Israel Law Review **55**(2) 2022, pp 145–177.
doi:10.1017/S0021223721000261

The 2021 ECtHR Decision in *Georgia v Russia (II)* and the Application of Human Rights Law to Extraterritorial Hostilities

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First published online on 25 March 2022

This article discusses the findings of the European Court of Human Rights in the 2021 case of Georgia v Russia (II) *in relation to the applicability of the European Convention on Human Rights to the conduct of hostilities. The article describes the arguments advanced by the Court to support the idea that the Convention does not apply to extraterritorial hostilities in an international armed conflict. In the light of past decisions, international humanitarian law, international human rights law, and the law of the treaties, it is argued that the Court's conclusion is unconvincing and the arguments seem to be based on extralegal considerations, rather than on a sound interpretation of the notion of state jurisdiction under the Convention.*

Keywords: conduct of hostilities, European Convention on Human Rights, European Court of Human Rights, extraterritorial application of human rights, right to life

1. Introduction

This article analyses the findings of the European Court of Human Rights (ECtHR or the Court) in the 2021 case of *Georgia v Russia (II)* in relation to the applicability of the European Convention on Human Rights (ECHR or the Convention) to the conduct of the hostilities.[1]

The *Georgia v Russia (II)* judgment addresses some alleged violations of the ECHR that occurred in the context of the 2008 armed conflict between Georgia and Russia.[2] As a result of this armed conflict, Russia gained control of the self-proclaimed independent republics of South Ossetia and Abkhazia, which, nonetheless, are seen by the international community as areas under Russian occupation.[3] The armed conflict resulted in some 850 deaths, with many

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[1] ECtHR, Grand Chamber, *Georgia v Russia (II)*, App no 38263/08, 21 January 2021.
[2] For an international law analysis of this conflict see, eg, Christine Gray, 'The Conflict in Georgia – 2008' in Tom Ruys and Olivier Corten (eds), *The Use of Force in International Law: A Case-based Approach* (Oxford University Press 2018) 712.
[3] On the declarations of independence see Olivier Corten, 'Déclarations unilatérales d'indépendance et reconnaissances prématurées: du Kosovo à l'Ossétie du sud et à l'Abkhazie' (2008) 112 *Revue Générale de Droit International Public* 721; Antonello Tancredi, 'Neither Authorized nor Prohibited? Secession and International Law after Kosovo, South Ossetia and Abkhazia' (2008) 18 *Italian Yearbook of International Law* 37. On the status

more wounded or missing, over 100,000 displaced persons who fled their homes, and around 35,000 of whom are still unable to return.[4] The 2021 decision of the ECtHR is just one element of a wider involvement of international courts in the assessment of the legality of the conflict.[5]

Georgia brought a case against Russia utilising the interstate procedure under Article 33 of the Convention,[6] alleging that Russia and/or the separatist forces placed under Russian control had engaged in administrative practices,[7] attacking civilians and their property in Georgia, amounting to violations of Articles 2, 3, 5, 8 and 13 of the Convention, Articles 1 and 2 of Protocol No 1, and Article 2 of Protocol No 4.[8] To resolve the case, the Court considered that it was necessary to draw a distinction between events that occurred before the ceasefire of 12 August 2008 and those that took place afterwards. In the Court's view, the ceasefire was a watershed between two different phases of the conflict: the 'active phase of the hostilities'[9] and the 'occupation'.[10] Moreover, the Court considered independently whether Russia exercised jurisdiction under Article 1 of the ECHR in relation to the treatment of civilian detainees,[11] the treatment of prisoners of war,[12] freedom of movement of displaced persons,[13] the right to education,[14] and the obligation to investigate deaths.[15]

This article focuses on the Court's rulings concerning jurisdiction during the 'active phase' of the hostilities, which, in the instant case, concerned alleged violations of the right to life under Article 2 of the Convention.[16] The present authors disagree with the reasoning of the Court, which is rife with inconsistencies and unpersuasive points. This article does not aim to demonstrate that the Court should have considered that the alleged violations of the right to life occurred in the framework of the exercise of state jurisdiction under Article 1 of the Convention – even if this could be one of the potential outcomes of more rigorous argumentation. The analysis

of these areas see Rule of Law in Armed Conflicts, 'Military Occupation of Georgia by Russia', 22 February 2021, https://www.rulac.org/browse/conflicts/military-occupation-of-georgia-by-russia#collapse2accord.

[4] *Georgia v Russia (II)* (n 1) para 32.

[5] See, eg, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, Preliminary Objections [2011] ICJ Rep 70; ICC, *Situation in Georgia, Decision on the Prosecutor's Request for Authorization of an Investigation*, ICC-01/15-12, 27 January 2016.

[6] On interstate cases before the Court see, generally, Isabella Risini, *The Inter-State Application under the European Convention on Human Rights* (Brill 2018). On the challenges posed by these kinds of application in relation to human rights and armed conflicts see Philip Leach, 'On Inter-State Litigation and Armed Conflict Cases in Strasbourg' (2021) 2 *European Convention on Human Rights Law Review* 27.

[7] Under ECtHR jurisprudence, an administrative practice consists of a repetition of acts in conjunction with official tolerance of practices which are incompatible with the guarantees of the Convention; see Kevin Boyle and Hurst Hannum, 'Individual Applications under the European Convention on Human Rights and the Concept of Administrative Practice: The *Donnelly* Case' (1974) 68 *American Journal of International Law* 440.

[8] *Georgia v Russia (II)* (n 1) para 48.

[9] ibid para 110. The analysis of jurisdiction is ibid paras 105–44.

[10] This is the title of ibid Section V, which divides para 144 from para 145. For the analysis on jurisdiction see ibid paras 146–75.

[11] ibid paras 238–39.

[12] ibid paras 268–70.

[13] ibid paras 292–94.

[14] ibid para 312.

[15] ibid paras 329–31.

[16] For a critique of *all* of the findings on jurisdiction, see Marko Milanovic, '*Georgia v Russia No 2*: The European Court's Resurrection of *Bankovic* in the Contexts of Chaos', *EJIL: Talk!*, 25 January 2021, https://www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos.

https://doi.org/10.1017/S0021223721000261 Published online by Cambridge University Press

presented here scrutinises the correctness of the Court's reasoning, with the hope of stimulating the Court to adopt more persuasive arguments in the future. Specifically, it is argued that the reasoning of the Court, whereby the ECHR does not apply to extraterritorial conduct of hostilities in an international armed conflict (IAC), contradicts the previous jurisprudence of the ECtHR and that of other international courts and quasi-judicial bodies. Some of the reasons offered by the majority of the Court do not withstand closer scrutiny; rather, they are problematic under international human rights law (IHRL), international humanitarian law (IHL) and public international law in general.

The decision of the ECtHR in the 2021 *Georgia v Russia (II)* case is extremely important not only for the specific situation before the Court, but because it establishes the non-applicability of the ECHR to extraterritorial hostilities in IACs, marking a turning point in the progressive involvement of the ECtHR in armed conflict scenarios.[17] The consequences of this decision may be particularly serious because they pertain to the application of the right to life in armed conflict, a topic in relation to which the ECtHR has offered significant contribution in the past.[18] Although the hostilities lasted for only four days in the instant case, the same reasoning could be applied to protracted hostilities, with many more casualties; in other words, the Court may have inadvertently decided that the Convention will not apply to World War Three, if such a horrible armed conflict generates cross-border hostilities in the territory of the contracting states.

While IHL offers some basic protection of the right to life that would be applicable in this context,[19] the regulation of the right to life under IHL and IHRL is different: whereas IHL protects the right to life on the basis of the status of the individuals involved (for example, combatants can be killed, civilians cannot), IHRL allows limitations on the right to life on the basis of the threat posed by one individual to another (for example, deprivation of life is permitted for personal self-defence if the defence is necessary and proportionate to the threat).[20] Moreover, IHL is a body of law characterised by weak institutionalised enforcement.[21]

[17] See, eg, EComHR, *Cyprus v Turkey*, App nos 6780/74 and 6950/75, 10 July 1976; ECtHR, *Ergi v Turkey*, App no 23818/94, 18 July 1998; ECtHR, *Isayeva v Russia*, App no 57950/00, 24 February 2005; ECtHR, *Al-Skeini and Others v United Kingdom*, App no 55721/07, 7 July 2011.

[18] See, eg, the analysis offered by Gloria Gaggioli and Robert Kolb, 'A Right to Life in Armed Conflicts? The Contribution of the European Court of Human Rights' (2007) 37 *Israel Yearbook on Human Rights* 115; Gloria Gaggioli, *L'influence mutuelle entre les droits de l'homme et le droit international humanitaire à la lumière du droit à la vie* (Pedone 2013); Marco Pedrazzi, 'La protezione del diritto alla vita tra diritto internazionale umanitario e tutela internazionale dei diritti umani' in Adriana Di Stefano and Rosario Sapienza (eds), *La tutela dei diritti umani e il diritto internazionale* (Editoriale Scientifica 2012) 79; Ian Park, *The Right to Life in Armed Conflict* (Oxford University Press 2018); Stuart Wallace, *The Application of the European Convention on Human Rights to Military Operations* (Cambridge University Press 2019).

[19] On the interplay between IHL and IHRL protection see Section 6.1 below.

[20] Charles Garraway, 'Occupation Responsibilities and Constraints' in Howard M Hensel (ed), *The Legitimate Use of Military Force* (Ashgate 2008) 263, 277.

[21] M Cherif Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) 59 *Law & Contemporary Problems* 9, 13–18. For an overview see Silja Vöneky, 'Implementation and Enforcement of International Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (4th edn, Oxford University Press 2021) 690.

https://doi.org/10.1017/S0021223721000261 Published online by Cambridge University Press

The mechanisms of enforcement of IHRL are more effective than those of IHL, which has been a key driver behind victims taking cases to bodies such as the ECtHR.[22] From a victim's perspective, applying the human right to life to the conduct of hostilities is more favourable than applying IHL alone.[23] The Court should therefore present a strong case for the non-applicability of the Convention in this context, and the following sections explore this in more detail.

This article focuses on the interpretation of jurisdiction under Article 1 of the ECHR and the related issue of the extraterritorial application of the Convention, on the interplay between the ECHR and IHL in armed conflict, and on the right to life in the conduct of hostilities. As these issues have received exhaustive coverage in international scholarship, they are addressed here only to scrutinise the specific reasoning offered in this decision.

The article is structured as follows. Section 2 outlines the Court's reasoning on state jurisdiction in this judgment. Section 3 examines the grounds for jurisdiction relied on by the ECtHR in the judgment. Section 4 looks at the Court's use of the case of *Bankovic v Belgium and Others* in this judgment and, in particular, the idea of Convention space alluded to in *Bankovic*. Section 5 challenges some of the Court's logic and explores inconsistencies in the ruling on jurisdiction. Section 6 looks at how the judgment sits within the body of international law more generally: exploring global trends in international law, the relevance of the *lex specialis* principle, the application of concepts from IHL in the judgment, and how the wider rules on treaty interpretation should apply. Section 7 criticises the impact that non-legal considerations appeared to have on the outcome of the judgment. Section 8 summarises the conclusions of the article.

2. The Reasoning of the Majority on State Jurisdiction During the 'Active Phase' of Hostilities

A central point of controversy in the *Georgia v Russia (II)* case relates to the Court's findings in relation to Russian jurisdiction under Article 1 during the active phase of hostilities *before* a ceasefire was declared between the parties.[24] The fact that Russia exercised jurisdiction after the ceasefire is not particularly controversial, as it fits squarely within past case law on the applicability of the Convention in similar cases where a contracting state exercises territorial control akin to belligerent occupation in another contracting state;[25] although the Court usually refrains

[22] Wallace (n 18) 2–3.

[23] See, generally, Jean-Marie Henckaerts, 'Concurrent Application of International Humanitarian Law and Human Rights Law: A Victim Perspective' in Roberta Arnold and Noëlle Quénivet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Brill 2008) 237.

[24] Milanovic (n 16); Helen Duffy, '*Georgia v Russia*: Jurisdiction, Chaos and Conflict at the European Court of Human Rights', *Just Security*, 2 February 2021, https://www.justsecurity.org/74465/georgia-v-russia-jurisdiction-chaos-and-conflict-at-the-european-court-of-human-rights; Jessica Gavron and Philip Leach, 'Damage Control after *Georgia v Russia (II)* – Holding States Responsible for Human Rights Violations during Armed Conflict', *Strasbourg Observers*, 8 February 2021, https://strasbourgobservers.com/2021/02/08/damage-control-after-georgia-v-russia-ii-holding-states-responsible-for-human-rights-violations-during-armed-conflict.

[25] See, eg, ECtHR, *Loizidou v Turkey*, App no 15318/89, 18 December 1996, para 62; ECtHR, *Cyprus v Turkey*, App no 25781/94, 10 May 2001, para 76; ECtHR, *Chiragov and Others v Armenia*, App no 13216/05, 16 June

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from referring explicitly to the IHL concept of belligerent occupation, the two situations are in fact similar.[26] More problematic are the findings in relation to the active phase of hostilities.

At the outset, the Court recalled that 'jurisdiction' under the Convention is a 'threshold criterion', meaning that the exercise of state jurisdiction is a precondition for the applicability of the Convention and, thus, for responsibility in relation to violations of the Convention.[27] Article 1 of the ECHR states that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms' of the Convention. The Court gives the impression that the interpretation of the notion of 'jurisdiction' is today well established in case law.[28] The Court affirms that state jurisdiction is primarily territorial but that, in certain specific circumstances, a state can exercise extraterritorial jurisdiction.[29] These circumstances are divided by the Court into two main groups. The first includes the exercise of extraterritorial 'state agent authority and control over individuals' (sometimes referred to as 'personal jurisdiction' or 'SAA jurisdiction'). This type of jurisdiction arises where the state agents of a contracting state exercise authority and control over an individual abroad. It arises typically in diplomatic contexts where diplomatic and consular agents exercise control over individuals on the territory of another state.[30] The other main circumstance where this jurisdiction arises occurs where state agents from a contracting state to the Convention travel to another state, which is not party to the Convention, to capture and return an individual to face trial or be detained in the contracting state. Thus, when Italian agents arrested Franco Freda in Costa Rica and flew him back to Italy, he was considered 'from the time of being handed over in fact under the authority of Italy and thus within the "jurisdiction" of that country, even if this authority was in the circumstances exercised abroad'.[31]

The second ground for extraterritorial jurisdiction under Article 1 is the exercise of 'effective control over an area' (sometimes referred to as 'spatial jurisdiction' or

2015, paras 168–69; ECtHR, *Ukraine v Russia*, App nos 20958/14 and 38334/18, 16 December 2020, paras 335 and 349. See also *Al-Skeini v United Kingdom* (n 17).

[26] See the discussion in Natia Kalandarishvili-Mueller, *Occupation and Control in International Humanitarian Law* (Routledge 2020).

[27] *Georgia v Russia (II)* (n 1) para 130.

[28] On this notion, see, eg, Pasquale De Sena, *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo* (Giappichelli 2002); William A Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 84–113.

[29] *Georgia v Russia (II)* (n 1) paras 131–32. On the extraterritorial application of IHRL see, generally, Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011); Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (2012) 25 *Leiden Journal of International Law* 857; Karen Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Brill 2012); Simone Vezzani, 'Considerazioni sulla giurisdizione extraterritoriale ai sensi dei trattati sui diritti umani' (2018) 101 *Rivista di diritto internazionale* 1086; Conall Mallory, *Human Rights Imperialists: The Extraterritorial Application of the European Convention on Human Rights* (Hart 2019); Lea Raible, *Human Rights Unbound: A Theory of Extraterritoriality* (Oxford University Press 2020); Yuval Shany, 'The Extraterritorial Application of International Human Rights Law' (2020) 409 *Recueil des cours de l'Acadmie de droit international de La Haye* 17.

[30] See, eg, ECtHR, *WM v Denmark*, App no 17392/90, 14 October 1992.

[31] EComHR, *Freda v Italy*, App no 8916/80, 7 October 1980; see also ECtHR, *Reinette v France*, App no 14009/88, 2 October 1989; ECtHR, *Sanchez Ramirez v France*, App no 28780/95, 24 June 1996; ECtHR, *Ocalan v Turkey (Merits)*, App no 46221/99, 12 May 2005.

'ECA jurisdiction').[32] This type of jurisdiction arises where the contracting state exercises control over an area or piece of territory outside its normal home territory. The paradigmatic example of this type of jurisdiction is the control exercised by Turkey over Northern Cyprus. In the 1970s, Turkey invaded and occupied a piece of territory in Northern Cyprus and later established a local administration: the Turkish Republic of Northern Cyprus. When cases challenging human rights violations within the territory were brought before the European Court of Human Rights, Turkey denied that its agents were exercising jurisdiction, claiming that the acts fell within the jurisdiction of the Turkish Republic of Northern Cyprus and were attributable to its agents.[33] The Court ultimately ruled that Turkey was exercising jurisdiction in the area, stating that:[34]

> the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.

The ECtHR has previously identified several indicators of effective control.[35] These include the strength of the state's military presence in the area,[36] whether a large number of troops were deployed there on active duty,[37] whether the territory was patrolled by the state with checkpoints on main lines of communication,[38] whether the troops had been deployed for a long time,[39] and whether the state had created and supported a subordinate local administration in the territory.[40] The Court is more cautious in relation to a third ground of extraterritorial jurisdiction, which is often referred to as 'cause and effect jurisdiction' (or 'instantaneous act jurisdiction'). This type of jurisdiction could arise, for example, where a state agent fires a weapon or missile outside the state's territory. The question of whether jurisdiction under Article 1 should arise in this context has dogged the ECtHR for almost 20 years. As explained further below,[41] other jurisdictions have taken a relatively straightforward approach to this. The Inter-American Commission on Human Rights considers this as part of personal jurisdiction, ruling that when a Cuban military aircraft shot down a civilian craft in international airspace, the act of firing was an exercise of authority for the purposes of personal jurisdiction.[42] The Human Rights Committee has observed that state parties have an obligation to respect and ensure the rights of all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any

[32] *Georgia v Russia (II)* (n 1) paras 138–39.
[33] ECtHR, *Loizidou v Turkey (Preliminary Objections)*, App no 15318/89, 23 March 1995, para 47.
[34] ibid para 62.
[35] Wallace (n 18) 67.
[36] *Al-Skeini v United Kingdom* (n 17) para 139.
[37] *Loizidou v Turkey* (n 33) para 56.
[38] ibid para 16.
[39] ECtHR, *Issa and Others v Turkey*, App no 31821/96, 16 November 2004, para 75.
[40] ECtHR, *Ilascu and Others v Moldova and Russia*, App no 48787/99, 8 July 2004, para 388.
[41] Section 6.1.
[42] IAComHR, *Alejandre v Cuba*, Report, No 86/99, 29 September 1999, para 25.

https://doi.org/10.1017/S0021223721000261 Published online by Cambridge University Press

territory effectively controlled by the state, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner.[43]

By contrast, the approach of the ECtHR has been anything but straightforward. In cases like *Bankovic v Belgium and Others* and *Medvedyev v France*, the Court has maintained that extraterritorial cause and effect-type jurisdiction was not recognised under Article 1.[44] However, there has been a surfeit of countervailing authority over the years in cases such as *Pad v Turkey*,[45] *Issa v Turkey*,[46] *Andreou v Turkey*[47] and, most recently, *Carter v Russia*.[48] The Court has also entertained cause and effect-type jurisdiction in circumstances where the state also exercises some (but not all) public powers in an area,[49] or limited territorial control, such as over a checkpoint.[50] In *Georgia v Russia (II)* the Court again rejects the notion that jurisdiction under the Convention can arise on the basis of a 'cause and effect' relationship between a state's conduct and its effects on the rights of an individual.[51] Accordingly, the Court describes the two well-established grounds for extraterritorial jurisdiction – state agent authority and control over individuals, and effective control over an area – and moves on to apply them to the armed conflict between Georgia and Russia.

As mentioned above, the Court divides the armed conflict in Georgia into two temporally distinct phases: before the ceasefire of 12 August 2018 and after the ceasefire. In relation to the former, the Court presents detailed reasoning to demonstrate that state jurisdiction does not exist during the active phase of the hostilities in an extraterritorial IAC. According to the Court:[52]

> [I]n the event of military operations – including, for example, armed attacks, bombing or shelling – carried out during an international armed conflict one cannot generally speak of 'effective control' over an area. The very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos means that there is no control over an area. This is also true in the present case.

The Court maintains that during this phase of conflict, which is characterised by active hostilities, an area cannot be considered under the control of the invading belligerent.

[43] Human Rights Committee, General Comment No 36 (2018) on Article 6 of the ICCPR, on the Right to Life (30 October 2018), UN Doc CCPR/C/GC/36, para 63.
[44] ECtHR, *Medvedyev v France*, App no 3394/03, 29 March 2010, para 64; ECtHR, *Bankovic v Belgium*, App no 52207/99, 12 December 2001, para 73.
[45] ECtHR, *Pad v Turkey*, App no 60167/00, 28 June 2007.
[46] *Issa v Turkey* (n 39).
[47] ECtHR, *Andreou v Turkey*, App no 45653/99, 3 June 2008.
[48] ECtHR, *Carter v Russia*, App no 20914/07, 21 September 2021.
[49] *Al-Skeini v United Kingdom* (n 17).
[50] ECtHR, *Jaloud v The Netherlands*, App no 47708/08, 20 November 2014; ECtHR, *Pisari v Moldova and Russia*, App no 42139/12, 21 April 2015.
[51] *Georgia v Russia (II)* (n 1) paras 124 and 134.
[52] ibid para 126.

https://doi.org/10.1017/S0021223721000261 Published online by Cambridge University Press

From the Court's perspective, the conclusion that jurisdiction cannot arise from effective control of an area means that it can arise only if extraterritorial state agent authority and control over individuals is proven.[53] In performing this assessment, the Court excludes the possibility that a purely causal relationship between state conduct and its extraterritorial effects is enough to establish jurisdiction under Article 1.[54] The Court considers that in its past case law 'the decisive factor in establishing "state agent authority and control" over individuals outside the state's borders was the exercise of physical power and control over the persons in question'.[55] When 'the Court has applied the concept of 'state agent authority and control' over individuals to scenarios going beyond physical power and control exercised in the context of arrest or detention',[56] the situations were different from *Georgia v Russia (II)*: 'those cases concerned isolated and specific acts involving an element of proximity'.[57] As a result, the Court assumes that, absent any reason to depart from its past case law,[58] it has to acknowledge that:[59]

> [T]he conditions it has applied in its case-law to determine whether there was an exercise of extraterritorial jurisdiction by a state have not been met in respect of the military operations that it is required to examine in the instant case.

This conclusion is based on the fact that:[60]

> [T]he 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.

The Court advances another element in support of its conclusion, based on the lack of practice in relation to derogations under Article 15 of the Convention in situations where they have engaged in an IAC outside their own territory. According to the Court, 'this may be interpreted as the High Contracting Parties considering that in such situations, they do not exercise jurisdiction within the meaning of Article 1 of the Convention'.[61] Moreover, the Court adds that the instant case cannot be seen as an opportunity to expand its case law on jurisdiction because of 'the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances and the fact that such situations are predominantly regulated by legal norms other than those of the Convention (specifically, international humanitarian law or the law of armed conflict)'.[62] Accordingly, the Court cannot decide whether alleged

[53] ibid para 127.
[54] ibid paras 128 and 134.
[55] ibid para 130.
[56] ibid para 131.
[57] ibid para 132.
[58] ibid para 136.
[59] ibid para 138.
[60] ibid para 137.
[61] ibid para 139.
[62] ibid para 141.

https://doi.org/10.1017/S0021223721000261 Published online by Cambridge University Press

violations of the Convention occurred in the active phase of the hostilities as the respondent state, in that phase, was not bound by the Convention.

The following subsections scrutinise these findings to assess their soundness under international law. These authors respectfully argue that the Court did not provide persuasive arguments to support its conclusions.

3. PRESENTING A FALSE DICHOTOMY ON THE GROUNDS FOR EXTRATERRITORIAL JURISDICTION UNDER THE CONVENTION

The Court presents a false dichotomy concerning extraterritorial jurisdiction, which in its view is either (i) state agent authority (SAA), or (ii) effective control over an area (ECA). *Tertium non datur*. The Court stresses that the extraterritorial IAC at hand presents unique features that make it impossible to apply the notion of jurisdiction elaborated in the Court's previous jurisprudence.[63] Assuming that the circumstances of this case really are different from those addressed by past case law,[64] and that there is no alternative outside the dichotomy between 'state agent authority and control over individuals' and 'effective control over an area', the attempt to fit the armed conflict in Georgia into one of these two categories might have ended in considering the situation outside the scope of application of the Convention.

However, these two categories are exemplifications of jurisdictional grounds created by the Court itself in its previous jurisprudence in the context of the situations it was asked to address. Nothing prevents the Court from considering that extraterritorial jurisdiction can exist in other situations if different scenarios were to be brought before the Court.[65] Indeed, the ECtHR has identified several other contexts where jurisdiction can arise beyond ECA and SAA jurisdiction in its previous jurisprudence, as we noted with 'cause and effect' jurisdiction above.

In *Al-Saadoon v United Kingdom*, for example, when the ECtHR held that the UK was exercising jurisdiction over the applicants who were detained in a UK military base in Iraq, the Court did not rely on either SAA or ECA jurisdiction to reach this conclusion. Instead, the court held that because the applicants were being held in a military base controlled by the UK:[66]

> The Court considers that, given the total and exclusive de facto, and subsequently also de jure, control exercised by the United Kingdom authorities over the premises in question, the individuals detained there, including the applicants, were within the United Kingdom's jurisdiction.

Although it is possible to consider that the premises in question are a small portion of territory over which the UK exercised effective control, the Court did not rely on the ECA ground of

[63] ibid para 138.
[64] See the remarks by Gavron and Leach (n 24).
[65] Some judges argue for a similar approach to jurisdiction under the ECHR: see *Georgia v Russia (II)* (n 1) jointly partially dissenting opinion of Judges Yudkivska, Wojtyczek and Chanturia, paras 6–8.
[66] ECtHR, *Al-Saadoon v United Kingdom*, App no 61498/08, 4 October 2010, para 88.

https://doi.org/10.1017/S0021223721000261 Published online by Cambridge University Press

jurisdiction, applying a novel de facto control over premises approach, which is clearly different from a situation of extraterritorial control akin to that exercised by an occupying power.

More complex, but still relevant, is the situation in *Al-Skeini v United Kingdom*. In that case six Iraqi civilians, who were relatives of people who had died in Iraq in 2003 when the UK was in belligerent occupation of part of Iraq, brought a case against the UK. British soldiers were involved in various ways in the deaths of their relatives: for example, one was shot by British soldiers on patrol, another was shot during a raid on a house. The relatives demanded that the UK carry out an effective investigation into the deaths of their relatives. On the issue of jurisdiction, even though the UK was a supposed belligerent occupier of Iraq, the ECtHR did not consider whether ECA jurisdiction arose over the territory under its control. Nor did the Court apply the SAA approach as an alternative because it considered that the exercise of state agent authority on its own was not sufficient to ground jurisdiction. Instead, the Court held that jurisdiction arises when a contracting state 'exercises all or some of the public powers normally to be exercised [by the government of the state]',[67] and within that context, its agents exercise authority and control over a person. The Court effectively created a middle ground between ECA jurisdiction and SAA jurisdiction in this case.[68] It is worth noting that SAA jurisdiction was equated with 'cause and effect' jurisdiction in this specific context because, as the Court states:[69]

> the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom.

As such, jurisdictional links arose from the British soldiers shooting Iraqis as distinct from the traditional SAA paradigm where someone is taken into custody.

Even if the *Al-Saadoon* and *Al-Skeini* cases are factually different from the *Georgia v Russia (II)* case, they demonstrate that in *Georgia v Russia (II)* the Court unjustly contends that ECA and SAA jurisdiction are the only games in town, when in fact other grounds for jurisdiction have been entertained in the past. The Court could have applied its reasoning in *Al-Skeini* to *Georgia v Russia (II)*, determining whether Russia was exercising public powers in the invaded areas, albeit only for a limited period of time, and then applying Article 2 as necessary, depending on this finding. It would have been a more consistent approach. Instead, the dichotomy between SAA and ECA is not even applied consistently by the Court in the *Georgia v Russia (II)* case itself, with the Court observing that 'special circumstances' may exist to interpret extraterritorial jurisdiction differently: later, the conclusion that there was jurisdiction in relation to the duty to investigate alleged violations of the right to life under Article 2 was based on the existence of 'special features'.[70]

[67] *Al-Skeini v United Kingdom* (n 17) para 135.
[68] Wallace (n 18) 58–62.
[69] *Al-Skeini v United Kingdom* (n 17) para 149.
[70] *Georgia v Russia (II)* (n 1) para 330. For more on this, see Section 6.2 below.

https://doi.org/10.1017/S0021223721000261 Published online by Cambridge University Press

The Court's approach to extraterritorial jurisdiction has developed in an ad hoc and extemporaneous manner to date. As such, the sudden fidelity of the ECtHR to SAA and ECA jurisdiction as the only available grounds is unseemly. To present more convincing reasoning, the Court should have explained why the situation presented in *Georgia v Russia (II)* does not fall into the notion of jurisdiction outside the two exemplifications of 'state agent authority and control over individuals' and 'effective control over an area', or indeed why it could not apply its reasoning concerning the application of Article 2 from *Al-Skeini*. The two notions – 'state agent authority and control over individuals' and 'effective control over an area' – are not part of the text of the Convention. Rather, they are concrete examples of situations in which a state exercises extraterritorial jurisdiction. Nothing prevented the Court from presenting a new test that is relevant for new situations or, at least, explaining why this is not possible.[71]

4. CONVENTION SPACE

4.1. THE GHOST OF *BANKOVIC*

The way in which the Court justifies its position on jurisdiction based mainly on the 2001 *Bankovic* case[72] is also worthy of critique. Not only does the Court resurrect[73] a decision that was forcefully criticised by scholars and considered to be no longer relevant in the light of more recent case law[74] but, more egregiously, the Court misinterprets its own precedent.

The Court held in *Bankovic* that the bombing of the RTS building in Belgrade on 23 April 1999 by NATO forces was an act not carried out within the jurisdiction of contracting states to the Convention. The decisive factor in the Court's view was the consideration that the bombing occurred outside the legal space protected by the Convention. According to the Court:[75]

> [T]he Convention is a multi-lateral treaty operating … in an essentially regional context and notably in the legal space (*espace juridique*) of the contracting states. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of contracting states. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.

This notion of Convention space has been criticised,[76] but it served as the basis for the Court to rule out jurisdiction in the *Bankovic* case.

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[71] See, again, *Georgia v Russia (II)* (n 1) jointly partially dissenting opinion of Judges Yudkivska, Wojtyczek and Chanturia, paras 6–8. See also the views advanced in the past by De Sena (n 28) 135–39.
[72] *Bankovic v Belgium* (n 44).
[73] This expression is borrowed from Milanovic (n 16). Similarly, this case 'resuscitates' *Bankovic*, according to *Georgia v Russia (II)* (n 1) partially dissenting opinion of Judge Chanturia, para 14.
[74] See, eg, Vezzani (n 29) 1124; Mallory (n 29) 88–114; Park (n 18) 68; Wallace (n 18) 52–53.
[75] *Bankovic v Belgium* (n 44) para 80.
[76] See, eg, Matthew Happold, '*Bankovic v Belgium* and the Territorial Scope of the European Convention on Human Rights' (2003) 3 *Human Rights Law Review* 77; Ralph Wilde, 'The "Legal Space" or "Espace

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In *Georgia v Russia (II)*, by contrast, the armed conflict occurred entirely within the legal space of the Convention: not only are both Russia and Georgia parties to the Convention, but also all the military operations under scrutiny occurred on Georgian territory. It follows that the invocation of the *Bankovic* precedent in relation to the armed conflict between Georgia and Russia is not appropriate, as *Bankovic* focused on military operations *outside* Convention space.[77]

One could argue that the aforementioned staunch rejection of jurisdiction based on a 'cause and effect' relationship should have been applicable also in the case of hostilities within Convention space, and that this would be in line with *Bankovic*. Thus, if Russia bombed Georgia from Russian territory, under the Court's approach, Russian jurisdiction would not arise because the alleged victims would not fall within either SAA jurisdiction or ECA jurisdiction; so, why should the situation be different if the same acts of active hostilities were committed from within Georgian territory? Although this question would be entirely moot under a notion of jurisdiction based on a 'cause and effect' relationship, it is also not particularly relevant in the instant case: Russian troops physically entered Georgian territory – it was an invasion – and physically controlled individuals during the military advance, as demonstrated by the fact that both combatants and civilians were detained during the hostilities. One could argue that during this active phase of hostilities it may be difficult to establish a *territorial* control that is relevant under Article 1 of the Convention,[78] but this does not mean that the advancing army cannot establish *personal* control. The situations of an army advancing on land and aerial bombing are entirely different, especially considering the very traditional approach to territory and territorial control advanced by the *Bankovic* case.

For all of these reasons, the heavy reliance of the majority on *Bankovic* appears to be devoid of the decisive character that the majority attributes to it. Rather, the facts underpinning *Bankovic* were so different from those in *Georgia v Russia (II)* that *Bankovic* could be used to argue the opposite view: that Russian military operations in Georgia constituted a form of state jurisdiction because the relevant hostilities occurred *within* Convention space.[79]

4.2. Creating Legal Black Holes in Convention Space

The Court's judgment in *Georgia v Russia (II)* also confounds the logic of *Bankovic* because it actively creates legal black holes within Convention space. This subsection demonstrates why this is at odds with the previous jurisprudence of the Court.

Juridique" of the European Convention on Human Rights: Is it Relevant to Extraterritorial State Action?' (2005) 2 *European Human Rights Law Review* 115; Milanovic (n 29) 86–86; Vezzani (n 29) 122–26.

[77] *Georgia v Russia (II)* (n 1) partially dissenting opinion of Judge Chanturia, para 14.

[78] But see the somewhat similar discussion on whether certain rules on the law of occupation, which should be applicable only when effective control is established, may be applicable during invasion (eg, Michael Bothe, 'Effective Control during Invasion: A Practical View on the Application Threshold of the Law of Occupation' (2012) 94 *International Review of the Red Cross* 29, 37).

[79] See also *Georgia v Russia (II)* (n 1) partially dissenting opinion of Judge Grozev, 169–70.

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The idea of 'Convention space' is predicated on the assumption that the Convention applies across the de jure territory of all contracting states. While it is recognised that Russia was the defending state in this litigation, a central problem with the Court's approach to jurisdiction is that it considers the jurisdiction exclusively from the Russian perspective, affirming that Russia is not exercising jurisdiction because it is engaged in extraterritorial active hostilities. However, these hostilities are territorial events from Georgia's perspective. The Court's ruling precluding jurisdiction during 'the chaos' of active hostilities has knock-on effects. It calls into question whether the individuals in the conflict zone remained within Georgian jurisdiction during the conflict, or whether, contrary to a very long trend in the Court's jurisprudence, these people were neither within Russian nor Georgian jurisdiction at the time – they were in a legal black hole in Convention space.

To explore this issue, we must first understand that Georgia is presumed to exercise jurisdiction over its de jure territory. The Court previously ruled, in relation to the Ajarian Autonomous Republic in Georgia, that there is a presumption that integral parts of Georgian territory, subject to its competence and control, fall within its jurisdiction.[80] This presumption is rebuttable and, indeed, active hostilities can rebut the presumption.[81] The Court does not address whether people in the territory under attack remained within Georgian jurisdiction during the active hostilities phase. However, by determining that because there was an armed confrontation in the territory 'there is no "effective control" over an area',[82] the ECtHR implicitly undermined the presumption that Georgia continued to exercise jurisdiction there. This encourages both Georgia and Russia to deny they were exercising jurisdiction during active hostilities and creates a vacuum of human rights protection between contracting states that the Court has previously gone to great lengths to avoid.

The Court's previous case law shows that hostilities within Convention space do not dispel jurisdiction because the Court is careful to avoid legal black holes within Convention space. In *Isayeva v Russia*, for example, Russia had lost control over Grozny in Chechnya to Chechen insurgents, with the Court acknowledging that the situation 'called for exceptional measures by the state in order to regain control over the Republic and to suppress the illegal armed insurgency'.[83] However, the Court did not question Russia's jurisdiction over the territory despite the significant armed confrontation between the parties. Leaving aside the obvious point that the existence of active hostilities had no bearing on the issue of jurisdiction at all in this case (and suddenly became decisive in *Georgia v Russia (II)*), the case is noteworthy because the Court completely overlooks the obvious jurisdiction issue created by Russia's loss of control over Grozny. Where a secessionist entity lacks the support of another state, like the Chechen insurgents in *Isayeva*, it is typically not capable of rebutting the presumption that the de jure

[80] ECtHR, *Assanidze v Georgia*, App no 71503/01, 8 April 2004, para 139.
[81] *Ilascu v Moldova and Russia* (n 40) para 312.
[82] *Georgia v Russia (II)* (n 1) para 137.
[83] *Isayeva v Russia* (n 17) para 180.

https://doi.org/10.1017/S0021223721000261 Published online by Cambridge University Press

state continues to exercise jurisdiction.[84] The reason for this is the crucial point: if the Court had ruled that Russia was not exercising jurisdiction in *Isayeva*, this would have resulted in a vacuum of human rights protection. The Chechen insurgents were not recognised as a state and could not accede to the European Convention. As a result, victims of human rights violations within that territory would lose the protection of Convention rights. Russia's jurisdiction would have been removed and the Chechen insurgents would not be able to take its place. This is a situation which the ECtHR would obviously seek to avoid.

The Court has been at pains to prevent similar gaps in protection arising in several other cases. In the case of *Cyprus v Turkey*,[85] for example, the issue of jurisdiction over Northern Cyprus was being litigated again. The area was de jure part of Cypriot territory, but Cyprus had lost control over the territory to Turkish forces following an armed confrontation there in the 1970s. This led to both Turkey and Cyprus denying they exercised jurisdiction over the region. If the Court had accepted each side's position, there would be a gap in human rights protection between two contracting states. The Court held that Turkey was exercising jurisdiction there for the purposes of the Convention on the ground of its effective control over the area, and added:[86]

> [A]ny other finding would result in a regrettable vacuum in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the Convention's fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court.

The Court further explained its rationale for this position in the case of *Bankovic*, stating that:[87]

> the inhabitants of northern Cyprus would have found themselves excluded from the benefits of the Convention safeguards and system which they had previously enjoyed, by Turkey's 'effective control' of the territory and by the accompanying inability of the Cypriot Government, as a contracting state, to fulfil the obligations it had undertaken under the Convention.

Elsewhere, in the case of *Al-Skeini v United Kingdom*, the Court referred to the desire to avoid a 'vacuum' of protection within the 'legal space of the Convention'.[88]

Similarly, in the case of *Sargsyan v Azerbaijan*,[89] where a piece of disputed territory between Azerbaijan and Armenia was at issue, Azerbaijan claimed that the village of Gulistan was part of its territory and occupied the territory with its military forces; however, these forces were surrounded by Armenian forces. As a result, Azerbaijan claimed that, despite the village being

[84] Kjetil Mujezinovic Larsen, 'Territorial Non-application of the European Convention on Human Rights' (2009) 78 *Nordic Journal of International Law* 73, 82–83; Wallace (n 18) 32.
[85] *Cyprus v Turkey* (n 25).
[86] ibid para 78.
[87] *Bankovic v Belgium* (n 44) para 80.
[88] *Al-Skeini v United Kingdom* (n 17) para 142.
[89] *Sargsyan v Azerbaijan*, App no 40167/06, 14 December 2011.

https://doi.org/10.1017/S0021223721000261 Published online by Cambridge University Press

under its de facto control, it could not exercise jurisdiction over this area, which was 'rendered inaccessible by the circumstances'.[90] However, the Court ruled that Azerbaijan continued to exercise jurisdiction over the village, again referring to the Convention as 'a constitutional instrument of European public order', and that when Azerbaijan ratified the Convention 'the whole of its territory entered the "Convention legal space"'.[91] The Court concluded that:[92]

> in the present case it has not been established that Gulistan is occupied by the armed forces of another state or that it is under the control of a separatist regime. In such circumstances the Court, taking into account the need to avoid a vacuum in Convention protection, does not consider that the Government have demonstrated the existence of exceptional circumstances of such a nature as to qualify their responsibility under the Convention.

The Court's desire to avoid a vacuum in protection between two contracting states is manifest in all these cases. Yet, in *Georgia v Russia (II)* the ECtHR seems to have overturned this long trend in Strasbourg jurisprudence.[93] The precedents discussed here, along with the dictum in the *Issa and Others* case – in which the Court affirmed that 'Article 1 of the Convention cannot be interpreted as to allow a state party to perpetrate violations of the Convention on the territory of another state, which it could not perpetrate on its own territory'[94] – warranted more attention from the majority.[95] The Court arguably has created a vacuum of human rights protection between two contracting states in the case of *Georgia v Russia (II)* by ruling that Russia did not exercise jurisdiction during the active hostilities phase of the conflict and contending that jurisdiction could not exist during the chaos of active hostilities.

5. THE COURT'S LOGIC IN *GEORGIA V RUSSIA (II)*

This section explores the logic of the Court's judgment as it relates to the issue of Russian jurisdiction during the active phase of hostilities. As noted above, the ECtHR claimed that neither SAA jurisdiction nor ECA jurisdiction can exist during the active hostilities phase in relation to alleged violations of the right to life. However, the Court went on to reach findings that imply that some jurisdiction must have been exercised by Russia in relation to other rights.

5.1. JURISDICTION OVER PRISONERS OF WAR AND CIVILIAN DETAINEES

A good example of Russia exercising jurisdiction in the *Georgia v Russia (II)* judgment is the treatment of prisoners of war (POWs) and civilian detainees. At its core, extraterritorial

[90] ibid para 146.
[91] ibid para 147.
[92] ibid para 148.
[93] See *Georgia v Russia (II)* (n 1) partially dissenting opinion of Judge Grozev, 171.
[94] *Issa v Turkey* (n 39) para 71.
[95] See the discussion in *Georgia v Russia (II)* (n 1) partially dissenting opinion of Judge Chanturia, paras 10–14.

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jurisdiction under the ECHR is intended to correlate with the exercise of factual control over people or territory.[96] Thus, creating any blanket exclusion of jurisdiction during active hostilities risks frustrating the connection between factual control and jurisdiction, because states will inevitably exercise factual control over people during the active hostilities phase of a conflict. The Court has previously addressed a number of cases where states have detained people extraterritorially,[97] even specific cases of POWs.[98] In these cases the detainees fell within the jurisdiction of the state from the moment they were detained – that is, the point when they fell within factual control of the state. The Court clearly states this in respect of a POW in the case of *Hassan v United Kingdom*, which concerned the detention of a POW in Iraq initially before the UK entered into occupation of the territory. The Court stated that:[99]

> following his capture by British troops early in the morning of 23 April 2003, until he was admitted to Camp Bucca later that afternoon, Tarek Hassan was within the physical power and control of the United Kingdom soldiers and therefore fell within United Kingdom jurisdiction.

A central question stemming from the *Georgia v Russia (II)* judgment will be at what point do POWs fall within the jurisdiction of the state and acquire protection under human rights law if the state is supposed to be incapable of exercising jurisdiction during the active hostilities phase of conflict? In *Georgia v Russia (II)* the ECtHR completely confuses the situation. Per *Hassan*, detainees should come within the jurisdiction of the state from the point they are captured by the contracting state. Yet, the Court contends that jurisdiction cannot exist during the 'chaos' of the active hostilities phase of the conflict.[100] This is where the binary active hostilities/occupation distinction starts to crumble, because the Court observes that Georgian POWs were detained between 8 August and 17 August 2008,[101] which would mean that they were detained during both the active hostilities phase of conflict (from 8 to 12 August) and the occupation phase (12 to 17 August). One would expect, if the ECtHR were being consistent, that those captured during the active hostilities phase would not be within the jurisdiction of the state until the ceasefire was agreed and those captured during the occupation phase would fall within Russian jurisdiction. Yet, the ECtHR states that 'given that they were detained, inter alia, after the cessation of hostilities, the Court concludes that they fell within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention'.[102]

[96] *Al-Skeini v United Kingdom* (n 17) para 136. See also Michael Duttwiler, 'Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights' (2012) 30 *Netherlands Quarterly of Human Rights* 137, 139–41; Wallace (n 18) 24.
[97] See, eg, ECtHR, *Ocalan v Turkey*, App no 57175/00, 28 January 2003; *Medvedyev v France* (n 44). On this topic see generally Federica Favuzza, *Security Detention in Times of Armed Conflict: The Relevance of International Human Rights Law* (CEDAM 2018).
[98] ECtHR, *Hassan v United Kingdom*, App no 29750/09, 16 September 2014.
[99] ibid para 76.
[100] *Georgia v Russia (II)* (n 1) para 126.
[101] ibid para 268.
[102] ibid para 269.

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Thus, in some of the cases, despite POWs being detained *during* the active hostilities phase, because their detention continued *after* the cessation of hostilities they were deemed to fall within the jurisdiction of the state for the entire duration. The arbitrariness is palpable. The fact that some POWs are considered to fall within the jurisdiction of the state and that the ECtHR is not drawing a distinction between whether they were detained during the active hostilities or occupation phases, means that Russia must be exercising some jurisdiction over the POWs during the active hostilities phase, undermining the claim of the ECtHR that states cannot exercise jurisdiction during the active hostilities phase. It is, in effect, creating an exception for POWs.

5.2. JURISDICTION AND THE PROTECTIVE LIMBS OF ARTICLE 2

The lack of follow-through in distinguishing between active hostilities and occupation for the purposes of jurisdiction is also evident in respect of the right to life. The previous jurisprudence of the ECtHR has separated the substantive obligations (which revolve around protecting individuals) in Article 2 (the right to life) from the procedural obligations (which revolve around investigating deaths and life-threatening injuries).[103] The ECtHR contends, in *Georgia v Russia (II)*, not only that procedural and substantive obligations under Article 2 are distinct, but also that jurisdiction in relation to them can exist separately. Indeed, the Court affirmed that the procedural obligations in Article 2 continue to apply during the active hostilities phase of the conflict in circumstances where the substantive obligations do not,[104] which creates further inconsistencies in the logic of the judgment.

The Court correctly acknowledges that jurisdiction is a threshold criterion, a pre-condition for the applicability of Convention obligations.[105] Thus, if there is no jurisdiction, the state does not owe any obligations. Yet, equally for obligations to apply, there must be jurisdiction. This clearly calls into question the Court's ruling on Russian jurisdiction during the active hostilities phase. If the rationale is that Russia cannot exercise any control and therefore Russia is not exercising any jurisdiction, the logical consequence is that the state cannot owe any obligations under the Convention – procedural or substantive. Yet, the procedural obligations in respect of the right to life under the ECHR continue to apply. This conclusion can be supported only by the assertion that the state must be exercising jurisdiction for those obligations to arise. Thus, if the ECtHR has ruled that the procedural obligations subsist, the state must be exercising jurisdiction and other obligations under the Convention should also be owed.

[103] See, eg, ECtHR, *Šilih v Slovenia*, App no 71463/01, 9 April 2009, para 159. The separation is open to criticism, not least because the entire *raison d'être* of the procedural obligation has been to give meaningful effect to the substantive obligations (ECtHR, *Nachova and Others v Bulgaria*, App nos 43577/98 and 43579/98, 6 July 2005, para 110) and the clarity of the separation is far from easy to understand (see the opinion of Lord Phillips of the British Supreme Court, who described the ECtHR ruling that separates the procedural and substantive obligations as 'totally Delphic' in *Re McCaughey* [2011] UKSC 20, [49]).

[104] *Georgia v Russia (II)* (n 1) paras 329–32.

[105] ibid para 129. See also *Ilascu v Moldova and Russia* (n 40) para 312; Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 *Human Rights Law Review* 411, 415.

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Extraneous acts of the Court also call into question the consistency of the approach of the majority to both procedural and substantive obligations. The Court has issued interim measures pertaining to a number of armed conflicts between contracting states, such as between Georgia and Russia, the armed conflict in Ukraine, and the recent armed conflict in the Nagorno-Karabakh.[106] The issuing of these interim measures, which call on the parties to comply with their engagements under the Convention in respect of Article 2, further undermine the Court's position. If, as stated in *Georgia v Russia (II)*, the Convention is inapplicable to the active phase of hostilities, why should states heed and implement interim measures purporting to safeguard Convention rights in situations of active hostilities?[107]

6. *GEORGIA V RUSSIA (II)* AND INTERNATIONAL LAW

6.1. THE GLOBAL TREND ON THE APPLICATION OF HUMAN RIGHTS IN ARMED CONFLICT

The judgment under scrutiny also marks a significant departure from trends in international law, and even the ECtHR's own recent case law, towards continuing to apply IHRL during armed conflicts and attempting to reconcile any clashes between IHL and IHRL that may arise. Since a great deal has been written on this rapprochement by both scholars and international bodies, suffice it to say that there is a solid consensus on the contextual application of IHL and IHRL, and on applying systemic integration under Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT)[108] to resolve normative conflicts.[109]

[106] See, eg, ECtHR, 'The Court Grants an Interim Measure in the Case of *Armenia v Azerbaijan*', Press Release ECHR 265 (2020), 30 September 2020 ('the Court called upon both Azerbaijan and Armenia to refrain from taking any measures, in particular military action, which might entail breaches of the Convention rights of the civilian population, including putting their life and health at risk, and to comply with their engagements under the Convention, notably in respect of Article 2 (right to life) and Article 3 (prohibition of torture and inhuman or degrading treatment or punishment) of the Convention').

[107] The contradiction is noted by Isabella Risini, 'Human Rights in the Line of Fire: *Georgia v Russia (II)* before the European Court of Human Rights', *Verfassungsblog*, 28 January 2021, https://verfassungsblog.de/human-rights-in-the-line-of-fire; Kanstantsin Dzehtsiarou, '*Georgia v Russia (II)*, Merits. App. No. 38263/08' (2021) 115 *American Journal of International Law* 288, 293.

[108] Vienna Convention on the Law of Treaties (entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

[109] See, in a vast scholarship, David Kretzmer, Rotem Giladi and Yuval Shany (eds), *Special Issue on: International Humanitarian Law and International Human Rights Law* (2007) 40 *Israel Law Review* 306; Françoise Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body' (2008) 90 *International Review of the Red Cross* 549; Arnold and Quénivet (eds) (n 23); Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (Oxford University Press 2011); Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2014); Gilles Giacca, *Economic, Social and Cultural Rights in Armed Conflict* (Oxford University Press 2014); Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015); Darragh Murray and others (eds), *Practitioners' Guide to Human Rights Law in Armed Conflict* (Oxford University Press 2016). The authors of the present article have commented on some of these issues in Marco Longobardo, *The Use of Armed Force in Occupied Territory* (Cambridge University Press 2018) 62–80, 261–68; Wallace (n 18).

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The ICJ has made a number of rulings in this regard. In the *Nuclear Weapons* Advisory Opinion, for example, the ICJ held that the right to life under the International Covenant on Civil and Political Rights (ICCPR)[110] applies to the conduct of hostilities when nuclear weapons are employed, but that this right should be interpreted in the light of applicable IHL rules. It stated that 'the protection of the International Covenant on Civil and Political Rights does not cease in times of war. … In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities'.[111]

Moreover, in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ affirmed that 'the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation'.[112]

The ICJ also set out its approach to interpretation of both IHL and IHRL in this decision:[113]

> As regards the relationship between international humanitarian law and human 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.

The ICJ repeated this very dictum in the 2005 *Armed Activities on the Territory of the Congo* case between the Democratic Republic of the Congo and Uganda,[114] with the significant omission of any reference to *lex specialis*.[115]

This trend towards co-application or harmonious interpretation is also evident in precedents from other jurisdictions, which were largely overlooked by the ECtHR. The *Georgia v Russia (II)* judgment does not mention the 2015 General Comment No 3 on the right to life under the African Charter on Human and Peoples' Rights, where the African Commission on Human and Peoples' Rights discussed why a state should respect the right to life of individuals outside its territory. In the Commission's view:[116]

> the nature of these obligations depends for instance on the extent that the state has jurisdiction or otherwise exercises effective authority, power, or control over either the perpetrator or the victim (or the

[110] International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[111] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226, [25].
[112] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, [106].
[113] ibid.
[114] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment [2005] ICJ Rep 168, [216].
[115] On the meaning of this omission, see Longobardo (n 109) 76.
[116] African Commission on Human and Peoples' Rights, General Comment No 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), 18 November 2015 (emphasis added).

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> victim's rights), … or whether the state engages *in conduct which could reasonably be foreseen to result in an unlawful deprivation of life*.

This ground of jurisdiction would have covered Russian conduct in Georgia before the ceasefire.

Contrary to a well-established practice of judicial cross-fertilisation,[117] the Court also overlooked several relevant documents from the Human Rights Committee. In the 2018 General Comment No 36, the Committee clearly stated that the right to life under the ICCPR applies to activities 'having a direct and reasonably foreseeable impact on the right to life of individuals outside [state] territory'.[118] The Committee also clearly endorses the co-application of IHL and IHRL implicitly in General Comment No 29[119] and explicitly in General Comment No 31, observing that:[120]

> while, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.

Similarly, in 2017, the Inter-American Court of Human Rights took the view that jurisdiction under IHRL should be constructed as a causal relationship, so that:[121]

> a person is subject to the 'jurisdiction' of a state in relation to an act committed outside the territory of that state (extraterritorial action) or with effects beyond this territory, when the said state is exercising authority over that person or when that person is under its effective control, either within or outside its territory.

The Inter-American Commission has stated that jurisdiction can arise 'where it is asserted that a use of military force has resulted in noncombatant deaths, personal injury, and property loss, the human rights of the noncombatants are implicated'.[122]

As a result, jurisdiction is not excluded by the existence of armed conflict (including when active hostilities occur). This is further corroborated by the 2010 *Ecuador v Colombia* case, in

[117] On the use of external treaties and decisions in the jurisprudence of the Court, see generally the cases discussed in ECtHR, Research Division, 'The Use of Council of Europe Treaties in the Case-Law of the European Court of Human Rights', 2011, https://www.echr.coe.int/Documents/Research_report_treaties_CoE_ENG.pdf; ECtHR, Research Report, 'References to the Inter-American Court of Human Rights and Inter-American Instruments in the Case-Law of the European Court of Human Rights', 2016, https://www.echr.coe.int/Documents/Research_report_inter_american_court_ENG.pdf. See also Carla M Buckley, Alice Donald and Philip Leach (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Brill 2017).

[118] Human Rights Committee (n 43) para 22.

[119] Human Rights Committee, General Comment No 29, States of Emergency (Article 4) (31 August 2001), UN Doc CCPR/C/21/Rev.1/Add.13, para 3.

[120] Human Rights Committee, General Comment No 31, The Nature of the General Legal Obligation imposed on States Parties to the Covenant (26 May 2004), UN Doc CCPR/C/21/Rev.1/Add.13, para 11.

[121] IACtHR, Advisory Opinion OC-23/17 requested by the Republic of Colombia: The Environment and Human Rights, 15 November 2017, para 81.

[122] IAComHR, *Salas and Others v United States*, Report no 31/93, 14 October 1993, para 6.

https://doi.org/10.1017/S0021223721000261 Published online by Cambridge University Press

which the Inter-American Commission held that the conduct of Colombian armed forces operating in Ecuador falls within the jurisdiction of Colombia under international human rights law, even if a situation of belligerent occupation is not established.[123]

The Inter-American human rights bodies have an open approach to interpreting the American Convention on Human Rights[124] consistently with IHL.[125] In *Coard v United States*, the Inter-American Commission observed that while IHL and HRL had distinct fields of application, there was substantial overlap and 'the potential application of one does not necessarily exclude or displace the other'.[126] This approach was implemented, for example, in the case of *Santo Domingo Massacre v Colombia*, with the Inter-American Court saying that it 'considers it useful and appropriate to interpret the scope of the treaty-based norms and obligations in a way that complements the norms of international humanitarian law'.[127]

Clearly, the ECtHR would have been free to depart from the conclusions of these different bodies in its reasoning in *Georgia v Russia (II)*, but it is surprising that these sources – and, in particular, the General Comments on the right to life – are not mentioned or discussed in the majority decision.[128] Rather, the Court preferred to exclude the idea that jurisdiction could be based on a causal link between state action and its effects on individual rights,[129] opting to overlook entirely the extremely relevant sources that are mentioned above. Taking their views into account – even to explain why the ECtHR decides to depart from them – would have enhanced the persuasive power of the Court's reasoning, in the light of the idea of cross-fertilisation between international human rights bodies that is often celebrated as one of the main features of the international protection of human rights systems.[130]

The ruling of the ECtHR in *Georgia v Russia (II)* places it at odds with all these international developments and with the common thread of trying to apply human rights law and IHL

[123] IAComHR, Interstate Petition IP-02, Report no 112/10, OEA/Ser.L/V/II.140 Doc 10, 21 October 2011, paras 97–103.
[124] American Convention on Human Rights, Pact of San José, Costa Rica (entered into force 18 July 1978) 1144 UNTS 123.
[125] See, generally, Antonio Augusto Cançado Trindade, 'Derecho internacional de los derechos humanos, derecho internacional de los refugiados y derecho internacional humanitario: Aproximaciones y convergencias' (1997) 30 *Estudio Internacionales* 321; Laurence Burgorgue-Larsen and Amaya Úbeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (Oxford University Press 2011) 163; Emiliano Buis, 'The Implementation of International Humanitarian Law by Human Rights Courts: The Example of the Inter-American Human Rights System' in Arnold and Quénivet (n 23) 286; Juan-Pablo Pérez-León-Acevedo, 'The Role of the Inter-American Court of Human Rights in Dealing with Armed Conflicts and Post-Conflict Reconstruction: Jurisprudential Analysis and Some Comparative Considerations' (2009) 7 *International Journal of Civil Society Law* 7, 9; Alonso Gurmendi Dunkelberg, 'There and Back Again: The Inter-American Human Rights System's Approach to International Humanitarian Law' (2017–18) 56 *The Military Law and the Law of War Review* 305; Longobardo (n 109) 79–80.
[126] IAComHR, *Coard and Others v United States*, Report no 109/99, 29 September 1999, para 39.
[127] IACtHR, *Santo Domingo Massacre v Colombia*, Series no 259, 30 November 2012, para 187; see also IAComHR, *Arturo Ribón Avilán v Colombia*, Report no 26/97, 30 September 1997; IAComHR, *Juan Carlos Abella v Argentina*, Report no 55/97, 18 November 1997; IAComHR, *Hugo Bustios Saavreda v Peru*, Report no 38/97, 16 October 1997.
[128] See Duffy (n 24); Gavron and Leach (n 24).
[129] *Georgia v Russia (II)* (n 1) para 124.
[130] eg, Buckley, Donald and Leach (n 117).

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simultaneously. Indeed, the Court has never recognised a distinction in the application of the Convention based solely on the distinction between active hostilities and occupation in its previous jurisprudence.

6.2. An Application of a 'Strong' Approach to *Lex Specialis* in Disguise?

This subsection analyses whether the majority has adopted a strong *lex specialis* approach in disguise, implicitly considering that IHL displaces the applicability of the Convention.

In a separate opinion Judge Keller stated that, if there was an exercise of state jurisdiction, 'the Court would consequently have been obliged to examine the deaths caused by Russian forces under the terms of the Charter and international humanitarian law *rather than the terms* of Article 2'.[131] It is unclear whether the judge here is alluding to a non-existent binary situation: applying IHL and the UN Charter[132] or applying Article 2 ECHR, or whether she means that Article 2 ECHR should be interpreted in the light of IHL and *jus ad bellum*. The use of the term 'rather than' implies that the Convention is displaced and IHL/Charter norms applied in its place. As we noted in relation to the jurisprudence of other bodies above, the application of these different bodies of law simultaneously is both possible and required.

There are several provisions in the Convention itself that imply that the Court's interpretive jurisdiction is wider than simply interpreting the Convention and its protocols. Article 15, for example, requires the Court, when considering a state's derogation, to examine whether it is 'inconsistent with its other obligations under international law'. This could clearly require the Court to interpret IHL.[133] The reference to 'lawful acts of war' in Article 15 could also potentially require reference to and interpretation of IHL (along with *jus ad bellum*). Similarly, Article 7 of the Convention, the principle of non-retroactivity, requires that no one is held guilty of a criminal offence that did not constitute an offence under national or international law when it was committed. This provision has previously required the Court to consider whether an individual's conduct violated IHL at the time of its occurrence,[134] thereby interpreting and applying IHL.

Indeed, this is something that the Court did in *Georgia v Russia (II)* itself to explain why Russia exercises jurisdiction in relation to the procedural duties under Article 2 of the Convention. The Court stated that 'in view of the allegations that it had committed war crimes during the active phase of the hostilities, the Russian Federation had an obligation to investigate the events in issue, in accordance with the relevant rules of international humanitarian law'.[135] So, in the same decision, the Court affirmed that (i) it *cannot* recognise that the activities of

[131] *Georgia v Russia (II)* (n 1) concurring opinion of Judge Keller, para 5 (emphasis added); see also ibid paras 30–31.
[132] Charter of the United Nations (entered into force 24 October 1945) 1 UNTS XVI (UN Charter)
[133] Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford University Press 2011) 192–93.
[134] See, eg, ECtHR, *Korbely v Hungary*, App no 9174/02, 19 September 2008; ECtHR, *Kononov v Latvia*, App no 36376/04, 17 May 2010.
[135] *Georgia v Russia (II)* (n 1) para 331. On procedural obligations under Article 2 during military operations, see Wallace (n 18) 110–40.

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Russia amounted to an exercise of jurisdiction under Article 1 *because this would force the Court to apply IHL rules*, while simultaneously (ii) holding that jurisdiction for the same actions in relation to the procedural limb of Article 2 can be interpreted extensively *thanks to IHL*. It is difficult to escape the impression that this finding is contradictory and untenable considering the jurisprudence of the Court on the need to apply the Convention, taking into account other applicable rules of international law. These authors take the view that this interpretive operation does not mean that the Court should have assessed Russian responsibility under IHL or *jus ad bellum* directly,[136] but only that the Court should have applied the Convention, taking into account other applicable rules as part of the interpretive context.[137] Any determination under IHL or *jus ad bellum* would have been incidental in nature, and the Court would have conducted that assessment only in order to apply the Convention.

The Inter-American bodies have already encountered and resolved this problem. While the Inter-American Commission has historically applied and found violations of IHL in some of its decisions,[138] the Inter-American Court stopped this practice and ruled that the Inter-American bodies should not directly apply IHL and find violations of it but, rather, should use IHL to aid their interpretation and application of IHRL in the specific circumstances.[139] This is clearly the correct approach, which is consistent with the law on treaty interpretation and other international practice. Nonetheless, contrary to the practice and case law referred to here, in *Georgia v Russia (II)* the majority of the ECtHR does not explain why taking into account IHL and the UN Charter would be outside the jurisdiction of the Court.

The majority's decision is also not based expressly on the idea that IHL displaces the application of IHRL through the operation of the *lex specialis* principle.[140] The ECtHR has never adopted this so-called 'strong' *lex specialis* approach to the application of IHL, according to which the application of IHL bars the application of IHRL.[141] Indeed, a strong *lex specialis* approach could not be applied to the *Georgia v Russia (II)* judgment because, by concluding that Russia did not exercise jurisdiction during the active phase of the hostilities, the Convention would not be applicable in the first place to create a norm conflict with IHL. Yet, while the majority does not expressly adopt a strong *lex specialis* approach in *Georgia v Russia (II)*, we can question whether the effect of the judgment is nonetheless similar. The ECtHR effectively washes its hands of the situation during the active phase of hostilities and defers to IHL. This is particularly evident where the Court, almost apologetically, observes that its ruling 'does not mean that states

[136] *Georgia v Russia (II)* (n 1) concurring opinion of Judge Keller, paras 5, 30–31.
[137] ibid, partially dissenting opinion of Judge Chanturia, para 31.
[138] *Ribón Avilán v Colombia* (n 127) para 202; it also found a violation of common article 3 of the Geneva Conventions in *Saavreda v Peru* (n 127) para 88.
[139] IACtHR, *Las Palmeras v Colombia*, Series C No 90, 6 December 2001, paras 33–34. See also IAComHR, Inter-state Petition IP-02 Admissibility Franklin Guillermo Aisalla Molina (Ecuador-Colombia), Report no 112/10, Doc OEA/Ser.L/V/II.140 Doc 10, 21 October 2011, para 121.
[140] On this view see, eg, Department of Defense, *Law of War Manual* (2015, updated 2016) section 1.3.2.1.
[141] Marko Milanovic and Tatjana Papic, 'As Bad as It Gets: The European Court of Human Rights's *Behrami* and *Saramati* Decision and General International Law' (2009) 58 *International and Comparative Law Quarterly* 267, 293; Wallace (n 18) 145–51. This approach is neglected by most international judicial and quasi-judicial bodies, as shown in Longobardo (n 109) 71–80.

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can act outside any legal framework; as indicated above, they are obliged to comply with the very detailed rules of international humanitarian law in such a context'.[142]

It is worth noting that this approach is inconsistent with previous jurisprudence in which the Court has interpreted and applied the Convention in the light of other bodies of international law.[143] In respect of IHL specifically, the ECtHR applied both IHL and human rights law simultaneously in *Hassan v United Kingdom*,[144] expressly stating that 'even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law'.[145]

As such, the ruling in *Georgia v Russia (II)* represents a significant *volte face* for the ECtHR. It is an odd, retrograde step for the Court, which historically has shown a very strong aversion to any kind of subordination or displacement of Convention norms by other bodies of law, such as resolutions of the UN Security Council via Article 103 of the UN Charter.[146] The judgment places it at odds with other international bodies, such as the Inter-American human rights bodies, and undermines the more recent moves into alignment with other international bodies.

6.3. The Use of IHL Terms in *Georgia v Russia (II)*

6.3.1. The Dichotomy between Active Hostilities and Occupation

The reasoning of the Court is unpersuasive when it links the existence of Russian jurisdiction to the dichotomy between occupation and the active phase of hostilities, using the ceasefire as the main divide between actions within and outside Russian jurisdiction in relation to violation of the right to life. This argument may give the impression that the Court believes that occupation and hostilities are mutually exclusive. Rather, as discussed in this subsection, hostilities may occur during an occupation and, thus, the existence of state jurisdiction should not be based on such a dichotomy.

The Court noted that a distinction between the actual phase of hostilities and the post-ceasefire occupation must be drawn. At no point does the ECtHR define what the 'active hostilities' phase of an armed conflict is, in line with the fact that positive international law does not

[142] *Georgia v Russia (II)* (n 1) para 143.
[143] For an analysis limited to IHL see the cases discussed by Andrea Gioia, 'The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict' in Ben-Naftali (n 109) 201; Linos-Alexandre Sicilianos, 'L'articulation entre droit international humanitaire et droits de l'homme dans la jurisprudence de la Cour européenne des droits de l'homme' (2017) 27 *Revue suisse de droit international et européen* 3; Julia Grignon and Thomas Roos, 'La Cour européenne des droits de l'homme et le droit international humanitaire' (2020) *Revue québécoise de droit international – Hors-série* 663.
[144] *Hassan v UK* (n 98).
[145] ibid para 104.
[146] See ECtHR, *Al-Jedda v United Kingdom*, App no 27021/08, 7 July 2011, para 102; ECtHR, *Al-Dulimi and Montana Management Inc v Switzerland*, App no 5809/08, 21 June 2016, para 143. See also Milanovic and Papic (n 141) 293; Wallace (n 18) 145–51.

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define the concept of 'hostilities', let alone that of 'active hostilities'.[147] The Court offers a definition of 'belligerent occupation' based on IHL elsewhere in the judgment,[148] but does not provide a similar definition for 'active hostilities'. This is important because the distinction between occupation and hostilities may not be clear-cut in practice.

The Court's approach of distinguishing between hostilities and occupation resonates with the long-standing distinction between invasion and occupation.[149] However, the Court uses this distinction in order to ascertain the existence of jurisdiction in relation to alleged violations of the right to life under Article 2. This is problematic because the judges should have acknowledged that hostilities may also occur *during* an occupation. One could wonder what the Court would have decided in relation to state jurisdiction when a situation of hostilities arises in occupied territory – a situation which has been addressed by relevant international case law and which could occur again in the future.[150] Would the Court affirm that there is state jurisdiction because of effective control over an area, or would the Court affirm that the 'chaos' of actual hostilities bars the existence of such jurisdiction? Either conclusion would be at odds with the reality, recognised by IHL,[151] that hostilities and occupation may coexist.[152]

In its past case law the Court was more nuanced and acknowledged that hostilities may occur during an occupation and that the dichotomy between hostilities and occupation does not bear on the existence of state jurisdiction under the Convention. During the second Gulf War in Iraq, for example, the UN acknowledged that the UK was the belligerent occupier of parts of Iraq, particularly around Basrah,[153] during the conflict there. However, during this occupation UK control over Basrah fluctuated. The UK had relatively few troops deployed across a large area –

[147] Consider the attempt made by the Office of the Prosecutor to define hostilities as a factual situation in ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v Bosco Ntaganda*, Prosecution Response to 'Sentencing Appeal Brief', ICC-01/04-02/06-2509-Red, 14 April 2020, para 66 (this definition is based entirely on scholarship: ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009) 41, 43; Stuart Casey-Maslen and Steven Haines, *Hague Law Interpreted: The Conduct of Hostilities under the Law of Armed Conflict* (Hart 2018) 73–76; Longobardo (n 109) 194–96; Niels Melzer, *Targeted Killing in International Law* (Oxford University Press 2008) 243–44, 269–76.

[148] *Georgia v Russia (II)* (n 1) para 195.

[149] See US Military Tribunal, Nuremberg, *Wilhelm List and Others*, 19 February 1948, (1948) 9 LRTWC 34; Italy, Supreme Military Tribunal, *In re Lepore*, 19 July 1946, 13 *International Law Reports* 354, 355; Department of Defense (n 135) s 11.1.3.1. See also Terry D Gill, 'The Law of Belligerent Occupation: The Distinction between Invasion and Occupation of Disputed Territory' in Andrea de Guttry, Harry G Post and G Venturini (eds), *The 1998–2000 Eritrea-Ethiopia War and Its Aftermath in International Legal Perspective* (2nd edn, TMC Asser Press 2021) 441.

[150] *List* (n 149) 56; *Prosecutor v Naletilić and Others*, Trial Chamber Judgment, IT-98-34-T, 31 March 2003, para 217; *Prosecutor v Prlić and Others*, IT-04-74A, Appeals Chamber, 29 November 2017, para 320; ICC, *Prosecutor v Lubanga*, Decision on Confirmation of Charges, ICC-01/04-01/06-803, Pre-Trial Chamber I, 29 January 2007, para 220; ICC, *Prosecutor v Katanga*, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, Pre-Trial Chamber I, 30 September 2008, para 240.

[151] Arts 53 and 6(3) of the Fourth Geneva Convention refer to 'military operations', which is synonymous with hostilities: Geneva (IV) Convention relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287.

[152] For more on this see Longobardo (n 109) 198–204.

[153] UNSC Res 1483, The Situation between Iraq and Kuwait (22 May 2003), UN Doc S/RES/1483.

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approximately 5,000 operational troops in an area with a population of 2.75 million[154] – and insurgents regularly attacked UK forces. In fact, so precarious was the UK control that the UK Court of Appeal determined that its forces were not exercising effective control over the area, stating that:[155]

> it is quite impossible to hold that the UK, although an occupying power for the purposes of the Hague Regulations and Geneva IV, was in effective control of Basrah City for the purposes of ECHR jurisprudence at the material time.

When the case came before the ECtHR, the Court did not even consider whether the UK was exercising effective control over an area[156] but, rather, decided to ascertain whether the UK exercised jurisdiction on a case-by-case basis.

A contrario, in the *Georgia v Russia (II)* case, the fact that no occupation was established should not have been used to conclude that no Russian jurisdiction existed. Rather, the Court should have ascertained whether Russia exercised jurisdiction notwithstanding the lack of a situation of occupation.[157] Although this point may seem to have minor weight, the inaccurate dichotomy between occupation and hostilities may result in the recognition of state jurisdiction in armed conflict only in situations of occupation or in the future mischaracterisation of hostilities in occupied territory.

Furthermore, the distinction that the ECtHR creates in *Georgia v Russia (II)* between active hostilities and the occupation phase is based on the conclusion of a ceasefire agreement between Georgia and Russia on 12 August.[158] Yet, the Court itself showed the arbitrariness of this cut-off point in several ways. It observed that different parts of the territory fell under Russian occupation at different times both before and after the ceasefire agreement came into effect; in the Court's words, 'Russian forces had taken effective control of the last parts of South Ossetia and the "buffer zone" during or *immediately after* the five-day war'.[159] Thus, some territory deemed to be under Russia's effective control clearly was not at the time of the conclusion of the ceasefire.

The ceasefire also did not appear to mark the end of the hostilities between Georgia and Russia as 'Russian and South Ossetian forces reportedly continued their advances for some days after the August ceasefire was declared and occupied additional territories'.[160] This hardly represents a clear-cut distinction between occupation and active hostilities. The situation was far more fluid than the binary active hostilities/occupation presented by the ECtHR, making it both difficult and arbitrary to determine when human rights law applies.

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[154] *Al-Skeini v UK* (n 17) para 20.
[155] *R (Al-Skeini) v Secretary of State for Defence* [2005] EWCA Civ 1609, [124].
[156] *Al-Skeini v UK* (n 17); for discussion see Wallace (n 18) 68.
[157] On how the ECtHR has been inconsistent in examining issues of this nature in its jurisprudence, see Wallace (n 18) 65–71.
[158] *Georgia v Russia (II)* (n 1) para 175.
[159] ibid para 111 (emphasis added).
[160] ibid para 153.

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6.3.2. THE IRRELEVANCE OF THE CHARACTERISATION OF THE CONFLICT

The Court makes numerous references to the characterisation of the armed conflict without explaining how this may impact upon the application of the Convention. This imprecise use of IHL notions to discuss the interpretation of jurisdiction under Article 1 of the Convention is unnecessary and can fuel uncertainty in future cases.

The Court stresses that the Convention does not apply to the phase of actual hostilities in an extraterritorial IAC,[161] arguing that the existence of an extraterritorial IAC justifies the application of the *Bankovic* precedent.[162] *Quid juris* if actual hostilities occur extraterritorially during a non-international armed conflict (NIAC)? One could speculate that the reference to IACs is an attempt by the Court to reconcile its past case law on the applicability of the Convention to hostilities in NIACs[163] with the new approach adopted in the instant decision.

Nevertheless, the argument is fallacious for many reasons. For instance, the Court should be mindful that NIACs may occur also extraterritorially as, under the prevalent view, the characterisation of an armed conflict is a consequence of the status of the parties involved rather than a result of the territorial or extraterritorial nature of the hostilities.[164] Accordingly, one may wonder whether a NIAC that occurs extraterritorially will be treated as a territorial NIAC (the Convention applies) or as an extraterritorial IAC (the Convention does not apply). In either case, it is apparent that the Court alludes to the characterisation of an armed conflict without any serious reason to do so to interpret Article 1 of the Convention.

Finally, the Court argued that the Convention does not apply to hostilities in extraterritorial IACs with reference also to the scale of the armed conflict in Georgia.[165] However, the characterisation of an armed conflict as an IAC is not linked to the intensity or scale of the hostilities. In fact, whereas the existence of a NIAC is determined by the fact that hostilities between a state and an armed group (or between two armed groups) reach a certain level of intensity,[166] IAC exists regardless of the scale of armed force used by states (with the possible exception of minor border incidents).[167] Accordingly, it is unclear why the Court bases its conclusion on the characterisation of the armed conflict, and how this characterisation is related to the territorial or extraterritorial nature of the hostilities, and to their scale.

[161] eg, ibid paras 133, 138, 140, 142.
[162] ibid para 113.
[163] eg, *Isayeva v Russia* (n 17); ECtHR, *Esmukhambetov and Others v Russia*, App no 23445/03, 29 March 2011. See also Gaggioli (n 18) 360–76.
[164] ICTY, *Prosecutor v Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, para 70; Lindsey Cameron and others, 'Article 3: Conflicts Not of an International Character' in ICRC, *Updated Commentary on the First Geneva Convention* (Cambridge University Press 2016) para 393.
[165] eg, *Georgia v Russia (II)* (n 1) paras 132, 141.
[166] See the discussion in Cameron and others (n 164) paras 422–37.
[167] Tristan Ferraro and Lindsey Cameron, 'Article 2: Application of the Convention' in ICRC (n 164) paras 236–44.

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6.4. Issues of Treaty Interpretation in relation to Derogations

The use that the ECtHR made of the absence of state practice concerning derogations under Article 15 raises further concerns. As noted above, the Court held that the lack of state derogations under Article 15 of the Convention in extraterritorial IACs 'may be interpreted as the High Contracting Parties considering that in such situations, they do not exercise jurisdiction within the meaning of Article 1 of the Convention'.[168] Thus, in the Court's view, the lack of derogations under Article 15 demonstrates a specific belief that there is no state jurisdiction when extraterritorial hostilities occur. However, the Court does not offer any ground to explain this conclusion. While this 'may' be one way of interpreting the absence of state derogation, the lack of derogations in similar circumstances can also be explained in a number of other ways: a state may have assumed that the Court would adopt a strong *lex specialis* approach to the application of IHL and IHRL so that IHRL was displaced, or a state may not have derogated because in doing so it may have conceded that it was exercising jurisdiction; contesting jurisdiction is often part of a state's defence in these cases.[169] Indeed, the Article 15 exclusion of derogations from Article 2 'except in respect of deaths resulting from lawful acts of war' implies that the Convention continued to apply to IACs; if the Convention was not applicable, why would such an exception need to be stated?

The Court's reasoning is also not supported by any relevant international law sources. Indeed, the Court does not rely openly on the rules of treaty interpretation. Under the law of treaties, subsequent practice is mentioned by Article 31(3)(b) of the VCLT, according to which, along with the context, the interpreter must take into account 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.[170] The threshold set by this provision is particularly high in that it requires not only state practice, but also the fact that the practice establishes an *agreement* regarding the interpretation of that treaty provision.[171] The International Law Commission (ILC) has recognised that subsequent practice in the application of the treaty 'which does not establish the agreement of all parties to the treaty, but only of one or more parties' may be relevant as a supplementary means of interpretation under Article 32 of the VCLT.[172] Accordingly, to be relevant for interpretive purposes, subsequent practice should establish an agreement between at least two parties to a treaty.

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[168] *Georgia v Russia (II)* (n 1) para 139.
[169] For detailed analysis see Wallace (n 18) 197–200.
[170] VCLT (n 108) art 31(3)(b). On this topic see, among others, Irina Buga, *Modification of Treaties by Subsequent Practice* (Oxford University Press 2018); Anja Seibert-Fohr, 'The Effect of Subsequent Practice on the European Convention on Human Rights: Considerations from a General International Law Perspective' in Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford University Press 2018) 61.
[171] ILC, Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties, with Commentaries, (2018) *Yearbook of the International Law Commission*, vol II, Part Two, Draft Conclusion 10.
[172] ibid Conclusion 2(4) and its commentary, para 9.

Although the *Georgia v Russia (II)* decision does not refer to any of these sources, it is difficult to understand the Court's position from the perspective of treaty interpretation. Judge Keller, in her separate opinion, affirms that in 2008 there was a tacit agreement of the parties that they did not need to give notice of derogation for extraterritorial armed conflicts,[173] even though she admits that the agreement was breached after the submission of the application in the *Georgia v Russia (II)* case.[174] More persuasively, Judges Yudkivska, Wojtyczek and Chanturia argue that the lack of derogation may be justified on grounds other than a tacit agreement, for instance, as the acceptance by states of the duty to apply the Convention to extraterritorial IACs.[175]

Although it is possible that some states, in the past, did not issue derogations because they considered that they were not exercising extraterritorial jurisdiction,[176] the conclusion of the majority that the lack of derogations should be equated to an agreement on the interpretation of Article 15 is unconvincing. In particular, such a view is in conflict with past case law of the Court: in the *Hassan* case, the Court unequivocally affirmed that the lack of derogations in relation to the application to Article 5 of the Convention during extraterritorial operations does reinforce the idea that Article 5 is applicable.[177]

In any case, the entire question is probably framed incorrectly as the decision to issue a derogation relates to the law applicable to a specific situation rather than to the interpretation of the notion of jurisdiction, as briefly noted by Judge Pinto de Albuquerque.[178] The text of Article 15 does not make any reference to the notion of jurisdiction and thus any practice related to this provision is hardly relevant for the interpretation of Article 1. This conclusion is supported by the fact that derogations 'may' be issued: accordingly, the lack of derogation cannot be seen as lawful only if states presupposed that derogations for extraterritorial IACs were not needed because of their tacit interpretation of the notion of jurisdiction under Article 1. Accordingly, the scarcity of derogations in IACs reflects only the attitude of the contracting states in relation to the exercise of one of the powers conferred by the Convention, rather than an agreement on the interpretation of Article 1.

[173] *Georgia v Russia (II)* (n 1) concurring opinion of Judge Keller, para 18.
[174] ibid para 18 (with implicit reference to the Ukrainian derogation in Ukrainian Government, 'Resolution of the Verkhovna Rada of Ukraine on Declaration on Derogation from Certain Obligations under the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms', 21 May 2015, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680304c47#search=ukraine%20derogate). Consider also the announced UK decision to adopt a presumption of derogation in UK Ministry of Defence, 'Government to Protect Armed Forces from Persistent Legal Claims in Future Overseas Operations, 4 October 2016, https://www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations.
[175] *Georgia v Russia (II)* (n 1) jointly partially dissenting opinion of Judges Yudkivska, Wojtyczek and Chanturia, para 10
[176] 'Such a position is looking increasingly untenable' according to Park (n 18) 198. See the discussion in Wallace (n 18) 198–99, with further references to relevant sources.
[177] *Hassan v UK* (n 98) para 101.
[178] *Georgia v Russia (II)* (n 1) partly dissenting opinion of Judge Pinto de Albuquerque, para 28.

https://doi.org/10.1017/S0021223721000261 Published online by Cambridge University Press

7. The Relevance of Non-Legal Considerations

The majority decision includes some references to non-legal considerations that are difficult to reconcile with the need to interpret the notion of state jurisdiction under the Convention. Critics of this kind of argument have claimed that the reasoning of the ECtHR is entirely arbitrary,[179] whereas other scholars – even before the instant decision – have maintained that policy reasons should shape the legal determination of whether IHRL applies to hostilities.[180] This subsection deals briefly with some of these non-legal considerations, highlighting that the Court refers to them to resolve some contradictions with its previous jurisprudence.

7.1. A Question of Legitimacy

The Court affirms that as the situation in this case was 'predominantly regulated by legal norms other than those of the Convention', the Court was 'not in a position to develop its case-law beyond the understanding of the notion of "jurisdiction" as established to date'.[181] The Court then goes on to reveal misgivings about its role in cases of this nature:[182]

> If, as in the present case, the Court is to be entrusted with the task of assessing acts of war and active hostilities in the context of an international armed conflict outside the territory of a respondent state, it must be for the Contracting Parties to provide the necessary legal basis for such a task.

The Court's request for a legal basis to assess 'acts of war and active hostilities in the context of an international armed conflict outside the territory of a respondent state' seems redundant: if the Convention is applicable because of the exercise of state jurisdiction, then the Court has jurisdiction to deal with the case.

Of course, many have observed that the ECtHR does not have an express mandate to interpret and apply IHL.[183] The Court's subject-matter jurisdiction is ostensibly limited by Article 32(1) to 'all matters concerning the interpretation and application of the Convention and the Protocols thereto'. The Court may be obliquely referencing this perceived limitation of its jurisdiction in the quote above. However, it remains just that: a perceived limitation rather than a true limitation. Nothing in the Convention expressly limits its application to IACs; in fact, the Convention

[179] Milanovic (n 16).
[180] See, eg, Yaël Ronen, 'International Human Rights Law and Extraterritorial Hostilities' in Robin Geiß and Heike Krieger (eds), *The 'Legal Pluriverse' Surrounding Multinational Military Operations* (Oxford University Press 2020) 198.
[181] *Georgia v Russia (II)* (n 1) para 141.
[182] ibid para 142.
[183] Giulia Pinzauti, 'The European Court of Human Rights' Incidental Application of International Criminal Law and Humanitarian Law: A Critical Discussion of *Kononov v Latvia*' (2008) 6 *Journal of International Criminal Justice* 1043, 1044; Michael O'Boyle and Jean Paul Costa, 'The ECtHR and IHL' in Christos Rozakis (ed), *The European Convention on Human Rights, a Living Instrument* (Bruylant 2011) 107. The Court itself has expressed some doubts about the scope of its mandate; see ECtHR, *Markovic v Italy*, App no 1398/03, 14 December 2006, paras 108–09.

https://doi.org/10.1017/S0021223721000261 Published online by Cambridge University Press

contains several references that imply that it continues to apply during armed conflicts of various kinds. Article 2(2)(c), for example, allows the use of force 'in action lawfully taken for the purpose of quelling a riot or insurrection', and the reference to insurrection here clearly corresponds to NIAC as traditionally understood.[184] This means that Article 2 is intended to continue to apply during NIACs. Likewise, Article 15 of the Convention states there can be 'no derogation from Article 2, except in respect of deaths resulting from lawful acts of war'. War in this context clearly connotes IACs. Why would such an exception regarding the right to life be necessary if the Convention was not intended to continue to apply during IACs? So, if there are no express barriers to applying the ECHR to IACs – and, indeed, there are some green lights in the Convention itself alluding to this – what has prompted the Court's call for an additional 'legal basis' to apply the Convention in this scenario?

The majority appears to be seeking endorsement for the exercise of its own jurisdiction in this context. The Court seems uncomfortable in dealing with extraterritorial hostilities because it is mindful that states are unhappy with the Court's involvement in these situations.[185] This attitude of states could be based on the fact that IHL and IHRL are perceived to have developed from different theoretical bases.[186] Indeed, the Court's dictum does not ask for additional resources – maybe needed considering the complexity of such a case – or additional expertise on IHL but, rather, it asks for an explicit legal basis. Considering the growing backlash against the Court in recent years,[187] one could wonder whether the Court may have perceived that it needed stronger political endorsements and support from states in relation to the exercise of its own jurisdiction over extraterritorial IACs, and whether the absence of this resulted in the present judgment.[188]

Ultimately, it is not up to the Court to assess whether, for policy reasons, it is better not to apply the Convention to the active phase of hostilities.[189] It is up to the contracting states, which have the possibility, under certain conditions, to derogate from the applicability of some Convention rights under Article 15. This is the appropriate response to policy concerns borne out of the consideration that IHRL, irrespective of any legal consideration, might be unfit to regulate the reality of hostilities. This may be particularly relevant for rights other than the right to life, the prohibitions on torture and slavery, and the principle of legality, which are regulated similarly in both IHL and IHRL[190] (and which, for this reason, cannot be

[184] Doswald-Beck (n 133) 193.
[185] Milanovic (n 16).
[186] Ronen (n 180) 200.
[187] See, generally, Mikael Rask Madsen, 'From Boom to Backlash? The European Court of Human Rights and the Transformation of Europe' in Helmut P Aust and Esra Demir-Gürsel (eds), *The European Court of Human Rights: Current Challenges in Historical and Comparative Perspective* (Edward Elgar 2021) 21.
[188] Milanovic (n 16).
[189] Similar evaluations can be performed in the framework of the International Criminal Court, where the Prosecutor can assess that an investigation or a prosecution should not be commenced because they would not serve the interests of justice (see Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 (ICC Statute), art 53). The radical differences between the Convention and the ICC Statute render a more detailed analysis of the interests of justice outside the purview of this article.
[190] See, again, Ronen (n 180).

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derogated from under Article 15). If states decide not to derogate from the Convention, the Court cannot substitute its own assessment of the opportunity to apply the Convention in armed conflict, disguising its policy-oriented decision in ambiguous and controversial interpretations of the notion of jurisdiction.

7.2. VOLUME OF EVIDENCE

The determination of what falls within the scope of the Convention should also be independent from the subject-matter of the rights at stake (such as the procedural versus substantive right to life, large-scale violations versus isolated acts, and so on). The reasoning of the majority is not convincing when it affirms that 'the large number of alleged victims and contested incidents, the magnitude of the evidence produced, [and] the difficulty in establishing the relevant circumstances' do not allow it to extend the interpretation of the notion of jurisdiction.[191] The Court adds that past case law ascertaining jurisdiction in relation to the use of armed force when there was no physical control of the victim 'concerned isolated and specific acts involving an element of proximity'.[192] This statement is problematic for a number of reasons. The Court is affirming that limited violations of the rights to life in the conduct of hostilities may fall within the jurisdictional threshold of Article 1, whereas under this interpretation more widespread violations would escape the applicability of the Convention. The fact that the Court relied on this distinction in a subsequent decision in 2021[193] failed to dispel the sense of arbitrariness.[194]

By this logic, the more widespread and indiscriminate the state's attacks, the less likely they are to trigger the state's jurisdiction. Inadvertently, the Court has encouraged states to violate the right to life more extensively in order to escape accountability.[195] This is compounded by the distinction the Court draws between pre- and post-ceasefire, with post-ceasefire situations resulting in jurisdiction for the states. Such a view arguably creates a further perverse incentive not to negotiate ceasefire agreements and continue fighting to forestall the applicability of human rights law. Cleary, this was not the intention of the Court, as such a conclusion runs against the object and purpose of the ECHR; it is also in conflict with the above-mentioned *Nuclear Weapons* opinion of the ICJ, where IHRL was considered to be applicable to one of the most intense acts of hostilities: the use of nuclear weapons.[196]

[191] *Georgia v Russia (II)* (n 1) para 141.
[192] ibid para 132.
[193] See *Carter v Russia* (n 48) para 129.
[194] For early critical remarks see Marko Milanovic, 'European Court Finds Russia Assassinated Alexander Litvinenko', *EJIL: Talk!*, 23 September 2021, https://www.ejiltalk.org/european-court-finds-russia-assassinated-alexander-litvinenko.
[195] This is considered irrational: *Georgia v Russia (II)* (n 1) partly dissenting opinion of Judge Pinto de Albuquerque, para 28.
[196] See Section 6.1 above.

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The statement is also problematic because it mentions non-legal considerations that pertain specifically to the case at hand, such as the magnitude of the evidence produced, as practical obstacles that should be considered relevant for interpreting the notion of state jurisdiction. Clearly, this assertion is based on policy considerations rather than on interpretive method: as claimed by some individual opinions, the Court should not refrain from adjudicating a case only because it is a complex one;[197] or, at least, the Court should not present these non-legal considerations as part of the mere application of past case law on jurisdiction. The claim that the Court lacks capacity to adjudicate during the active hostilities phase – because of the large number of alleged victims, the magnitude of evidence and difficulty in establishing circumstances – is also undermined by the Court's reliance, in other parts of the same judgment, on evidence from the Organization for Security and Co-operation in Europe,[198] the European Union,[199] reports of non-governmental organisations[200] and witness accounts[201] in reaching determinations concerning violations of the Convention.

8. CONCLUSION

In conclusion, the judgment of the ECtHR in the case of *Georgia v Russia (II)* is a lamentable misstep in the Court's ongoing struggle to deal with cases arising from hostilities. The Court ultimately presented a deeply distorted view of jurisdiction, rolling the clock back twenty years to the ignominious days of *Bankovic*. As we have shown in this article, the judgment is out of step with international law and the Court's own jurisprudence, and is at many points logically unsustainable. It generates worrying gaps in human protection and 'for the first time in history[,] the ECtHR failed to establish jurisdiction in relation to people living on a territory which would otherwise be protected by the Convention'.[202] Only time will tell if this judgment will be an isolated episode in the case law of the ECtHR, or whether it will become the standard authority to bar the Court's involvement in hostilities occurring in extraterritorial armed conflict. The authors sincerely hope this is an aberration to be swiftly rectified in the coming interstate applications on the armed conflicts in the Nagorno-Karabakh and between Russia and the Ukraine.

[197] *Georgia v Russia (II)* (n 1) partly dissenting opinion of Judge Lemmens, para 2; ibid, jointly partially dissenting opinion of Judges Yudkivska, Wojtyczek and Chanturia, para 10; ibid, partly dissenting opinion of Judge Pinto de Albuquerque, para 28.
[198] eg, *Georgia v Russia (II)* (n 1) para 180.
[199] eg, ibid para 182.
[200] eg, ibid para 184.
[201] eg, ibid para 232.
[202] Kanstantsin Dzehtsiarou, 'The Judgement of Solomon that Went Wrong: *Georgia v Russia (II)* by the European Court of Human Rights', *Völkerrechtsblog*, 26 January 2021, https://voelkerrechtsblog.org/the-judgement-of-solomon-that-went-wrong-georgia-v-russia-ii-by-the-european-court-of-human-rights.

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