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CONCEPT OF EXTRATERRITORIAL JURISDICTION IN THE PRISM OF THE CASE GEORGIA V. RUSSIA (II)

ABSTRACT

The Article concerns the concept of extraterritorial jurisdiction in the meaning of Article 1 of the European Convention of Human Rights (ECHR/the Convention) and its application in the interstate case of *Georgia v. Russia (II)* relating to the war of August 2008. The Article provides a critical assessment of the Judgment of the Grand Chamber of the European Court of Human Rights (ECtHR/the Court), according to which the events that occurred in the active phase of hostilities (8-12 August 2008) did not fall within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention, wich resulted in declaring this part of the interstate complaint inadmissible.

The article states that the arguments based on the applicability of international humanitarian law towards international conflicts, the exclusion of spontaneous extraterritorial acts from the scope of jurisdiction, the insufficiency of causal links, and the practice of non-derogation from Article 15 of the ECHR failed to establish a coherent and convincing legal basis for the judgment concerning the active phase of the war. According to the author, the circumstances of the case readily allowed the ECtHR to recognize the extraterritorial jurisdiction of the Russian Federation based on both the spatial model ("effective control over an area") and, especially, on the personal model ("state agent authority and control over an individual"). Moreover, the Court could have expanded the substantive scope of these two concepts or established a new, third form of extraterritorial jurisdiction. According to the article, excluding the active phase of armed conflict from the scope of responsibility and accountability of a Convention-binding state grants implicit permission for such states to act beyond their borders in ways that would be prohibited under the Convention within their own territory.

The author of the article argues that the protection of human rights in Europe during armed conflicts should not remain beyond European supervision, especially when the risk of human vulnerability and the likelihood of victimization are increasing significantly due to extraterritorial military actions.

The article emphasizes the essential role that the concept of causality can play in the lawful determination of a state's extraterritorial jurisdiction. The author argues

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that a jurisdictional link between the affected individuals and the respondent state's extraterritorial actions should, in principle, be recognized if there is a causal connection between those actions and the alleged violation of the rights of individuals located beyond the state's territory, provided that this connection was reasonably foreseeable. According to the author, the foreseeability of the causal link should be recognized as a factor that gives rise to a presumption of the existence of a jurisdictional link between the state committing the act and the relevant victim; resulting in the burden of proof shifting to the respondent state.

The article, among other issues, discusses the scope within which a state's positive and negative obligations should be considered when committing an extraterritorial act concerning individuals located beyond the state's territory who may be directly or indirectly affected by that act.

I. THE JUDGMENT IN THE CASE OF "GEORGIA V. RUSSIA" (II)

On January 21, 2021, the ECtHR examined the case of *Georgia v. Russia (II)* based on an interstate complaint. By eleven votes to six, the Court judged that the events occurring during the active phase of hostilities (August 8-12, 2008) did not fall within the jurisdiction of the Russian Federation for the purposes of Article 1 of the ECHR; consequently, the interstate complaint was declared inadmissible in this part. The Court found that neither of the two possible grounds for the exercise of extraterritorial jurisdiction was present - neither "effective control over an area" nor "state agent authority and control over an individual". However, the Court ruled that the events occurring after the cessation of hostilities fell within the jurisdiction of the Russian Federation, as Russia had established "effective control" over the relevant territories. In this part, the complaint was declared admissible**,** and the Grand Chamber found multiple violations of the Convention. The procedural violation of Article 2 of the ECHR was also recognized due to the failure to investigate killings, including those that occurred during the active phase of the armed conflict. According to the judgment, this was because Russia established "effective control" over the relevant territories shortly thereafter, the alleged perpetrators were located in the Russian Federation or in areas under its control, while Georgia was prevented from conducting an adequate and effective investigation.

Thus, since the ECtHR found that the events occurring during the active phase of hostilities did not fall within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention, Russia's international legal responsibility under the ECHR could not be established for the loss of life and other serious harm linked to the active phase of the armed conflict. The present article analyzes whether the exclusion of the active phase of the armed conflict from the responsibility and accountability framework

of a Convention-signatory state was justified and appropriate for the purposes of the Convention. Five partly dissenting opinions were written regarding the judgment in the case of *Georgia v. Russia (II)*,[1] the authors of which, relying on different arguments and reasoning, hold that for the purposes of Article 1 of the Convention, the victims of Russian military actions during the period of August 8-12, 2008, were under the (extraterritorial) jurisdiction of this country; therefore, in this part, Georgia's interstate complaint against the Russian Federation should have been admitted.

II. "JURISDICTION" IN THE SENSE OF ARTICLE 1 OF THE ECHR

The concept of "its jurisdiction" given in Article 1 of the Convention primarily takes as its starting point the notion of state jurisdiction under international law, which is linked to territorial jurisdiction, where a state legitimately exercises public authority. However, this approach proved insufficient, leading to a modification of the concept of "its jurisdiction". In its current interpretation, "jurisdiction" under the Convention reflects the scope of public authority that is actually exercised by the state. Since, in practice, a state's legal (de jure) authority and factual (de facto) power do not always coincide, the case-law of the ECHR has established that the Convention applies only to the territories where a state effectively exercises public authority. A Contracting State may be unable to exercise effective control over part of its own territory; or, it may exercise such control over the territory of another state or part of it without any valid jurisdictional title; or, a state agent may have the ability to exercise authority and control over individuals located in the territory of another country. In such cases, the issue of a state's extraterritorial jurisdiction arises. The need to protect human rights has driven the expansion of the scope of state jurisdiction in practice and led to the development of the concept of extraterritorial jurisdiction. This ensures that situations where a Contracting State must bear responsibility under the ECHR for violations of Convention rights beyond its own territory fall within the Convention's protective framework. Over time, two forms of extraterritorial jurisdiction have been established: "effective control over an area" (spatial jurisdiction) and "state agent authority and

[1] It was established that, considering the killings of civilians, the burning and looting of homes in Georgian villages located in South Ossetia and the "buffer zone," an administrative practice inconsistent with Articles 2, 3, and 8 of the Convention, as well as Article 1 to Protocol No.1, was identified. Violations of Articles 5 and 3 of the Convention were found due to the arbitrary detention of individuals and the conditions of their imprisonment. Additionally, a violation of Article 3 was established regarding the torture of Georgian prisoners captured by South Ossetian forces. A violation of Article 2 of Protocol No.4 was recognized due to the restriction of freedom of movement of forcibly displaced persons from the conflict zone and the denial of their right to return. The violation of Article 2 of Protocol No.1 was based on the alleged looting and destruction of public schools and libraries, as well as the intimidation of ethnically Georgian students and teachers. A violation of Article 38 of the Convention was established due to the failure of the respondent government to provide the European Court with so-called war reports.

control over an individual" (personal jurisdiction). The ECtHR rejected both forms of Russia's extraterritorial jurisdiction in relation to the active phase of the August war in Georgia (August 8-12, 2008).

III. WAS THERE "EFFECTIVE CONTROL OVER AN AREA" (THE SO-CALLED SPATIAL JURISDICTION)?

According to the spatial model of extraterritorial jurisdiction, established in the case of *Loizidou v. Turkey*,[2] jurisdiction arises when a state exercises effective control over an area beyond its national territory, where the alleged victim is located.

The ECtHR defines jurisdiction through "effective control over an area" as follows: "An exception to the principle under Article 1 that jurisdiction is limited to a state's own territory arises when a Contracting State, as a result of its lawful or unlawful military operation, exercises effective control over an area outside its national territory. In such an area, the obligation to secure the rights and freedoms under the Convention derives solely from the fact of this control, regardless of whether it is exercised directly by the armed forces of the Contracting State or through a subordinate local administration." [3] In the case of *Banković*, the Court clarified that effective control over an area beyond a state's national territory constitutes the primary exception to the territorial applicability of the Convention. The ECtHR explained that extraterritorial jurisdiction arises when a state, through effective control over a foreign territory and its inhabitants, exercises all or some of the public powers that are normally exercised by a national government.[4]

According to the ECtHR' approach, the determination of whether a Contracting State exercises effective control over an area beyond its own territory is a question of fact. The ECtHR primarily considers the strength of the state's military presence in the area; while other relevant factors include the degree of military, economic, or political support provided by the Contracting State to a subordinate local administration, through which it exerts influence and control over the region.[5]

[2] See joint partly dissenting opinion of Judges Yudkivska, Pinto de Albuquerque and Chanturia; joint partly dissenting opinion of Judges Yudkivska, Wojtyczek and Chanturia; partly dissenting opinion of Judge Pinto de Albuquerque; partly dissenting opinion of Judge Chanturia; and partly dissenting opinion of Judge Lemmens. Concurring opinions were also written regarding the case Georgia v. Russia (II).

[3] Judgment of the European Court of Human Rights N15318/89 "Loizidou v. Turkey", 18 December 1996. Paragraph 188.

[4] Judgment of the European Court of Human Rights N25781/94 "Cyprus v. Turkey" [GC] 2001-IV. Paragraph 76; Judgment of the European Court of Human Rights "Banković and Others v. Belgium and Others" (dec.) [GC] 2001. 890. Paragraph 70; Judgment of the European Court of Human Rights N48787/99 "Ilaşcu and Others v. Moldova and Russia" [GC] 2004-VII. Paragraphs 314-16; Loizidou v. Turkey (merits) supra note 4, paragraphs 52 and 56; Judgment of the European Court of Human Rights N55721/07 "Al-Skeini and Others v. the United Kingdom" [GC] 2011. Paragraph 138.

[5] Banković and Others v. Belgium and Others, supra note 5, paragraph 71.

The ECtHR has previously recognized extraterritorial jurisdiction and respective state responsibility based on the notion of "effective control over an area" in multiple cases. For example, the Court acknowledged Turkey's extraterritorial jurisdiction over the occupied territory of Northern Cyprus,[6] Russia's extraterritorial jurisdiction over Transnistria in Moldova,[7] Armenia's extraterritorial jurisdiction over Nagorno-Karabakh,[8] etc.

However, in the case of the 2008 August war, as noted above, the ECtHR's Grand Chamber rejected the notion that during the active phase of hostilities (August 8-12, 2008) the Russian Federation exercised "effective control" over the combat zone and, consequently, its extraterritorial jurisdiction in the meaning of Article 1 of the Convention. Specifically, the Court explained the following:

"It should be emphasized that in its admissibility decision, the Chamber noted that "the present application concerns events that began in South Ossetia and Abkhazia on 7 August 2008" (see *Georgia v. Russia (II)* (dec.), cited above, §98). Furthermore, the question of the nature and extent of the control exercised by the Russian Federation in South Ossetia is immaterial for the present case, given that most of the fighting took place in areas that were previously under Georgian control: in South Ossetia, in the ethnically Georgian villages around Tskhinvali, and in Gori, which is located in the "buffer zone" on uncontested Georgian territory. The applicant Government itself acknowledged that Russian forces established effective control over the remaining territory of South Ossetia and the "buffer zone" during the five-day war or immediately after its conclusion." (See Paragraph 78 cited above, the Judgment, §111).

In that connection it can be considered from the outset that in the event of military operations - including, for example, armed attacks, bombing or shelling - carried out during an international armed conflict, one cannot generally speak of "effective control" over an area. 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, given that the majority of the fighting took place in areas which were previously under Georgian control" (the Judgment, §126). […] the active phase of hostilities […] is very different, as it concerns bombing and artillery shelling by Russian armed forces seeking to disrupt the Georgian army and to establish control over areas forming part of Georgia." (The Judgment, §133).

[6] Loizidou v. Turkey, supra note 4, paragraph 16; Ilaşcu and Others v. Moldova and Russia, supra note 5, paragraphs 387, 388-94; Al-Skeini and Others v. the United Kingdom, supra note 5, paragraph 139.

[7] Cyprus v. Turkey, supra note 5, paragraphs 76-80.

[8] Ilaşcu and Others v. Moldova and Russia, supra note 5; Catan and Others v. the Republic of Moldova and Russia.

The author of the article argues that the arguments presented in the referenced provisions, which were used to justify the rejection of the Russian Federation's jurisdiction, are artificial and lack credibility.

The assertion that "question of the nature and extent of the control exercised by the Russian Federation in South Ossetia was immaterial" because "most of the fighting took place in Georgian-controlled territory and the "buffer zone" is highly debatable. The analysis of the military confrontation from August 8-12, 2008, without properly considering the broader historical context or disregarding it entirely, is not only unreasonable but simply impossible. The actions of the Russian Federation's armed forces during this period were a continuation of the aggressive policy that Russia had pursued in Abkhazia and South Ossetia since the 1990s - within Georgia's internationally recognized territory - through both direct military intervention and military, economic, and financial support for separatist groups, which ultimately led to Georgia's de facto loss of control over these regions. The fact that "the present complaint concerned events that began in South Ossetia and Abkhazia on August 7, 2008," did not prevent the ECtHR from taking into account the recent historical context. It is well established that in cases of continuing violations**,** the examination of events predating a state's ratification of the ECHR is permissible if their consequences persist. What is most regrettable in this case is that the Court had access to extensive materials, including findings from EU missions and the International Criminal Court, which the ECtHR could have referred to for assessing the situation leading up to the outbreak of active hostilities.

The documentary evidence presented in the case demonstrated that the Russian Federation exercised significant military, economic, and political control over Abkhazia and South Ossetia even before the outbreak of military hostilities on August 8, 2008. This was corroborated by, among other sources, the European Parliament's Resolution of June 5, 2008, which concluded that, given the strength of Russia's military presence in the area (including the number of troops and military equipment), Russian military forces could no longer be considered neutral and impartial peacekeepers. Additionally, the EU's Fact-Finding Mission established that high-ranking Russian officials had already exercised de facto control over South Ossetian institutions - particularly over security services and forces - before the conflict began. The de facto authorities, including the so-called Ministries of Defense, Interior, Civil Defense and Emergency Situations, as well as the State Security Committee, State Border Protection Service, and Presidential Administration, were staffed either by Russian officials or by South Ossetian residents holding Russian citizenship, many of whom had previously served in equivalent positions in Russia's central government or Russia's North Ossetia region. Even if South Ossetia was not formally dependent on another state, Russia's decisive

influence on security-related decision-making was so substantial that South Ossetia's claim to independence appeared highly questionable."[9]

The ECtHR also failed to take into account the January 27, 2016 decision of the Pre-Trial Chamber I of the International Criminal Court, which authorized the Court's prosecutor to open an investigation into alleged crimes committed in Georgia's South Ossetia region between July 1 and October 10, 2008. This decision described the factual situation as follows: "At this stage, there is sufficient indication that the Russian Federation exercised overall control over South Ossetian forces, which means that the period before the direct intervention of Russian forces should also be considered as an international armed conflict." Accordingly, it was evident that the Russian Federation had exercised effective control in the region even before the outbreak of the armed conflict. However, the Court entirely disregarded this fact.

This shortcoming was precisely pointed out by ECtHR's Judge Lado Chanturia in his partly dissenting opinion on the judgment:

"[The active phase of the conflict] was not an isolated event disconnected from prior developments but rather part of a continuous situation, which included both the pre-conflict period and its aftermath." The fact that "The Russian Federation remained an occupying power in both regions even after the cessation of hostilities" clearly demonstrated that "Russia's direct military intervention during the period of August 8-12 was nothing more than an intensified form of the military support it had continuously provided for years to the de facto authorities of these two regions, even before the so-called small war began. According to the explanation provided by Judge Chanturia, "the result of the respondent state's decision to engage in a large-scale armed conflict with Georgia was the further consolidation and reinforcement of its status as an occupying power. Hence, from a passive occupying power the respondent State became a belligerent occupying power."[10]

As Judge Chanturia points out, the ECtHR, unfortunately, failed to properly take into account the conclusions of the EU's Independent International Fact-Finding Mission, which, unlike the Court, adopted a continuous and comprehensive approach in describing the August 8-12 military conflict.

The partly dissenting opinion also highlights that the third party involved in the case - the Human Rights Centre of the University of Essex,[11] advised the ECtHR that before deciding on Russia's jurisdiction over alleged crimes committed during the armed conflict, it should first have answered the question: What was the nature and extent of the

[9] Judgment of the European Court of Human Rights N13216/05 "Chiragov and Others v. Armenia" [GC] 2015. Paragraph 168.

[10] The EU Fact-Finding Mission Report, 2, 133.

[11] See partly dissenting opinion of Judge Chanturia. Paragraph 38.

control, if any, that Russia exercised over South Ossetia and Abkhazia before the armed conflict? Not to mention that the applicant government itself had also, unsurprisingly, requested the ECtHR to assess the pre-existing situation before the active phase of the conflict.

It should not be overlooked that the ECtHR separated the active phase of hostilities (August 8-12) not only from the preceding period but also from the subsequent phase, during which it was determining Russia's extraterritorial jurisdiction. Specifically, the Court distinguished between the active (August 8-12) and passive (post-August 12) phases[12] of the Georgia-Russia conflict, ostensibly on the grounds that "a distinction needs to be made" between these two periods; however, it failed to explain why such a distinction was necessary. Judge Chanturia considered this segmentation to be a "questionable methodology" adopted by the majority in a case "involving two Contracting Parties to the Convention." In Judge's view, a more logical and appropriate approach to determining jurisdiction would have been to examine issues such as 'attributability' and 'imputability'.

In this regard, even more controversial and unacceptable is the Grand Chamber's above-mentioned statement that: "The very realities accompanying the confrontation and fighting between hostile military forces, which were attempting to establish control over an area amidst chaos (emphasis added by the author), meant that there was no control over that area."

First of all, the above statement is openly contradictory. If the area in question was under Georgian control, it is inaccurate to describe it as a territory where "the sides were attempting to establish control amidst chaos." Such wording creates the false impression that the situation involved on some kind of unclaimed territory, a remote and uninhabited island, where both parties had an equally legitimate right to assert control. Furthermore, by framing events as occurring "in the context of chaos," it effectively suggests that determining right and wrong becomes impossible, making it unclear who acted lawfully and who acted unlawfully.

Secondly, as the ECtHR described, "the majority of the fighting" took place in Georgian-controlled territory. While this is true, for the sake of accuracy, it would have been more precise to state that the fighting occurred within the territory of Georgia, where Georgia was legitimately exercising its control. Moreover, the hostilities themselves should have been described as a confrontation between two subjects, one of which (the Russian Federation) was attempting to seize such control of the internationally recognized and lawfully governed territory of a foreign country (Georgia) through the unlawful use of military force, while the other (Georgia) was seeking to maintain its legitimate de facto control over this territory. Thus, the wording used by the ECtHR, which effectively

[12] See Judgment of the Human Rights Centre of the University of Essex. Paragraph 80.

served as the basis for rejecting the recognition of extraterritorial jurisdiction, does not adequately or fairly reflect the actual circumstances of the case. In reality, the situation was undeniably evident - it concerned one Contracting Party to the Convention carrying out hostile and aggressive military operations on the territory of another Contracting Party, with the aim of its occupation. In other words, it was an aggressive war waged by the Russian Federation, while Georgia was engaged in self-defense. Thirdly, the Court could and should have taken into account that even if not directly within the combat zone itself, Russia undoubtedly exercised "effective control" - in the sense of the Convention - over the adjacent territories - by having military units, weaponry, and a subordinate local administration in these areas, which it supported politically, economically, and in other ways. All of this was the direct result of Russia's prior expansionist actions. Fourthly, the ECtHR should have considered not only the situation before the outbreak of hostilities but also the subsequent developments: Specifically, Russia's military aggression led to the full occupation of the respective region, followed by the Russian Parliament's recognition of the "independence" of Georgia's two regions. This clearly demonstrates that the case involved a pre-planned act of aggression with far-reaching objectives, rather than a spontaneous or immediate extraterritorial act. All the more so, it was not a case, where "hostile military forces were attempting to establish control over an area amidst chaos," as the ECtHR's reasoning suggested.

Moreover, excluding the active phase of hostilities from Russia's jurisdiction on the grounds that the relevant territory was under Georgian control before the fighting began, and therefore Russia could not have exercised "effective control over an area," is not only unjust but also illogical and irrational in other aspects. Following this reasoning, if one Contracting State were to invade and progressively occupy the entire territory of another State, its extraterritorial jurisdiction under the Convention would still not be recognized, because at the time of each new town or village being bombed, that area would not yet be a place where the aggressor State exercised "effective control" - as such control would only be established after the military aggression had already taken place. Notably, the Court itself cited a statement by the applicant government, which confirmed that the events of August 8-12 were immediately followed by the Russian Federation establishing control over the parts of Georgian territory where the fighting had taken place (the Judgment, Paragraph 78). Thus, it appears that even the "immediate establishment of effective control" was not deemed a decisive factor by the Court for recognizing the spatial model of extraterritorial jurisdiction. Once again, projecting this perspective onto the broader and large-scale military confrontation, such as the war in Ukraine might be interesting for the reader. There, too, the Russian Federation is waging an aggressive war, continuously bombing and destroying more and more territory, causing loss of life, destruction, and devastation. It advances further, gradually establishing "effective control" over new areas. Following this logic, every newly bombed and destroyed area would remain beyond Russia's extraterritorial

jurisdiction, simply because "effective control" would only be recognized after/as a result of the use of force - bombing, destruction, and loss of human life.

If this is the case - and if it is to remain so - then it follows that the entire system of the Convention is ineffective, as it proves to be an inadequate instrument in addressing the most dramatic challenges. It fails to properly respond to the most serious and large-scale human rights violations committed by Contracting States within the Convention's legal framework.

However, it is hard to believe that if the ECtHR is ever called upon to examine Russia's violations of Convention rights during the war in Ukraine - even if only because many acts of aggression occurred while the ECHR was still in force for Russia - it would apply the same approach and once again seek to exclude Russia from responsibility. In the author's view, the large-scale nature of hostilities and the massive number of casualties - which, in the Georgian case, became one of the justifications for rejecting jurisdiction[13] - will likely lead the ECtHR in the opposite direction. It is probable that the Court will develop new criteria or approach to expand the concept of extraterritorial jurisdiction. Unfortunately, the August war and its victims were not deemed sufficient motivation for the majority of international judges to "develop the case-law" beyond the principles already established. The ECtHR's position would have been far more reasonable and just if it had used Georgia's case against Russia as a foundation for a new approach, one that would have given real substance to the concept of extraterritorial jurisdiction and ensured that the victims of Russian military aggression were not excluded from the protection of the Convention - especially considering that these victims were located within the Convention's legal space, on Georgian territory.

IV. WAS THERE "STATE AGENT AUTHORITY AND CONTROL" (THE SO-CALLED PERSONAL JURISDICTION)?

Here, first and foremost, it should be noted that, according to the ECtHR's conclusion, the armed confrontation also ruled out the second foundational element of extraterritorial jurisdiction – "state agent authority and control." Specifically, the Court explained:

"[…] The Court attaches decisive weight to the fact that the very realities accompanying the confrontation and fighting between hostile military forces, who are attempting to establish control over an area amidst chaos, exclude not only "effective control" over an area but also "state agent authority and control" over individuals." (The Judgment, §137).

However, the Court simultaneously distinguished the present case from other cases in which it had previously recognized "state agent authority and control" over an

[13] See Judgment, paragraph 83.

individual; while later based its rejection of extraterritorial jurisdiction during the active phase of hostilities on the precedent set in the case of *Banković*.

1. UNDERSTANDING PERSONAL JURISDICTION

According to the ECtHR's case-law, the concept of "state agent authority and control" means that: "In certain circumstances, the use of force by a state agent acting outside the national territory may bring the individual under the control of state authorities and, consequently, within the jurisdiction of the state as understood under Article 1 of the ECHR." Furthermore: "[…] When a state, through its agent, exercises control and authority over an individual - and thus jurisdiction - the state is bound by its obligations under Article 1 to secure the rights and freedoms set out in Section 1 of the ECHR that are relevant to the individual's situation."[14]

However, the initial references to personal jurisdiction were made by the European Commission of Human Rights, which stated that state agents bring individuals and property within the jurisdiction of the state to the extent that they exercise authority and control over them. Furthermore, to the extent that they cause harm to individuals or property, the state bears responsibility.[15]

The essential distinction between "personal jurisdiction" and the "effective control over an area" concepts is not only that state control is exercised over an individual or a group of individuals rather than a specific area, but also that this control does not extend to all of the individual's rights, but only to certain rights depending on circumstances. This approach was first confirmed by the ECtHR in *Al-Skeini* case, thereby overruling the precedent set in *Banković*, where the Court had rejected the idea that Convention rights and corresponding positive obligations could be "divided and tailored" according to the specific circumstances of an extraterritorial act.[16] However, in *Al-Skeini*, the concept of "dividing and tailoring" rights and obligations was recognized, and the ECtHR established that in cases of extraterritorial acts, the scope of a state's human rights obligations is limited and reduced. It further determined that Article 1 of the Convention imposes on states only those obligations that are "relevant to the specific circumstances in which the individual is placed."

Most of the cases in which the ECtHR recognized the respondent state's extraterritorial jurisdiction on this basis involved detention operations conducted abroad, arrest and imprisonment, targeted killings, and beatings leading to death (including in buffer zones), among others. In other words, the decisive factor in establishing "state agent authority and control" over individuals in the context of detention and imprisonment

[14] See Judgment, paragraph 141.
[15] Al-Skeini and Others v. the United Kingdom, supra note 5, paragraphs 136, 137, 142.
[16] Cyprus v. Turkey, supra note 5, paragraph 3.

outside the state's territory was "the use of physical authority and control over the person."

For example, in *Al-Skeini and Others v. the United Kingdom*, the ECtHR established personal jurisdiction over individuals who were subject to deliberate (whether lawful or unlawful) actions by the state. [17]

However, in other cases, the Court applied the "state agent authority and control" concept to individuals in scenarios beyond the use of physical force and control in the context of detention and arrest. This included cases where individuals were deliberately targeted and killed by state armed forces or police through the intentional use of gunfire.[18]

Andreou v. Turkey (cited above) can be referred to as an illustrative case, which concerned deaths that occurred in the United Nations buffer zone in Cyprus. The ECtHR confirmed that the victims fell under Turkey's jurisdiction, as they were killed by gunfire from members of the Turkish armed forces or police, or those of the Turkish Republic of Northern Cyprus (TRNC - Refers to the Turkish territorial entity unrecognized internationally, established as a result of Turkey's occupation of Northern Cyprus). The Court recognized that the victims were within Turkey's extraterritorial jurisdiction, despite the fact that the shootings took place in Cyprus, stating: "[…] even though the applicant had sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, had been such that the applicant should be regarded as "within [the] jurisdiction" of Turkey within the meaning of Article 1 of the Convention."[19]

In *Pad and Others v. Turkey* (cited above), the ECtHR established that the victims' relatives fell under Turkey's jurisdiction, as they were killed by gunfire from Turkish military helicopters. The Court relied on the fact that a Turkish helicopter opened fire on suspected smugglers at the Iraq-Turkey border. Despite the uncertainty regarding which country the victims represented and whether they were on Turkish or Iraqi territory at the time of the shooting, the ECtHR recognized Turkey's jurisdiction and responsibility for the victims.[20]

When examining the issue of personal jurisdiction, the ECtHR also concluded that Turkey exercised its jurisdiction when Kenyan officers handed over Abdullah Öcalan

[17] Banković and Others v. Belgium and Others, supra note 5, paragraph 75.

[18] Al-Skeini and Others v. the United Kingdom, supra note 5, paragraph 136.

[19] See Judgment of the European Court of Human Rights N47708/08 "Jaloud v. the Netherlands" [GC] 2014. Paragraphs 40-53; Judgment of the European Court of Human Rights N36832/97 "Solomou and Others v. Turkey", 24 June 2008. Paragraphs 41-52; Judgment of the European Court of Human Rights N45653/99 "Andreou v. Turkey" (dec.), 03 June 2008; Judgment of the European Court of Human Rights N60167/00 "Pad and Others v. Turkey" (dec.), 28 June 2007; Judgment of the European Court of Human Rights N44587/98 "Isaak and Others v. Turkey" (dec.), 28 September 2006; Judgment of the European Court of Human Rights N31821/96 "Issak and Others v. Turkey", 16 November 2004. Paragraphs 68, 71, 74.

[20] Andreou v. Turkey, supra note 20.

to Turkish officials in the international zone of Nairobi Airport.[21] The same conclusion was reached in the case, when a protester was fatally beaten by a group of people, including Turkish soldiers, in the United Nations demilitarized zone between the TRNC and the Cypriot government-controlled area;[22] or in the case, when a Greek Cypriot demonstrator was shot and killed by a Turkish or Turkish Cypriot soldier upon entering the UN-controlled buffer zone in an attempt to remove a Turkish flag from TRNC territory.[23]

In all of these cases, the key legal position was that, for the purposes of Article 1 of the ECHR, jurisdiction depends on whether the state exercises de facto authority over an individual, a group of individuals, property, or an area; irrespective of whether the state's actions were spontaneous or prolonged; whether the harm caused was intentional, premeditated, reckless, or indirect; whether the state's conduct was lawful or unlawful; or what substantive legal framework might apply to the facts of the case.

The ECtHR has also clearly identified the existence of a jurisdictional link in various extraterritorial contexts, without attempting to define them in a generalized manner.[24] There are also the precedents involving extraterritorial dimension, where the existence of a jurisdictional link is not explicitly discussed but is clearly implied.[25]

The use of physical force by a state agent outside the state's national territory, whether in the context of detention and arrest or through targeted actions aimed at killing or injuring individuals, has been regarded as the exercise of public authority and responsibility beyond the state's own territory for security purposes.[26]

[21] Pad and Others v. Turkey, supra note 20, paragraph 54.

[22] Judgment of the European Court of Human Rights N46221/99 "Öcalan v. Turkey" [GC] 2005-IV. Paragraph 91.

[23] Isaak and Others v. Turkey, supra note 20.

[24] Solomou and Others v. Turkey, supra note 20, paragraphs 48-49.

[25] See Markovic and Others, paragraph 54; Naït-Liman, paragraph 183; Güzelyurtlu and Others, paragraph 188.

[26] Here are some examples illustrating this principle: An asylum seeker who was pushed back within minutes at the border was still considered to be under the jurisdiction of the state to which they had applied for asylum. The jurisdictional link was established solely through physical contact with the state border or border officials. See, e.g., Judgment of the European Court of Human Rights N59793/17 "M.A. and Others v. Lithuania", 11 December 2018. In cases concerning the enforcement of foreign court decisions, the only jurisdictional link between the applicant and the respondent state lies in the fact that the property is located within the state from which the applicant seeks enforcement, even though the individual is not physically present in that state nor under the control of its agents. See, e.g., Judgment of the European Court of Human Rights N17502/07 "Avotiņš v. Latvia" [GC] 23 May 2016.

2. EXCLUSION OF PERSONAL JURISDICTION IN THE GEORGIAN CASE

The ECtHR referenced most of the above-mentioned precedents in the Georgian case. However, it explained that in those cases, decisive weight was given to the fact that they involved isolated and specific acts characterized by a proximity element. The Court distinguished the Georgian case by stating that, unlike those cases, "The active phase of hostilities, which the Court is required to examine in the present case in the context of an international armed conflict is fundamentally different, as it involves bombing and artillery fire by the Russian armed forces, aimed at disrupting the Georgian army and establishing control over parts of Georgian territory."[27]

To begin with, it is unclear what exactly is meant by the element of "proximity" or an "isolated act", or what specific nature or characteristics make these factors decisive for the recognition of jurisdiction. This issue has also been subject to academic criticism. For example, Petra Stoinić has pointed out that the ECtHR excluded cases involving the use of heavy weaponry and methods that caused large-scale harm from its jurisdictional scope. However, she argues that it is difficult to identify instances of the use of force that qualify as "isolated and specific acts" while simultaneously possessing a "proximity element."[28] Secondly, it is unclear where the threshold lies and what dimensions give "proximity" and "isolated acts" a different legal meaning. Thirdly, even if we fully accept the significance of "proximity" and "isolation" elements, there is no substantial difference, in terms of imputability, attribution, or jurisdiction, between causing deaths through gunfire from a helicopter and causing deaths through aerial bombings from military aircraft, as those took place on Georgian territory. Moreover, it remains unclear why the element of proximity was considered absent in the 2008 August war events, causing the direct killings and injuries of individuals.

Ultimately, this reasoning led to the following conclusions:

- A person's detention, arrest, injury, or killing during a police operation abroad establishes jurisdiction (as confirmed by the ECtHR in the above-mentioned Turkish and Cypriot cases), however, a large-scale loss of life resulting from military operations abroad does not; or
- When a state, lawfully or unlawfully, detains, arrests, injures or kills an individual abroad through its agents, it exercises state authority; however, when it conducts a military operation abroad, it does not; or

[27] Judgment of the European Court of Human Rights "Drozd and Janousek v. France and Spain", 26 June 1992. Paragraphs 91-98; Judgment of the European Court of Human Rights N48205/99 "Gentilhomme, Schaff-Benhadji and Zerouki v. France", 14 May 2002. Paragraph 20; Al-Skeini and Others v. the United Kingdom, supra note 5, paragraphs 143-50; Judgment of the European Court of Human Rights N27021/08 "Al-Jedda v. the United Kingdom", [GC] 2011. Paragraphs 75-96.

[28] See Judgment, paragraph 133.

- If a state kills one or several individuals abroad (e.g., by firing from a helicopter), it exercises extraterritorial jurisdiction and is accountable under the Convention; however, if a military aircraft bombs a larger number of individuals, causing more deaths, the state does not exercise jurisdiction and bears no responsibility under the ECHR.

It is difficult to find a rational explanation for all of this.

Clearly, this inconsistency is also addressed in the dissenting opinions. Specifically, Judge Albuquerque, in his partly dissenting opinion, states that it is very difficult to find rationality and logic in the consequences of the *Banković* ruling. According to that precedent, extraterritorial jurisdiction exists when a state agent arrests a person, but it does not exist when the agent kills or injures them. In his view, if the extraterritorial arrest, injury, or killing of an individual establishes jurisdiction, then the killing of an even greater number of people should not exclude jurisdiction - at the very least, not personal jurisdiction.[29]

The authors of the joint partly dissenting opinion (Judges Yudkivska, Wojtyczek, and Chanturia) focused on the argument that the use of the army by a state constitutes an exercise of public authority. They rightly noted the following: "It is obvious that the use of the army against insurgents in a civil war constitutes the exercise of public authority and, consequently, the exercise of jurisdiction (*ultima ratio regum*). From the perspective of state authority, the use of the army against another state's forces has the same nature as its use against insurgents. Both situations represent forms of the exercise of state sovereignty and, at the same time, the exercise of public authority over the individuals affected by it."[30] (Emphasis added by the author.) In his individual dissenting opinion, Judge Chanturia pointed out that "There was no real or substantive difference between a police operation and a large-scale military conflict, and in practice, it was impossible to draw a clear distinction between targeted actions and large-scale military operations." Judge Chanturia considered it "arbitrary and incompatible with humanitarian considerations" that potential victims of targeted police operations fall under a state's jurisdiction, while victims of large-scale military operations do not.[31] Additionally, Judge Albuquerque, in his dissenting opinion, formulated an approach that is difficult to disagree with. He explained that "the use of firearms by a state agent constitutes the ultimate form of the exercise of state control."

[29] Petra Stojnić, 'Gentlemen at home, hoodlumselsewhere': The Extraterritorial Application of the European Convention on Human Rights, 153 <https://www.law.ox.ac.uk/sites/default/files/migrated/public_law_5.pdf> [last accessed on 17 August 2024]; See also, Marko Milanovic, Georgia v. Russia No. 2: The European Court's Resurrection of Banković in the Contexts of Chaos (EJIL: Talk!, 25 January 2021) <https://www.ejiltalk.org/georgia-v-russia-no-2-theeuropean-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/> [last accessed on 17 August 2024].

[30] See partly dissenting opinion of Judge Pinto de Albuquerque. Paragraphs 5 and 27.

[31] See joint partly dissenting opinion of Judges Yudkivska, Wojtyczek and Chanturia. Paragraph 6.

In analyzing personal jurisdiction, the author of the article argues that the ECtHR should have started from the premise that a state, when engaging in a military conflict and deploying its armed forces, is exercising public authority. Accordingly, when a state's decision and its implementation determine the fate of an individual or a group of individuals, whether within or beyond its national territory, this constitutes a jurisdictional link between the state and the potential victims. The key element here is the decision itself, which, by its very nature, already implies the determination of the rights of individuals located beyond the state's borders. It is precisely this decision that brings the affected individuals under the jurisdiction of the state, as its implementation is likely to impact their rights. A second essential element is the causal link between the state's extraterritorial act and the violation of rights in the area where the act was carried out. This issue will be discussed in more detail below.

V. THE BANKOVIĆ CASE AND THE ECTHR'S POSITION THAT "INSTANTANEOUS EXTRATERRITORIAL ACTS" EXCLUDE JURISDICTION, WHILE A CAUSAL LINK IS NOT ALWAYS SUFFICIENT

1. BANKOVIĆ CASE

In the case of *Banković*, which served as the primary precedent for declaring the complaint inadmissible regarding events that occurred during the active phase of hostilities, concerned a military operation conducted by NATO forces in Belgrade. As part of this operation, NATO forces bombed the headquarters of state radio and television, resulting in deaths and injuries. The relatives of the victims filed a complaint against the NATO member states that were also Contracting Parties to the ECHR, seeking to hold them accountable under the Convention. However, the ECtHR dismissed the complaint, ruling that the respondent states acted within the framework of NATO regulations and not "within their jurisdiction" in the sense of Article 1 of the Convention.

In *Banković*, the ECtHR applied an extremely restrictive approach to the issue of jurisdiction, interpreting "extraterritorial jurisdiction" through the lens of general international law and limiting its scope to an extension of domestic jurisdiction, which it linked to a state's sovereign territorial rights (including nationality, the national flag, diplomatic and consular relations, etc.). More importantly, the ECtHR confined the applicability of the Convention to the territory of Contracting States, referring to the "European legal space" and emphasizing that, at the time, the territory of the Federal Republic of Yugoslavia did not fall within the ECHR's scope.[32] With this judgment,

[32] See partly dissenting opinion of Judge Chanturia. Paragraph 16.

the Court also established that instantaneous military actions excluded the possibility of extending extraterritorial jurisdiction and that a mere causal link (between a state's actions and their consequences outside its territory) could not serve as the basis for jurisdiction (between the state and alleged victim) - and therefore, for the state's responsibility under the Convention.

In its Judgment in *Georgia v. Russia (II)* (§134), the ECtHR reiterated the principle established in the case of *Banković*, stating that: "The wording of Article 1 of the Convention is not compatible with the theory that anyone adversely affected by an act imputable to a Contracting State, wherever that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention."[33] Thus, the Court confirmed that the existence of a causal link between a state's extraterritorial act and the harm suffered by the victim is not sufficient to establish extraterritorial jurisdiction.

Beyond the fact that the approach taken in Banković case is itself highly controversial and has been the subject of criticism, it is essential to emphasize that its circumstances differ fundamentally from those of Georgia-Russia case:

- First, in the case of *Banković,* the military operation took place outside the Convention's legal space - in Belgrade, within the territory of the former Federal Republic of Yugoslavia, a non-Contracting State at the time. The Court built its reasoning around the concept of the "European legal space", asserting that the Convention's obligations did not extend beyond this space. In contrast, in the case of the 2008 August war, both the respondent and applicant states were Contracting Parties to the Convention, and all events occurred within the Convention's legal space. Moreover, the "Convention's legal space" argument is itself debatable, as it suggests an interpretation of Article 1 that could be seen as permitting (or at least not prohibiting) actions by Contracting States beyond this space that would be unlawful within it. However, this reasoning appears to contradict the ECtHR's general approach.[34] And, yet, by excluding the active phase of hostilities from its jurisdiction in the August war case, the Court effectively endorsed this (problematic) outcome.
- Second, unlike the NATO operations in the *Banković* case, during the August war Russia did not limit its military engagement to aerial and artillery bombings only,

[33] According to Judge Pinto de Albuquerque, the ECtHR reached this conclusion by disregarding both the Preamble of the Convention and Article 56 of the Convention. Specifically, Judge argued that the Court ignored the clear intent of the Convention's founding fathers, that the Convention should be applicable worldwide, beyond the territories of the Contracting States (except in certain cases). As in the case of Preamble, the Court ignored its spirit, which does not set geographical limits on the protection of Convention rights and freedoms but instead emphasizes a "universal and effective recognition and observance of fundamental rights." Paragraph 4.

[34] Banković and Others v. Belgium and Others, supra note 5, paragraph 75.

but rather conducted a full-scale military intervention including the deployment of ground forces into Georgian territory starting from the morning of August 10, 2008. This fact was (although indirectly) acknowledged by the Grand Chamber as well .[35] The author believes that this development should have strengthened the grounds for recognizing a jurisdictional link rather than undermining it.

- Third, in the case of *Banković*, the NATO member states and NATO forces did not aim to occupy Yugoslav territory or any part of it when conducting their military operation in Belgrade. In contrast, Russia's actions in the August war resulted in the occupation of a significant portion of Georgia's sovereign territory, effectively bringing it under "effective control" in the language of Convention law.
- Fourth, in the case of *Banković*, the respondent states acted within the framework of other international treaty obligations, arising from NATO membership.[36] By contrast, Russia's military intervention led to the occupation of part of another state's territory, an act explicitly prohibited under international law.

Due to the above-mentioned differences, the *Banković* case was not an appropriate or suitable precedent for determining the responsibility of the Russian Federation; not to mention the inherent flaws in the approaches applied in the case itself.

2. SPONTANEITY

As for the exclusion of extraterritorial jurisdiction in cases of instantaneous/spontaneous extraterritorial acts, based on the argument that Article 1 of the Convention does not encompass a cause-and-effect interpretation, the Court's case-law in this regard is neither consistent nor logically explainable or convincing.

The Convention has been applied in the past to various spontaneous or instantaneous acts, such as detentions carried out by agent of a Contracting State.[37] As mentioned earlier, the ECtHR has failed to provide a clear explanation of what constitutes the "instantaneous" or "spontaneous" nature of a state's act: whether it refers to a spontaneously made decision regarding an action or the immediacy of the action itself in response to specific events; whether it encompasses all state acts that are not continuous under international law, or whether it holds an autonomous meaning within

[35] See Issa and Others v. Turkey, supra note 20, paragraph 71.

[36] This refers to the Report of the EU's Fact-Finding Mission, which is included in the case materials and confirms the fact of the intervention (II 210).

[37] The bombing of the Radio Television Broadcasting Building in Belgrade was carried out as part of NATO's military operation "Allied Force". The bombing of the former Yugoslav territory took place between March 24 and June 8, 1999, following the decision of the North Atlantic Council to launch airstrikes, which was announced by NATO Secretary-General on March 23, 1999. This decision was made after unsuccessful attempts to achieve a peaceful resolution of the Kosovo conflict, which involved military confrontations between Serbian forces and Kosovar Albanian armed groups.

the ECtHR's jurisprudence. However, the main ambiguity concerns the relationship between the instantaneous nature of an act and jurisdiction. The question is what are the specific factors of "spontaneity" that, despite the existence of a causal link, exclude a jurisdictional connection (between the respondent state and the alleged victim), and as a result, justify the state's lack of responsibility under the Convention for the alleged human rights violation.

However, it still remains unclear why a state's responsibility cannot be based on an instantaneous/spontaneous extraterritorial act, why an instantaneous decision excludes responsibility, or why the military actions waged by the Russian Federation in the active phase of the 2008 August war - lasting at least five days - should be considered "instantaneous" acts of Russia. It is difficult to justify why certain acts resulting from genuinely immediate decisions (for instance, a border guard's spontaneous decision to open fire on an individual illegally crossing the border) are not considered "instantaneous" and can give rise to state responsibility under the Convention, while each individual action carried out by Russia during the five-day war, including bombing, artillery shelling, and ground attacks, and even more so, their cumulative impact, are classified as "instantaneous extraterritorial acts", exempting the state from liability under the ECHR. The authors of the joint partly dissenting opinion rightly pointed out: "The use of military force abroad is never an "instantaneous act" in this sense; rather, it is always a complex process, from the stage of decision-making to the stage of execution. It requires the issuance of military orders, including orders to launch an operation. It should be taken into account that the army is a strictly hierarchical structure based on obedience and a chain of command."[38]

Moreover, the Grand Chamber faced an even simpler question. It could have recognized that the instantaneous (spontaneous) nature of an extraterritorial act was not a relevant argument in this case, without resorting to the above-mentioned hypothetical logical reasoning. To do so, the Court simply needed to consider the documentary evidence available in the case, namely an interview given by President Putin in August 2012, in which he explicitly stated that the military operation against Georgia in August 2008 had been carefully pre-planned: "It is no secret that a plan existed long before the conflict in August 2008... We trained the South Ossetian military precisely based on this plan... It turned out to be more than just effective."[39]

[38] Including in such a distant places as Costa Rica (Judgment of the European Court of Human Rights N8916/80 "Freda v. Italy", 07 October 1980. Paragraph 254); San Vicente (Judgment of the European Court of Human Rights N14009/88 "Reinette v. France", 02 October 1989. Paragraph 192); and Sudan (Judgment of the European Court of Human Rights N28780/95 "Sánchez Ramirez v. France", 24 June 1996. Paragraph 155).

[39] See joint partly dissenting opinion of Judges Yudkivska, Wojtyczek and Chanturia. Paragraph 11.

Regarding the casual link:

On the one hand, in the *Banković* case, the ECtHR ruled that the wording of Article 1 of the Convention was not compatible with the theory that: "Anyone adversely affected by an act imputable to a Contracting State, wherever that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention."[40] Similarly, in the case *Medvedyev and Others* (cited above), the Court explicitly reaffirmed, relying on the *Banković* case, that state responsibility could not be based on an instantaneous extraterritorial act, as Article 1 did not imply a "cause-and-effect" interpretation of jurisdiction.[41] Later, the Court applied a similar approach in the case *M.N. and Others v. Belgium* (also cited above)[42], concluding that: "The mere fact that a decision taken at the national level causes harm to individuals residing outside the state's borders is not, in itself, sufficient to establish the jurisdiction of that state over those individuals."

On the other hand, in certain cases, the ECtHR has employed formulations that effectively grounded extraterritorial jurisdiction on the existence of a causal link. For example, in *Pad and Others v. Turkey*, which concerned the killing of the applicants' relatives by Turkish military fire from helicopters, the Court held that the victims fell under Turkey's jurisdiction, despite the fact that it was unclear whether the deceased individuals were in Turkey or Iran at the time of the incident - meaning that they may have been outside Turkey's territorial jurisdiction. The ECtHR found Turkey responsible, stating: "It was not disputed by the parties that the victims of the alleged events came within the jurisdiction of Turkey. While the applicants attached great importance to the prior establishment of the exercise by Turkey of extraterritorial jurisdiction with a view to proving their allegations on the merits, the Court considers that it is not required to determine the exact location of the impugned events, given that the Government had already admitted that the fire discharged from the helicopters had caused the killing of the applicants' relatives […]." (Emphasis added by the author). Thus, the recognition of a jurisdictional link was based precisely on the fact that "the fire discharged from the helicopters had caused the killing of the applicants' relatives."[43]

Similarly, in *Andreou v. Turkey* (cited above), which concerned the killing of individuals by gunfire from members of the Turkish or TRNC's armed forces/police, the ECtHR stated: "In these circumstances, regardless of the fact that the applicants sustained injuries outside the territory where Turkey exercised control, the act of opening fire on a group of people from close range, which was the direct and immediate cause of their injuries, constitutes a basis for considering the applicants as falling within Turkey's

[40] See partly dissenting opinion of Judge Chanturia. Paragraph 48.
[41] Banković and Others v. Belgium and Others, supra note 5, paragraph 75.
[42] Judgment of the European Court of Human Rights N3394/03 "Medvedyev and Others v. France" [GC] 2010. Paragraph 64.
[43] M.N. and Others v. Belgium, paragraph 112.

jurisdiction under Article 1 of the Convention. Consequently, the respondent state's responsibility under the Convention is based on the resulting consequences." (Emphasis added by the author).

As we can see, in the above-mentioned case, the ECtHR based the victims' inclusion within the respondent state's jurisdiction precisely on the 'resulting consequences' of the state's extraterritorial act. Accordingly, it remains unclear why the significance of the 'resulting consequences' of an extraterritorial act is completely disregarded in certain other cases that are not fundamentally different.

The Court's rejection of a state's jurisdiction over individuals harmed by its extraterritorial actions during an armed conflict, despite the existence of a causal link, not only narrows the scope of Contracting States' responsibility under the Convention but also contradicts the Court's own rational and logical reasoning, which explains why a Contracting State should not be exempt from accountability for human rights violations committed outside its own territory. Specifically, in *Issa and Others v. Turkey* (cited above), the Court stated the following:

"Moreover, a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating - whether lawfully or unlawfully - in the latter State. […] Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so 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."[44] (Emphasis added by the author). Incidentally, it is widely recognized that the above-mentioned principle, which the Court has reiterated in several cases,[45] effectively confirms that the existence of a jurisdictional link is largely determined by the causal connection between a state's actions and the alleged human rights violations resulting from those actions beyond its own territory.[46]

The author believes that whenever a state carries out an extraterritorial act, it bears an equal obligation to uphold Convention rights for all individuals affected by its actions, whether directly or indirectly, regardless of their location. Of course, this may not extend to "any national decision" that "causes harm" to those "residing outside its territory" (referring to the ECtHR's reasoning in *M.N. and Others v. Belgium*,[47] cited above). However, when a "national decision" specifically concerns an extraterritorial act, and individuals residing outside the state's territory suffer harm as a direct result of that act, then the existence of a jurisdictional link and the Contracting State's responsibility under the Convention should not be excluded.

[44] Pad and Others v. Turkey, supra note 20, paragraph 54.
[45] Issa and Others v. Turkey, supra note 20, paragraph 71.
[46] Isaak and Others v. Turkey, supra note 20; Solomou and Others v. Turkey, supra note 20, paragraph 45.
[47] See partly dissenting opinion of Judge Pinto de Albuquerque.

According to the author, a causal link is a necessary element for establishing a jurisdictional connection, but it may indeed not be sufficient on its own. However, in such cases, excluding a state's responsibility under the Convention should likely be based only on an assessment of factors such as the foreseeability of the consequences and whether the case concerns a violation of negative or positive obligations. With regard to extraterritorial acts, the scope of negative and, in particular, positive obligations under Article 1 of the Convention may differ when applied to individuals located outside the state's territory. This issue was partially addressed in the dissenting and concurring opinions attached to the judgment.

Specifically, as Judges Yudkivska, Wojtyczek, and Chanturia noted in their joint partly dissenting opinion: "The detonation of an atomic bomb per se would not place individuals living in neighboring countries under the jurisdiction of the state where the explosion occurred, even if they were harmed by it, regardless of whether the explosion was caused by negligence."[48]

The use of this hypothetical example suggests that there is no uniform understanding of what constitutes an "extraterritorial act". The judges presented a hypothetical scenario - a state causing harm to individuals in a neighboring country through an atomic explosion - in which, in their view, the mere existence of a causal link would not be sufficient to establish state responsibility under the Convention. While some may agree on this position, a separate question arises: Does the negligent detonation of a bomb within a state's own territory even qualify as an "extraterritorial act" at all? And, does the concept of an extraterritorial act encompass any action (or omission) committed within a state's own territory that results in harm to individuals located beyond its borders?

Essentially, when the violation of the rights of persons residing outside a state's territory results from that state's negligent or careless action or omission, it would be incorrect to claim that the victims fall under the state's jurisdiction solely because they suffered harm. However, when a state makes a decision to carry out a specific extraterritorial act, plans, prepares, and executes it, and when the likelihood of causing harm to persons in the affected territory is foreseeable, then a jurisdictional link should be recognized. The state's decision to undertake an extraterritorial operation serves as the critical link that establishes jurisdiction in such cases. It is this very decision that places the potential victims under the jurisdiction of the state making it. For illustration: when a state decides to carry out artillery shelling on the territory of another state, it effectively places potential victims within its jurisdiction. In such cases, the state acts as a public authority, since the use of military force is one of the instruments of state power, and the use of force represents a form of state coercion. As the authors of the joint partly dissenting opinion rightly pointed out: "The problem does not begin when the bombs

[48] M. N. and Others v. Belgium, paragraph 112.

start falling but rather when the decision to launch the bombing has been planned and ordered."[49]

In this context, an interesting issue arises: When a causal link is established, should the recognition of extraterritorial jurisdiction depend on whether the harm inflicted on persons outside the state's territory results from a breach of the state's positive obligation to protect rights or from a violation of its negative obligation not to interfere with them? This is a legitimate question, and the only firm answer is that a violation of negative obligation provides a stronger justification for recognizing extraterritorial jurisdiction than a failure to fulfill positive obligation. Illustration: If people are killed as a result of a state bombing a certain area beyond its borders, this would constitute a violation of the state's negative obligation to respect the right to life and consequently, would present a stronger case for recognizing jurisdiction. Conversely, if a bomb explosion occurs due to the state's failure to observe safety regulations, thereby breaching its positive obligation to protect life and causing deaths outside its territory, the justification for recognizing jurisdiction would be weaker. Thus, if a causal link alone is insufficient to establish extraterritorial jurisdiction, it may still meet the threshold when combined with a violation of a negative obligation.

However, as mentioned above, this issue can also be approached from a different perspective. Specifically, could it be argued that a state's negative obligations toward persons residing beyond its borders are greater - or significantly greater - than its positive obligations to protect rights? Or perhaps a Contracting State does not incur any positive obligations at all toward individuals located outside its borders? A state may be directly required not to interfere with the exercise of rights and not to violate the rights of individuals present in the territory of another state, even though these individuals were not within its jurisdiction prior to the act of interference. At the same time, the recognition of positive obligations - such as ensuring the effective enjoyment of rights, preventing threats, or providing other safeguards - toward individuals outside the state's borders may be significantly weaker or even non-existent. The author does not share the view that a state never incurs positive obligations toward individuals abroad, nor does she believe that such obligations always arise. In different and specific circumstances, appropriate and concrete positive obligations can and should be recognized.

It is noteworthy that one of the authors of a partly concurring opinion in the present case, Judge Serghides, analyzed the issue precisely from this perspective. In his view, the applicant state missed an important opportunity to raise a crucial issue - namely, the accountability and jurisdiction of the respondent state in relation to its negative obligations - not under Article 1 of the Convention, but rather under the substantive provisions of the Convention (particularly Articles 2 and 3), as well as in relation to

[49] See joint partly dissenting opinion of Judges Yudkivska, Wojtyczek and Chanturia. Paragraph 11.

Articles 32, 19, 13, and 33, and to the inherent power of the Court. According to Judge Serghides, there is one aspect of examining whether the events that took place during the active phase of the armed conflict fell under the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention (as the complaint was presented to the ECtHR), while another aspect is considering the complaint more broadly, in light of all potentially relevant provisions of the Convention and the Court's inherent power. In Judge's view, if it is accepted that a member state's negative obligation, in terms of accountability and jurisdiction, extends beyond the scope of Article 1 of the Convention, then they are broader than its positive obligations. Consequently, the Court's jurisdiction over the protection of negative obligations would become broader than in the case of positive obligations.[50]

Accordingly, if we analyze the events of the 2008 August war within the above-mentioned contexts, the conclusions still weigh in favor of recognizing jurisdiction:

The case concerned:

- First, the military actions carried out directly on Georgian territory and the consequences that occurred there, meaning undeniably extraterritorial acts;
- Second, the deaths of individuals as a direct result of military aggression, including killings and injuries inflicted based on decisions made by the state, which constitute violations of the negative obligations to protect the right to life;
- Third, a clear causal link between Russia's actions on Georgian territory and the violations of human rights that occurred there.

For these reasons, the author argues that the Russian Federation's decision-making regarding military intervention during the active phase of hostilities, and the execution of those decisions on Georgian territory constitutes a decisive factor that should have formed the basis for recognizing a jurisdictional link between Russia and the victims whose occurrence was causally linked to the respective decisions made by Russian Federation.

VI. THE SPECIFICITY OF INTERNATIONAL ARMED CONFLICTS AND THE ABSENCE OF DEROGATION PRACTICE UNDER ARTICLE 15 OF THE ECHR

As additional arguments for excluding the events of the active phase of hostilities from Russia's jurisdiction, the Court cited the specificity of international armed conflicts and the absence of a practice of derogation from Article 15 of the Convention by Contracting Parties in such situations.

[50] ibid.

The ECtHR stated that "Unlike the latter (i.e., an isolated extraterritorial act characterized by the so-called proximity element - emphasis added by the author), the active phase of hostilities, which the Court is required to assess in the present case within the context of an international armed conflict, is fundamentally different as it involves bombing and artillery shelling by Russian armed forces, aimed at disrupting the Georgian army and establishing control over parts of Georgian territory."[51]

According to the ECtHR's reasoning: "Due to the large number of alleged victims and claimed incidents, the vast volume of evidence, the difficulty in determining the relevant circumstances, and the fact that such situations are predominantly regulated by other international legal norms (specifically, the rules of international humanitarian law or the law of armed conflict), the Court considers that there is no basis for developing its case law on the concept of 'jurisdiction' beyond what has already been established."[52] The Court further added: "If the Court is to be entrusted with the task of assessing acts committed outside the respondent state's territory during the active phase of hostilities in an international armed conflict, then Contracting States must provide an appropriate legal basis for fulfilling this task."[53]

The ECtHR also noted: "This conclusion (i.e., that the exercise of extraterritorial jurisdiction by a state is not established during military operations and that the active phase of hostilities should be assessed in the context of an international armed conflict - emphasis added by the author) is supported by the practice of High Contracting Parties. Specifically, they do not resort to derogation from Article 15 of the Convention in situations where they are engaged in international armed conflicts beyond their own territory. In the Court's view, this could be interpreted as an indication that High Contracting Parties consider that, in such circumstances, they do not exercise their jurisdiction within the meaning of Article 1 of the Convention - position also advanced by the respondent government in the present case."[54]

In response to that argument, it can be mentioned that the ECtHR had already recognized the jurisdiction of a respondent state in armed conflict situations based on the standard of state agent authority and control.

In *Hassan v. the United Kingdom*,[55] the Court found that the United Kingdom had jurisdiction during the active phase of the conflict, relying on the standard of "physical power and control" over the victim. As a result, the United Kingdom was held responsible for the alleged human rights violations. Notably, the Court did not assess whether the UK exercised "effective control" over the area, justifying this omission by

[51] See partly concurring opinion of Judge Serghides. Paragraph 3.
[52] See Judgment, paragraph 133.
[53] See Judgment, paragraph 141.
[54] See Judgment, paragraph 142.
[55] See Judgment, paragraph 139.

stating that jurisdiction had already been established based on the "physical power and control" standard.

However, the most significant point is that, in the Georgian case, the ECtHR refused to recognize Russia's jurisdiction based on the very argument it had relied upon to establish the United Kingdom's jurisdiction in the case of *Hassan* (cited above). In *Hassan,* the respondent government had raised precisely the same argument that Russia put forward in the Georgian case - namely, that this basis of jurisdiction (i.e., "state agent authority and control") should not apply to the active phase of hostilities in an international armed conflict, particularly when the agents of the Contracting State were operating in a territory where the state was not an occupying power and where it was instead subject to the requirements of international humanitarian law."[56]

However, in the above case, the ECtHR rejected this argument and ruled in favor of the applicants, whereas in the Georgian case, it took the opposite stance - siding with the respondent government. The *Al-Skeini* case (cited above) also concerned a period in which international humanitarian law could be applicable, specifically it concerned the period, when the United Kingdom and its coalition partners exercised occupation in Iraq. Despite this context, the Court judged that the United Kingdom exercised jurisdiction under Article 1 of the Convention over the applicants' relatives. When rejecting the jurisdictional argument put forward by the UK government, the Court stated: "The Court cannot follow this argument [...]. Accepting the government's argument on this matter would be incompatible with the case-law of the International Court of Justice, which has established that international human rights law and international humanitarian law must be applied concurrently. As the ECtHR has found in multiple cases, the Convention cannot be interpreted in a vacuum and must, as far as possible, be interpreted harmoniously with the principles of international law, of which it is a part."[57] This applies equally to Article 1 as well as to other provisions of the Convention."[58]

With this interpretation, the ECtHR made it clear that:

- It did not accept the approach that extraterritorial jurisdiction could not be established during the active phase of a conflict merely because "effective control" could not be determined in circumstances where states were fighting precisely for that control;
- It rejected the notion that, in the context of an international armed conflict, only international humanitarian law was applicable for regulating the situation.

[56] Judgment of the European Court of Human Rights N29750/09 "Hassan v. the United Kingdom" [GC] 2014. Paragraph 76.
[57] ibid, paragraphs 71 and 76.
[58] See Judgment of the European Court of Human Rights N35763/97 "Al-Adsani v. the United Kingdom" [GC] 2001. Paragraph 55.

The author fully agrees with this perspective. It remains unclear why the ECtHR diametrically changed its approach, without providing sufficient justification, and why it relied on arguments in the Georgian case that it had previously rejected. Judge Pinto de Albuquerque sharply criticized this new approach of the Court, according to which the ECtHR "should not delve" into "such situations [that] are predominantly regulated governed by legal norms other than those of the Convention."[59]

It is noteworthy that this issue was also highlighted by the authors of the joint partially dissenting opinion in the Georgian case. Specifically, Judge Chanturia posed the following question: If, in *Hassan* case, the Court was able to rely on the norms of international humanitarian law in conjunction with Article 5 of the Convention when assessing the actions of the United Kingdom in Iraq, why could the majority not do the same in the present case regarding Russia's actions and similarly rely on international humanitarian law norms in relation to Article 2 of the Convention?[60] The authors of the joint partially dissenting opinion noted: "Whereas in *Hassan*, the Court consciously chose to take path most in harmony with the purpose of the Convention and with the widest possible respect for and application of Convention rights, in the present judgment, without proper justification based on the law and on the facts, the majority have chosen the opposite direction."[61]

The fact that the active phase of hostilities in an international armed conflict may be assessed through the lens of international humanitarian law does not exclude the simultaneous application of the Convention. Nor does it serve as evidence that Russia was not acting within its jurisdiction under Article 1 of the Convention during the August war and that, as a result, it bears no responsibility under the Convention for violations of negative obligations regarding the protection of rights during the active phase of hostilities.

The fact that an issue brought before the ECtHR under the Convention can also be assessed under other norms of international law does not negate the Court's jurisdiction over it. The protection ensured by the ECHR is not secondary or supplementary to other international legal norms; and the Convention remains applicable to relevant facts regardless of whether those facts are also assessed under other international legal frameworks. A clear illustration of this principle can be found in the present case. The Grand Chamber examined allegations of ill-treatment of prisoners of war during the August war under Article 3 of the Convention and noted in its judgment that the treatment of prisoners fell within the scope of the Third Geneva Convention related to the Treatment of Prisoners of War (Articles 13, 129, and 130) and Article 75 of the Additional Protocol relating to the protection of victims of international armed conflicts.

[59] ibid, paragraph 77.
[60] See partly dissenting opinion of Judge Pinto de Albuquerque. Paragraph 29.
[61] See partly dissenting opinion of Judge Chanturia. Paragraph 30.

The Court further stated that there was no conflict between Article 3 of the Convention and the provisions of international law mentioned above, and based on its examination of the relevant facts concluded that a clear violation of Article 3 of the Convention had taken place.[62]

Moreover, the ECtHR was not even facing a serious dilemma in the sense that it was not required to assess Russia's territorial jurisdiction by first determining the lawfulness of its military intervention under international humanitarian law, a competence it did not possess. In reality, the Court did not even need to establish in advance whether Russia's actions violated international humanitarian law and whether they were lawful or unlawful under both in the sense of *jus ad bellum* and *jus in bello.*[63] The reason for this is that the concept of extraterritorial jurisdiction encompasses the extraterritorial acts of Contracting States regardless of their legality or illegality under international law. For the purposes of adjudicating the inter-State complaint, the ECtHR's sole focus should have been to determine whether a jurisdictional link existed between the decisions that Russia reached and executed on its military intervention into Georgia and the individuals who suffered as a result of that intervention, even without assessing the intervention through the lens of international humanitarian law. The Court should have recognized that through its extraterritorial act, Russia exercised extraterritorial jurisdiction over a person or the groups of persons whose fate was determined by its intervention. It is far more just to hold a Contracting Party accountable under the Convention when it violates Convention rights through an extraterritorial act beyond its own state territory, *a fortiori,* when those violations occur within territory that falls within the Convention's legal space, as was the case with Georgia.

Thus, in author's view, the applicability of international humanitarian law or other legal norms to certain events does not *per se* render the Convention inapplicable or turn it into an ineffective instrument.

As for the "large number of alleged victims, the vast amount of evidence, and the difficulty in establishing the relevant circumstances", the author believes these factors have no rational connection to the issue of jurisdiction, and this "argument" should not have been invoked by the Court at all. The large number of victims should have served as a basis for prioritizing the case, rather than as a reason for excluding the State's jurisdiction.

Finally, with regard to the appropriateness of referencing the practice of non-derogation from Article 15 of the Convention during armed conflicts as an argument for rejecting jurisdiction:

[62] See joint partly dissenting opinion of Judges Yudkivska, Wojtyczek and Chanturia. Paragraph 13.
[63] See Judgment, paragraphs 266 and 267.

First of all, according to the ECtHR's own statement, the present case was the first instance since *Banković* case, in which the Court had to assess the active phase of military operations within the context of an international armed conflict. If this is indeed the case, then it is inconsistent to speak of any solid practice suggesting that, as a rule, "derogation from Article 15 of the Convention does not occur." Furthermore, in *Banković*, the respondent states were acting under their NATO obligations rather than within their own jurisdiction as defined under Article 1 of the Convention, as the Court affirmed. Consequently, if their actions could not be assessed under the Convention, then logically, they were not required to derogate from Article 15 of the ECHR. What is crucial here is that, in reality, non-derogation from Article 15 does not determine the absence of jurisdiction; rather, it is the absence of jurisdiction, as understood under the Convention that should justify the lack of necessity for derogation from Article 15.

Furthermore, in substantive terms, derogation under Article 15 of the Convention is permissible only "in time of war or other public emergency threatening the life of the nation." Additionally, any derogation must be "strictly required by the exigencies of the situation" and must not be inconsistent with the other obligations of the state under international law. In *Banković*, however, none of the Convention's Contracting States involved in the NATO military operation were in a state of war, no state of emergency had been declared, and there was no threat to the life of their nations. Consequently, the conditions for invoking Article 15 did not exist in the first place, which means that these states could not have issued derogation under this provision.

Moreover, Article 15 of the Convention permits derogation from the right to life only in cases of lawful acts of war. In other words, a Contracting State may only be excused for loss of life under Article 15 if it results from lawful acts of war.[64]

The question of whether the NATO member states involved in the military operation in Belgrade conducted "lawful acts of war" (in the sense of the Article 15 of the Convention or international humanitarian law) when bombing the radio and television building lies beyond the scope of the author's interest. However, it is clear that Russia's actions during the August war cannot, by any standard, be classified as lawful acts of war. Russia's military intervention was not limited to artillery shelling of parts of Georgian territory, but also involved sending troops and military equipment into Georgia, engaging in ground combat, and occupying a significant portion of a sovereign state's territory. It is therefore evident that Russia's actions in the August war were unlawful, including under international humanitarian law, and could not have met the requirements for derogation as mentioned above.

[64] According to Judge Chanturia, the Court was not required to assess the legality of the armed conflict waged by Russia under international law (jus ad bellum). Its sole task was to determine whether Russia's actions during the active phase of the armed conflict constituted a violation of Article 2 of the Convention, either independently or, if appropriate in light of the specific circumstances of the case, within the framework of international humanitarian law (jus in bello).

Here, it is also important to emphasize that if the applicability of international humanitarian law in determining jurisdiction under Article 1 of the ECHR is a matter of debate, the situation is different in relation to Article 15. Since this article explicitly refers to "lawful acts of war", its interpretation necessarily requires the Court to assess its content through the lens of international humanitarian law. Consequently, the ECtHR is not prohibited from operating with terms and concepts derived from international humanitarian law in this context. Thus, it is through Article 15 that the meaning of "lawful acts of war" - where loss of life might be condoned under the Convention - should be determined.[65] Accordingly, instead of invoking the absence of derogation under Article 15 as an argument for lack of jurisdiction, the Court should have assessed whether Article 2 of the ECHR was violated also due to Russia's failure to invoke derogation under Article 15. It is evident that the Court could not have reached a conclusion on this matter (in the framework of international humanitarian law) without first determining whether Russia's military intervention in Georgia should be considered "lawful acts of war". It is, therefore, undeniably clear that the argument based on Article 15 is artificial and entirely inadequate. The purpose of Article 15 was never to justify the unlawful actions of an aggressor state, including the deprivation of life, but rather to provide a legal basis for derogation in cases where states engage in defensive military operations or face situations where "the life of the nation is threatened". Russia, however, did not have any conditions necessary to meet the requirements of Article 15 for derogation from the right to life. Therefore, the absence of derogation under Article 15 cannot serve as a legitimate justification for Russia's actions nor as a means of exempting it from responsibility for the violations committed.

In general, Article 15 of the Convention should not be interpreted or applied in a way that suggests that a state's failure to derogate during an armed conflict automatically implies a presumption of the lawfulness of its military actions, nor that the absence of derogation indicates that the state is not acting within its jurisdiction. Thus, the argument referring Article 15 is inappropriate, unfitting, and even carries an ironic undertone. It is difficult to assume the presumption of good faith on the part of an aggressor state and to build serious normative reasoning upon it. As Judge Pinto de Albuquerque masterfully pointed out: "The failure to derogate from Article 15 has nothing to do with jurisdiction, as the Court has previously confirmed."[66] He further emphasized that: "The Court

[65] According to Article 15, paragraph 2, no derogation from Article 2 of the Convention except in respect of deaths resulting from lawful acts of war shall be made under this provision.

[66] The author of concurring opinion, Judge Keller, points out that the Court has said little about the concept of a "lawful war" and that, under Article 15 of the Convention, military operations can be considered lawful only if they comply with the requirements of international humanitarian law, particularly the Hague Conventions. Paragraphs 24 and 25.

cannot divest itself of or renounce its own jurisdiction (Kompetenz-Kompetenz[67]) under Article 1 merely because the parties have ignored Article 15." In Judge's view, the confusion of the majority between jurisdictional issues and the question of applicable law in the present case only highlights the irrationality of majority's position, that "the graver the State military conduct, the less intensive the Strasbourg oversight."[68]

The refusal of states engaged in conflict to derogate from their obligations under Article 15 of the Convention can be interpreted as some kind of a strategy and an attempt to project an image that their planned military operations will not result in violations of Convention rights and that they do not seek to exempt themselves from human rights obligations during active hostilities. A state's decision not to invoke Article 15 may also stem from a desire to avoid external perception that its derogation signals an intent to violate human rights during military operations. The author believes that the mere fact of non-derogation does not justify a legitimate presumption that a state will not violate the Convention in the course of its military operations. The fact that the Russian Federation did not derogate from Article 15 of the ECHR during the August war is neither an indication that its military intervention constituted a "lawful act of war" within the meaning of Article 15 of the Convention, nor that it remained within the obligations imposed by the Convention, thereby making human rights violations unlikely, nor that no violations occurred. If the ECtHR truly believes that the military operations conducted during the August war constituted a situation in which Article 15 could have been invoked and that Russia had the option to rely on it, then this implicitly comes dangerously close to recognizing that Russia's military aggression and hostilities on Georgian territory - which ultimately led to the occupation of significant parts of Georgia - constituted "lawful acts of war" under Article 15 of the Convention.

The "argument" based on Article 15 is not consistent with the ECtHR's case-law either. Since, in the landmark case of *Hassan v. the United Kingdom*, the fact that the United Kingdom had not formally derogated from Article 15 did not prevent the Court from establishing the UK's extraterritorial responsibility for events in southeastern Iraq.[69]

More broadly, if during international armed conflicts, a Contracting State is only accountable under international humanitarian law, as this precedent suggests, and the Convention ceases to apply altogether, then, paradoxically, derogation under Article 15 would have been necessary to maintain credibility under the ECHR. At the same time, if the Convention does not apply during armed conflicts (in the active phase of hostilities), and states are not required to derogate from Article 15, this would imply that the very purpose of Article 15 - which only permits derogation in cases of "public emergency

[67] Kompetenz-Kompetenz is a legal doctrine according to which a judicial body, such as a court or tribunal, has the authority/jurisdiction to determine its own competence in resolving a dispute before it.

[68] See partly dissenting opinion of Judge Pinto de Albuquerque. Paragraph 28.

[69] Hassan v. the United Kingdom, supra note 57, paragraphs 101, 107, 110.

threatening the life of the nation" - is entirely illusory. This is the unfortunate conclusion to which the Court's reasoning regarding Article 15 of the Convention leads.

VII. CONCLUSION

The rejection of the Russian Federation's extraterritorial jurisdiction concerning events during the active phase of the 2008 August war, particularly on the basis of the *Banković* case, is not justified. The author fully agrees with the dissenting opinions expressed in the judgment that the ECtHR, unfortunately, relied on an outdated and irrelevant precedent (*Banković)* instead of drawing upon more recent and appropriate case-law (*Jaloud, Solomou and Others, Andreou, Pad and Others, Isaak and Others, Issa and Others*).[70] It is unfortunate that the particularly sensitive political nature of this case deprived the Court of the strength and determination to effectively address one of the most serious challenges ever faced within the European legal space since its establishment.

The invocation of international humanitarian law in the context of international conflicts, the exclusion of spontaneous extraterritorial acts from the scope of jurisdiction, the insufficiency of causality, and the reference to the practice of non-derogation from Article 15 of the Convention as "arguments" failed to provide a coherent and convincing legal basis for the judgemnet regarding the active phase of the war.

In author's view, there were grounds for recognizing both spatial and, in particular, personal jurisdiction in this case. Moreover, if the Court considered that none of the established models adequately corresponded to the realities of the August war, it could have introduced a new criterion/approach, expanded the interpretation of spatial or personal extraterritorial jurisdiction, or even established a new, third form of extraterritorial jurisdiction to ensure that cases of mass loss of life resulting from military operations would not be left beyond the scope of Convention responsibility.

In the context of spatial jurisdiction, it would have been sufficient for the notion of "effective control over an area" to encompass not only the cases where the respondent state already exercises effective control over a given area but also the instances where the state is actively seeking to establish such control and employs public authority (including military force) for this purpose. At the very least, the interpretation of spatial jurisdiction should have been expanded to cover situations where effective control over an area, while not present before the commencement of the contested state act, is immediately established upon its execution. However, a fairer approach would ensure that human rights violations committed in the process of attempting to gain such control do not remain beyond the scope of Convention responsibility.

[70] See partly dissenting opinion of Judge Chanturia. Paragraph 13.

Personal jurisdiction should encompass all individuals outside the state's borders over whom the state exercises its authority through its agents, regardless of whether such authority is exercised lawfully or unlawfully and irrespective of whether the corresponding extraterritorial act may also be assessed under other international legal norms in addition to the Convention. In such cases, state responsibility should, at the very least, extend to the rights that are directly affected by the extraterritorial act and should be determined to the extent that the act impacts those rights (in line with the concept of the divisibility and tailoring of rights and corresponding obligations).

The author argues that causal connections should be utilized more extensively in establishing jurisdictional links to prevent a situation where the Convention indirectly allows Contracting States to act beyond their borders in ways that are prohibited within their own territory. The recognition of jurisdictional links should be primarily based on causality.[71]

A jurisdictional connection between affected individuals and the respondent state's actions should, in principle, be acknowledged if the causal link was reasonably foreseeable.

At the same time, it would be fair to recognize that the existence of a causal link between a state's extraterritorial act and the alleged violation of the rights of individuals located outside its territory should give rise to a presumption of a jurisdictional link between the state responsible for the act and the affected individuals. Accordingly, where a causal link exists, the development of various legal constructs by the Court should serve to allow appropriate exceptions to the presumption of jurisdiction in justified cases. If the consequences of the state's actions were foreseeable, then the jurisdictional link - and, consequently, the state's responsibility under the Convention - should be recognized. The burden of proving the impossibility of foreseeing the consequences should rest on the respondent state. It is noteworthy that in principle, the application of interim measures by the ECtHR in similar cases based on Article 39 of the Rules of Court implicitly acknowledges the presumption of jurisdiction, at least a prima facie.[72] Therefore, it would be reasonable that, once causal link has been established, a strong presumption of jurisdiction arises for the respondent state, shifting the burden of proof to the state responsible for initiating the cause.

[71] The concept of causality already has a broad application in Convention law. In practice, the recognition of a Convention violation is always based on establishing a causal link between the state's failure to fulfill its negative or positive obligations and the infringement of a right. However, the ECtHR, unfortunately, applies this concept inconsistently and in a fragmented manner rather than relying on a unified methodological approach. Moreover, it employs varying terminology and expressions in different cases. And yet, a well-reasoned application of the causality concept, with its clear and reliable logic, would have allowed the Court to base its decisions on a solid and logical foundation and to reject inadequate and irrational arguments - something it regrettably failed to do in the present case. For a discussion on the use of causality in Convention law, see Eva Gotsiridze, Causality in European Human Rights Law (2006).

[72] On August 11, 2008, in the context of the military attack by the Russian Federation, Georgia requested an interim measure from the ECtHR. The Court granted this request.

The infliction of harm on individuals beyond national borders should, in principle, give rise to responsibility under the Convention when it results from the deliberate actions of a state. Jurisdictional link must always be recognized when a state carries out a premeditated extraterritorial act that involves the use of instruments of state power, such as the application of force - including military force - and coercion, thereby causing harm to private individuals.

The Court must explicitly affirm that the concept of "within their jurisdiction" under Article 1 of the ECHR does not exempt Contracting Parties from responsibility when they violate Convention rights through extraterritorial acts affecting individuals beyond their own territory. The Court should make it clear that Article 1 of the Convention cannot be interpreted as granting a Contracting Party the right to disregard the rights of individuals affected by its extraterritorial actions while carrying out such actions. Furthermore, this obligation should not be confined solely to the European Convention's territorial scope.

In the aforementioned context, differentiation may be justified only based on whether the harm results from a violation of a negative or a positive obligation. A state's negative obligations concerning the rights of individuals beyond its borders must always be recognized with regard to the rights affected by its extraterritorial actions. In other words, a Contracting Party must be held accountable under the Convention for violations of the rights of individuals outside its borders when such violations result from its direct intervention. As for positive obligations, their applicability in extraterritorial contexts should depend on the specific circumstances of the extraterritorial act in question.

In general, a violation of rights due to negligence, including inaction, may not always establish a jurisdictional link, depending on the specific circumstances of the case. However, it is crucial that this issue be thoroughly and comprehensively examined. A reasonable answer must be provided to the question of whether, in principle, a state bears a positive obligation under the Convention to mitigate or prevent the risk of harm to individuals located outside its territory when carrying out extraterritorial actions. If the answer to this question is negative, it follows that, at least to some extent, the approach prevails that positive obligations regarding the protection of human rights in the context of extraterritorial actions are significantly reduced or even nonexistent. This, in turn, leads to the problematic conclusion that a Contracting State may grant itself the right to engage in conduct beyond its borders that it would be prohibited from undertaking within its own territory due to its Convention obligations. Such an approach ultimately results in an unjustified differentiation in the treatment of individuals based on their location, allowing for different standards of human rights protection without adequate justification. Therefore, the author strongly believes that whenever a state carries out an extraterritorial act that involves direct interference with rights or creates a risk of endangering them - such as the detention or imprisonment of a person on foreign territory, the implementation of security measures, the planning

or participation in counterterrorism operations, the use of a specific area for purposes such as the transportation of weapons or ammunition, or any other activity that may impact the rights of individuals present in that territory - this undoubtedly gives rise to corresponding positive obligations.

In general, rejecting the extraterritorial jurisdiction of a warring state during an international conflict over the population living in the area of military operations, and excluding such actions from accountability under the Convention, is unacceptable - particularly when it occurs within the European legal space (*espace juridique*). Such an approach undermines the fundamental logic of international criminal law and could even serve as an incentive for similar conflicts.[73] The protection of human rights in Europe during armed conflicts, when the risk of vulnerability and likelihood of victimization due to extraterritorial military actions are particularly high, should not be left outside the scope of European oversight. Without an adequate response to such situations, the Convention will be unable to effectively fulfill its role as a guarantor of peace and public order in Europe.

Finally, in Paragraph 140 of its Judgment, the Court acknowledged its sensitivity to the fact that the interpretation of the notion of "jurisdiction" under Article 1 of the Convention may seem unsatisfactory to the alleged victims of the Russian Federation's military actions, who suffered harm during the active phase of the armed conflict. Judge Pinto de Albuquerque referred to this as "the crocodile tears of the European Court." In Judge's view, the ECtHR now will face a gargantuan task[74] in restoring the damage caused by its judgment to its credibility. The authors of the joint dissenting opinion captured the situation with the Latin maxim: *silent enim leges inter arma* ("laws fall silent in times of war").[75] It is hard to disagree with this assessment. One cannot help but feel that the Court sought to avoid delving deeply into the issues that were highly sensitive and politically charged. It delivered a decision that falls short of fulfilling the Convention's purpose and built an unsustainable justification for refusing to recognize Russia's jurisdiction during the active phase of hostilities, relying on artificially assembled "arguments". The author suggests that inadequacy of the approaches taken in the case of the war of August 2008 will become even more apparent in relation to the war in Ukraine. Given the strong international condemnation of Russia's actions, the ECtHR will inevitably revise its approach if it is ever called upon to adjudicate on the matter.

[73] According to Judge Chanturia, the majority's decision on extraterritorial jurisdiction during the active phase of the conflict created a legal vacuum, which contradicts the spirit of the Convention. He argues that leaving individual victims of an armed conflict within the European legal space in a legal void should be regarded as a refusal to protect the rights of those who need it the most. Paragraph 6.

[74] See partly dissenting opinion of Judge Pinto de Albuquerque. Paragraph 30.

[75] See joint dissenting opinion of Judges Yudkivska, Wojtyczek and Chanturia. Paragraph 6.