a great judge 'human rights imperialist' Bonello said:

> 'The Court should stop fashioning doctrines which somehow seem to accommodate the facts, but rather, to appraise the facts against the immutable principles which underlie the fundamental functions of the Convention'.[334]

[330] See Partly Dissenting Opinion of the Judge Lemmens in *Georgia v. Russia (II)* (n 1), para 3.
[331] *Al-skeini and others v. The United Kingdom,* (n 7), para 141.
[332] Partly dissenting opinion of Judge Chanturia in *Georgia v. Russia (II)*, (n 1), para 53.
[333] *Al-skeini and others v. The United Kingdom,* (n 7), para 74.
[334] Concurring opinion of Judge Bonello in *Al-skeini and others v. The United Kingdom,* (n 7), para 8.

# 6. Final Words

The issue of the extra-territorial applicability of human rights is the cornerstone of the existence of the European Convention as never before. Even though Strasbourg endeavoured to avoid assessments of the conduct of hostilities the most challenging part is yet to come. New inter-state and thousands of associated individual applications before the Court, brought with respect to the armed confrontation and its consequences in either South Caucasus or Ukraine will firmly force them to start taking steps in the direction that it has been trying to avoid. The Court will not be capable of rejecting applications as it will cause leaving a large number of victims without effective remedies. The Court easily managed to distinguish the occupation phase from the conduct of hostilities in case of Georgia and declared that victims of the latter one cannot fall under conventional protection. Besides, legal aspects, separation of the phases in the armed conflict is not as easy as it was in the Georgian case. The Ukrainian example illustrated, that the beginning and end of the armed confrontation are not always very clear. Furthermore, the approach should not be applied to the forthcoming cases based on the duty-bound of the Court. As long as the universal values that Europe has been striving to protect are under threat, the Court cannot run away from its predominant aim to be a key locomotive in preventing human rights violations.

Building on the above, the thesis tried to prove that the European Convention should apply during the conduct of hostilities and to illustrate the special necessity of applicability extra-territorially in the active phase of hostilities. Since the European Court explained the reasons for the opposite, it was important to respond to all the arguments separately. Thereby, this thesis aimed to rebut the reasoning of the non-applicability of the Convention in the conduct of hostilities, on the one hand, and to illustrate practical examples which assert the opposite on the other hand.

The thesis reviewed all the international armed conflicts, assessed by European Court and stated that ECtHR is not coherent with the application of the standards to similar cases. It further led to the position that Strasbourg faces practical difficulties in the armed conflict case litigation, which may cause its abstention approach towards the engagement in the assessment of the active phase of confrontation. Notwithstanding, as it has been demonstrated practical difficulties in obtaining and analyse pieces of evidence cannot be a credible argument as there is a well-established practice of using reports provided by international organisations as the Court has done many times.

The cornerstone of the issue is the test of '*Chaos*', which is the main obstacle to human rights applicability so far. The presented paper tried to analyse the test thoroughly and it can be undoubtfully said that the test of '*Chaos*' is a factual statement, which refers to the difficulties to obtain and analyse proofs from the battlefield. Moreover, the thesis argued that due to harmonious interpretation of the international legal norms, possible norm conflict with the international humanitarian law does not cease applicability of the human rights.

That being stated exercising jurisdiction is of the essence in effective applicability. One of the main arguments of the Court was the inability to effectively assess the existence of the extra-territorial jurisdiction. However, based on the various sources, the thesis proved that there were enough tangible pieces of evidence to prove that Russia did have extra-territorial jurisdiction on the most events, occurred before the cease-fire agreement. Wherefore, the first part of the thesis asserted that none of the argumentation made by the Court shall be valid for the excluding applicability of the European Convention from the conduct of hostilities.

By stating that Russia had jurisdiction for the effective investigation with respect to the measures, which were taken during the active phase of hostilities, as well as on the detention and ill-treatment of the people who were captured during the active phase of confrontation proved that regardless formal confirmation, Strasbourg *de facto* affirmed certain human rights provisions applicability. These two examples illustrate that regardless of procedural difficulties, in fact, human rights are unavoidably applicable.

In conclusion, this thesis did not aim to undervalue European Court's role, but the opposite. One of the most successful human rights institutions should reveal courage as it has done at various milestones before. Armed conflicts and their consequences are truly a threat to determinedly obtained values. Victims are the ones who need effective human rights instruments the most and they cannot be abandoned by restrictive interpretation of the convention. Whereby, the thesis argued that European Convention should apply during the extra-territorial hostilities and it should respond to challenges of human rights. It cannot be human rights treaty that leaves the victims to suffer in the shadow of the armed conflict.

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