# "ACTIVE PHASE OF HOSTILITIES"

# A VACUUM UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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## Abstract

In August 2008, an active five-day military confrontation between Georgia and the Russian Federation severely affected thousands of individuals. Georgia lodged an inter-state application to the European Court of Human Rights alleging that during and after the war, the Russian Federation had violated several rights enshrined in the European Convention on Human Rights. On January 21, 2021, the European Court of Human Rights declared that the subsequent developments that had taken place after the active phase of hostilities fell within the jurisdiction of the Russian Federation; however, as for the war period itself, Russia's jurisdiction was excluded. The Court's new approach is problematic because it is inconsistent with its previous case-law. Therefore, as the judgment is still novel, it is vital to critically assess the reasons of the majority of the Court concerning the case of *Georgia v. Russia (II)* to understand the broader impact the judgment will have on future inter-state and individual applications.

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## 1. Introduction

The European Convention on Human Rights (hereinafter the "ECHR" or the "Convention") is one of the strongest regional instruments safeguarding individual rights and freedoms, while the European Court of Human Rights (hereinafter "The ECtHR" or "the Court"), "as the chief enforcement organ of the Convention,"[1] remains one of the most proactive mechanisms for states and individuals to find their justice on a regional level. The ECtHR has a well-established case-law concerning military conflicts as well;[2] it has received and ruled on inter-state and individual applications with respect to war.

After the war between Georgia and the Russian Federation broke out during the night of August 7, three days later, the Minister for Foreign Affairs of Georgia informed the Secretary General of the Council of Europe that the President of Georgia had declared a state of war the day before.[3] The notification by the Minister was followed by Georgia's inter-state application against the Russian Federation on August 11, 2008.[4] The Government of Georgia was arguing that the Russian Federation "in the course of indiscriminate and disproportionate attacks by Russian forces and/or

[1] Yue Ma, 'The European Court of Human Rights and the Protection of the Rights of Prisoners and Criminal Defendants Under the European Convention on Human Rights' (2000) 10(1) International Criminal Justice Review, 54, 54

[2] See *Cyprus v. Turkey* [GC], no. 25781/94 (10 May 2001) ECHR 2001-IV; *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99 (12 December 2001) ECHR 2001-XII; *Al-Skeini and Others v. The United Kingdom* [GC], no. 55721/07 (7 July 2011) ECHR 2011-IV.

[3] *Georgia v. Russia (II)* (dec.), no. 38263/08 (ECtHR, 13 December 2011), para 1.

[4] ibid para 2.

by the separatist forces under their control"[5] violated the rights and freedoms guaranteed by the Convention.[6]

The Court had to rule on the case concerning an international ongoing armed conflict between the High Contracting States of the ECHR, considering that the Russian Federation had been a member state during the Georgia-Russia war and at the time the judgment had been delivered.[7] Therefore, the expectations towards this judgment of the Grand Chamber were high. The ECtHR had to assess the extraterritorial jurisdiction of the respondent State, whilst also accosting a connection between international humanitarian law (hereinafter "IHL") and human rights law.

Nevertheless, the long-awaited judgment from the Court contributed to a far-fetched controversy among international law experts, scholars and victims. The ECtHR did not establish the extraterritorial jurisdiction of the Russian Federation during the war. Interestingly, based on this judgment, the Court did not declare the territorial jurisdiction of Georgia as well while assessing the individual applications against Georgia. Therefore, the judgment of the ECtHR deprived thousands of individuals of the protection guaranteed by the European Convention on Human Rights.

The 11-6 majority of the Grand Chamber found the application about the war period inadmissible, stating that the context of chaos excludes any possibility to establish extraterritorial jurisdiction of the respondent State.[8] Additionally, the majority held that the active phases of hostilities are



[5] ibid para 21.
[6] ibid.
[7] The Russian Federation was a High Contracting State of the European Convention on Human Rights, however, on March 16, 2022, the Committee of Ministers of the Council of Europe adopted Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe as a consequence of Russia's military aggression to Ukraine.
[8] *Georgia v Russia (II)* [GC], no. 38263/08 (ECtHR, 21 January 2021), para 137.

predominantly regulated by other fields of the international law, in particular, international humanitarian law.[9] Although the Court in most of its former cases tried to avoid creating any vacuum in the protection of individuals, 13 years after the war between Georgia and Russia, the ECtHR itself created a gap without thorough examinations and explanations.

Hence, the thesis elaborates on the reasoning set out by the Court to see its practical implications and consequences with regards to the military confrontation between the High Contracting States of the ECHR. Considering that the judgment was delivered in 2021, this contribution aims to determine whether the ECtHR in its judgment of *Georgia v. Russia (II)* has been in accordance with its former case-law and what are the effects of this judgment on victims. For the purposes of this thesis, the case of *Georgia v. Russia (II)*[10] is of a primary focus. The issue at hand is approached through a comparative analysis to define the scope of a State's responsibility under the Convention. The thesis takes into consideration the correlation between the international humanitarian law and human rights law developed by the International Court of Justice (hereinafter the "ICJ") and the European Court of Human Rights to contextualize the reasoning of the Grand Chamber in the case of *Georgia v. Russia (II).*

This thesis is divided into two main parts. After the introductory remarks, the second chapter examines the analysis of the Court with an overview of the factual background of the case. In order to critically engage with the approach of the majority of the Court, the former practice of the ECtHR about state jurisdiction is looked into. As for the link between human rights law and international humanitarian law, precedential cases of the European Court of Human Rights and the International Court of Justice are also introduced. The thesis incorporates the positions of the

[9] ibid para 141.
[10] *Georgia v Russia (II)* [GC], no. 38263/08 (ECtHR, 21 January 2021).

dissenting judges to the Grand Chamber judgment in *Georgia v. Russia (II)* for a more far-reaching understanding of the subject matter. In the third chapter, the thesis evaluates the impact of this judgment on individuals. Namely, it is important to outline that limiting the jurisdiction of the European Convention on Human Rights during the active phase of hostilities is concerning for not only victims of 2008 Georgia-Russia war, but potential victims in the future as well. Therefore, the thesis explores admissibility decisions of the ECtHR regarding individual applications on 2008 Georgia-Russia war to further argue the negative consequences of this judgment.

## 2. The Unanswered Limitation of the Notion of "Jurisdiction" under the European Convention on Human Rights

### *2.1. Introduction*

On January 21, 2021 the European Court of Human Rights delivered its judgment concerning Georgia's inter-state application against the Russian Federation. This is the second inter-state case between these countries lodged by the Government of Georgia since the judgment of the ECtHR in 2014. In the first case the Court held that the Russian Federation through a coordinated policy of arresting, detaining and expelling Georgian nationals from the Russian Federation was in breach of the rights guaranteed by the European Convention on Human Rights.[11]

The second inter-state application of Georgia covered the period of the 2008 war between Georgia and Russia and its subsequent developments, namely, occupation of the *de jure* territories of Georgia by the Russian Federation. Georgia was claiming that military actions by either separatists or directly by Russian soldiers violated the ECHR,[12] and in agreement with the position of the Georgian Government, the Russian Federation was liable because "the entire scheme, strategy and policy pursuant to which the military operations had been conducted had derived from the Russian Federation as architect, controller, instructor and executor of the military operations."[13]

Nevertheless, the Court did not concur with the position of Georgia. Eventually, the part of the application concerning the active military confrontation was found inadmissible.[14] The ECtHR



[11] *Georgia v. Russia (I)* [GC], no. 13255/07 (3 July 2014) ECHR 2014-IV.
[12] *Georgia v. Russia (II)* (dec.), no. 38263/08 (ECtHR, 13 December 2011), para 21.
[13] ibid para 25.
[14] *Georgia v Russia (II)* [GC], no. 38263/08 (ECtHR, 21 January 2021), para 144.

suggested several arguments to justify its position, however, in this chapter, it is argued that none of those arguments are consistent with its former case-law. Additionally, the approach of the ECtHR had not been properly explained by the majority of the Grand Chamber which raises even more concerns.

### *2.2. The Factual Background of the Case*

From 1921 to 1991, Georgia was a part of the Soviet Union, however, without Georgia's intention or will. After declaring independence from the Soviet Union, it struggled to restore its statehood considering division between ethnic groups and conflicting memories.[15] First in South Ossetia (Samachablo)[16] in 1991-1992 and then in Abkhazia[17] 1992-1994, fighting between Georgian forces and separatist forces had taken place, which ended with Georgia losing *de facto* control of large parts of both territories.[18] According to the EU's Fact-Finding Mission, "there was support from Russia for the insurrectionists."[19] The situation remained apprehensive, eventually, having led to the war between Georgia and the Russian Federation, starting in the night of 7 to 8 August 2008.[20] Nevertheless, in its report, the EU Fact-Finding Mission defines the beginning of the war as "a culminating point of a long period of increasing tensions, provocations and incidents."[21] According to this report, some military preparation by the Russian side had said to have taken place prior to the conflict.[22] From 8 August 2008 the Russian ground forces penetrated into

[15] Laetitia Spetschinsky, Irina V. Bolgova, 'Post-Soviet or Post-Colonial? The relations between Russia and Georgia after 1991" (2014) Vol. 1, No. 3 European Review of International Studies, 110, 111
[16] The term "South Ossetia" is used in this thesis only because the European Court of Human Rights defines the disputed territory this way, however, it is important to note that this territory is called Samachablo.
[17] Abkhazia is a historical region of Georgia, located in northwestern Georgia.
[18] Independent International Fact-Finding Mission on the Conflict of Georgia, Council Decision 2008/901/CFSP of 2 December 2008, The Council of the European Union, 2009, 13
[19] ibid.
[20] *Georgia v Russia (II)* [GC], no. 38263/08 (ECtHR, 21 January 2021), para 35.
[21] Independent International Fact-Finding Mission on the Conflict of Georgia, Council Decision 2008/901/CFSP of 2 December 2008, The Council of the European Union, 2009, 11
[22] ibid 20.

Georgia, assisted by the Russian air force and Black Sea fleet.[23] The fighting, bombing and destruction lasted until August 12, 2008, but, as written by the Human Rights Watch, will have consequences for lifetimes and beyond.[24] During the five-day military confrontation, it is estimated that about 850 persons lost their lives, while far more than 100 000 civilians fled their homes.[25] Eventually, a ceasefire agreement was negotiated and concluded on 12 August 2008 between the Russian Federation and Georgia under auspices of the European Union, stating that the parties would refrain from the use of force, while also providing access for humanitarian aid.[26] However, on 26 August 2008, by a decree of former Russian President Dmitry Medvedev, the Russian Federation recognized the independence of *de facto* Abkhazia and South Ossetia.[27] It was followed by "friendship and cooperation" agreements with both of the regions, allocating Russia's military forces to them.[28] The decision of the Russian Federation was widely condemned by the international actors.[29] After 14 years since the war, the Georgian government is still deprived of the capability to enter any of these regions, as they are separated with administrative boundary lines. Furthermore, Georgian nationals are being detained by the occupying powers near the *de facto* regions.[30]

[23] *Georgia v Russia (II)* [GC], no. 38263/08 (ECtHR, 21 January 2021), para 36.
[24] Human Rights Watch, *Up In Flames Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia* (January 2009) 2
[25] Independent International Fact-Finding Mission on the Conflict of Georgia, Council Decision 2008/901/CFSP of 2 December 2008, The Council of the European Union, 2009, 5
[26] *Georgia v Russia (II)* [GC], no. 38263/08 (ECtHR, 21 January 2021), para 40.
[27] ibid para 41.
[28] ibid para 43.
[29] See Parliamentary Assembly of the Council of Europe (35th Sitting) Resolution 1633 (2008), The consequences of the war between Georgia and Russia, para 9 <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17681> accessed on 5 March 2022
[30] The detention of Georgian nationals has become an actively used mechanism by the occupying powers to terrorize Georgians. For example, on November 9, 2019, the *de facto* government of so-called South Ossetia detained Georgian doctor Vazha Gaprindashvili for "deliberately crossing the border." However, Dr. Gaprindashvili did not recognize any existence of the border, stating that those territories were a part of Georgia. See the Statement by the Spokesperson on the case of Georgian citizen Vazha Gaprindashvili Brussels, 2019 <www.eeas.europa.eu/eeas/statement-spokesperson-case-georgian-citizen-vazha-gaprindashvili_en> accessed June 01 2022. Dr. Gaprindashvili was released after around 2 months.

Accordingly, in its application, which led to the judgment analyzed in this thesis, the Government of Georgia addressed the issues regarding the developments during and after the war. More particularly, Georgia submitted to the Court that the Russian Federation violated Article 2 of the ECHR – Right to life during the active phases of hostilities, while also accosting subsequent circumstances, namely, the occupation, and lodging complaints under Article 3 - prohibition of torture and of inhuman or degrading treatment, Article 5 - right to liberty and security, Article 8 - right to respect for private and family life, Article 13 - right to an effective remedy, Article 1 - protection of property and Article 2 - right to education of Protocol No. 1, and Article 2 – freedom of movement of Protocol No. 4[31] The Georgian Government claimed that the consequences of the war and the ensuing lack of any investigation engaged the respondent Government's responsibility under above-mentioned articles.[32] The Russian Federation opposed to the arguments of Georgia stating that these allegations had taken place outside the jurisdiction of Russia and outside Russia's effective control.[33] Moreover, the Russian Federation was arguing that Russia's obligations during an international armed conflict were exclusively governed by the international humanitarian law, which, in their position, they fully had complied with.[34]

The European Court of Human Rights declared this application of Georgia admissible in 2011, noting that the issue of respondent Government's "jurisdiction" should be determined at the merits stage of the proceedings.[35] In 2012, the application was relinquished to the Grand Chamber of the Court consisting of 17 judges, which delivered its judgment in 2021.[36] In its judgment, the Court



[31] *Georgia v. Russia (II)* (dec.), no. 38263/08 (ECtHR, 13 December 2011), para 10.
[32] ibid para 21.
[33] *Georgia v Russia (II)* [GC], no. 38263/08 (ECtHR, 21 January 2021), para 49.
[34] ibid.
[35] *Georgia v. Russia (II)* (dec.), no. 38263/08 (ECtHR, 13 December 2011), para 63.
[36] *Georgia v Russia (II)* [GC], no. 38263/08 (ECtHR, 21 January 2021), para 16.

ruled on these two sets of events separately. Namely, the five-day war[37] and "occupation phase after the cessation of hostilities"[38] were assessed one at a time. For the purposes of this thesis, only the part of the active military confrontation is critically addressed.

### *2.3. The Ruling of the ECtHR*

The judgment of the European Court of Human Rights on the case of *Georgia v. Russia (II)* is thought-provoking for various reasons. With regards to the war phase, relevant to the thesis, the Court was expected to examine an international ongoing armed conflict between the High Contracting States of the European Convention on Human Rights. This examination included both – the notion of "jurisdiction" and the relationship between the international human rights law and international humanitarian law. In order to rule on this case, the Court considered and cited its former case-law regarding the extraterritorial jurisdiction. As for the link between the IHL and human rights law, along with ECtHR case-law, the opinions rendered by the International Court of Justice were cited *in extenso.*

Eventually, the Grand Chamber of the ECtHR asserted Russia's jurisdiction after the active phase of hostilities as a consequence of its military presence and the dependency of *de facto* authorities on Russia.[39] However, similar to the respondent government's position, the Court opined that Russia did not exercise effective control during the war itself.[40] In other words, The ECtHR found Russia responsible for unlawful killing, torture, arbitrary detention, looting and destruction of



[37] ibid para 51.
[38] ibid para 52.
[39] ibid para 174.
[40] 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' (2021) EJIL:Talk! <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 on 10 June 2022

villages only after the war.[41] The Grand Chamber held "that the events which occurred during the active phase of the hostilities (8 to 12 August 2008) did not fall within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention" and declared this part of the application inadmissible.[42] The ECtHR listed several reasons of having reached this conclusion, such as the context of chaos, the quantity of victims, the difficulty of establishing the relevant circumstances, and international humanitarian law as *lex specialis*. As the judgment was reached by 11-6 majority, it is visible that the judges of the Grand Chamber did not see eye to eye with one another. The argumentation of the majority had not been satisfactory for the dissenting judges, who wrote extensive separate opinions. For Judges Yudkivska, Pinto de Albuquerque, Wojtyczek, Lemmens and Chanturia, the majority's reasoning was inconsistent and challenging.[43] According to them, the judgment "confuses the case-law, undermines the authority of the Court, weakens the protection of the Convention and runs counter to its spirit."[44] In the subsequent sub-chapters, the arguments introduced by the majority of the Grand Chamber are analysed in details, also incorporating the positions of the dissenting judges.

### *2.3.1. The Notion of "Jurisdiction" under the European Convention on Human Rights*

In order to assess alleged violations under the Convention, the European Court of Human Rights, firstly, determines whether a case meets admissibility criteria set by Article 35(1) of the Convention and whether a respondent state has exercised its jurisdiction as established by Article 1 of the Convention. Pursuant to Article 1 of the Convention, "the High Contracting Parties shall



[41] Christina M. Cerna, 'Introductory Note to Georgia v. Russia (II) (EUR. CT. H.R. (Grand Chamber))' (2021) 60 International Legal Materials, 713, 713
[42] *Georgia v Russia (II)* [GC], no. 38263/08 (ECtHR, 21 January 2021), para 144.
[43] Kanstantsin Dzehtsiarou, 'The Judgement of Solomon that went wrong: Georgia v. Russia (II) by the European Court of Human Rights' (2021) Völkerrechtsblog, <https://intr2dok.vifa-recht.de/receive/mir_mods_00009921> accessed on 15 April 2022
[44] ibid.

secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." Jurisdiction under Article 1 is a threshold criterion,[45] hence, the exercise of jurisdiction is an essential condition to hold a State responsible for the infringement of rights and freedoms set forth in the Convention.[46] Therefore, Article 1 raises the liability of Contracting States for the violations of ECHR rights within their jurisdiction. [47]

Jurisdiction is connected to a state's sovereignty and it predominantly applies territorially.[48] Each High Contracting State is presumed to exercise jurisdiction over their *de jure* territory.[49] However, even though a State's jurisdiction under Article 1 is primarily territorial,[50] it is not automatically restricted to the *de jure* territories of the High Contracting States. Therefore, the above-mentioned presumption is rebuttable.[51] To put it simply, if the territorial jurisdiction of the State is excluded, it does not automatically exclude the responsibility of that State. This can occur if there are exceptional circumstances of jurisdiction, such as, when particular acts of the State have an impact on another State and outside its own territory.[52] According to the case-law of the ECtHR, these exceptional types of jurisdiction take place if a state cannot exercise its jurisdiction properly over its *de jure* territory due to external forces, like Cyprus could not exercise its jurisdiction because of Turkey's military presence in northern Cyprus. More particularly, in its judgment of *Loizidou*



[45] *Al-Skeini and Others v. The United Kingdom* [GC], no. 55721/07 (7 July 2011) ECHR 2011-IV, para 130.
[46] *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99 (8 July 2004) ECHR 2004-VII, para 311.
[47] *Issa and Others v. Turkey*, no. 31821/96 (ECtHR, 30 March 2005), para 66.
[48] Aldo Ingo Sitepu, 'Application of Extraterritorial Jurisdiction in European Convention on Human Rights (Case Study: Al-Skeini and Others v. U.K.)' (2016) 13/3 Indonesian Journal of International Law 353, 354
[49] Marco Longobardo, Stuart Wallace, 'The 2021 ECtHR Decision in Georgia v. Russia (II) and the Application of Human Rights Law to Extraterritorial Hostilities' (2022) Israel Law Review, Cambridge University Press, 13
[50] *Al-Skeini and Others v. The United Kingdom* [GC], no. 55721/07 (7 July 2011) ECHR 2011-IV, para 131.
[51] Marco Longobardo, Stuart Wallace, 'The 2021 ECtHR Decision in Georgia v. Russia (II) and the Application of Human Rights Law to Extraterritorial Hostilities' (2022) Israel Law Review, Cambridge University Press, 13
[52] *Al-Skeini and Others v. The United Kingdom* [GC], no. 55721/07 (7 July 2011) ECHR 2011-IV, para 133.

*v. Turkey*,[53] the Court had to look into the application of the Cypriot national, who was arguing that she had been prevented by the Turkish forces from returning to her own property.[54] The ECtHR said that the alleged violations fell within the jurisdiction of Turkey,[55] and not Cyprus. Even though it was not Turkey's territory, Turkey, as an external force, had prevented Cyprus from fulfilling its obligations.

The Court's viewpoint to examine the circumstances of each case is very important, because these exceptional circumstances of jurisdiction fill in possible vacuum that might come up if the territorial jurisdiction is precluded. The notion of possible vacuum was used by the Court when it delivered its judgment on the case of *Cyprus v. Turkey*.[56] This case, like above-discussed *Loizidou*, also concerned the Turkish military operation in northern Cyprus in 1974, and the continuing division of the territory.[57] The Court took into account the applicant Government's, Cyprus', inability to exercise their Convention obligations in northern Cyprus, and established the jurisdiction of Turkey in order to avoid a vacuum in the system of human-rights protection because in the territory in question those individuals generally enjoyed the benefits of the Convention.[58]

Thus, in order to fill in "regrettable vacuums,"[59] the Court checks whether there are any exceptional circumstances, which can create jurisdiction of another State. Through it case-law, the Court developed two concepts of extraterritorial jurisdiction, namely, a "state agent authority and



[53] *Loizidou v. Turkey* [GC], no. 15318/89 (ECtHR, 18 December 1996).
[54] ibid para 12.
[55] ibid para 57.
[56] *Cyprus v. Turkey* [GC], no. 25781/94 (10 May 2001) ECHR 2001-IV.
[57] ibid para 13.
[58] ibid para 78.
[59] ibid.

control" or/and the concept of "effective control. The principle of "State agent authority and control" can be established through three main ways. Firstly, the acts of diplomatic and consular agents being on a foreign territory in accordance with international law might be equal to exercising the jurisdiction if they exert an authority and control over others.[60] Secondly, if there is an invitation or acquiescence from the Government that an inviting State exercises all or some of the public powers, which are generally exercised by the inviting State, the invited State might be held responsible for breaches of the Convention.[61] Thirdly, if by the state agents' individuals are brought under control of another State's power, such as taking an individual into a custody, such individuals fall within the jurisdiction of the controlling State.[62] As for the "effective control over an area," it occurs when, a Contracting State controls an area outside its own national territory as a consequence of lawful or unlawful military action.[63] Effective control is established if there is a military presence, an occupation or economic and political support for local *de facto* governments. It is important to note that for the purposes of the extraterritorial jurisdiction if such domination over the territory is established, determination whether the Contracting State exercises detailed control over the subordinate local administration is not needed.[64] Considering the criteria set by the ECtHR, the Court takes into account the particular circumstances of the case in order to establish or exclude the jurisdiction of a respondent State prior to analysing its responsibility regarding alleged violations.



[60] *Al-Skeini and Others v. The United Kingdom* [GC], no. 55721/07 (7 July 2011) ECHR 2011-IV, para 134.
[61] ibid para 135.
[62] ibid para 136.
[63] ibid para 138.
[64] ibid.

The aforementioned well-established assessment of the ECtHR regarding the jurisdiction was also thoroughly addressed in the case of *Georgia v. Russia (II)*. The exclusion of the territorial jurisdiction of Russia is not disputed in this case, because the active phases of hostilities had been taking place outside the respondent Government's territory, therefore, the Court had to look into the extraterritorial aspects of the jurisdiction,[65] namely, the concept of "effective control" and "state agent authority and control." The Government of Georgia was arguing that prior to the war, the Russian Federation had already controlled most of the parts of the war zones and in the beginning of the war the Russian military forces had managed to gain effective control over the rest of the disputed territories.[66] As for the "state agent authority and control," the applicant Government submitted that Russia had been in control of the developments through its agents.[67] The Russian Federation denied both of arguments of the applicant Government, stating that the disputed regions were independent and concerned individuals had not been Russia's agents.[68]

While examining this issue, the Court, firstly, addressed the effective control argument. According to the majority, the reality of the armed conflict endeavouring to gain control over an area means that there is no control over an area.[69] Thus, the Court rejected "effective control" of the respondent State. In regards to the "state agent authority and control," in the words of the Court, the decisive factor was "the exercise of physical power and control over the persons in question."[70] The Court outlined that compared to *Georgia v. Russia (II),* allegations in its former case-law involved an element of proximity.[71] Therefore, the majority of the Grand Chamber concluded that in this case,



[65] *Georgia v Russia (II)* [GC], no. 38263/08 (ECtHR, 21 January 2021), para 125.
[66] ibid para 78.
[67] ibid.
[68] ibid para 79.
[69] ibid para 126.
[70] ibid para 130.
[71] ibid para 132.

"the very reality of armed confrontation and 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, but also excludes any form of 'State agent authority and control' over individuals."[72] Nevertheless, the Grand Chamber did not assess 'the context of chaos' in depth. Can this judgment be interpreted that whenever the States engage in the wars, the context of chaos is created? Unfortunately, the Court did not explain it appropriately. Even though the Court emphasized its sympathy towards the victims,[73] it considered that it is not in a position to develop its case-law beyond the understanding of the notion of "jurisdiction" as established to date.[74] Hence, it is important to discuss why the majority of the Grand Chamber decided to have firmly turned their backs on the jurisprudence of the Court having retreated back two decades to its infamous decision on the case of *Bankovic and others v. Belgium and Others*.[75]

As *Georgia v. Russia (II)* judgment itself highlights, since the case of *Bankovi*c,[76] the Court for the first time had to examine the jurisdiction of a Contracting State in respect to active military operations during an international armed conflict.[77] More specifically, in the case of *Bankovic*, the applicants complained about the deaths of their family members and the injuries they had sustained during the 1998-1999 Kosovo crisis, namely, the North Atlantic Treaty Organization's (NATO) air strike on the buildings of Radio Televizije Srbije in Belgrade.[78] Eventually, the ECtHR declared the application inadmissible not having been persuaded that there had been any jurisdictional link

[72] ibid para 137.
[73] ibid para 140.
[74] ibid para 141.
[75] Tatyana Eatwell, 'Adjudicating Armed Conflicts: Georgia v. Russia (II), Jurisdiction and The Right to Life in "Context of Chaos' (2021) 1361-1526/3 European Human Rights Law Review, 294, 294
[76] *Banković and Others v. Belgium and Others* (dec.) [GC] no. 52207/99 (12 December 2001) ECHR 2001-XII.
[77] *Georgia v Russia (II)* [GC] no. 38263/08 (ECtHR, 21 January 2021), para 113.
[78] Georg Ress, 'Problems of Extraterritorial Human Rights Violations - The Jurisdiction of the European Court of Human Rights: The Bankovic Case' (2002) 12 Italian Yearbook of International Law, 51, 58

between victims and the respondent States.[79] As pointed out by Georg Ress, the Court explained its position in light of the objective of the European Convention on Human Rights to maintain a "European public order," and stated that the benefits of the ECHR cannot be expanded to the territory which is not generally covered by the Convention, as the Federal Republic of Yugoslavia.[80] The special character of the Convention as an instrument of European public order (ordre public) was also discussed in the inter-state case of *Cyprus v. Turkey* to guarantee the protection of individual human beings in the High Contracting State of the Convention.[81] But in *Bankovic*, the Court used the "legal space" argument in order to clarify that there are some limits to the applicability of the Convention. Even though the applicants in *Bankovic* were arguing that NATO's control over the airspace had been nearly as complete as Turkey's control over the territory of northern Cyprus,[82] as FRY had not been a member state of the Convention, the *espace juridique* arguments were inapplicable. It also rejected that Convention rights can be "divided and tailored."[83] The reasons why the Court decided to invoke the case of *Bankovic* in *Georgia v. Russia (II)* are vague given the lack of similarity between the two cases.[84] Moreover, *Bankovic* has been extensively criticized by scholars[85] and it was also overruled by the Court with later cases, discussed below.[86] Accordingly, compared to *Bankovic*, in the case of *Georgia v. Russia (II)*, the

[79] *Banković and Others v. Belgium and Others* (dec.) [GC] no. 52207/99 (12 December 2001) ECHR 2001-XII, para 82.
[80] Georg Ress, 'Problems of Extraterritorial Human Rights Violations - The Jurisdiction of the European Court of Human Rights: The Bankovic Case' (2002) 12 Italian Yearbook of International Law, 51, 60
[81] *Cyprus v. Turkey* [GC], no. 25781/94 (10 May 2001) ECHR 2001-IV, para 78.
[82] *Banković and Others v. Belgium and Others* (dec.) [GC] no. 52207/99 (12 December 2001) ECHR 2001-XII, para 52.
[83] ibid para 75.
[84] Marco Longobardo, Stuart Wallace, 'The 2021 ECtHR Decision in Georgia v. Russia (II) and the Application of Human Rights Law to Extraterritorial Hostilities' (2022) Israel Law Review, Cambridge University Press, 12 citing *Georgia v Russia (II)* [GC] no. 38263/08 (ECtHR, 21 January 2021), Partly Dissenting Opinion of Judge Chanturia, para 14.
[85] See Kerem Altiparmak, 'Bankovic: An Obstacle to the Application of the European Convention for Human Rights in Iraq?' (2004) Vol. 9, No. 2 Journal of Conflict & Security Law, 213, <www.jstor.org/stable/26294306?seq=1> accessed on 10 May 2022
[86] See *Al-Skeini and Others v. The United Kingdom* [GC], no. 55721/07 (7 July 2011) ECHR 2011-IV.

Court had to look into not only an armed conflict, but "an armed conflict between two High Contracting Parties to the Convention."[87] Even more, not only were both Russia and Georgia parties to the Convention, but also all the military operations occurred on Georgian territory.[88] In the present case everything had clearly occurred within the legal space (*espace juridique*) of the Convention.[89] Therefore, the object of the Convention to maintain a "European public order" was disregarded by the Court in *Georgia v. Russia (II).*

The analysis of the majority in this case goes against the rationale of the case-law of the Court. Since *Bankovic*, the Court established a strong and thorough approach under what circumstances to establish the jurisdiction.[90] Even in the judgment of *Georgia v. Russia (II)*, the Court explicitly states that its case-law in respect to extraterritorial jurisdiction has evolved since that decision on *Bankovic*.[91] The Court has found a way to protect individuals, and not only those living in the legal space of the Council of Europe, as described earlier in the case of *Cyprus v. Turkey*, but outside as well. More particularly, in the landmark judgment *Al-Skeini and Others v. The United Kingdom*, six Iraqi nationals had been claiming that their relatives were killed by the British soldiers while conducting a special operation in Iraq, therefore, falling within the jurisdiction of the United Kingdom. The Court concluded that the alleged violations took place when the United Kingdom had assumed authority and responsibility for the maintenance of security in south-east Iraq,[92] therefore, there had been a jurisdictional link between the United Kingdom and victims.[93] As it is

[87] *Georgia v Russia (II)* [GC] no. 38263/08 (ECtHR, 21 January 2021), Partly Dissenting Opinion of Judge Grozev.
[88] Marco Longobardo, Stuart Wallace, 'The 2021 ECtHR Decision in Georgia v. Russia (II) and the Application of Human Rights Law to Extraterritorial Hostilities' (2022) Israel Law Review, Cambridge University Press, 12
[89] *Georgia v Russia (II)* [GC] no. 38263/08 (ECtHR, 21 January 2021), Partly Dissenting Opinion of Judge Chanturia para 14.
[90] See *Al-Skeini and Others v. The United Kingdom* [GC], no. 55721/07 (7 July 2011) ECHR 2011-IV.
[91] *Georgia v Russia (II)* [GC] no. 38263/08 (ECtHR, 21 January 2021, para 114.
[92] *Al-Skeini and Others v. The United Kingdom* [GC], no. 55721/07 (7 July 2011) ECHR 2011-IV, para 149.
[93] ibid para 150.

sometimes described, the judgment in *Al-Skeini* casts *Bankovic* a new light.[94] The ECtHR cemented its approach with following cases as well. Three years after the judgment on *Al-Skeini*, the Court ruled on the death of another Iraqi national, Azhar Sabah Jaloud, who died as a result of shooting at a military checkpoint controlled by Dutch troops patrolling under the Stabilisation Force in Iraq (SFIR). In this case of *Jaloud v. The Netherlands*, the respondent Government, the Netherlands, was arguing that their contingent had fully been under the operational control of the officer from the United Kingdom,[95] thus, they did not have jurisdiction. However, the fact that the Netherlands had assumed the responsibility for providing security in the area,[96] where Mr. Jaloud passed away, was satisfactory for the Court to establish the extraterritorial jurisdiction of the respondent Government.[97] In his dissenting opinion to the judgment of *Georgia v. Russia (II),* Judge Chanturia accordingly argued that the majority should have relied on its recent and relevant case-law, rather than basing their findings on the clearly outdated *Bankovic*.[98] Interestingly, the Court managed to respond to this criticism in the judgment, saying that "those cases concerned isolated and specific acts involving an element of proximity."[99] To follow the argument introduced by the Court, a violation of the rights of specific individuals controlled by the Contracting States falls within the scope of Article 1 of the Convention, but when there is a military confrontation, the jurisdiction is excluded. This raises another concerning matter, as it sends a very dangerous message to states to engage in wars rather than conduct isolated and specific military acts.[100] Judge

[94] Anna Cowan, 'A New Watershed - Re-evaluating Bankovic in Light of Al-Skeini' (2012) 1 Cambridge Journal of International and Comparative Law, 213, 214
[95] *Jaloud v. The Netherlands* [GC], no. 47708/08 (20 November 2014) ECHR 2014-VI, para 115.
[96] ibid para 149.
[97] ibid para 153.
[98] *Georgia v Russia (II)* [GC] no. 38263/08 (ECtHR, 21 January 2021), Partly Dissenting Opinion of Judge Chanturia, para 13.
[99] ibid para 132.
[100] Kanstantsin Dzehtsiarou, 'The Judgement of Solomon that went wrong: Georgia v. Russia (II) by the European Court of Human Rights' (2021) Völkerrechtsblog, <https://intr2dok.vifa-recht.de/receive/mir_mods_00009921> accessed on 15 April 2022

Lemmens also explicitly expressed his dissent towards the distinction between isolated acts and the active phase of military actions, as "in both situations, State agents use physical force aimed at injuring or killing human beings, and the force used is normally even much more serious in the case of large-scale activities than with isolated and specific acts."[101] It can be argued that when individuals are in the custody, they cannot only be killed, but can also be forced to act under the command, which makes more sense to establish the jurisdiction compared to the air strike.[102] However, with an air strike an individual may die and every other right just loses its importance. Apparently, the Court shares that position, and affirms that while isolated and specific violations of the rights to life in the conduct of hostilities may overcome the jurisdiction and reach the merits, more widespread violations would escape the applicability of the Convention.[103] Unfortunately, it means that state military forces can commit atrocities with impunity.

### *2.3.2. Choosing a Different Path – The Connection between the International Humanitarian Law and the European Convention on Human Rights*

Not only the active phase of hostilities excluded the jurisdiction of the Respondent State in *Georgia v. Russia (II)*, but the Grand Chamber also introduced the argument of international humanitarian law as *lex specialis*. More particularly, according to the majority, active military confrontations are mostly regulated by legal norms other than those of the Convention, specifically, international humanitarian law or the law of armed conflict.[104] However, these branches of the law had not interfered with one another before. Hence, the position of the Grand Chamber in *Georgia v. Russia*



[101] *Georgia v Russia (II)* [GC] no. 38263/08 (ECtHR, 21 January 2021), Partly Dissenting Opinion of Judge Lemmens, para 2.
[102] Severin Meier, 'Reconciling the Irreconcilable? – The Extraterritorial Application of the ECHR and its Interaction with IHL' (2019) Vol. 9 Goettingen Journal of International Law, 395, 413
[103] Marco Longobardo, Stuart Wallace, 'The 2021 ECtHR Decision in Georgia v. Russia (II) and the Application of Human Rights Law to Extraterritorial Hostilities' (2022) Israel Law Review, Cambridge University Press, 32
[104] *Georgia v Russia (II)* [GC] no. 38263/08 (ECtHR, 21 January 2021), para 141.

*(II),* contradicts the approach set by the ECtHR and the International Court of Justice, confirming that human rights law continues to apply in situations of armed conflicts as well.[105]

The relationship between international humanitarian law and human rights law has been a focus of many scholars.[106] Helen Duffy eloquently notes: "co-applicability of IHRL and IHL in armed conflict, once a matter of hot dispute, is now well established in the jurisprudence of the ECHR and all other international and regional human rights bodies."[107] Their jurisprudence had been cited in the case of *Georgia v. Russia (II)* as well but, interestingly, introduction of international humanitarian law in this case served as one of the reasons to limit the jurisprudence of the Convention. If previously this link between human rights law and international humanitarian law had not been that straightforward, the Grand Chamber of the ECtHR answered this question in *Hassan v United Kingdom*[108] in 2014.[109] To be more specific, in the case of *Hassan v. the United Kingdom,* the Court had to examine an issue of military activities of the United Kingdom in Iraq which involved detention of an Iraqi national, who later died in uncertain circumstances. The United Kingdom acknowledged the detention of such an individual, however, the respondent Government was arguing, similarly to the Government of the Russian Federation in the case of *Georgia v. Russia (II),* that their presence in Iraq was due to international armed conflict and in compliance with the standards of the Geneva Conventions on the International Humanitarian Law,

[105] Tatyana Eatwell, 'Adjudicating Armed Conflicts: Georgia v. Russia (II), Jurisdiction and The Right to Life in "Context of Chaos' (2021) 1361-1526/3 European Human Rights Law Review, 294, 301-302
[106] See Marko Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2009) Vol. 14, No. 3 Journal of Conflict & Security Law, Oxford University Press, 459
[107] Helen Duffy, 'Georgia v. Russia: Jurisdiction, Chaos and Conflict at the European Court of Human Rights' (2021) Just Security, <www.justsecurity.org/74465/georgia-v-russia-jurisdiction-chaos-and-conflict-at-the-european-court-of-human-rights/ > accessed on 30 May 2022.
[108] *Hassan v. The United Kingdom* [GC], no. 29750/09 (16 September 2014) ECHR 2014-VI.
[109] Silvia Borelli, 'Jaloud v. The Netherlands and Hassan v. United Kingdom: Time for a Principled Approach in the Application of the ECHR to Military Action Abroad' (2015) 16 Questions of International Law, 25, 34, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2606171> accessed on 30 May 2022

therefore, it could not have been a ground for jurisdiction.[110] The U.K. Government further submitted that in such situation the conduct of a state should be subject to the requirements of the international humanitarian law.[111] Interestingly, the Court was not persuaded with the arguments of the United Kingdom, because, according to the Court, accepting such an argument would have been inconsistent with the case-law of the International Court of Justice, "which has held that international human rights law and international humanitarian law may apply concurrently."[112] Moreover, the Court has held that the Convention needs to be interpreted in harmony with other rules of international law,[113] which, therefore, involves international humanitarian law as well. The international humanitarian law can assist the ECtHR to examine whether particular alleged violations are lawful or not.[114]

The consistency with the case-law of the International Court of Justice does not exclude in any manner the jurisprudence of ECtHR to hear and rule on the cases concerning the military operations in an international armed conflict. To be more specific, in 1996 in its advisory opinion regarding the *Legality of the Threat or Use of Nuclear Weapons*,[115] the International Court of Justice stated that the application of human rights law does not cease during armed conflicts.[116] The position of the ICJ was again highlighted in its more recent advisory opinion in 2004 on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, further clarifying that "as regards the relationship between international humanitarian law and human

[110] *Hassan v. The United Kingdom* [GC], no. 29750/09 (16 September 2014) ECHR 2014-VI, para 76.
[111] ibid.
[112] ibid para 77.
[113] ibid.
[114] Marko Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2009) Vol. 14, No. 3 Journal of Conflict & Security Law, Oxford University Press, 459, 476
[115] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Reports 226.
[116] ibid para 25.

rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law."[117] Additionally, in its judgment regarding the application of Congo against Burundi, Uganda and Rwanda in respect to acts of armed aggression, the ICJ reiterated its approach, stating that as Uganda had been an occupying power, it had a duty to secure the rights guaranteed by the international human rights law and international humanitarian law.[118] Therefore, it is not novel that the ICJ refers to international human rights law, because it accepts the continuing applicability of international human rights law in time of armed conflicts.[119] That was also the position of the European Court of Human Rights, thus, it is concerning why in the case of *Georgia v. Russia (II)*, the standard was changed and application of the international humanitarian law was prioritized over the ECHR.

The ECtHR took one step back. Albeit the fact that the Court had the opportunity to once again highlight the importance of coordination between human rights law and international humanitarian law, it explicitly attributed the priority to the international humanitarian law. It is not questionable that humanitarian law norms might act as *lex specialis* during the active phases of hostilities, however, it does not exclude the responsibility of the Council of Europe to protect individuals who are generally, or in other words, during the peacetime, under its protection. The *lex specialis* nature

[117] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian* Territory (Advisory Opinion) [2004] ICJ Reports 136, para 106.
[118] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (*Judgment), [2005] ICJ Reports 168, para 178
[119] Vera Gowland-Debbas, Frits Kalshoven, 'The Relevance of Paragraph 25 of the ICJ's Advisory Opinion on Nuclear Weapons' (2004) Vol. 98 Proceedings of the Annual Meeting (American Society of International Law), 358, 359

of the international humanitarian law does not mean that it just always overrides human rights.[120] In order to see how the position of the Court in *Georgia v. Russia (II*) runs counter to the interpretation of the Convention, it is important to closely analyze the claims submitted by the applicant government in view of Geneva Conventions on international humanitarian law.

The Government of Georgia argued that during the armed conflict between Georgia and Russia, the Russian Federation had not complied with its substantive obligation under Article 2 of the Convention.[121] More particularly, Article 2 of the ECHR guarantees the right to life and it prohibits arbitrary deprivation of life of individuals. However, the Russian Federation alleged that their actions were in accordance with international humanitarian law.[122] Therefore, to answer this question it is necessary to refer to relevant provisions of the Geneva Conventions.

The four 1949 Geneva Conventions and Protocol I regulates the norms of conduct during wars. The attack on civilians is prohibited by the Additional Protocol I to Geneva Conventions. Particularly, according to Article 50(2), "the civilian population as such, as well as individual civilians, shall not be the object of attack." As written in the report by the Human Rights watch, between August 8 and 12, Russia's military attacks were targeted within meters of civilians and resulted in significant casualties.[123] Furthermore, Human Rights Watch was not able to identify legitimate military targets in the cases it investigated, concluding that the Russian Federation either



[120] Heike Krieger, 'A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study' (2006) Vol. 11, No. 2 Journal of Conflict & Security Law, Oxford University Press, 265, 271
[121] *Georgia v. Russia (II)* (dec.), no. 38263/08 (ECtHR, 13 December 2011), para 26.
[122] *Georgia v Russia (II)* [GC] no. 38263/08 (ECtHR, 21 January 2021), para 49.
[123] Human Rights Watch, *Up In Flames Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia* (January 2009) 89

had failed to do everything feasible to avoid civilian casualties or the Russian military forces deliberately targeted civilians.[124] It is noteworthy that "the prohibition of indiscriminate attacks, set forth in Article 51(4) of Additional Protocol I, constitutes a norm of customary international law."[125] Therefore, considering the findings of the Human Rights Watch and assessing the relevant law, it can be proved that Russia had not been complying with international humanitarian law during Georgia-Russia war. It is understandable that when there is a war, shelling creates chaos on the ground, but having complied with the Geneva Conventions, actions should not be "chaotic."[126] Therefore, the Court was expected to assess the violation of Article 2 of the Convention in accordance with the rules of international humanitarian law, as it did in its landmark judgment of *Hassan v. the United Kingdom*.

The introduction of the *lex specialis* argument apparently could not convince the dissenting judges as well. The language in the dissenting opinions is sometimes strongly worded, which proves the level of disagreement.[127] Judges Yudkivska, Pinto De Albuquerque and Chanturia express their disappointment that the Court did not discuss the most important legal issue, "namely whether the alleged bombardments of the villages of Eredvi, Karbi and Tortiza and the town of Gori, from 8 to 12 August 2008, by the Russian armed forces amounted to a violation of Article 2 of the Convention."[128] Furthermore, the above-mentioned judges did not agree with the majority that the armed confrontation and fighting between enemy military forces are chaotic per se. As stated by

[124] ibid.
[125] *Hanan v. Germany* [GC], no. 4871/16 (ECtHR 16 February 2021), para 81.
[126] Tatyana Eatwell, 'Adjudicating Armed Conflicts: Georgia v. Russia (II), Jurisdiction and The Right to Life in "Context of Chaos' (2021) 1361-1526/3 European Human Rights Law Review, 294, 300
[127] Floris Tan, Marten Zwanenburg, 'One Step Forward, Two Steps Back? Georgia v. Russia (II), European Court of Human Rights, Appl no 38263/08' (2021) Melbourne Journal of International Law, 136, 145
[128] *Georgia v Russia (II)* [GC] no. 38263/08 (ECtHR, 21 January 2021) Joint Partly Dissenting Opinion of Judges Yudkivska, Pinto De Albuquerque and Chanturia, para 26.

them, "international humanitarian law requires informed military decisions based upon intelligence and careful planning, including planning in respect of collateral damage and possible civilian casualties."[129] The judge Chanturia separately raised his concern, asking why the majority decided not to have applied the relevant rules of IHL in conjunction with Article 2 as regards the use of military power by the Russian Federation, if the Court had done so in the case of *Hassan v. the UK* in regards to IHL and Article 5 of the Convention.[130] Unfortunately, questions remain unanswered, because the majority did not engage into a thorough and convincing examination of the issue, hence, left the questions of dissenting judges and scholars open for a debate. It seems to be more of a political step rather than legal. The European Court of Human Rights decided not to comment on the military confrontation between two Contracting States of the European Convention on Human Rights and on the territory of the Contracting State. It summarized its reasoning only in a few paragraphs without explaining its new approach in details. The majority just decided to depend on the principle *"silent enim leges inter arma"* (in times of war law falls silent).[131] The argument of the Court lacks coherence with its former case-law and, interestingly, even with the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, who wrote in his report regarding the 2008 war the following words: "The ECHR is applicable at all times, also during armed conflict."[132]



[129] ibid para 11.
[130] ibid Partly Dissenting Opinion of Judge Chanturia, para 30.
[131] Charles Archer, Tom Howe, 'Russo-Georgian war European Court of Human Rights (Grand Chamber): Judgment of 21 January 2021' (2021) 3 European Human Rights Law Review, 317, 320
[132] Thomas Hammarberg, Council of Europe Commissioner for Human Rights, 'Human Rights in Areas Affected by the South Ossetia Conflict Special Mission to Georgia and Russian Federation' (September 2008), para 11

### *2.3.3. "The non-Derogation by the Respondent State" and "The Difficulty in Establishing the Relevant Circumstances" as Justifications*

The Court, among other justifications discussed below, introduces non-derogation from Article 15 of the Convention and difficulty in establishing the evidence as reasons for not declaring the jurisdiction of the respondent State. More precisely, the majority shared the position of the Russian Federation that not derogating under Article 15 of the Convention during the war could be interpreted as the High Contracting Parties considering that they do not exercise jurisdiction within the meaning of Article 1 of the Convention.[133] How can this be a valid argument in front of the European Court of Human Rights is not clear. There can be other explanations why the States do not enter a derogation. It is not a new phenomenon that States intend to limit the scope of relevant human rights bodies.[134] Therefore, the lack of derogations by the States can be due to not have conceded that it was exercising jurisdiction, especially, when contesting jurisdiction can be used by the States in their defence strategies.[135] Additionally, neither did the United Kingdom derogate from Article 15 while being in Iraq, and it was not an obstacle for the Court to establish its jurisdiction in the case of *Hassan v. UK*. Judge Grozev based his dissenting argumentation on the interpretation of the Convention itself. According to him, that Article 15 of the Convention is a vivid example that the Convention applies during the military confrontations. Article 15 of the ECHR allows some derogations in terms of war. Therefore, it was the intention of the drafters of the Convention to ensure that rights guaranteed by the Convention also apply during the wars. Moreover, while examining the derogation clause, the Court in *Al-Skeini* stated that the provisions



[133] *Georgia v Russia (II)* [GC] no. 38263/08 (ECtHR, 21 January 2021), para 139.
[134] Işıl Karakaş, Hasan Bakırcı, 'Extraterritorial Application of the European Convention on Human Rights Evolution of the Court's Jurisprudence on the Notions of Extraterritorial Jurisdiction and State Responsibility' (2018) The European Convention on Human Rights and General International Law, Oxford University Press, 112, 122
[135] Marco Longobardo, Stuart Wallace, 'The 2021 ECtHR Decision in Georgia v. Russia (II) and the Application of Human Rights Law to Extraterritorial Hostilities' (2022) Israel Law Review, Cambridge University Press, 28

of the Convention should be interpreted in a way to protect individuals, hence, the safeguards should be practical and effective.[136] Apparently, in *Georgia v. Russia (II)* the interpretation of Article 15 worsened the situation of individuals. But not in *Hassan*, where the Court without the existence of the derogation assessed the facts of this case in accordance with relevant rules of international humanitarian law.[137]

To comprehensively compare *Hassan* with *Georgia v. Russia (II)*, it is essential to look into the articles under which the applicants were complaining. In *Hassan*, the issue at hand was about Article 5 of the Convention, the right to liberty and security. Even though, as mentioned above, the United Kingdom had not derogated from Article 15, the Court assessed the alleged violation in light of the rules set by the international humanitarian law. As for *Georgia v. Russia (II),* Georgia complained that Russia violated Article 2 during the active phase of hostilities. Similar to the United Kingdom in *Hassan*, the Russian Federation did not lodge a derogation. As argued by Judge Chanturia in his dissenting opinion the absence of formal derogation in *Hassan v. the United Kingdom*, did not hinder the establishment of the respondent State's extraterritorial jurisdiction over the events which had been taking place in Iraq.[138] So, it is questionable why the Court had not done the same in *Georgia v. Russia (II)?* The majority should have considered that no derogation is possible under Article 15 when it comes to Article 2 – the Right to life, "except in respect of deaths resulting from lawful acts of war."[139] As I argued before, the indiscriminate killing does not serve as lawful acts of war. I understand that the active hostilities create a lot of

[136] *Al-Skeini and Others v. The United Kingdom* [GC], no. 55721/07 (7 July 2011) ECHR 2011-IV, para 162.
[137] *Hassan v. The United Kingdom* [GC], no. 29750/09 (16 September 2014) ECHR 2014-VI, para 103.
[138] *Georgia v Russia (II)* [GC] no. 38263/08 (ECtHR, 21 January 2021) Partly Dissenting Opinion of Judge Chanturia, para 19.
[139] *Al-Skeini and Others v. The United Kingdom* [GC], no. 55721/07 (7 July 2011) ECHR 2011-IV, para 162.

chaos, but they are planned in advance. And the notion of "chaos" cannot be utilized as a proper explanation to commit serious war crimes. The Court should not have just stopped assessment of the facts at the level of jurisdiction, but it should have studied the distinction between lawful and unlawful wars. The Russian Federation was not even entitled to derogate due to the interpretation of Article 15(2) of the Convention. Therefore, the Court had to analyse and distinguish lawful and unlawful acts of war, rather than simply disregarding the part of the application.

Moreover, the majority of the Court also mentions the large number of alleged victims and difficulty in establishing the relevant circumstances[140] as a justification not to establish jurisdiction of the respondent State. Considering that number of international reports,[141] 33 witnesses[142] and additional hearings to establish evidence, it is concerning that the Court bases its decision on that argument. Even more, the Commissioner for Human Rights of the Council of Europe also studied the case.[143] In his dissenting opinion, Judge Chanturia listed evidence in order to show that the Court had had at its disposal more than enough evidence for a judicial assessment.[144] He also highlighted the quantity of video and photo recordings, the reports by various organizations,[145] as well as, the Court's hearing of the witnesses.[146]

Therefore, it is interesting why the Court decided to elaborate on this controversial argument, especially, when in number of cases, the Court has proved that in has the ability to deal with



[140] *Georgia v Russia (II)* [GC] no. 38263/08 (ECtHR, 21 January 2021), para 141.
[141] ibid para 63.
[142] ibid para 74.
[143] ibid para 63.
[144] ibid Partly Dissenting Opinion of Judge Chanturia, para 23.
[145] ibid para 23.
[146] ibid para 24.

complex evidence if it commits so.[147] It is not doubtful that collecting evidence is hard, but, at the same time, this is what the ECtHR is charged with - adjudicating exactly these kinds of cases.[148] The Court is entitled to request the parties to provide it with more evidence. For example, in the case of *Isayeva v. Russia*, where the applicant was complaining having been a victim of indiscriminate bombing by the Russian military,[149] in the judgment it is written explicitly that the Court asked both – the applicant and the respondent state – to produce and provide the Court with additional documentary evidence.[150] Hence, it is not straightforward why the Court decided to introduce "difficulty in establishing the relevant circumstances" as one of the reasons of excluding the jurisdiction. Especially when the Court was provided with the extensive evidence by not only the applicant and respondent states, but by the independent EU fact-finding mission as well. One of the reasons could be the Court's aim to have room for manoeuvre in upcoming cases. The Court can use this argument stating that in *Georgia v. Russia (II)*, the ECtHR did not have enough evidence and interpret new cases differently. But the fact is that the reasoning of the majority in *Georgia v. Russia (II)* implies an unwillingness to deal with cases that are too difficult or would require too much work to solve.[151]

### *2.4. Interim Conclusion*

The judgment of *Georgia v. Russia (II)* raises many questions for both future inter-state and individual applications before the Court. The Court altered its former approach in several respects.

[147] Helen Duffy, 'Georgia v. Russia: Jurisdiction, Chaos and Conflict at the European Court of Human Rights' (2021) Just Security, <www.justsecurity.org/74465/georgia-v-russia-jurisdiction-chaos-and-conflict-at-the-european-court-of-human-rights/ > accessed on 30 May 2022

[148] Tatyana Eatwell, 'Adjudicating Armed Conflicts: Georgia v. Russia (II), Jurisdiction and The Right to Life in "Context of Chaos' (2021) 1361-1526/3 European Human Rights Law Review, 294, 300

[149] *Isayeva v. Russia*, no. 57950/00, (ECtHR 24 February 2005), para 3.

[150] ibid para 10.

[151] Tatyana Eatwell, 'Adjudicating Armed Conflicts: Georgia v. Russia (II), Jurisdiction and The Right to Life in "Context of Chaos' (2021) 1361-1526/3 European Human Rights Law Review, 294, 300

Firstly, the reincarnation of the overruled case of *Bankovic* is concerning. The Court uses the decision, which "triggered twenty years of academic critique and litigation to undo its 'regrettable,'[152] or even 'ludicrous'[153] effects."[154] The Court decided to find the part of the application regards to war inadmissible and, unfortunately, it did so without explaining the reasons in a thorough way.

Moreover, the established relationship between the international humanitarian law and human rights law has also been disregarded by the ECtHR. The articles of the ECHR can be interpreted in light of the Geneva Conventions to examine alleged violations in a more comprehensive way. The introduction of "difficulty of establishing facts" and "non-derogation from Article 15" as justifications for excluding the jurisdiction is questionable. The Court managed to overcome these obstacles before. Therefore, it seems to be just additional remarks in order to justify its approach for future cases. The under examined interpretation of the notion of "jurisdiction" in the case of *Georgia v. Russia (II)* is controversial and leaves many questions unanswered.



[152] Helen Duffy, 'Georgia v. Russia: Jurisdiction, Chaos and Conflict at the European Court of Human Rights' (2021) Just Security, <www.justsecurity.org/74465/georgia-v-russia-jurisdiction-chaos-and-conflict-at-the-european-court-of-human-rights/ > accessed on 30 May 2022 citing *Georgia v Russia (II)* [GC] no. 38263/08 (ECtHR, 21 January 2021) Partly Dissenting Opinion of Judge Pinto De Albuquerque, para 5.
[153] ibid Para 7 citing Loukis G. Loucaides, 'Determining the extra-territorial effect of the European Convention: facts, jurisprudence and the Bankovic case' (2006) European Human Rights Law Review, 391, 399.
[154] Helen Duffy, 'Georgia v. Russia: Jurisdiction, Chaos and Conflict at the European Court of Human Rights' (2021) Just Security, <www.justsecurity.org/74465/georgia-v-russia-jurisdiction-chaos-and-conflict-at-the-european-court-of-human-rights/ > accessed on 30 May 2022

## 3. The Impact of the Judgment on Individuals

### *3.1. Introduction*

Not only the judgment of the ECtHR on *Georgia v. Russia (II)* is inconsistent with its former case-law, but is has created vacuum for individual applications. As the thesis discussed above, the Court dismissed the complaint of Georgia in terms of Russia's extraterritorial jurisdiction, but, additionally, it dismissed Georgia's territorial jurisdiction as well for similar reasons, which would be explained in details below.

This approach leaves victims without the guarantees established by the European Convention on Human Rights. This part examines the negative consequences of the judgment on those people affected by the war.

### *3.2. Georgia v. Russia (II) Depriving Individuals of Enjoying ECHR Protection*

The argumentation of the Court regarding the international humanitarian law did not only formally exclude its competence in terms of the active military confrontation, but, at the same time, left individuals without the protection of the Convention. As stated above those individuals were within the legal space of the Convention, namely, they would have been granted the safeguards of the ECHR during a peaceful period. The majority of the Grand Chamber in *Georgia v. Russia (II)* acknowledged that the above-discussed interpretation of the "jurisdiction" might have been unsatisfactory for the victims.[155] However, their approach was justified with the reason that such situations predominantly are regulated by other norms rather than Convention, specifically, international humanitarian law.[156] There is no doubt that international humanitarian law has a key

[155] *Georgia v Russia (II)* [GC] no. 38263/08 (ECtHR, 21 January 2021), para 140.
[156] ibid para 141.

role in the context of the active phases of armed conflicts. The Fourth Geneva Convention, known as "civilians' convention,"[157] strengthened the guarantees for civilians to be protected during an armed conflict. However, bearing in mind that "there is no permanent international court considering individual complaints regarding IHL violations,"[158] this approach has put war victims in even more struggling positions. Dissenting Judge Pinto De Albuquerque does not even hide his irony towards the judgment, and outlines that the position of the majority looks like crocodile tears for the victims.[159] Furthermore, Judge Chanturia noted in his partly dissenting opinion, "(t)he Court has not only a legal but also a moral obligation to stay active and exercise its duty of European supervision in the event of armed conflicts occurring within the legal space of the Convention, on pain of leaving individual victims of such military conflicts in a legal vacuum, which would amount to a denial of human-rights protection to those who most need it."[160] Thus, as a consequence of this judgment, individuals are removed from the benefits of the Convention, including an effective remedy before an international court.[161] In contrast to humanitarian law, ECHR provides the individuals with direct means to ask for redress for violations of his or her rights.[162] In comparison to the structure of the European Court of Human Rights, the International Court of Justice only takes inter-state applications, while the decisions of the United Nations'

[157] Ann Clywd MP, Andrew Mitchell MP, Tom Brake MP, Stephen Twigg MP, 'The Continued Importance of International Humanitarian Law in Protecting Civilians in Conflict, Debate' (2019) CDP-0152 Debate Pack House of Commons Library, 2

[158] 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' (2021) EJIL:Talk! <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 on 10 June 2022

[159] *Georgia v Russia (II)* [GC] no. 38263/08 (ECtHR, 21 January 2021) Partly Dissenting Opinion of Judge Pinto De Albuquerque, para 30.

[160] ibid Partly Dissenting Opinion of Judge Chanturia, para 54.

[161] 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' (2021) EJIL:Talk! <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 on 10 June 2022

[162] Heike Krieger, 'A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study' (2006) Vol. 11, No. 2 Journal of Conflict & Security Law, Oxford University Press, 265, 289

bodies are not legally binding. According to the dissenting opinions of Judge Grozev and Judge Chanturia, the judgment creates a legal vacuum in protecting human rights within the competence of the Council of Europe. In other words, the people who were affected by Georgia-Russia war, were under the protection before the war started and are under protection after the war just because they were in the war zone. [163]

However, it can be argued that as inter-state and individual applications are different in front of the European Court of Human Rights, the Court might not take the same route considering individual applications. This was the position of Judge Keller in her concurring opinion to the judgment of *Georgia v. Russia (II)*. Moreover, it can also be suggested that the exclusion of Russia's extraterritorial jurisdiction does not create any vacuum, as the Court will establish the territorial jurisdiction of Georgia, because the war took place there. Therefore, in order to engage with these counterarguments, it is important to look into the recent decisions of the Court regarding the admissibility of 2008 war-related individual applications against Russia and Georgia.

### *3.2.1. Admissibility Decisions of Individual Applications against Russia Regarding 2008 Georgia-Russia War*

In the Concurring Opinion of the judgment of *Georgia v. Russia (II*), Judge Keller emphasized "the judicial function entrusted to the Court by the Convention cannot be discharged in precisely the same fashion in inter-State cases as in cases originating in individual applications."[164] However, the belief of Judge Keller that the arguments introduced by the court would not be the

[163] Kanstantsin Dzehtsiarou, 'The Judgement of Solomon that went wrong: Georgia v. Russia (II) by the European Court of Human Rights' (2021) Völkerrechtsblog, <https://intr2dok.vifa-recht.de/receive/mir_mods_00009921> accessed on 15 April 2022

[164] *Georgia v Russia (II)* [GC] no. 38263/08 (ECtHR, 21 January 2021) Concurring Opinion of Judge Keller, para 9.

same while dealing with individual applications was not thus proven by the later decisions of the Court.

On November 18, 2021, the Court published its decision on the case *Mevludi Jioshvili v. Russia* and 58 other applications.[165] The applicants, the Georgian nationals, were complaining that their property was destroyed or damaged as a result of active hostilities between Georgia and Russia.[166] The Court reiterated that the events that had taken place during the active military phase did not fall within the jurisdiction of the Russian Federation.[167] Thus, the Court found that part of the application inadmissible.[168]

It is unfortunate that the Court did not even try to evaluate individual circumstances of applicants. As the majority argued in *Georgia v. Russia (II),* the cases[169] where it found the jurisdiction of the respondent State dealt with isolated and specific acts involving an element of proximity.[170] The question remains why the Court simply disregarded the cases without proper analysis or individual assessment. The Court had the chance to fill this very regrettable vacuum, but it did not.

### *3.2.2. Admissibility Decisions of Individual Applications against Georgia Regarding 2008 Georgia-Russia War*

Nevertheless, there is another way to avoid the vacuum. Albeit the fact that as Russia's jurisdiction was not established, the rights guaranteed by the European Convention on Human Rights and the

[165] *Mevludi Jioshvili against Russia and 58 other applications* (dec.), no. 8090/09 (ECtHR 19 October 2021).
[166] ibid para 4.
[167] ibid para 18.
[168] ibid.
[169] See *Al-Skeini and Others v. The United Kingdom* [GC], no. 55721/07 (7 July 2011) ECHR 2011-IV.
[170] *Georgia v Russia (II)* [GC] no. 38263/08 (ECtHR, 21 January 2021), para 132.

obligation under Article 1 can fall within the scope of territorial jurisdiction of Georgia. Concluding otherwise would leave victims without Convention protection. But the Court did not think so.

More particularly, initially, the five applications were lodged against Georgia related to the same armed conflict between Georgia and the Russian Federation in August 2008.[171] Some of the applications addressed the context of the active phase of hostilities. The Court has reiterated "the exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts of omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention."[172] It once again emphasized that matters in the applications concern "the five-day international armed conflict that took place between the military forces of Georgia and the Russian Federation."[173] In these individual applications against Georgia, the Court concluded that taking into account the reasons of the majority in the judgment of *Georgia v. Russia (II)*, Georgia similar to the Russian Federation could not have been held liable. [174] According to the Court, the same events cannot fall within the jurisdiction of Georgia merely because the territory in which the hostilities took place was formally Georgian.[175]

Even more recently, on March 3, 2022, the Court reinforced its approach while assessing 370 individual applications against Georgia concerning the Georgia-Russia war. Specifically, applicants, who were Russian nationals, claimed during this military confrontation violated their

[171] *Elza Alikhanovna Bekoyeva against Georgia and 3 other applications* (dec.) no. 48347/08 (ECtHR 5 October 2021), para 35.
[172] ibid para 34.
[173] ibid para 35.
[174] ibid para 39.
[175] ibid para 38.

rights of the Convention, including right to life, prohibition of torture, right to liberty and security, right to an effective remedy, prohibition of discrimination and protection of property, by Georgia.[176] The Court once again reiterated that the respondent State, in this case Georgia, could not be held liable for the acts that took place during the active phase of hostilities,[177] because the chaos and confusion deprived Georgia a capability to exercise its authority.[178] Therefore, all 370 applications were held inadmissible.[179]

### *3.3. Interim Conclusion*

Albeit the thoughtful reasoning that it would not be realistic to expect Georgia to have taken diplomatic, economic, judicial or any other measure during the war, the Court sympathised more with the States rather than people who had been injured or harmed because of the State's engagement in the war. Accordingly, the concept argued by Judge Grozev, namely, the "legal vacuum"[180] has been confirmed by the ECtHR while having found individual applications regarding the same war inadmissible. "It is for the first time in history that the ECtHR failed to establish jurisdiction in relation to people living on a territory which would otherwise be protected by the Convention."[181]

To conclude this part of the thesis that, it needs to be emphasized that the Court found the applications inadmissible because it did not establish the jurisdiction of Russia in the inter-state

[176] *Dzerassa Feliksovna Tskhovrebova against Georgia and 369 other applications* (dec.), no. 43733/08 (ECtHR 3 March 2022), para 1.
[177] ibid para 3.
[178] ibid.
[179] ibid para 4.
[180] *Georgia v Russia (II)* [GC] no. 38263/08 (ECtHR, 21 January 2021), Partly Dissenting Opinion of Judge Grozev.
[181] Kanstantsin Dzehtsiarou, 'The Judgement of Solomon that went wrong: Georgia v. Russia (II) by the European Court of Human Rights' (2021) Völkerrechtsblog, <https://intr2dok.vifa-recht.de/receive/mir_mods_00009921> accessed on 15 April 2022

case, and it also did not establish the jurisdiction of Russia and/or Georgia in individual applications. Therefore, January 21, 2021 inter-state judgment did what it should not have done, left the victims without any possibility to reach justice.

## 4. Conclusion

The thesis analyzed the judgment of the European Court of Human Rights in the inter-state case of *Georgia v. Russia (II)*. The ruling of the ECtHR was assessed in regards to two main aspects, namely, its coherence with the former case-law and its impact on victims.

As it is argued, the Court, in the case of *Georgia v. Russia*, took a different path from what it has been developing for years. The ECtHR had to rule on the military conflict between the High Contracting States of the European Convention on the territory the ECHR covers. However, it abandoned the extraterritorial jurisdiction of the Russian Federation due to the reason that the war was chaotic. Indeed, the war is full of chaos, but it does not start in one day. There are preparations and commands to conduct the war. The Court should have moved to the merits and studied whether the respondent State's actions were lawful acts of war or not. Moreover, the approach that isolated acts establish the extraterritorial jurisdiction, but the war cannot suffice the criteria is perilous, as the states are encouraged to carry out military operations. However, it does not end here. In only one paragraph, the Court listed several reasons why the jurisdiction of the respondent Government was excluded. None of these arguments, particularly the non-derogation from Article 15 of the Convention, the difficulty of establishing relevant circumstances or international humanitarian law as *lex specialis* is per the former case-law of the ECtHR. It has not been the first time such issues arose in front of the Court, but it managed to overcome each of them before. Seven years before the judgment of *Georgia v. Russia (II)*, the Court explicitly stated that the absence of the derogation could not interfere the Court to move forward to the merits. Neither did the international humanitarian law, and even quite the opposite; the Court has the practice of interpreting ECHR articles in light of the Geneva Conventions. As for the evidence, although it is tough to establish

the evidence in terms of war, the difficulty should not be an obstacle for the Court to find the truth. It seems that the Court did not want to open Pandora's box and discuss more complicating issues.

Eventually, the road the Court chose has already harmed the victims of the Georgia-Russia war. More than four hundred individual applications regarding the same war were dismissed. The Court did not analyze whether those who were complaining against Russia had been the victims of Russia's isolated and specific acts, as suggested by the Court in the inter-state judgment. The Court did not establish the territorial jurisdiction of Georgia again without proper examinations of the factual circumstances of the individuals. Against whom can the victims of the Georgia-Russia war lodge their applications? Simply no one, as there is not any state responsible for a massive breach of human rights. Even if it can be arguable that establishing jurisdiction was not possible during the war, one thing is obvious: the European Court of Human Rights did not fulfill its principal obligation. It did not offer guarantees to people living in the territory protected by the Convention just because there was war.

Some might say that the European Convention on Human Rights is one of the most robust regional instruments safeguarding individual rights and freedoms. However, the judgment of the European Court of Human Rights on *Georgia v. Russia (II)* shows the indifference of the Court towards the victims. It is disappointing that the ECtHR did not even try to examine the issues thoroughly. Unfortunately, the European Court of Human Rights simply closed its door to the individuals when they most needed it.

## Bibliography

### Case-Law

### European Court of Human Rights

Al-Skeini and Others v. The United Kingdom [GC], no. 55721/07 (7 July 2011) ECHR 2011-IV

Banković and Others v. Belgium and Others (dec.) [GC], no. 52207/99 (12 December 2001) ECHR 2001-XII

Cyprus v. Turkey [GC], no. 25781/94 (10 May 2001) ECHR 2001-IV

Dzerassa Feliksovna Tskhovrebova against Georgia and 369 other applications (dec.), no. 43733/08 (ECtHR 3 March 2022)

Elza Alikhanovna Bekoyeva against Georgia and 3 other applications (dec.) no. 48347/08 (ECtHR 5 October 2021)

Georgia v. Russia (I) [GC], no. 13255/07 (3 July 2014) ECHR 2014-IV

Georgia v. Russia (II) (dec.), no. 38263/08 (ECtHR, 13 December 2011)

Georgia v Russia (II) [GC], no. 38263/08 (ECtHR, 21 January 2021)

Hanan v. Germany [GC], no. 4871/16 (ECtHR 16 February 2021)

Hassan v. The United Kingdom [GC], no. 29750/09 (16 September 2014) ECHR 2014-VI

Isayeva v. Russia, no. 57950/00, (ECtHR 24 February 2005)

Ilaşcu and Others v. Moldova and Russia [GC], no. 48787/99 (8 July 2004) ECHR 2004-VII

Issa and Others v. Turkey, no. 31821/96 (ECtHR, 30 March 2005)

Jaloud v. The Netherlands [GC], no. 47708/08 (20 November 2014) ECHR 2014-VI

Loizidou v. Turkey [GC], no. 15318/89 (ECtHR, 18 December 1996)

Mevludi Jioshvili against Russia and 58 other applications (dec.), no. 8090/09 (ECtHR 19 October 2021)

### International Court of Justice

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Reports 226

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Reports 136

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (Judgment), [2005] ICJ Reports 168

**Legislation**

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949

Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949

Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949

Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

**Secondary Materials**

**Reports**

Human Rights Watch, Up In Flames Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia (January 2009)

Independent International Fact-Finding Mission on the Conflict of Georgia, Council Decision 2008/901/CFSP of 2 December 2008, The Council of the European Union, 2009

Thomas Hammarberg, Council of Europe Commissioner for Human Rights, 'Human Rights in Areas Affected by the South Ossetia Conflict Special Mission to Georgia and Russian Federation' (September 2008)

**Articles**

Altiparmak K., 'Bankovic: An Obstacle to the Application of the European Convention for Human Rights in Iraq?' (2004) Vol. 9, No. 2 Journal of Conflict & Security Law, 213, <www.jstor.org/stable/26294306?seq=1> accessed on 10 May 2022

Archer C., Howe T., 'Russo-Georgian war European Court of Human Rights (Grand Chamber): Judgment of 21 January 2021' (2021) 3 European Human Rights Law Review, 317

Borelli S., 'Jaloud v. The Netherlands and Hassan v. United Kingdom: Time for a Principled Approach in the Application of the ECHR to Military Action Abroad' (2015) 16 Questions of International Law, 25 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2606171> accessed on 30 May 2022

Cerna C. M., 'Introductory Note to Georgia v. Russia (II) (EUR. CT. H.R. (Grand Chamber))' (2021) 60 International Legal Materials, 713

Clywd A., Mitchell A., Brake T., Twigg S., 'The Continued Importance of International Humanitarian Law in Protecting Civilians in Conflict, Debate' (2019) CDP-0152 Debate Pack House of Commons Library

Cowan A., 'A New Watershed - Re-evaluating Bankovic in Light of Al-Skeini' (2012) 1 Cambridge Journal of International and Comparative Law, 213

Duffy H., 'Georgia v. Russia: Jurisdiction, Chaos and Conflict at the European Court of Human Rights' (2021) Just Security, <www.justsecurity.org/74465/georgia-v-russia-jurisdiction-chaos-and-conflict-at-the-european-court-of-human-rights/ > accessed on 30 May 2022

Dzehtsiarou K., 'The Judgement of Solomon that went wrong: Georgia v. Russia (II) by the European Court of Human Rights' (2021) Völkerrechtsblog, <https://intr2dok.vifa-recht.de/receive/mir_mods_00009921> accessed on 15 April 2022

Eatwell T., 'Adjudicating Armed Conflicts: Georgia v. Russia (II), Jurisdiction and The Right to Life in "Context of Chaos' (2021) 1361-1526/3 European Human Rights Law Review, 294

Gowland-Debbas V., Kalshoven F., 'The Relevance of Paragraph 25 of the ICJ's Advisory Opinion on Nuclear Weapons' (2004) Vol. 98 Proceedings of the Annual Meeting (American Society of International Law), 358

Karakaş I., Bakırcı H., 'Extraterritorial Application of the European Convention on Human Rights Evolution of the Court's Jurisprudence on the Notions of Extraterritorial Jurisdiction and State Responsibility' (2018) The European Convention on Human Rights and General International Law, Oxford University Press, 112

Krieger H., 'A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study' (2006) Vol. 11, No. 2 Journal of Conflict & Security Law, Oxford University Press, 265

Longobardo M., Wallace S., 'The 2021 ECtHR Decision in Georgia v. Russia (II) and the Application of Human Rights Law to Extraterritorial Hostilities' (2022) Israel Law Review, Cambridge University Press

Loucaides L.G., 'Determining the extra-territorial effect of the European Convention: facts, jurisprudence and the Bankovic case' (2006) European Human Rights Law Review, 391

Ma Y., 'The European Court of Human Rights and the Protection of the Rights of Prisoners and Criminal Defendants Under the European Convention on Human Rights' (2000) 10(1) International Criminal Justice Review, 54

Meier S., 'Reconciling the Irreconcilable? – The Extraterritorial Application of the ECHR and its Interaction with IHL' (2019) Vol. 9 Goettingen Journal of International Law, 395

Milanović M., 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2009) Vol. 14, No. 3 Journal of Conflict & Security Law, Oxford University Press, 459

Moiseieva A., 'The ECtHR in Georgia v. Russia – a farewell to arms? The effects of the Court's judgment on the conflict in eastern Ukraine' (2021) EJIL:Talk! <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 on 10 June 2022

Ress G., 'Problems of Extraterritorial Human Rights Violations - The Jurisdiction of the European Court of Human Rights: The Bankovic Case' (2002) 12 Italian Yearbook of International Law, 51

Sitepu A.I., 'Application of Extraterritorial Jurisdiction in European Convention on Human Rights (Case Study: Al-Skeini and Others v. U.K.)' (2016) 13/3 Indonesian Journal of International Law 353

Spetschinsky L., Bolgova I. V., 'Post-Soviet or Post-Colonial? The relations between Russia and Georgia after 1991" (2014) Vol. 1, No. 3 European Review of International Studies, 110

Tan F., Zwanenburg M., 'One Step Forward, Two Steps Back? Georgia v. Russia (II), European Court of Human Rights, Appl no 38263/08' (2021) Melbourne Journal of International Law, 136

**Other Resources**

Parliamentary Assembly of the Council of Europe (35th Sitting) Resolution 1633 (2008), The consequences of the war between Georgia and Russia, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17681> accessed on 5 March 2022

European Union, Statement by the Spokesperson on the case of Georgian citizen Vazha Gaprindashvili (2019) <www.eeas.europa.eu/eeas/statement-spokesperson-case-georgian-citizen-vazha-gaprindashvili_en> accessed on 25 May 2022