CRY 'HAVOC!': THE EXTRATERRITORIAL APPLICATION OF THE ECHR DURING THE 'ACTIVE PHASE' OF INTERNATIONAL ARMED CONFLICT

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Abstract: Even in times of armed conflict, the European Convention on Human Rights remains an essential instrument for the protection of individuals, especially where other legal frameworks may fall short. This article critically assesses the European Court of Human Rights' restrictive approach to extraterritorial jurisdiction in *Georgia v Russia (II)*. The Court's exclusion of ECHR applicability during the 'active phase' of hostilities marks a significant departure from its earlier, more flexible course of jurisprudence. It relies on vague notions of 'context of chaos' and avoids fact-specific analysis, effectively retreating from the Convention's protective function in favour of States Parties' autonomy. The article examines the internal tensions of the Court's reasoning and evaluates to what extent this has been remedied in the *Ukraine and the Netherlands v Russia* judgment on the merits. It concludes that the Court's inconsistent approach weakens accountability during armed conflict, narrowing the reach of human rights precisely when they are most needed.

Resumé: Evropská úmluva o ochraně lidských práv zůstává i v době ozbrojeného konfliktu zásadním nástrojem ochrany jednotlivců, a to zejména tam, kde jiné právní rámce selhávají. Tento článek kriticky analyzuje restriktivní přístup Evropského soudu pro lidská práva k otázce extrateritoriální jurisdikce v případu *Gruzie proti Rusku (II)*, v němž Soud vyloučil použitelnost Úmluvy během aktivní fáze ozbrojeného konfliktu, čímž se výrazně odchýlil od své dřívější, flexibilnější judikatury. Svůj závěr opírá o neurčité odkazy na ‚prostředí chaosu' a vyhýbá se posouzení konkrétních skutkových okolností, následkem čehož ustupuje od ochranné funkce Úmluvy ve prospěch autonomie jejích smluvních stran. Článek rozebírá vnitřní rozpory v argumentaci Soudu a hodnotí do jaké míry byly tyto nedostatky napraveny v meritorním rozsudku *Ukrajina a Nizozemsko proti Rusku*. Dochází k závěru, že nekonzistentní přístup Soudu oslabuje odpovědnost za jednání v průběhu ozbrojeného konfliktu a zužuje dosah lidskoprávní ochrany právě v okamžiku, kdy je zapotřebí nejvíce.

Key words: European Convention on Human Rights, Extraterritorial Jurisdiction, Georgia v. Russia (II), Ukraine and the Netherlands v. Russia, Active Phase of Hostilities, European Court of Human Rights

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Introduction

With the proliferation of armed conflicts worldwide and the grave human suffering they entail, the need for accountability presses with renewed urgency. However, while international humanitarian law ('IHL'), as the traditional framework governing the conduct of hostilities, sets limits on warfare, it lacks effective enforcement mechanism, particularly in relation to judicial remedies. It is precisely this gap that human rights law helps to fill. The International Court of Justice has affirmed the concurrent and complementary application of human rights during armed conflict,[1] and regional mechanisms such as the one established by the European Convention on Human Rights (the 'Convention' or the 'ECHR')[2] may provide what IHL does not: judicial oversight and direct access for victims.[3] By delivering enforceable remedies, the Convention strengthens protection of those most vulnerable to consequences of war.

However, the European Court of Human Rights' (the 'Court') jurisprudence on the extraterritorial jurisdiction—a precondition for the applicability of the Convention—during military activities abroad has long been marked by uncertainties. In its most recent contributions to this saga, the Court considered whether, and to what extent, the Convention applies during the active hostilities of international armed conflict. In the 2021 *Georgia v Russia (II)* judgment,[4] the Court appeared to depart from its previous trajectory, in which it progressively expanded the Convention's applicability beyond the borders of its States Parties. Instead, it adopted a more restrictive stance, drawing a strict boundary by holding that the Convention does not apply extraterritorially during the 'active phase' of hostilities in the context of an international armed conflict. This position significantly narrowed the protection available to victims of human rights violations by leaving the matter within States' autonomous domain. In 2025, the Court revisited the issue in *Ukraine and the Netherlands v Russia*.[5] While in this seminal case it found jurisdiction during an active phase of hostilities established, the criteria on which it relied leave open the debate as to whether this represented a genuine departure from, or a meaningful re-evaluation of, its *Georgia v Russia (II)* approach.

With the evolving nature of armed conflicts—characterised by a growing reliance on remote warfare and the gradual deployment of sophisticated AI systems—and the rising number of such conflicts,[6] the Court's conclusions regarding the limits of the ECHR's

[1] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168, para 216; MEIER, Severin, 'Reconciling the Irreconcilable? – The Extraterritorial Application of the ECHR and its Interaction With IHL' (2019) 9 *Goettingen Journal of International Law* 395, 409–412.

[2] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950) ETS 005, *entered into force* 3 September 1953 (European Convention on Human Rights, as amended).

[3] See DUFFY, Helen, 'Georgia v Russia: Jurisdiction, Chaos and Conflict at the European Court of Human Rights' (*Just Security*, 2 February 2021) <justsecurity.org/74465/georgia-v-russia-jurisdiction-chaos-and-conflict-at-the-european-court-of-human-rights/> accessed 15 September 2025; LONGOBARDO, Marco and WALLACE, Stuart, 'The 2021 ECtHR Decision in Georgia v Russia (II) and the Application of Human Rights Law to Extraterritorial Hostilities' (2022) 55 *Israel Law Review* 145, 148.

[4] *Georgia v Russia (II)*, App No 38262/08 (ECtHR, 21 January 2021).

[5] *Ukraine and the Netherlands v Russia*, App Nos 8019/16, 43800/14, 28525/20, and 11055/22 (ECtHR, 9 July 2025).

[6] See, e.g., SANTORA, Marc and others, 'A Thousand Snipers in the Sky: The New War in Ukraine' (The New York Times, 3 March 2025) <nytimes.com/interactive/2025/03/03/world/europe/ukraine-russia-war-drones-deaths.html> accessed 15 September 2025; 'How AI is changing warfare: An AI-assisted general staff may be

extraterritorial applicability once again call for attention. The aim of this article is to critically assess the Court's judgments and evaluate to what extent the Convention applies in the so-called 'active phase' of hostilities during military operations abroad.

To this end, the article first outlines the concept of extraterritorial jurisdiction and its gradual development throughout the Court's case law. Next, it turns to the *Georgia v Russia (II)* judgment, summarising the factual background of the case and the Court's key findings on jurisdiction. This is followed by a critical analysis of the Court's refusal to recognise jurisdiction in cases arising during the active phase of international armed conflict, assessing its coherence with earlier jurisprudence and the underlying objectives of the Convention. Then, the article considers the Court's treatment of jurisdiction in the *Ukraine and Netherlands v Russia* judgment, analysing to what extent it remedied its previous approach. Finally, the conclusion draws together the analysis and reflects on the implications for future cases.

1. Setting the Stage: Extraterritorial Jurisdiction before *Georgia v Russia (II)*

Before delving into the analysis of the judgments in question, it is essential to understand the concept of extraterritorial application of the ECHR, its evolution throughout the Court's case law, and the tensions it has generated. Rather than attempting an exhaustive account, this section distils the core principles and dynamics of extraterritorial jurisdiction, providing the necessary theoretical foundation and context for analysing the judgment at hand.

When the Court is called upon to determine whether a State has complied with its obligations under the Convention, it must first establish whether the ECHR applies to the conduct in question. Article 1 ECHR obliges States Parties to secure the right and freedoms set out in the Convention 'to everyone within their jurisdiction'. Jurisdiction here refers to a power of a State, and not the ability of the Court to deliver a judgment. Accordingly, jurisdiction serves as a 'threshold criterion', since before any alleged violation can be examined on its merits, the preliminary question is whether the individuals affected fell within the jurisdiction of the respondent State.[7]

Traditionally, a State exercises jurisdiction within its territory and is thus bound by the Convention in relation to acts taken within its borders.[8] This purely territorial focus, however, quickly proved insufficient as situations emerged in which States Parties exerted power beyond their frontiers. Although a State's jurisdictional competence remains essentially territorial, the Court has recognised that it may be exercised outside its territory in exceptional—yet increasingly frequent—circumstances.[9] Any such conclusion requires a determination based on the particular facts of the case.[10]

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more important than killer robots' (The Economist, 20 June 2024) <economist.com/briefing/2024/06/20/how-ai-is-changing-warfare> accessed 15 September 2025.

7 *Al-Skeini and Others v the United Kingdom*, App No 55721/07 (ECtHR, 7 July 2011), para 130; MILANOVIC, Marko, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 19; WALLACE, Stuart, *The Application of the European Convention on Human Rights to Military Operations* (CUP 2019) 43.

8 PARK, Ian, *The Right to Life in Armed Conflict* (OUP 2018) 68.

9 *Banković and Others v Belgium and 16 Other Contracting States*, App No 52207/99 (ECtHR, 12 December 2001), para 131; *Al-Skeini*, para 132; PARK (n 8) 68.

10 *Al-Skeini*, para 132.

1.1 Evolution of the Court's Jurisprudence on Extraterritorial Jurisdiction

Providing a comprehensive overview of the Court's development of this doctrine is a gargantuan task. For the purposes of this article, it suffices to note that this evolution has been far from linear. While the first instance of extraterritorial jurisdiction dates back to 1965,[11] with the first reference to extraterritoriality in the context of military activities in 1975,[12] its gradual development was not without obstacles. This is notably illustrated by the Court's decision in *Banković* case, concerning the NATO aerial bombardment of the RTS building in Belgrade, where it adopted a highly restrictive approach, rejecting that jurisdiction could arise as a result of effective control over an individual.[13]

This position was, to a certain extent, remedied in *Issa*,[14] *Öcalan*[15] and primarily *Al-Skeini*,[16] which marked a turning point towards a more expansive understanding, gradually extending the Convention's reach to a broader range of extraterritorial military activity. Yet, despite this progressive trend, the case law remains complex, occasionally contradictory, and open to divergent interpretations.

Nonetheless, three principal forms of States' extraterritorial jurisdictional competence entailing the applicability of the ECHR can be identified in the context of military activities abroad: *spatial*, *personal*, and what may be referred to as *personal plus jurisdiction*.[17] While not always clearly delimited, certain common characteristics can be recognised.

Spatial jurisdiction arises when a State exercises effective control over an area outside its territory.[18] This was confirmed in *Loizidou v Turkey*, where the Court held that jurisdiction may also arise if 'as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory', either 'directly, through its armed forces, or through a subordinate local administration'.[19] In such cases, since the State assumes powers normally carried out by the government of the territory, it is bound by the full range of obligations under the Convention.[20]

Personal jurisdiction is established through acts of State's authorities exercising 'authority and control over individuals abroad'.[21] With respect to diplomatic and consular agents' acts, such jurisdiction is not contentious, but its application to military forces remains to be clarified. Although recognised in *Cyprus v Turkey*,[22] the personal model in military operations was later rejected in *Banković*.[23] When revisiting the issue in *Al-Skeini*, the Court acknowledged that extraterritorial jurisdiction may arise from 'the use of force by a State's

[11] *X v Federal Republic of Germany*, App No 1611/62 (EComHR, 25 September 1965); WALLACE, *The Application of the ECHR to Military Operations* (n 7) 44.
[12] Cyprus v Turkey, App Nos 6780/74 and 6950/75 (EComHR, 26 May 1975), para 8; WALLACE, The Application of the ECHR to Military Operations (n 7) 46.
[13] PARK (n 8) 77. See also WALLACE, *The Application of the ECHR to Military Operations* (n 7) 48–56.
[14] *Issa and Others v Turkey*, App No 31821/96 (ECtHR, 3 March 2005).
[15] *Öcalan v Turkey*, App No 46221/99 (ECtHR, 12 May 2005).
[16] *Al-Skeini and Others v the United Kingdom*, App No 55721/07 (ECtHR, 7 July 2011).
[17] WALLACE, *The Application of the ECHR to Military Operations* (n 7) 44.
[18] Ibid, 47.
[19] *Loizidou v Turkey*, App No 15318/89 (ECtHR, 23 March December 1995), para 62.
[20] *Banković*, para 71; WALLACE, *The Application of the ECHR to Military Operations* (n 7) 48.
[21] WALLACE, *The Application of the ECHR to Military Operations* (n 7) 44.
[22] See ibid, 46.
[23] *Banković*, para 75.

agents operating outside its territory'.[24] Rather confusingly, the Court alludes here to cases of apprehension abroad, and it is not certain whether the reference to 'use of force' also pertains to the use of military force by the State or lethal and other physical force by its agents.[25]

Personal plus jurisdiction, introduced by the Court in *Al-Skeini*, exists where a State 'exercises all or some of the *public powers* normally to be exercised by that Government' in the foreign territory.[26] This model combines aspects of spatial and personal jurisdiction. It requires not only that State agents exercise authority and control over individuals, but also that the State assumes 'public powers' normally exercised by the government.[27] Importantly, acknowledging the practical difficulties in conflict zones, the Court accepted that human rights obligations may be 'divided and tailored' according to the degree of control a State could be expected to reasonably exert.[28] In this context, a sliding scale emerges: the more stable the situation, the more stringent the human rights obligations; conversely, in chaotic conditions, States may be held to a more flexible standard.

The post-*Al-Skeini* era reflects the Court's continued commitment to the principle of extraterritorial application of the ECHR.[29] However, a close analysis reveals that uncertainties remain and that the Court's approach has not always been coherent. These forms of jurisdiction are not mutually exclusive, and each entails distinct obligations. Correctly identifying the applicable model is therefore crucial for determining the scope of a State's duties under the Convention—something the Court does not always approach with sufficient rigour. What is needed is a clearer articulation of the criteria for applying each jurisdictional model and a stable methodology in assessing all possible bases in every case.[30]

1.2 Institutional and Political Factors Influencing the Court's Assessment

Beyond the legal dimension, it must be admitted there are two additional factors that influence the Court reasoning, often pushing it towards a more cautious and at times inconsistent approach.

First, practical and institutional constraints limit what one can reasonably expect from a single judicial institution of forty-six judges when dealing with the realities of war. By opening itself to applications arising from wartime violations, the Court risks overwhelming its docket with the volume of individual applications.[31] It also faces notable evidentiary challenges, particularly in gathering reliable and verifiable information from conflict zones. Moreover, as a human rights institution, the Court may display a certain degree of hesitation when interpreting and applying rules of IHL—a field in which its judges are not primarily

[24] *Al-Skeini*, para 136.

[25] WALLACE, *The Application of the ECHR to Military Operations* (n 7) 57.

[26] *Al-Skeini*, para 135.

[27] PARK (n 8) 79; WALLACE, *The Application of the ECHR to Military Operations* (n 7) 58.

[28] *Al-Skeini*, para 137.

[29] PARK (n 8) 68.

[30] DUFFY (n 3).

[31] As of September 2025, there were approximately 9,500 individual applications pending before the Court relating to the war in Ukraine. See ECtHR, 'Update on applications concerning the conflicts and war in Ukraine' (*Press Release*, 17 February 2025) <hudoc.echr.coe.int/fre-press?i=003-8159585-11438692> accessed 15 September 2025; PAVLIUK, Alina and MORA, Arie, 'Looking Ahead: Implications of the Inter-State Judgment in Ukraine and the Netherlands v. Russia for Individual Applications' (*EJIL: Talk!*, 7 August 2025) <ejiltalk.org/looking-ahead-implications-of-the-inter-state-judgment-in-ukraine-and-the-netherlands-v-russia-for-individual-applications/> accessed 15 September 2025.

specialised. While these considerations raise legitimate questions about the Court's ability to perform its adjudicative function effectively in such demanding settings, over time they have been mitigated to some extent by the Court's practical measures in case management, as discussed elsewhere.[32] For present purposes, it needs to be stressed that such matters ought not to interfere with the Court's assessment of whether a State exercises jurisdiction in a given situation. Rather, it would be preferable for the Court to acknowledge its institutional limits than obscure the analysis by conflating them with legal reasoning.

Second, these developments must also be seen in a political light. The expansion of the ECHR's extraterritorial application has not been without controversy. It is suggested that at the time of the ECHR's adoption, its application to extraterritorial military operations was not foreseen. On this basis, this judicial development is considered by some as an overstep of the Convention's original intent, effectively carving out their sovereignty without explicit consent.[33] For these critics, the Court's approach represents a form of 'judicial creep' rather than a legitimate interpretation of the States' obligations under the Convention.

It is against this backdrop of the evolving doctrine, capacity concerns, and political sensitivity that the Court's findings in *Georgia v Russia (II)* and *Ukraine and Netherlands v Russia* must be understood.

2. *Georgia v Russia (II)* Judgment

The *Georgia v Russia (II)* case was an inter-State dispute brought before the Court arising out of the 2008 Russo-Georgian War. It represents Georgia's attempt to hold Russia accountable for serious human rights violations allegedly committed during the conflict and in its direct aftermath.[34]

The conflict itself erupted on the night of 7–8 August 2008, following a series of violent incidents between the Georgian army and the Russia-supported separatist regions of South Ossetia and Abkhazia.[35] On 8 August, Russia responded with a large-scale invasion: approximately 12,000 Russian troops entered Georgian territory, supported by aerial strikes

[32] These measures include the grouping of applications, the use of simplified procedure in cases concerning repetitive issues or based on well-established case law, and other techniques designed to help the Court to manage the growing volume of applications. See, e.g., VAN DEN HERIK, Larisa and DUFFY, Helen, 'Human Rights Bodies and International Humanitarian Law: Common but Differentiated Approaches' in BUCKLEY, Carla., M., DONALD, Alice, and LEACH, Philip (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Brill 2016); LEACH, Philip, 'Enhancing Fact-finding in Inter-State Cases: A Critical Challenge for the European Court of Human Rights' (*Völkerrechtsblog*, 29 April 2021) <voelkerrechtsblog.org/enhancing-fact-finding-in-inter-state-cases/> accessed 15 September 2025; PAVLIUK and MORA (n 31).

[33] In the United Kingdom context, as a State Party engaged in military activities abroad, see, e.g., Lord PHILLIPS, 'Strasbourg Overreach and ECHR Membership' (*Judicial Power Project*, 7 March 2018) <judicialpowerproject.org.uk/lord-phillips-strasbourg-overreach-and-echr-membership/> accessed 15 September 2025; RAAB, Dominic, 'Introduction of the Bill of Rights' (*UK Parliament*, 22 June 2022) <questions-statements.parliament.uk/written-statements/detail/2022-06-22/hcws129> accessed 15 September 2025. For a detailed response to this critique, see WALLACE, Stuart, 'Military Operations and Withdrawal from the European Convention on Human Rights' (2021) 5 *European Convention on Human Rights Review* 151.

[34] *Georgia v Russia (II)*, para 48.

[35] Ibid, para 35; DZEHTSIAROU, Kanstantsin, 'Georgia v Russia (II)' (2021) 115 *American Journal of International Law* 288, 288.

and the Black Sea Fleet, leading to open armed conflict.[36] Russian and allied paramilitary groups gradually pushed Georgian troops out of South Ossetia and surrounding buffer zones. Crucially, hostilities soon extended into parts of undisputed Georgian territory, meaning that much of the combat took place in areas previously under full Georgian control.[37] Active fighting ceased five days later, on 12 August 2008, following a ceasefire agreement.[38] Although the Russian forces withdrew from Georgia's undisputed territory by October 2008, South Ossetia and Abkhazia remain under separatist control, with Russia continuing to exert influence and maintain military presence in both regions.[39]

2.1 The Court's Findings on Jurisdiction

The principal legal issue before the Court was whether Russia exercised extraterritorial jurisdiction during the conflict and was thus bound to apply the ECHR. To address this, the Court divided its analysis into two distinct temporal phases: first, the five-day period of active hostilities following Russia's invasion from 8 to 12 August 2008, and second, the subsequent post-ceasefire phase of occupation following the cessation of large-scale fighting. Additionally, the Court set aside certain specific claims from these temporal phases—such as those related to detainees, prisoners of war, displaced persons, education, and the obligation to investigate—and considered them separately.[40] As a result, only the substantive aspect of the right to life under Article 2 ECHR was examined in the context of the active hostilities phase.[41]

2.1.1 The Phase of Active Hostilities

In its assessment of the initial phase of active hostilities, the Court began by recalling its settled case law that the ECHR may apply extraterritorially in 'exceptional circumstances,' including military operations abroad. In this regard, it acknowledged two modes of jurisdiction: spatial jurisdiction, where a State exercises effective control over a territory; and personal jurisdiction, where State agents exercise authority and control over individuals.[42]

The Court quickly dismissed the application of spatial jurisdiction during the active hostilities phase. Referring to the inherent disorder of armed conflict, it held that '[t]he very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a *context of chaos* means that there is no control over an area.'[43] The Court then turned to the question of personal jurisdiction. Here, it reiterated that extraterritorial jurisdiction on this basis is limited to 'exceptional' cases, and noted that its previous case law on this issue was restricted to 'isolated and specific acts involving an element of proximity'.[44] Returning to its 'context of chaos', the Court distinguished such instances from the context of active hostilities conflict, where a State seeks, through shelling and bombing, to neutralise an adversary and gain territorial control.[45] In such scenarios,

36 *Georgia v Russia (II)*, paras 33–36.
37 Ibid, paras 37–39, 111.
38 Ibid, para 40.
39 Ibid, paras 41, 43–44.
40 Ibid, paras 53–57, 83.
41 Ibid, para 105.
42 Ibid, paras 114–115.
43 Ibid, para 126. Emphasis added.
44 Ibid, paras 128, 132.
45 Ibid, para 133.

States' agents cannot exercise control over individuals, and the basic condition of the personal jurisdiction is not met.[46]

Concluding that Russian forces had neither exercised sufficient control over individuals nor over territory 'during the active phase of hostilities in the context of an international armed conflict', the Court held that Russia did not exercise jurisdiction for the purposes of Article 1 ECHR. Accordingly, it declined to examine the merits of this part of Georgia's claim.[47]

Aware of the sensitivity of the issue and the disappointment its stance might cause among victims, the Court explained that it was 'not in a position to develop its case law beyond the understanding of the notion of "jurisdiction" as established to date'.[48] It reasoned that in order to rule on acts committed during the active phase of hostilities in an international armed conflict beyond a State's own territory, it would need to be equipped with a 'necessary legal basis'.[49] Yet, in attempting to justify this claim, it relied on arguments concerning 'the large number of alleged victims and contested incidents, [and] the magnitude of the evidence produced', which would make adjudication difficult.[50] While such considerations may be understandable, these are matters of institutional capacity and practical feasibility, which are unrelated, as outlined earlier,[51] to the Court's role in determining whether a State exercised jurisdiction in a given situation. To temper the perceived implications of its refusal to find jurisdiction, the Court emphasised that States remain bound by IHL.[52] However, as pointed out in the introduction,[53] deferring protection back to IHL appears hollow in light of the absence of effective means to enforce it. Consequently, it has been suggested that the Court seeks to avoid addressing more problematic and widespread instances of human rights violations.[54]

2.1.2 The Post-Ceasefire Phase and Other Separately Considered Issues

In contrast, the Court's findings concerning the second phase—the period after 12 August when active hostilities had ceased—were markedly less contentious. Through a relatively straightforward analysis and without encountering any interpretative difficulties, the Court concluded that Russia exercised effective control over the relevant territory. As result, under the spatial model of jurisdiction, the ECHR was deemed applicable, permitting the Court to rule on the merits of Georgia's claims arising during this phase.[55] Similarly, the Court also affirmed jurisdiction over the separately considered claims, including those relating to

46 *Georgia v Russia (II)*, paras 137–138.

47 Ibid, para 144.

48 Ibid, paras 140–141.

49 Ibid, para 142.

50 Ibid, para 141.

51 See text accompanying n 32.

52 *Georgia v Russia (II)*, paras 141, 143.

53 See text accompanying n 3.

54 DZEHTSIAROU, 'Georgia v Russia (II)' (n 35) 293; TAN, Floris and ZWANENBURG, Marten, 'One Step Forward, Two Steps Back? Georgia v Russia (II), European Court of Human Rights, Appl No 38263/08' (2021) 22 *Melbourne Journal of International Law* 136, 145; GAVRON, Jessica and LEACH, Philip, 'Damage control after Georgia v Russia (II) – holding states responsible for human rights violations during armed conflict' (*Strasbourg Observers*, 8 February 2021) <strasbourgobservers.com/2021/02/08/damage-control-after-georgia-v-russia-ii-holding-states-responsible-for-human-rights-violations-during-armed-conflict/> accessed 15 September 2025.

55 *Georgia v Russia (II)*, paras 174–175.

detainees, displaced persons, and the obligation to investigate.[56] In each of these instances, the Court found that Russia had breached its obligations under the Convention.[57]

In sum, the judgment represented only a partial victory for Georgia. While the Court accepted that Russia exercised jurisdiction—and breached the Convention—during the post-ceasefire period and in connection with separately considered claims, it declined jurisdiction over the critical initial phase of active hostilities.

2.2 Analysing the Court's Reasoning

The Court's judgment, particularly its reasoning regarding the active hostilities phase, attracted considerable amount of criticism for excluding from scrutiny the period most likely to involve serious human rights violations, and thus depriving victims of protection under the ECHR. This criticism is evident from academic discourse following the decision,[58] but also, crucially, from the considerable number of dissenting opinions. For instance, Judge Albuquerque characterised the Court's position on the jurisdiction as 'morally and legally untenable.'[59] The following section analyses the main contentious points of the Court's judgment.

2.2.1 Artificiality of the Phase-Based Division

The first issue to be considered is the Court's decision to divide its assessment into two separate parts: the 'active hostilities phase' and the 'occupation phase'. This division is conceptually problematic, since it remains unclear what the term 'active hostilities phase' denotes, and consequently, why it should merit separate treatment. Highlighting the lack of coherent basis for this, Judge Chanturia criticised this separation as a 'fallacy of methodology'.[60]

While the term 'active hostilities' originates in the IHL context, there is no direct definition of it, nor does the Court offer one.[61] The adjective 'active' suggests a focus on the intensity of military engagement. However, the Court's binary treatment of this issue as neatly divisible in either 'active' or not 'active' idealises the conduct of hostilities and fails to capture the fluid and complex nature of modern armed conflicts. Without any articulated criteria to determine the point of transition between these phases, the Court introduces an arbitrary and potentially impracticable standard into its already complicated case law on extraterritorial jurisdiction.

In the present case, the Court uses the 12 August 2008 ceasefire agreement as the dividing line between phases. While this may serve the needs of this specific dispute, relying on formal ceasefire agreements as jurisdictional benchmarks is problematic for broader application.[62]

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56 *Georgia v Russia (II)*, paras 238–239, 269, 295, 312.

57 Ibid, paras 222, 252, 281, 301, 337.

58 See, e.g., MILANOVIC, Marko, 'Georgia v. Russia No 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos' (*EJIL: Talk!*, 25 January 2021) <ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/> accessed 15 September 2025; DZEHTSIAROU, Kanstantsin, 'The Judgement of Solomon that went wrong: Georgia v. Russia (II) by the European Court of Human Rights' (*Völkerrechtsblog*, 26 January 2021) <voelkerrechtsblog.org/the-judgement-of-solomon-that-went-wrong-georgia-v-russia-ii-by-the-european-court-of-human-rights/> accessed 15 September 2025; DUFFY (n 3); LONGOBARDO and WALLACE (n 3); TAN and ZWANENBURG (n 54).

59 *Georgia v Russia (II)*, Partly Dissenting Opinion of Judge Pinto De Albuquerque, para 22.

60 *Georgia v Russia (II)*, Partly Dissenting Opinion of Judge Chanturia, para 33.

61 LONGOBARDO and WALLACE (n 3) 168–169.

62 DZEHTSIAROU, 'Georgia v Russia (II)' (n 35) 292.

In many armed conflicts, no such formal agreements are concluded. Even when they are, the cessation of 'active hostilities' may not necessarily correspond with the official date of agreement: violence may de-escalate already before parties are able to agree on its text or continue even after its conclusion. Indeed, even in this case, the Court itself acknowledged that Russian forces continued operations for several days after the ceasefire had been agreed.[63]

In sum, by structuring its assessment around this rigid phase-based framework, the Court appears to import an outdated and overly formalised conception of warfare—one that reflects the romanticised portrayal of traditional inter-State wars characterised by clear beginnings and ends. This approach risks obscuring or excluding potential human rights violations that occur during less easily defined moments of conflict, purely by virtue of their temporal placement within an artificial timeline.

2.2.2 Ambiguities of the 'Context of Chaos'

A second problematic aspect of the Court's reasoning lies in its treatment of jurisdiction during the so-called 'active phase of hostilities'. Rather than undertaking a close, fact-specific assessment of whether any forms of extraterritorial jurisdiction might apply, the Court begins with a generalised theoretical assertion.[64] It frames its task as determining whether the conditions for extraterritorial jurisdiction 'may be regarded as fulfilled in respect of military operations carried out during an international armed conflict'.[65] Without engaging in any detailed analysis of the factual circumstances, the Court concludes that '[t]he very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos not only means that there is no "effective control" over an area (…), but also excludes any form of "State agent authority and control" over individuals.'[66]

This broad and categorical conclusion raises the question of whether the Court intended this as a *normative standard* or a *factual determination* limited to the Georgian situation.[67] The latter seems unlikely, given the absence of any meaningful factual analysis beyond vague references to the general 'context of chaos'.

If interpreted instead as a normative stance—stating that the ECHR can never apply extraterritorially during the active phase of an international armed conflict simply because such conflicts are inherently chaotic—then the implications are even more troubling, as this reasoning could also apply in other, even more prolonged and bloody armed conflicts.[68] The issue here is with the totality of the refusal: within this reasoning, any extraterritorial jurisdiction in the active phase of hostilities is presumptively excluded.[69] This represents a marked departure from the Court's own prior jurisprudence, reiterated in this very case, which consistently emphasised that the existence of jurisdiction must be assessed on a case-by-case basis, accounting for the particular facts and context of each situation.[70]

63 *Georgia v Russia (II)*, para 153; LONGOBARDO and WALLACE (n 3) 160.
64 DUFFY (n 3).
65 *Georgia v Russia (II)*, para 125.
66 Ibid, para 137.
67 DUFFY (n 3).
68 LONGOBARDO and WALLACE (n 3) 147.
69 MILANOVIC, 'Georgia v. Russia No 2' (n 58).
70 See *Georgia v Russia (II)*, para 82.

By asserting that no form of State control—either spatial or personal—can exist during the active phase of an international armed conflict, the Court effectively rules out the possibility of jurisdiction in this category of cases, without individual examination. This absolutist approach undermines the principle of judicial scrutiny grounded in factual nuance and may erode the ECHR's capacity to offer protection precisely where the risk of abuse is the greatest.

Such blanket reasoning is particularly difficult to sustain when set against the realities of warfare. For instance, although the Court's conclusion that intense fighting precludes the establishment of effective control over territory could be defensible in most scenarios,[71] and was plausibly the case for the advancing Russian army in these circumstances, not every case is like this. As Milanovic argues, intense combat in one area does not rule out the possibility that in other areas—even nearby—the situation may be sufficiently stable for a State to exercise effective control over territory.[72] This is even clearer for jurisdiction based on the personal model. In other words, the 'context of chaos' is not monolithic. In armed conflicts, 'pockets' of sufficient control and operational coherence may well exist, even amidst broader instability.

Indeed, the Court's own reference to the EU Fact-Finding Mission, which described Russia's operation as 'well-planned and well-executed,' sits uneasily with its claim of context of chaos.[73] That assessment, along with evidence of coordinated troop movements and logistical planning, undermines the idea that the situation was too anarchic for any form of jurisdiction to exist.

2.2.3 Inconsistencies and Missed Opportunities in the Personal Jurisdiction Analysis

While the Court's rejection of spatial jurisdiction during the active hostilities phase might be defensible in this case, the categorical denial of personal jurisdiction raises more serious concerns, especially due to its dismissal of its prior case law on this issue as inapplicable to present context. Ironically, by referencing *Al-Skeini*—a case in which the Court notably refrained from fully embracing personal jurisdiction outside of arrest or detention contexts—it tacitly concedes that personal jurisdiction can also arise from actions of members of a State's armed forces in the military understanding of 'use of force'.[74] After all, such a conclusion makes sense: as Judge Leggatt observed in *Al-Sadoon*, a 'principled system of human rights law [cannot] draw a distinction between killing an individual after arresting him and simply shooting him without arresting him first'.[75] In the present case, Judge Albuquerque adds that 'the shooting of an individual by State agents constitutes the ultimate form of exercise of control.'[76]

As the Court emphasised in *Hassan*, the Convention, including Article 1, 'cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part'.[77] In fact, international jurisprudence supports recognition of a broader application of personal jurisdiction in the context of military

71 LONGOBARDO and WALLACE (n 3) 156.
72 MILANOVIC, 'Georgia v Russia No 2' (n 58).
73 *Georgia v Russia (II)*, para 108.
74 MILANOVIC, 'Georgia v Russia No 2' (n 58).
75 *Al-Sadoon and Others v Secretary of State for Defence* [2015] EWHC 715 (Admin), para 95.
76 *Georgia v Russia (II)*, Partly Dissenting Opinion of Judge Pinto De Albuquerque, para 9.
77 *Hassan v the United Kingdom*, App No 29750/09 (ECtHR, 16 September 2014), para 77.

activities.[78] For instance, Human Rights Committee's General Comment No 36 on the right of life under the International Covenant on Civil and Political Rights[79] affirms that personal jurisdiction extends also over individuals 'located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner'.[80] A similarly less rigid approach to personal jurisdiction can be observed in other regional human rights systems than the one established by the ECHR.[81]

Yet, the Court refuses to embrace this line of reasoning. It asserts that previous cases of personal jurisdiction related to 'isolated and specific acts involving an element of proximity', whereas the present case 'concerns bombing and artillery shelling'.[82] The relevance of this distinction is questionable. As Milanovic notes, the Court's position leads to one of two equally problematic conclusions: either large-scale violations are less likely to give rise to human rights obligations than isolated ones, or personal jurisdiction depends on physical proximity, meaning that close-range killings are subject to scrutiny, while distant attacks, such as bombing or artillery shelling escape it.[83] The first interpretation suggests a perverse logic in which the scale of abuse operates as a shield against accountability—implying that more chaotic and widespread violence triggers fewer human rights obligations.[84] More fundamentally, the Court's approach risks incentivising brutality. By denying jurisdiction in situations of large-scale and remote violence, it signals that the more brutal and disordered a conflict becomes, the less likely it is to fall within the scope of the Convention.[85] Such a position is wholly incompatible with the Court's mandate to uphold human rights. The second interpretation rests on an artificial and outdated understanding of control and oversight in warfare.[86] It fails to recognise that modern technology—drones, satellite surveillance, precision-guided weaponry—enables States to exercise effective operational control over lethal force at a considerable distance. The Court's conclusion would, in effect, imply that as modern warfare grows increasingly remote, it becomes progressively more sheltered from legal scrutiny.

To support its restrictive view, the Court returns to *Banković* and reiterates its reliance on the notion of 'chaos' during the active phase of hostilities. However, in addition to the arguments against this categorical approach stated above, the Court's assessment also sits uneasily with its ruling in *Hassan*. In that case, the UK similarly argued that the ECHR could

78 See MILANOVIC, 'Georgia v Russia No 2' (n 58); GAVRON and LEACH (n 54).

79 International Covenant on Civil and Political Rights (New York, 19 December 1966) 999 UNTS 171, *entered into force* 23 March 1976 (ICCPR).

80 Human Rights Committee, 'General Comment No 36 – Article 6: Right to Life' (3 September 2019) UN Docs CCPR/C/GC/36, para 63.

81 See, e.g., *Salas and Others v United States*, Report No 31/93, (IAComHR, 14 October 1993), para 6; *Advisory Opinion OC-23/17 requested by the Republic of Colombia: The Environment and Human Rights* (IACtHR, 15 November 2017), para 81; African Commission on Human and Peoples' Rights, 'General Comment No 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)' (18 November 2015); LONGOBARDO and WALLACE (n 3) 163–165.

82 *Georgia v Russia (II)*, paras 132–133.

83 MILANOVIC, 'Georgia v Russia No 2' (n 58).

84 Ibid. See also *Georgia v Russia (II)*, Joint Partly Dissenting Opinion of Judges Yudkivska, Wojtyczek, and Chanturia, para 9.

85 DUFFY (n 3); LONGOBARDO and WALLACE (n 3) 176.

86 DUFFY (n 3).

not apply extraterritorially during 'active hostilities phase of an international armed conflict, where the agents of the Contracting State in question were operating in territory of which they were not the occupying power'.[87] This position closely resembles the circumstances in *Georgia v Russia (II)*, as Russia was not formally an occupying power at the time. Yet in *Hassan*, the Court rejected the UK's argument and held that jurisdiction existed regardless of the ongoing active hostilities. While it declined to assess whether the UK exercised effective control over territory, it held that personal jurisdiction arose by virtue of the UK agents' direct control over the individual in question—even during active hostilities.[88]

This directly contradicts the approach taken in *Georgia v Russia (II)*. While the Court now claims that the context of chaos inherently excludes any form of jurisdiction, its previous case law demonstrates that personal jurisdiction can be—and has been—recognised in comparable circumstances. This inconsistency is further highlighted by the fact that the Court ultimately held that Russia exercised jurisdiction over detained individuals, while hostilities were ongoing.[89] Such recognition implicitly concedes that personal jurisdiction is not foreclosed by the intensity of conflict or the lack of effective territorial control.

3. *Ukraine and the Netherlands v Russia* Judgment on the Merits

The issue of the Convention's extraterritorial application during the active phase of hostilities resurfaced in *Ukraine and Netherlands v Russia*. This case brought together four inter-State applications lodged by Ukraine and one by the Netherlands concerning Russia's violations of the Convention in the context of the aggression against Ukraine from 2014 onwards.[90] It covered a wide span of events, including the downing of MH17 flight and the full-scale invasion on 24 February 2022, extending until 16 September 2022, when Russian Federation ceased to be bound by the Convention following its expulsion from the Council of Europe.[91]

The virtually unanimous judgment stands out for the gravity and breadth of the violations of Convention rights that the Russian Federation was found to have committed.[92] These conclusions have been widely commended for extending the Convention's protective reach to one of the most destructive conflicts in Europe since Second World War.[93] In reaching these

87 *Hassan*, para 71.

88 Ibid, para 77.

89 LONGOBARDO and WALLACE (n 3) 161.

90 *Ukraine and the Netherlands v Russia*, para 1.

91 On the background of the case, see, e.g., MILANOVIC, Marko, 'Grand Chamber Judgment in Ukraine and the Netherlands v. Russia Forthcoming Next Week' (*EJIL: Talk!*, 3 July 2025) <ejiltalk.org/grand-chamber-judgment-in-ukraine-and-the-netherlands-v-russia-forthcoming-next-week/> accessed 15 September 2025; ECtHR, 'The Court holds Russia accountable for widespread and flagrant abuses of human rights arising from the conflict in Ukraine since 2014, in breach of the European Convention on Human Rights' (*Press Release*, 9 July 2025) <hudoc.echr.coe.int/fre-press?i=003-8279845-11657965> accessed 15 September 2025.

92 *Ukraine and the Netherlands v Russia*, 493–497.

93 See, e.g., MILANOVIC, Marko, 'The European Court's Merits Judgment in Ukraine and the Netherlands v. Russia: As Good as It Gets (Almost)' (*EJIL: Talk!*, 10 July 2025) <ejiltalk.org/the-european-courts-merits-judgment-in-ukraine-and-the-netherlands-v-russia-as-good-as-it-gets-almost/> accessed 15 September 2025; SOMMERDAL, Jasmine, 'Ukraine and the Netherlands v. Russia – A Tour de Force in Applying the Convention as Part of International Law' (*ECHR Blog*, 11 July 2025) <echrblog.com/2025/07/ukraine-and-netherlands-v-russia-tour.html> accessed 15 September 2025; RISINI, Isabella, 'Beyond the Fog of War: On the ECtHR's Ukraine, The Netherlands v. Russia judgment on the merits' (*Verfassungsblog*, 12 July 2025) <verfassungsblog.de/

findings, the Court addressed several germane questions of international law, including the relationship between the Convention and IHL, the law of occupation, and the attribution test under the law of state responsibility.[94] Unlike in *Georgia v Russia (II)*, the Court did not hesitate to engage in detail with IHL rules, as their violation served as a baseline for assessing whether the Russian Federation complied with its substantive obligations under the Convention.[95] In doing so, it relied on a diverse range of sources of evidence, including reports from international organizations and NGOs, which helped establish the factual situation—admittedly, this was, to a considerable extent, facilitated by Russia's absence in the proceedings, which spared the Court from confronting competing factual narratives.[96]

At the centre of the case, however, lay the question of jurisdiction.[97] In its partial admissibility decision of 2022, the Court had already held that separatist forces operating in the Donetsk and Luhansk regions exercised spatial jurisdiction by virtue of their effective control over those areas.[98] The outstanding jurisdictional issues were reserved for merits judgment.[99] The most contentious of these, as also reflected by 26 intervening State Parties,[100] concerned the question in part analogous to that refused in *Georgia v Russia (II)*, namely whether jurisdiction could be exercised in relation to military attacks, including bombing and shelling.[101] Unlike in its earlier judgment, where it categorically refused this possibility on the basis that the inherent 'context of chaos' in the active phase of hostilities precludes jurisdiction,[102] the Court here ultimately concluded that Russia exercised jurisdiction in all contested situations, including those relating to military attacks.[103]

beyond-the-fog-of-war/> accessed 15 September 2025; KHACHATRYAN, David, 'The Judgment in Ukraine and the Netherlands v. Russia: A "Nicaragua Moment" for the ECtHR?' (*Strasbourg Observers*, 23 July 2025) <strasbourgobservers.com/2025/07/23/the-judgment-in-ukraine-and-the-netherlands-v-russia-a-nicaragua-moment-for-the-ecthr/> accessed 15 September 2025.

94 On closer analysis of these issues, see, SOMMERDAL (n 93); KHACHATRYAN (n 93).

95 *Ukraine and the Netherlands v Russia*, paras 428–430. See JACKSON, Miles and AKANDE, Dapo, 'Harmonious Interpretation, Lex Specialis, and IHL-Compliance in Ukraine and the Netherlands v Russia: An Open Question on the Right to Life' (*EJIL: Talk!*, 8 August 2025) <ejiltalk.org/harmonious-interpretation-lex-specialis-and-ihl-compliance-in-ukraine-and-the-netherlands-v-russia-an-open-question-on-the-right-to-life/> accessed 15 September 2025; MILANOVIC, 'The European Court's Merits Judgment in Ukraine and the Netherlands v. Russia' (n 93).

96 SOMMERDAL (n 93).

97 MILANOVIC, 'The European Court's Merits Judgment in Ukraine and the Netherlands v. Russia' (n 93).

98 *Ukraine and the Netherlands v Russia*, App Nos 43800/14, 8019/16 and 28525/20 (decision) (ECtHR, 30 November 2022), para 695.

99 *Ukraine and the Netherlands v Russia*, para 327.

100 For a detailed analysis of the substance of these interventions, see MILANOVIC, Marko, 'The Mariupol Test: Analysing the Briefs of Third States Intervening in Ukraine and the Netherlands v. Russia' (*EJIL: Talk!*, 9 January 2024) <ejiltalk.org/the-mariupol-test-analysing-the-briefs-of-third-states-intervening-in-ukraine-and-the-netherlands-v-russia/> accessed 15 September 2025.

101 *Ukraine and the Netherlands v Russia*, paras 340–361. The other remaining issues concerned the continued exercise of jurisdiction of the Donetsk and Luhansk separatist forces following the delivery of the partial admissibility decision, and jurisdiction in relation to the filtration process, and transfer and adoption of children. See ibid, paras 328–339.

102 *Georgia v Russia (II)*, para 137.

103 *Ukraine and the Netherlands v Russia*, paras 365–366.

3.1 The Court's Findings on Jurisdiction in Relation to Military Attacks

On closer examination of how the Court reached its positive finding on jurisdiction in relation to military attacks, it must be first noted how it framed its considerations in highly normative ethos. Emphasising how the full-scale invasion to Ukraine 'marked a clear watershed moment in the history of the Council of Europe and the Convention,' it highlighted that the underlying principles of the ECHR are 'of critical importance for the Court today in its interpretation of the Convention's provisions'.[104] Perceiving the events in Ukraine as 'an unprecedented and flagrant attack on the fundamental values of the Council of Europe and object and purpose of the Convention,' the Court felt it needs to 'reflect anew' on its exercise of the jurisdiction.[105] Only after establishing this benchmark, it turns to the issue of military attacks.

Here, the Court began by considering the preparation of Russian war, observing that Russian actions were 'carefully planned and orchestrated'.[106] It further highlighted the 'immediate purpose of military attack was to enable [Russia] to acquire and retain effective control over Ukrainian territory', with direct artillery support 'aimed at securing this objective'.[107] The full-scale invasion in 2022 was characterised as 'continuation and escalation' of this strategy (note that the degree of preparation was already mentioned in *Georgia v Russia (II)* but without any implication for the assessment of jurisdiction).[108] The Court then reiterates that such objectives are 'wholly at odds with the Council of Europe peace project based on democracy, human rights and the rule of law.'[109] Immediately after, the Court concludes that '[t]he reality of the extensive, strategically planned military attacks perpetrated by Russian forces across Ukrainian sovereign territory between 2014 and 2022, carried out with the deliberate intention and indisputable effect of assuming authority and control, falling short of effective control over areas, infrastructure and people in Ukraine, is wholly at odds with any notions of chaos'.[110] On this basis, the Court found 'in planning and in executing' its military attacks, the Russian Federation 'assumed a degree of responsibility over those individuals affected by its attacks', thereby exercising 'authority and control' over them, which brought the situation within its jurisdiction.[111]

3.2 Farewell to Georgia v Russia (II)?

The Court's pronouncement confirms that jurisdiction may be exercised in an international armed conflict during the active phase of hostilities, even in the absence of effective territorial control. In doing so, it pierced the conception advanced in *Georgia v Russia (II)* of the battlefield as inherently chaotic and beyond control. It entirely omitted the issue of proximity, which had remained problematic in the earlier case,[112] and by relying on the personal model, it found jurisdiction in cases of military attacks, including instances

[104] *Ukraine and the Netherlands v Russia*, paras 179, 349.
[105] Ibid, para 349.
[106] Ibid, para 357.
[107] Ibid, para 358.
[108] Ibid, para 360; *Georgia v Russia (II)*, para 108. See text accompanying (n 73).
[109] *Ukraine and the Netherlands v Russia*, para 360.
[110] Ibid, para 361.
[111] Ibid.
[112] See MILANOVIC, 'The European Court's Merits Judgment in Ukraine and the Netherlands v. Russia' (n 93). See also text accompanying (n 82).

of bombing and shelling.[113] Yet, although the Court stresses it had to assess its approach taken in *Georgia v Russia (II)* 'anew', it avoided making a direct pronouncement on whether such approach was being overturned, limiting itself only to 'comparing' the case with the present one.[114] As a result, it continues to be unclear whether the judgment signals a full departure from the *Georgia v Russia (II)* approach, or only a contextual differentiation reflecting a lesser scale of that conflict.[115]

If the former, the Court may have taken a step towards aligning its jurisdictional standard with the more relaxed one of other international treaty bodies.[116] Considerable ambiguities, however, remain as to whether this was the intended course, and it therefore cannot be said with certainty that this was the path taken.[117] If the latter, the Court preserves the differentiated approach of earlier jurisprudence, while carving out category of extreme situations in which large-scale violations trigger an expansive application of jurisdiction.

Although the judgment does not expressly frame the present case as exceptional, the criteria it identifies for establishing jurisdiction set such a high threshold that few future cases are likely to meet it. These can be characterised both in qualitative terms (the scale and magnitude of the invasion) and qualitative terms (the intent behind it and the assault on the system established by the Council of Europe). In this way, the Court creates a grey zone between the conflicts comparable in their immensity to Russian aggression in Ukraine and the context of chaos of *Georgia v Russia (II)*. For cases falling in between this constellation, the Court's position remains uncertain. This thus leaves a leeway for arguments that conflicts of lesser intensity, or overseas missions may still fall outside the Convention's protection reach.[118] Such approach, however, appears at odds with the universality of human rights and the understanding of binding a State Party when individuals are under its power. Differentiation based on the type of conflict is not part of this equation.

Admittedly, the Court's approach may be read as pragmatic, designed to accommodate the concerns of States such as the United Kingdom and France by leaving them space for argument in cases of their involvement in overseas missions.[119]

3.3 Criteria Conceptually Alien to Jurisdiction

From this arises another concern—the reasoning through which the Court reached this conclusion. In determining whether the Russian Federation exercised jurisdiction, it relied on criteria not necessarily bound to the establishment of control. While the 'lengthy preparation'

[113] The Court is not entirely clear as to whether it adopts a strictly personal model or expands *Al-Skeini* personal plus model. For the former interpretation, see MILANOVIC, 'The European Court's Merits Judgment in Ukraine and the Netherlands v. Russia' (n 93); for the latter, see GIORKAS, Konstantinos, 'The ECtHR as Protector of the Council of Europe's ideals – the case of Ukraine and the Netherlands v the Russian Federation (merits)' (*EJIL: Talk!*, 28 August 2025) <ejiltalk.org/the-ecthr-as-protector-of-the-council-of-europes-ideals-the-case-of-ukraine-and-the-netherlands-v-the-russian-federation-merits/> accessed 15 September 2025.

[114] MILANOVIC, 'The European Court's Merits Judgment in Ukraine and the Netherlands v. Russia' (n 93).

[115] Ibid; SOMMERDAL (n 93).

[116] See text accompanying n 78.

[117] See SOMMERDAL (n 93). For a more optimistic reading of the Court's conclusions on this matter, see KHACHATRYAN (n 93).

[118] See MILANOVIC, 'The European Court's Merits Judgment in Ukraine and the Netherlands v. Russia' (n 93); SOMMERDAL (n 93).

[119] See MILANOVIC, 'The European Court's Merits Judgment in Ukraine and the Netherlands v. Russia' (n 93).

and 'scale of the invasion'[120] may very well strengthen the case for establishing jurisdictional control, the role of intent in this context is less evident. Possibly, where the long-term objective is 'annexation' and 'subjugation'[121] of foreign territory, one might argue that State's intention to establish control implies the capacity to foresee the developments on the ground. However, such reasoning seems to engage with considerations not associated with the issue of jurisdiction under the Convention. When the Court subsequently condemns such purpose as 'being wholly at odds with the project of the Council of Europe peace project,'[122] it is difficult to clarify how this relates to the evaluation of military control on the ground. By adopting this reasoning, the Court departs from 'purely factual analysis' and incorporates into its jurisdictional assessment considerations connected to object and purpose of the Convention.[123]

Indeed, it has been suggested that the Court's analysis even veers towards reliance on a *jus ad bellum* argumentation.[124] On such reasoning, the jurisdictional basis is tied to 'clear, manifest cases of aggression'.[125] By this logic, applying these considerations to the facts of *Banković*, the Court would probably have reached the same conclusion, shielding that operation from the Convention's scrutiny.[126]

As the Court itself acknowledged, it is not its role to convict Russia for its war of aggression since such task is outside of its mandate.[127] Nonetheless, its reasoning still incorporates *jus ad bellum* standards, which, however, do not affect the State's duty to comply with its human rights obligations. Put simply, whether a State uses force abroad in conformity with the UN Charter rules is irrelevant to its obligations to secure Convention rights to those under its power. Rather than a matter of jurisdiction, *jus ad bellum* consideration should inform the scope of substantive rights—something the Court avoided addressing.[128] The Court's approach is therefore problematic: it lacks support in the Convention and risks producing 'a de facto asymmetrical application of human rights obligations.'[129]

Had the Court confined itself to holding only that the military attacks constitute an exercise of authority and control over individuals—without its accompanying reflections on Russian intent—it would have avoided the resulting ambiguity for future cases.[130]

Conclusion

It remains a demanding task to disentangle common threads in the Court's case law on extraterritorial jurisdiction. The Court's judgment in *Georgia v Russia (II)*, while perhaps intended as a pragmatic solution, marks a significant regression in the jurisprudence on the extraterritorial application of the ECHR during armed conflict. By rigidly dividing the

120 *Ukraine and the Netherlands v Russia*, para 360.
121 Ibid.
122 Ibid.
123 See GIORKAS (n 113).
124 Ibid.
125 Ibid.
126 Ibid; MILANOVIC, 'The European Court's Merits Judgment in Ukraine and the Netherlands v. Russia' (n 93).
127 *Ukraine and the Netherlands v Russia*, para 178.
128 On this issue, see JACKSON and AKANDE (n 95); GIORKAS (n 113).
129 GIORKAS (n 113).
130 MILANOVIC, 'The European Court's Merits Judgment in Ukraine and the Netherlands v. Russia' (n 93).

conflict into artificial phases and adopting an overly formalistic reading of jurisdiction, the Court effectively excluded from scrutiny some of the gravest violations. Rather than engaging with an analysis of the factual circumstances at hand, it relied on abstract notions of chaos to justify its restrained stance. Such approach weakens human rights protection precisely where it is most needed and risks creating twisted incentives for States to intensify or prolong the conflict to escape their human rights obligations.

The merits judgment in *Ukraine and The Netherlands v Russia* is undoubtedly commendable, both for the importance to victims of the Russia's egregious actions and for the advancing the interconnection of the ECHR's regime with broader issues of international law. Yet in terms of dispelling anxieties over the clarity of the jurisdictional test, its contribution is less persuasive. It does not clearly articulate its relationship to *Georgia v Russia (II)* judgment, and its reasoning relies to a considerable extent on factors external to the notion of jurisdiction.

As long as the Court's consideration of new cases relies on carve-outs from its previously established standards and the creation of ill-fitting clawbacks, without adherence to consistent criteria, parties cannot approach the Court with a reasonable degree of certainty as to the outcome. The notion of 'context of chaos' epitomises this problem: unexpectedly introduced in one case, then put aside in another, and accompanied with a reliance on considerations extraneous to jurisdiction, it highlights the lack of stability in Court's approach. This inconsistency suggests that future cases may again be resolved on an ad hoc basis, shaped more by their particularities and political sensitivities than by a stable legal test. Such a course, however, leads to legal uncertainty and double standards. A coherent and principled approach, grounded in a fact-specific, context-aware analysis of control, is needed to safeguard human rights during conflict. Practical challenges and political sensitivities undoubtedly exist, but they must not erode the foundational principle that States remain accountable for their actions, even in war.