Sopio Asatiani*

GEORGIA V RUSSIA: JURISDICTIONAL CHAOS AT EUROPEAN COURT OF HUMAN RIGHTS

ABSTRACT:

The article analyses the European Court of Human Rights' recent judgment in case of Georgia v. Russa (II). Coupled with its historic relevance the case presents significant developments with regard to issue of extraterritorial application of the Convention. The latter notion has become increasingly important as more States Parties to the Convention engage in cross-border activities and cases that have arisen out of inter-state conflicts are on the rise. The article critically examines the reasoning behind the judgment and attempts to trace the novel standards offered by the court with respect to extraterritorial jurisdiction and arguments put to support it. Hence, the first part will examine the notion of state jurisdiction as developed by the court in its previous case-law, the second part will proceed to apply those principles to the findings of the court and identify deficiencies in its reasoning. The author takes the position that the court was wrong on its assessment of law and facts with respect to extraterritorial jurisdiction during the active phase of hostilities.

INTRODUCTION

On January 21, 2021 the European Court of Human Rights, sitting as a Grand Chamber, issued a long-awaited judgement in the second inter-state case: *Georgia v. Russia (II)*. The case concerns events occurring in 2008: five-day war and subsequent occupation of Georgian territories by the Russian Federation, therefore the historical and moral relevance of the decision is tremendous. After all, the judgement marks the first victory for the victims of aggression in their quest for justice. It is also a strong advantage for Georgian state in its claim over regions of South Ossetia and Abkhazia. The main objective has been achieved- the court has recognized continuous occupation of Georgian

* Invited Lecturer, East European University. Human Rights Program Coordinator, Open Society Georgia Foundation

territories by the Russian Federation and the large scale violation of the rights of Georgians are now not only an allegation but rather facts proved in the court of law.

The court has affirmed mostly with unanimous support that the repeated violations and/or official tolerance towards grave breaches of Human rights is attributable to Russia. In particular, the killing of individuals, torching and looting of houses in Georgian villages, treatment of civilians and prisoners of war in detention facilities in South Ossetia and in the "buffer zone" amounted to violation of Articles 2, 3 and 8 of the Convention and Article 1 of Protocol No. 1.[1] Importantly enough, the court has also acknowledged 23, 000 Georgians right to return to their homes and subsequent duty placed on Russian federation.[2]

Unfortunately, the same enthusiasm cannot be shared with respect to Courts' approach towards the primary question of extraterritorial jurisdiction in times of international armed conflict. It shall be hereby noted, that it was the first time the Court had been asked to examine military operations (armed attacks, bombing, shelling) in the context of an international armed conflict among two high contracting parties to the Convention. Therefore, the expectations as well as stakes were placed high enough for the court to finally clarify and reverse troubling legacy of *Bankovic* it has so steadily tried to improve over the last decade.[3] However, in an unexpected move the court has made what many have correctly labeled predominantly "policy decision." It has essentially avoided the adjudicate merits of legally and politically extremely difficult aspects of the case by simply drawing an artificial line among active phase and occupation and declared the former part (*id est* 8-12 August 2008) inadmissible.[4] In fact the court has unapologetically stated that the "*the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances"5* coupled with the context of "chaos" during the armed conflict, were the primary hurdles in the road towards jurisdiction.

As a result, even the most serious violations of unlawful killings committed during the five days of war were left behind, while other abuses, even the ones which started during the active phase of hostilities (prisoners of war, detention of civilians) proceeded to the merits stage. Consequently, the court created a legal reality whereby "vacuum in the system of Human Rights protection"[6] is created for the individuals of High Contracting state. In particular, told Georgian citizens that during an international armed conflict they are essentially unprotected, even though the country they

1 *Georgia v. Russia (II),* ECtHR, App. No. 38263/08, 21 January 2021, para: 222

2 *Ibid* at para.298

3 *Al-Skeini and others v. United Kingdom,* ECtHR, App. No. 55721/07, 7 July 2011; *Solomou and Others v Turkey, ECtHR, App. No. 36832/97*, 24 June, 2008; *Issa v. Turkey*, ECtHR*,* App. No 31821/96, 16 November 2004;

4 Jessica Gavron and Philip Leach, *Damage control after Georgia v Russia (II) – holding states responsible forhuman rights violations during armed conflict,* available at: https://strasbourgobservers.com/2021/02/08/damage-control-after-georgia-v-russia-ii-holding-states-responsible-for-human-rights-violations-during-armed-conflict/; Marko Milanovic, *Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos,* available at: https://www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/?fbclid=IwAR08olzOJrvwSh-dZusoXD0NQdx1qjbZt0Eec84r1ZEtjPZsvpgiz5JEoJ4

5 *Georgia v. Russia (II),* ECtHR, App. No. 38263/08, 21 January 2021, para:141

6 *Cyprus v Turkey*, ECtHR, App. no. 25781/94, 10 May 2001, para.78

reside(Georgia) and the invading power (Russia) are both bound by the European Convention.[7] The judgement has serious implications not only for the victims of the 2008 war, but will also have serious effect for the Council of Europe member states, that are currently counting on the court as the last resort to justice (cases of Ukraine, Armenia and Azerbaijan).

I. EXTRATERRITORIAL APPLICATION OF CONVENTION

According to the public international law "jurisdiction" defined as the power of the state to regulate its own public order, and limitations placed on this authority stemming from the equal sovereignty of other states is an uncontested principle.[8] The concept of jurisdiction is closely linked with control, since State exercises jurisdiction only where it has control. It is assumed that the states have exclusive control over their territories hence the jurisdiction is predominantly territorial. However, international law has long acknowledged the need for its application beyond national borders. International Court of Justice *(hereinafter ICJ*) in its *Wall Advisory Opinion* did not attach particular significance to the territorial effects of jurisdiction but rather interpreted jurisdictional clause of the International Covenant in Political and Civil Rights (ICCPR) to apply to the occupied Palestinian territory.[9]

The concept of jurisdiction under Human Rights treaties has even more arguments to support its extraterritorial application, since the very aim of post-World War II multilateral agreements and declarations was to safeguard peace and acknowledge universal character of human rights. It is precisely the principle of universality that "sets a benchmark against which all other considerations are to be tested."[10] The European Convention on Human Rights(ECHR) which came into force in 1952 is an attestation of the latter approach and is based on two concepts: universality of rights, as well as regional aspiration of uniting "like-minded" states.[11]

Article 1 of the Convention sets grounds for jurisdiction and states that the State parties "shall secure *to everyone within their jurisdiction* the rights and freedoms." It has been interpreted as so-called "framework provision" since it enables and gives effect to the Convention's system of

7 *Georgia v. Russia (II),* ECtHR, App. No. 38263/08, 21 January 2021, *Partly Dissenting Opinion of Judge Grozev*, p.169;

8 Ian Brownlie, *Principles of Public International Law* , Oxford University Press, 6th edn, 2003, p. 297; A. Cassese*, International Law*, Oxford University Press, 2nd edn, 2005 p. 49.

9 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ, 9 July 2004, paras: 109-111

10 M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law*, Principles and Policy, Oxford University Press, Oxford, 2011, p.106

11 Robin C. A. White & Clare Ovey: Jacobs, White and Ovey: *The European Court of Human Rights*, 5th ed., Oxford University Press, Oxford, 2010, pp. 64-81

rights.[12] The exact meaning of the words 'within their jurisdiction' remains controversial however it has managed to evolve over the years due to Courts willingness to view convention as a "living instrument."[13]

Additionally, The ECtHR is bound to interpret the "jurisdiction" of states in compliance with the Vienna Convention on the Law of Treaties (VCTL). Under art. 31(1) VCLT, the interpretation of a norm must take into account not only the wording used, but also the context, object and purpose of the treaty. Therefore, to establish a case for the meaning and interpretation of the jurisdiction reference shall be made back to the purpose of the Convention as a whole.[14]

In the Preamble of the Convention the intent of signatories is clearly stated, the reference to the Universal Declaration of Human Rights is specifically made, since the signatories viewed Convention as the first step for the collective enforcement of rights stated in the declaration. The convention also clearly indicates that it aims to support and bring together states who share the desire for common European public order, have a common heritage of political traditions, ideals, freedom and rule of law.[15] Hence for the Council of Europe the convention is the "constitutional instrument"[16] that operates to achieve the latter aims.[17] The court has further stated that the Convention: *"creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement*."[18] Hence, the Convention does not allow: *"vacuum in the system of human rights protection*."[19]

The arguments above expanded to apply to the notion of jurisdiction and since the extraterritorial application was the only logical conclusion that can be drawn from the broader aims of the convention. Regardless, the Court has always been careful its initial judgements to emphasize the "primarily territorial" scope of the article 1, however the possibility to expand the convention rights to apply extraterritorially was never excluded.[20] At the same time, it was also acknowledged that the jurisdictional link is necessary precondition. As a result, over the years of practice the Court has identified certain typical situations with an extraterritorial dimension that may be categorized as "control over a territory" (Spatial Model) or "control over persons".

---

12 *Ireland v. United Kingdom,* ECtHR, App.No. 5310/71, 18 January,1978, para. 238

13 *Tyrer v. United Kingdom,* ECtHR, App. No. 5856/72,1978, para 31; Barbara Miltner, Revisiting Extraterritoriality after Al-Skeini: The ECHR and Its Lessons, 33 MICH. J. INT'L L. 693 (2012).

14 Dobrosława C. Budzianowska ,*Some reflections on the Extraterritorial Application of the European Convention on Human Rights,* Wroclaw Review of Law, Administration & Economics, April 2014

15 European Convention on Human Rights, Preamble.

16 *Al-Skeini and Others v. the United Kingdom, ECtHR, App* no. 55721/07, 7 July 2011, para. 141

17 Juka Viljanen, *The Role of the European Court of Human Rights as Developer of International Human Rights Law, available: https://www.corteidh.or.cr/tablas/r26759.pdf*

18 *Ireland v. United Kingdom,* ECtHR, App.No. 5310/71, 18 January,1978, para. 239

19 *Cyprus v Turkey*, ECtHR, App. no. 25781/94, 10 May 2001, para.78

20 *Loizidou v. Turkey, ECtHR,* Application No. 15318/89, 18 December 1996, para. 52.

A) Spatial Concept: Jurisdiction as control of an area

The spatial model of jurisdiction or the "control over an area" was developed by the court in the case of *Loizidou v. Turkey*.[21] The case originated out of Turkish military intervention in Northern Cyprus in 1974. The applicant claimed that the Turkish forces had prevented and continued to prevent her from returning to Northern Cyprus and peacefully enjoy her property, violating article 1 of Protocol No. 1 and article 8 of the Convention.[22] The decision was groundbreaking for two reasons. Firstly, the court established that the responsibility of a Contracting state arises when as a consequence of military action-it exercises effective control over an area outside its territory. As for the level of control required, according to the facts 30 000 Turkish armed forces stationed throughout the Northern Cyprus and check-points on all main lines of communications were considered sufficient for the effective control. Secondly, the court stated that it was not necessary to determine whether the nature of control exercised by Turkey over the policies and actions of the TRNC was detailed and *effective overall control* was sufficient to engage responsibility.[23]

In the subsequent cases of Turkish occupation, the court has developed another important jurisdictional argument: *vacuum juris.* The argument stems from the aim that the convention envisaged as of document of European *public order*. According to the Court, Turkey's effective control of Northern Cyprus makes it impossible for the Cypriot government to fulfil the obligations it has undertaken under the Convention and thus, deprives the inhabitants of Northern Cyprus their conventional rights. Hence, it places on Turkey responsibility to secure the entire range of rights set out in the Convention, since to state otherwise, the situation would create a "*regrettable vacuum in the system of human rights protection in the territory in question by removing from individuals there the benefit of the Convention's fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court*"[24]

In the case of *Ilascu and others v.* Moldova and Russia, the Court examined the matter of jurisdiction of a Member State which had lost effective control over a separatist area and the extraterritorial jurisdiction exercised by another member state-Russia over the same separatist area.[25] On the one hand , the court stated that a state party, which has lost effective control over certain parts of its territory to a separatist forces, does not *cease* to have jurisdiction under article 1, however, the scope of jurisdiction is reduced to positive obligations.[26] On the other hand, the Court has expanded

21 *Ibid*

22 *Ibid* para 11-12

23 *Ibid* para 56

24 *Cyprus v Turkey*, ECtHR, App. no. 25781/94, 10 May 2001, para.78

25 *Ilaşcu and Others v. Moldova and Russia, ECtHR App.* no. 48787/99, 8 July, 2004

26 *Ibid* para. 333

components of control to involve not only military presence, but also *military, economic and political support* provided by the State to the local subordinate administration.[27]

B) State Agent Authority and control

The extraterritorial application of the Convention can also be engaged through "personal model." The notion is based on the idea that the respondent State can bringing the applicant within its *defacto* control through the actions of its agents outside its own territory.[28] The principle was applied by the Commission in Northern Cyprus cases, when the conflict with Turkey was in its initial stages and effective overall control test could not have been satisfied, but at the same time *authority over persons* was considered sufficient to engage Article.[29]

The Courts' positive development with respect to jurisdiction took a different and regrettable turn in the case of *Bankovic v Belgium and Others*.[30] The case concerned NATO member states air strikes at the building of Radio Televizije Srbije (RTS) in Belgrade. Six of the victims/their relatives, filed applications to Strasbourg against seventeen NATO member States on grounds of violations of article 2 (right to life) and 10 (freedom of expression). Adopting quite restrictive approach to the extraterritorial application of the European Convention, the Court held that individuals killed outside a State's territory through air bombing did not fall within the State's jurisdiction.[31] The decision is heavily cited in case of *Georgia v. Russia (II)* and hence it is important to outline the primary tests established therein.

First, the court establishing a closed list of exceptions under which the extraterritorial jurisdiction of a state can be engaged.[32] In particular, the court has stated that extraterritorial jurisdiction is engaged: "*when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government*."[33] The court introduced the new criteria in the assessment of effective control. Namely, the State should also exercise *"all or some of the public powers"* normally exercised by local Government. The similar criteria was never employed to assess the effective con-

27 *Ibid* at para 392-393

28 M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law*, Principles and Policy, Oxford University Press, Oxford, 2011, p.173

29 *Cyprus v Turkey,* ECommHR (admissibility decision) Appl. no. 8007/77, 10 julY 1978, para.8

30 *Banković and Others v. Belgium and 16 other Contracting States*, ECtHR 12 December 2001, Appl. no. 52207/99

31 *Ibid* paras-80-82

32 Ress, G., *"The jurisdiction of the European Court of Human Rights: The Bankovic case"* in Italian Yearbook of International law, 2002, p. 62.

33 *Banković and Others v. Belgium and 16 other Contracting States*, ECtHR 12 December 2001, Appl. no. 52207/99 para. 71

trol of Turkey over Northern Cyprus. Applying this interpretation to the facts of the case, the court has concluded that bombing missions could not be treated as giving rise to effective control by military forces over that territory.[34]

Secondly, the court altogether has rejected the "*divided and tailored"* approach. The applicants suggested that the positive obligation under Article 1 be proportionate to the level of control exercised. Basing their argument on the *Cyprus v Turkey* case, the applicants argued that if Turkey as the state having effective overall control was obliged to secure the entire rage of Convention rights, in the *Bankovic* case the respondent States would have obligation to secure at least those rights which were in their control in the actual situation. The Court's "all-or-nothing" approach is troublesome since it states that the degree of control over a territory has to be such that either all Convention rights are applied, or no guarantees at all are available.[35] The approach also contradicts findings in *Ilascu* case (discussed above) in which the Court held that States were still obliged to fulfil some positive obligations proportional to their level of control.[36]

Lastly, to reason its rejection on admissibility the court has introduced novel *espace juridique* notion. In particular, court interpreted ECHR as regional multilateral treaty, operating in an essentially regional context and notably in the legal space (*éspace juridique*) of the Contracting States, thus limiting jurisdictional link to situations where the forces operate within the space of another State party.[37] It is the latter point that has received great criticism mainly for its incompatibility with the principle of universality of human rights. As it was claimed by many authors the Court has conceded to policy driven consideration and post 9/11 context of the time.[38]

In the following years the Court continuously attempted to backtrack the damage done by the restrictive and vague definitions given in the *Bankovic* judgement. In the case of *Issa v. Turkey* decided shortly after the former case, the court has asserted different definition of effective control. Namely, the one encompassing *"State's authority and control through its agents operating – whether lawfully or unlawfully."*[39] Moreover, the claim that a state is bound by the Convention wherever it acts, and its obligations abroad are no different from its obligations at home, are radically contradictory to the notion of *éspace juridique* applied above.[40]

34 *Ibid* at para. 82

35 Ibid at paras. 71-75; Alex Conte, *Human Rights Beyond Borders: A New Era in Human Rights Accountability for Transnational Counter-Terrorism Operations",* Journal of Conflict & Security Law , Vol. 18, No. 2 (2013), pp. 233-258

36 *Ilaşcu and Others v. Moldova and Russia, ECtHR App.* no. 48787/99, 8 July, 2004, para. 318

37 *Banković and Others v. Belgium and 16 other Contracting States*, ECtHR 12 December 2001, Appl. no. 52207/99 para. 80

38 Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, The European Journal of International Law Vol. 23 no. 1, 2012; Wilde*, Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties'*, 40 Israel L Rev (2007) 503.

39 Issa v. Turkey, ECtHR, App. No 31821/96, 16 November 2004, para. 71

40 Ibid; Sarah Miller, *Revisiting Extraterritorial Jurisdiction: A territorial Justification for Extraterritorial Jurisdiction under the European Convention,* The European Journal of International Law Vol. 20 no. 4, 2010, 1228

Furthermore, the case of *Öcalan v Turkey* appears to broaden the scope of Article 1 to almost any instance where a state exercises authority or control over an individual outside its own territory in a way which engaged Convention rights. The applicant in the present case had been arrested by Kenyan officials and, in the international zone of Nairobi airport, was handed over to members of the Turkish security service. What is more important, the jurisdiction in this case was spontaneously engaged *"directly after being handed over to the Turkish officials by the Kenyan officials."*[41]

While the instances of arrest or the physical custody over individuals might seem an easier to link with the concept of *"state agent authority*" the Court has not shied away to establish applicability of the convention in cases that do not involve direct contact. In *Pad and others v. Turkey*, the applicants were Iranian nationals living close to the Turkish border. They were killed by a Turkish helicopter. Applying *Issa* standards, the Chamber held them to have been within Turkey's jurisdiction under the "state agent authority", regardless of on which side of the border the deaths took place.[42]

Similarly, the case of *Andreou v Turkey,* involved shooting and injuring an applicant by Turkish Army forces while she had been standing outside the UN buffer zone and in the area which was close to the Greek-Cypriot checkpoint. The court unequivocally admitted that: *""In these circumstances, even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as 'within [the] jurisdiction' of Turkey"*[43]

Despite the wide array of expansive case-law, it was still not a decade after *Bankovic* that its legacy could be said to be overturned or at least mitigated in the case of *Al-Skeini and others v. UK*.[44] The case concerned the deaths of six Iraqis as a result of British troops involvement in Basra region in southern Iraq. At the outset the Court first outlined the two main strands of jurisdiction: special and personal. It has classified personal or *"state agent authority and control"* into three categories:

- Acts of diplomatic and consular agents present on foreign territory-through these agents exert authority and control over others;[45]
- On the *"consent, invitation or acquiescence"* of the government of a foreign territory, a contracting State *"exercises all or some of the public powers"*[46]

41 *Öcalan v Turkey, ECtHR, App. No.* 46221/99, 12 May 2005, para. 91

42 *Pad and others v. Turkey,* ECtHR*,* App. No. 60167/00, 28 June 2007, paras 53-54;

43 *Andreou v. Turkey*, ECtHR, App. no. 45653/99, 3 June 2008;

44 *Al-Skeini and others v. The United Kingdom,* ECtHR, App. no.55721/07, 7 July, 2011

45 Ibid at para 134

46 Ibid at para. 135

- The use of force by a State's agents operating outside member state's territory, bringing the individual under their control[47]

The court has also referred to the "exercise of physical power and control over the person in question" as the test of authority. Another important divergence from the *Bankovic* relates to the possibility of "dividing and tailoring" rights. The court has stated that when state through its agents exercises control and authority over an individual it has an obligation to secure rights "that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored."[48] Most importantly, the court has clearly changed the notion of "European legal space" when rejecting that the obligations under the Convention cannot spread beyond the territories of member states of the Council of Europe.[49] Interestingly enough, the Court applied a *personal* model of jurisdiction to the *killing* of applicants, but it did so on an *exceptional basis*, recalling the principle of "public power" which it established to had been practised by the UK. As Milanovic correctly pointed out despite its progress the judgement did not completely erase *Bankovic's* ambiguity, since the ability to kill is 'authority and control' over the individual if the state has public powers, however killing might not be authority and control if the state is merely firing missiles from an aircraft.[50]

Overall it can be said that ECtHR has thus far, developed a practice that is occasionally straightforward and frequently quite controversial. Regardless, over the last decade the Court has put substantial efforts to expand the notion of jurisdiction and interpret it in line with universal nature of human rights. Drawing on this precedents, some principles can still be carved out: first, the jurisdiction is primarily viewed as territorial, secondly the extraterritorial application of convention can be engaged through *effective overall control* of the territory or *state agent authority* over a person. The former can be exercised by direct involvement or through military, economic and political support and the latter is engaged the when the authority exercises physical power and control over the persons.

47 Ibid at para. 136

48 Ibid at paras 136-137.

49 Ibid at para. 142

50 Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, The European Journal of International Law Vol. 23 no. 1, 2012, 130

II. GEORGIA V. RUSSIA (II) IN FRONT OF THE COURT

A) Relevant Facts of the case

Georgia appealed ECtHR on August 11, 2008, a day before the EU-mediated six-point ceasefire agreement was signed with Russia in an attempt to stop massive invasion and gross ongoing violation of Human rights on its territory. Even though the formal application that followed in February 2009 alleged violation of eight rights guaranteed under the Convention, the one and the most important question from the purely legal perspective placed in front of the court was that of jurisdiction. Namely, *whether or not Russia had a jurisdiction over the human rights violations that occurred prior, during and immediately after the international armed conflict?* Therefore, the analysis below will be limited to the subject of jurisdiction in the present case.

At the outset, the applicant state argued that the violations of the Convention of which they complained fell within the jurisdiction of the Russian Federation. Firstly, prior to the conflict, the Russian Federation had already controlled the majority of those regions, both directly, through its armed forces, and indirectly, by controlling and supporting the *de facto* South Ossetian and Abkhazian authorities, moreover, during the 7-8 August and 22 August 2008 the Russian forces had taken control over the remaining parts of South Ossetia and Abkhazia. Secondly, the applicant considered that the actions of Russian federation should be alternatively or cumulatively considered as exercise of effective control over territory and State agent authority engaged on account of the acts and omissions of its armed forces and separatist groups.[51] It shall be specifically emphasized that the applicant state also explicitly requested the Court to take into account the jurisdictional situation affecting South Ossetia and Abkhazia prior to the outbreak of the active phase of the hostilities while applying the principle of extraterritoriality.[52]

According to the relevance evidence admitted by the court as guiding in its decision, long before the actual outbreak of conflict Russia *"was promoting progressive annexation of Abkhazia and South Ossetia by integrating these territories into its economic, legal and security space*."[53] In particular, active "passportisation" process for the residents of these regions started years before the outbreak of conflict. In addition, as affirmed by the EU Independent fact-finding mission, the separatist governments and security forces were staffed by Russian officials: *"Russia appointed its former civilian and military leaders to serve in key posts in Abkhazia and especially in South Ossetia, including the*

51 *Georgia v. Russia (II),* ECtHR, App. No. 38263/08, 21 January 2021, para.78

52 *Georgia v. Russia (II),* Partly Dissenting opinion of judge Chanturia, ECtHR, App. No. 38263/08, 21 January 2021, para.35

53 Independent International Fact-Finding Mission on the Conflict in Georgia Report, The Council of the European Union 2009, Volume II, pp. 18-19

de facto Defence Ministers of Abkhazia (Sultan Sosnaliev) and South Ossetia (Anatoly Barankevich) and the de facto Chief of the Abkhaz General Staff (LtGen Gennadi Zaytsev)."[54]

Based on these mounting evidence the court in paragraph 168 clearly indicates its position by affirming the "*pre-existing relationship of subordination between the separatist entities and the Russian Federation, which lasted throughout the active phase of the hostilities and after the cessation of hostilities."*

Another aspect of evidentiary materials concerns the very "phase of hostilities", level of control of the military operations and dates that will later be proved to be important. The court has established that the actual hostilities commenced on 7th of August 2008. It is also affirmed by the court that within next four days in total 25 000 - 30 000 Russian troops were on the ground in Georgia, with more than 1 200 pieces of armour and heavy artillery.[55]

By 10 August 2008 Georgian forces withdrew not only from Tskhinvali region but also from Gori (undisputed Georgian territory). At the same time, the mounting evidence, satellite images submitted to the court and witnesses questioned all show that by 10 of August Russian ground forces controlled entirety of ethnically Georgian villages. American Association for the Advancement of Science (AAAS) report as well as Witness 32 employee of the organization, indicated that the most damage sustained by Georgian villages pre-10 August 2008 was caused by shelling whereas after the 10 August till 19 August 2008, the Georgian villages have been burned to the ground.[56] In total, during the period of 8-12 August 2008 alone there had been more than 75 aerial attacks on Georgian territory by the Russian Federation, as well as destruction of property and capture of civilian population.

B) Finding of the Court

At the outset the Court the court decided to divide the case in two parts. Namely the period between 8-12 August was labeled as "active phase of hostilities" and the period after 12th as the continuous occupation. Applying the spatial jurisdiction, the court had no difficulty finding a jurisdiction of Russian federation in the occupation phase, however it is the "active hostilities" part that is reason of confusion and chaos. The court essentially made three separate but interconnected findings:

1. *It lacked jurisdiction whether personal or special to assess violation of rights during the active phase of hostilities;*

54 Ibid

55 Ibid at p. 215-217

56 *Georgia v. Russia (II),* ECtHR, App. No. 38263/08, 21 January 2021, paras: 190-193

2. *It had jurisdiction to assess the rights of civilians and prisoners of war(PoW) taken during the active phase;*
3. *It had jurisdiction to establish that Russia failed to comply with procedural limb of Article 2 even with respect to period of 8-12 August;*

These findings on the surface do indeed look inconsistent and contradictory, however the Court tries its best to justify the expansion of jurisdiction either by referring to civilians *"mostly"* being detained after hostilities ceased or that PoW were "*inter alia"* detained after 12 August.[57]These justifications imply that on the one hand the Court was cognizant how arbitrary and cruel it would look, if some PoWs/civilians would have had conventional protections and others not, while on the other hand it lacked any desire to expand jurisdiction over what it considered matters of active phase, *id est* International Humanitarian law. Even though a lot could be analyzed and assumed from the policy perspective of above arguments, it is far more essential to address the arguments or the lack of thereof in the judgement.

1. Division of phases

As mentioned above, even before answering the question of jurisdiction the court has divided the case among two phases. It has done so within two paragraphs (83-84) without giving any clear justification as towards the dates or the need to separate them artificially. It is indeed true that the ceasefire agreement was concluded on 12 August 2008, however this fact alone cannot be assumed to imply that it should be also the demarking line between active phase and occupation, since end of military actions from Georgian side does not mean that the International Armed conflict ceased to exist.[58]

In addition to being artificial, the division also contributed to assessment of a conflict within limited scope, that is looking at an effective control test only from 8 August 2008, while it is clear from the mounting evidence that the Russian involvement in these regions, their support towards separatist regimes legitimately raised questions of effective control. The court tries to address the issue by claiming that prior assessment of *"hostilities is immaterial in the present case, given that the majority of the fighting took place in areas which were previously under Georgian control"*[59] As correctly argued by the dissenting judge Chanturia, this approach precluded the Court from possi-

57 Ibid at paras: 239, 269;

58 Marko Milanovic, *Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos,* available at: https://www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/?fbclid=IwAR08olzOJrvwSh-dZusoXD0NQdx1qjbZt0Eec84r1ZEtjPZsvpgiz5JEoJ4

59 Georgia v. Russia (II), ECtHR, App. No. 38263/08, 21 January 2021, para.119

bility of assessing whether the "state agent authority" could be claimed over the separatist powers operating in Georgia far before the actual military intervention.[60]

Even if the commencement of the conflict was correctly chosen by the court, it is even more unclear why the court could not have looked at occupation phase from August 10, 2008? As mentioned above, the fact-finding mission, as well as satellite images and witness accounts clearly indicated that at least on 11August 2008 Russia had a total military control over conflict regions and buffer zones nearby, sufficient to bring individuals at least under *"state agent authority"* if not spatial. The military actions were not limited by aerial bombardments but rather included active military forces burning villages down to the ground, arresting civilians and conducting executions.

2. Context of International Armed Conflict and control test

The court has initially examined the possibility of establishing *spatial control* during the alleged active phase. In its assessment the court has categorically stated that: *"in the event of military operations – including, for example, armed attacks, bombing or shelling – carried out during an international armed conflict one cannot generally speak of "effective control" over an area."*[61] The approach is regrettable, since there might well be circumstances whereby control over an area is gradually established and hence it would have been better to apply " divided and tailored" approach. Parallels with the case of *Bankovic* would not be useful here, provided that the court in that case altogether rejected tailoring rights (the position which has been alter later) and the fact that the armed conflict has arisen within the *éspace juridique* of the two high contracting States.

The court later proceeded to explore possibility of applying "*state agent authority"* test with respect to bombing, shelling, artillery fire. It is here where the court disregarding its previous case-law takes the argument of "chaos" to the further farthest extremes claiming: *"fighting between enemy military forces seeking to establish control over an area in a context of chaos not only means that there is no "effective control" over an area as indicated above (see paragraph 126 above), but also excludes any form of "State agent authority and control" over individuals."*[62]

Affirming that state agent control over individuals is excluded in every case of international armed conflict is contradicted by the very same court when in cases originating from Iraq court rejected the similar argument of the UK government.[63] At the same time, the court in the present

60 Ibid at Partly Dissenting opinion of judge Chanturia, para.34

61 Ibid at para. 126

62 Ibid at para. 137

63 Hellen Duffy, Georgia v. Russia: Jurisdiction, Chaos and Conflict at the European Court of Human Rights, available at: https://www.justsecurity.org/74465/georgia-v-russia-jurisdiction-chaos-and-conflict-at-the-european-court-of-human-rights/

case still managed to apply convention guarantees to active phase in instances of arrest and obligation to investigate.

The case-law developed *post-Bankovic* indicates that the decisive factor in establishing State agent authority and control was *"the exercise of physical power and control over the person in question"*[64] Moreover, the court has established jurisdiction even in cases going clearly beyond the physical power and control. In case of *Andreou*,(discussed in part II) the applicant was shot while standing completely outside Turkish-occupied territory, however the court still established that "the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries" was enough to bring applicant under Turkish control.[65] As well as case of *Pad* where the fire from helicopter was considered sufficient to engage jurisdiction.[66]

The court tries to justify this divergence by claiming that the cases above *"concerned isolated and specific acts involving an element of proximity."*[67] Interpreting the extraterritoriality in this way would essentially mean that killing of individual outside state territory even from the helicopter would be considered sufficient but if we increase the scale and number of affected individuals the court would have no role?!

As correctly mentioned by multiple dissenting judges the court also failed to examine separately the question of "power" of a state exercises while making various military decisions.[68] In particular, classical theory of the State, one of the forms of the exercise of State power is the so-called "military power" or "military sovereignty." Hence, it would have been logical for the court to explore whether the very fact of pre-planned extraterritorial actions (as it is proved in this case) involving the use of instruments of State power creates a jurisdictional link.

In another attempt to justify restrictive approach the court refers to Article 15 of the Convention and claims that non-derogation from the state parties during International Armed Conflict somehow implies no jurisdiction.[69] This is rather illogical assumption given that States might have wide array of considerations giving them incentive not to derogate. It is even less appealing when compared against the findings of the court in case of *Hassan v. UK*, whereby the lack of official derogation did not hinder the establishment of the extraterritorial jurisdiction in Iraq.[70]

The court also seems to suggest that active hostilities "*situations are predominantly regulated by legal norms other than those of the Convention* (specifically, international humanitarian law or

64 Al-Skeini and others v. United Kingdom, ECtHR, App. No. 55721/07, 7 July 2011, para.136

65 *Andreou v. Turkey*, ECtHR, App. no. 45653/99, 3 June 2008 para.11

66 *Pad and others v. Turkey,* ECtHR, App. No. 60167/00, 28 June 2007, para.54

67 Georgia v. Russia (II), ECtHR, App. No. 38263/08, 21 January 2021, para. 132

68 Ibid dissenting Judges Yudkivska, Wojtyczek andChanturia p. 198

69 Ibid at para. 139

70 *Hassan v. the United Kingdom, ECtHR*, App. No. 29750/09, ECHR 2014, paras: 74-80

the law of armed conflict)" as a bar to adjudication of the present case. However, in other passages of the case the court underlines that "Convention must be interpreted in harmony" with rules of IHL, the position also clearly established in *Hassan.* Therefore, had the court established the jurisdiction it could very well apply article 2 either alone or where necessary in the light of international humanitarian law (*jus in bello*).[71]

Regardless of abovementioned, probably one of the most regrettable paragraph of the decision relates to the court's technical difficulties argument. In particular, after recalling suffering of the victims and the fact that its interpretation of the notion of "jurisdiction" *may seem unsatisfactory to them, the court claims that: "having regard in particular to the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances…* 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." [72] Not only is the view insensitive to the 12 year struggle of war victims but is also factually wrong. The court had previously dealt with high number of victims within the scope of military intervention in case of *Cyprus v. Turkey* or adjudicated complicated CIA rendition cases. Therefore, the complexity of the case should not as such been referred by the court as a legitimate argument to reject jurisdiction.

CONCLUDING REMARKS

Article 1 jurisdiction reveals itself to be highly complex, operating more clearly in territorial contexts, while its extraterritorial application is subject to courts' interpretations evolving gradually and consistent with its "living instrument" ideology. At the same time, the expansion of jurisdictional scope did not rely on *travaux préparatoires but rather on two initial arguments.* First, it has asserted that the convention provides a regional framework of European Public order ensuring protection and collective enforcement. Second, it has prohibited any "*vaccum in the human rights protection" which* would be inconsistent with the aims and fundamental principles of Convention.

The term "jurisdiction" in the Convention therefore reflects the scope of public power effectively exercised by the State which can take form of "control over a territory" or "control over persons." The former was established over an area, when the control was established either directly through State's armed forces or indirectly through a subordinate local administration. The "state agent au-

71 *Georgia v. Russia (II),* ECtHR, App. No. 38263/08, 21 January 2021, Jiont Partly dissenting Opinion of Judges Yudkivska, Pinto de Albuquerque and Chanturia

72 Ibid at para. 141

thority" was gradually extended to include cases of people taken directly into custody, to shots fired at UN buffer zones, territories of another state, or from a helicopter. The process was not usually straightforward or the control test always clear, however it was only the case of *Bankovic* so far that accumulated great deal of criticism towards court's overly restrictive approach, inconsistent with its role of guarantor of peace and human rights.

The case of Georgia v. Russia (II) marked the first time after *Bankovic* the court was asked to examine the question of jurisdiction in relation to military operations in the context of International armed conflict and thus given a chance to revisit the case and possibly rectify its shortcomings. While the case is a historic win for Georgia and the victims of war in many respects and the work of the court is commendable, the same is not true with respect to active phase of hostilities. The entire spirit of the judgement indicates that the Court does not want to deal with cases of International armed conflict. The arguments provided are especially troublesome when viewed in conjunction with court's previous case law. In particular, it seems that the Court denies jurisdiction with respect to of military control-killings via bombs, but accepts detention performed in the same timeframe, it establishes jurisdiction in case of close-range and isolated fires, but seems to be confused with large-scale operations resulting in even more deaths. What is most regrettable in this case is the fact that, the Court failed to fulfil its "essential protective purpose" by creating a "vacuum of protection" within the legal space of Convention, the very result it was created to avoid.