Georgia v. Russia (II), Merits. App. No. 38263/08. *At* http://hudoc.echr.coe.int/eng?i=001-207757.
European Court of Human Rights (Grand Chamber), January 21, 2021.[1]

On January 21, 2021, the European Court of Human Rights (ECtHR or Court) issued its judgment in the interstate case of *Georgia v. Russia (II)*.[2] Georgia complained that Russia committed systemic human rights violations in the course of the 2008 war in South Ossetia and Abkhazia. Both of these regions are *de jure* parts of Georgia, but they have not been effectively governed by central Georgian authorities since the collapse of the Soviet Union in 1991. During the night of August 7–8, 2008, Georgian artillery attacked Tskhinvali (the administrative capital of South Ossetia). Russian forces entered South Ossetia and Abkhazia the next day. Russian and Georgian troops engaged in hostilities for five days, before agreeing a ceasefire on August 12, 2008. Since then, a significant military contingent of Russian troops has remained in South Ossetia and Abkhazia. The Georgian authorities complained of systemic violations of European Convention on Human Rights (ECHR) Articles 2 (right to life), 3 (prohibition of torture), 5 (right to liberty), and 8 (right to privacy), ECHR Protocol 1 Articles 1 (right to private property) and 2 (right to education), and ECHR Protocol 4 Article 2 (Freedom of movement).

The Court first considered whether the respondent state had jurisdiction over the territory where violations were taking place. Second, if the respondent state did execute its jurisdiction, whether it had committed any violations of the Convention.

Regarding jurisdiction, the Court decided to divide the period of conflict into an active hostilities phase (August 8–12, 2008) and the subsequent events. One of the most significant and controversial findings of this judgment is that Russia had no jurisdiction over the territory of the conflict during the initial shooting war. The Court considered two grounds of jurisdiction here: *effective control over the territory*[3] and "*state agent authority or control over individuals*."[4] In other words, the ECtHR used both territorial and personal control as the grounds of jurisdiction.[5]

The ECtHR found no jurisdictional basis grounded in Russia's effective control of South Ossetian and Abkhazian territory during the active hostilities phase. In its words:

> 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. (Para. 126).

[1] I thank Andrew Forde for his helpful comments on the previous drafts of this case note. Usual disclaimers apply.

[2] Georgia v. Russia (II) [GC], Merits, App. No. 38263/08 (Eur. Ct. Hum. Rts. Jan. 21, 2021).

[3] *See* Loizidou v. Turkey, Merits, App. No. 15318/89, 1996-VI Eur. Ct. H.R. (Dec. 18, 1996).

[4] Issa and Others v. Turkey, Merits, App. No. 31821/96, 2004-V Eur. Ct. H.R. 629, para. 71 (Eur. Ct. Hum. Rts. Nov. 16, 2004).

[5] *See* Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to*, 25 LEIDEN J. INT'L L. 857, 874–76 (2012).

The Court thus concluded that a war zone creates a situation of chaos, in which it is hardly possible to talk about effective control.

The ECtHR then considered whether jurisdiction could be established during the period of active hostilities on the basis of "State agent authority and control over individuals" (para. 127). The Court acknowledged that it had confirmed the contracting parties' jurisdiction in comparable situations in the past, but distinguished prior cases as involving "isolated and specific acts" (para. 132).[6] The Court maintained that the scale of the hostilities in *Georgia v. Russia (II)* prevented it from establishing extraterritorial jurisdiction of the respondent state on this ground:

> Having regard in particular to the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances and the fact that such situations are predominantly regulated by legal norms other than those of the Convention (specifically, international humanitarian law or the law of armed conflict), the Court considers that it is not in a position to develop its case-law beyond the understanding of the notion of "jurisdiction" as established to date. (Para. 141).

The Court thus decided that the respondent state did not have jurisdiction over the territory of hostilities between August 8–12, 2008. Writing in concurrence, Judge Keller tried to elaborate on this barebones reasoning:

> Had the Court held otherwise as to the question of jurisdiction during the active phase of hostilities, its duty would have been to assess the conduct of the respondent State in terms of international humanitarian law in order to resolve the applicant Government's complaint under Article 2. (Concurring op., Keller, J., para. 25).

It seems that the ECtHR wanted to make a clear distinction between international human rights law and international humanitarian law—a distinction that this very Court has been blurring for years.[7]

Although the Court did not establish Russia's jurisdiction over the disputed territory during the hostilities, this did not absolve Russia from all human rights violations stemming from the events taking place between August 8–12, 2008. The Court confirmed Russia's obligation to investigate deaths even if they occurred during the hostilities for three reasons (para. 331). First, in its view, the Russian authorities took "steps to investigate" these deaths, thereby assuming an obligation to investigate (*id.*). Second, the Court found that Russian authorities did exercise effective control over the relevant Georgian territory after August 12. And third, "all the potential suspects among the Russian service personnel were located either in the Russian Federation or in territories under the control of the Russian Federation" (*id.*). The

[6] *See* Issa and Others v. Turkey, *supra* note 4; Solomou and Others v. Turkey, Judgment, App. No. 36832/97 (Eur. Ct. Hum. Rts. June 24, 2008). For more on the Court's extraterritoriality jurisprudence, see Marko Milanović & Tatjana Papić, Makuchyan and Minasyan v. Azerbaijan and Hungary, 115 AJIL 294 (2021).

[7] *See* Hassan v. the United Kingdom [GC], Judgment, App. No. 29750/09, 2014 ECHR (Sept. 16, 2014); Al-Skeini and Others v. the United Kingdom [GC], Judgment, App. No. 55721/07, 2011 ECHR (July 7, 2011); Jaloud v. The Netherlands [GC], Judgment, App. No. 47708/08, 2014 ECHR (Nov. 20, 2014). *See also* Stuart Wallace, The Application of the European Convention on Human Rights to Military Operations (2019) (especially Chapter 5).

Court also found that Russia had jurisdiction over the territories even between August 8–12, 2008, and that it is liable for its alleged arbitrary detention of civilians contrary to Article 5 of the Convention (paras. 238–39). The Court did not explain its decision here, simply stating that "[i]n so far as the Georgian civilians were mostly detained after the hostilities had ceased, the Court concludes that they fell within the jurisdiction of the Russian Federation within the meaning of Article 1 of the Convention" (para. 239).

For the period after active hostilities subsided (August 12–October 10, 2008[8]), the ECtHR confirmed Russian authorities' "effective control" over South Ossetia, Abkhazia, and the "buffer zone." The Court pointed to Russia's substantial military presence, as well as its military, economic, and political support of its allies in these regions.

After establishing Russia's partial jurisdiction over the territories, the Court considered whether Russian authorities committed systematic breaches of human rights. The ECtHR first examined whether the killings, ill-treatment, and looting and burning of homes had been carried out by Russian and South Ossetian armed forces in South Ossetia and the adjacent buffer zone. The ECtHR arranged a fact-finding mission to answer this and other substantive questions relevant to the merits of this case—a rarity in the Court's practice. Concurring Judge Keller, however, expressed her dissatisfaction with the scale of the fact-finding mission, pointing out that "the Court's usual fact-finding methodology is ill-suited, in its flexibility and forbearance, to inter-State cases" (concurring op., Keller, J., para. 11). Despite such criticism, the Court relied on witness statements as well as various reports and decisions by international organizations and NGOs in order to establish an administrative practice of killing, destruction of homes, and ill-treatment. The Court emphasized that this practice was demonstrated by both the "repetition of acts" and "official tolerance" of the authorities (para. 216). The Court came to a similar conclusion in relation to arbitrary detention and ill-treatment of arrested civilians (mostly women and elderly people) (paras. 242–56), and ill-treatment of Georgian prisoners of war (paras. 271–81). It also found that Russia had engaged in an administrative practice of violating the freedom of movement of displaced persons contrary to Article 2 of ECHR Protocol 4, and that Russian authorities failed to investigate deaths that happened during and after the war (paras. 296–301).

In its decision on the merits, the ECtHR did not distinguish between the Russian and local (for example, South Ossetian) troops:

> Even if the direct participation of the Russian forces has not been clearly demonstrated in all cases, since it has been established that the prisoners of war fell within the jurisdiction of the Russian Federation on account of the "strict control" that it exercised over the South Ossetian forces, it was also responsible for the latter's actions, without it being necessary to provide proof of "detailed control" of each of those actions. (Para. 276).

As a result of this standard, the ECtHR expects the relevant authorities to comply with human rights as soon as a member state establishes effective control over a territory. The Court did

[8] On October 10, 2008, Russia completed the withdrawal of its troops stationed in the "buffer zone" (para. 44). Since August 22, 2018, another application of Georgia against Russia is pending before the Court. This application concerns the deterioration of the human rights situation along the administrative boundary lines between Georgian-controlled territory and Abkhazia and South Ossetia. Georgia v. Russia (IV), App. No. 39611/18. European Court of Human Rights Registrar Press Release, New Inter-state Application Brought by Georgia Against Russia (Aug. 21, 2018), *at* http://hudoc.echr.coe.int/eng-press?i=003-6176209-8005403.

not, however, clearly distinguish between attribution and jurisdiction. As rightly noted by Marko Milanović:

> While Russia is being found responsible for an "administrative practice" . . . it is unclear whether Russia is being held responsible for violating (by action) a *negative* duty to respect human rights, or for violating (by omission) a *positive* duty to prevent third parties from violating human rights within an area under its jurisdiction.[9]

This ambiguity makes the question of jurisdiction—rather than attribution—the key battleground between the parties in this and other war-related cases.[10]

Finally, the Court established that Russian authorities failed to produce military combat reports regarding the armed conflict in Georgia and other relevant documents. As a result, the Court found a violation of Article 38 of the Convention, which obliges authorities to furnish all necessary facilities to the Court in its task of establishing the facts of the case (paras. 341–46).

The judgment includes nine separate opinions. The key point of disagreement between the majority and minority was whether Russia had jurisdiction during the active phase of hostilities. The dissenting judges attacked the Court's newly established principle of territorial jurisdiction during armed conflicts from various angles. Judge Grozev stressed that the reasoning of the majority creates an impermissible legal vacuum in Europe wherever a war zone arises. He questioned why individuals protected by the Convention before August 8, 2008 and after August 12, 2008 were removed from its protection during the intervening days simply because they found themselves in a war zone (partly diss. op., Grozev, J.). Judges Yudkivska, Pinto de Albuquerque, Wojtyczek, Lemmens, and Chanturia (in different combinations) argued that the majority's reasoning is inconsistent and ambiguous. For them, the majority confuses the case law, undermines the Court's authority, weakens the protection of the Convention, and runs counter to its spirit. Moreover, for some of the judges in the minority, the majority did not strike the right balance between international humanitarian law and international human rights law (joint partly diss. op., Yudkivska, Pinto de Albuquerque, Chanturia, JJ., para. 24).

* * * *

Georgia v. Russia (II) is a highly ambivalent judgment. It achieves some accountability for systemic human rights abuses, but at the cost of significant avoidance, compromise, and confusion. This judgment will long resonate for scholars of the ECHR, international humanitarian law, the jurisdiction of international tribunals, and everything in between. It seems that the majority of the ECtHR aspired to deliver a balanced judgment that offered a partial victory to both parties while also relieving itself of the need to adjudicate complex cases dealing with active international armed conflicts. On the one hand, the Court did not find that Russia had jurisdiction over the active war zone, effectively absolving it from some human rights obligations between August 8–12, 2008. This was a significant victory for Russian authorities. It also represents a retreat by the Court from the muddy waters of humanitarian law. On the

[9] Marko Milanović, Georgia v. Russia No. 2: *The European Court's Resurrection of* Bankovic *in the Contexts of Chaos*, EJIL: *Talk!* (Jan. 25, 2021), *at* https://www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos.

[10] For more discussion on attribution and jurisdiction, see Jane M. Rooney, *The Relationship Between Jurisdiction and Attribution After* Jaloud v. Netherlands, 62 Neth. Int'l L. Rev. 407 (2015).

other hand, the ECtHR found Russia liable for systemic human rights violations in territory it controlled after the active period of hostilities—no small victory for Georgia. However, the judgment confuses the law more than clarifying it. In striving for a (shaky) compromise involving a complex matter of jurisdiction, the Court reconsidered the recent development of its case law and left many questions unanswered. This judgment will also have significant ramifications for the pending cases in which contested jurisdiction during military hostilities is at stake.

In what follows, I make three brief arguments. First, the standard adopted by the Court is difficult to apply in practice. Second, the Court is inconsistent in how it applies human rights law to armed conflicts. Finally, the Court ultimately undermines its key function of human rights protection by not engaging with the active phase of military conflicts.

Over two thinly reasoned pages, the majority decided that the Convention does not apply to the active phases of military confrontations. As a result, the ECHR is not applicable when it is sorely needed. The Court's reasoning further leaves open many questions of how this interpretation can be applied in practice. Judge Keller argued that the reasoning of the majority might be appropriate in interstate cases involving active hostilities but not in individual applications (concurring op., Keller, J., para. 130). However, this approach seems questionable as a matter of principle.

The accountability gap during the active phase of hostilities is not total, however. The Court decided that Russia is still under the obligation to investigate deaths even if they happened before Russia established effective control. It also held Russia responsible for arbitrary arrests made during the hostilities. The Court's reasoning here looks like a slice of good Swiss Emmentaler, in which there are more holes than cheese. This porous accountability might seem appropriate in the present case, but the Court gives no indication of what it portends for other cases involving military confrontations. For example, will there be an obligation to investigate if the territory is not under effective control for a prolonged period of time? What of accountability during failed ceasefires, as in Nagorno-Karabakh? It is impossible to predict how the standard would be applied to the situation in Eastern Ukraine, where Russia is not officially involved and the hostilities have been going on for many years—and where the degree of activity ebbs and flows. In the pending interstate cases related to these conflicts, the Court will have to address whether the *Georgia v. Russia (II)* standard is limited to the very specific facts of the short war between Georgia and Russia, or if it has a wider application. If it is limited, the Court will need to explain how this standard fits with its prior as well as forthcoming judgments on jurisdiction during armed conflicts (concurring op., Keller, J., para. 25).

Arguably, the Court sought to draw a line beyond which the ECHR is no longer applicable. But if so, the line is a blurry one. Clearly the Court did not wish to get involved in the chaos of active armed conflicts. It is, however, unclear what that category encompasses. The Court's definition is narrower than the definition of Common Article 2 to the Geneva Conventions, which also explicitly includes occupation. The Court instead came up with a *sui generis* definition that is closely linked to the facts of this case. In the war between Georgia and Russia, the active phase of hostilities is relatively easy to distinguish. But many conflicts carry on without any formal resolution, and even formal ceasefires do not always put an end to actual hostilities. Does the Court mean that the Convention is not going to be applicable for the entire duration of such conflict, even if they continue for years? Is this principle only applicable to

lawful acts of war and not to the *de facto* military confrontations? The judgment in *Georgia v. Russia* (II) offers no answers.

The Court's reasoning is also inconsistent with its own institutional practices. For example, the Court can issue interim measures in interstate cases originating in armed conflicts and has done so recently.[11] Interim measures are provided by Rule 39 of the Rules of Court, to address circumstances presenting an immediate risk of potential human rights violations. Isabella Risini has rightly asked what point interim measures serve if the Court has no jurisdiction over the periods of active hostilities.[12] Similarly, the Court's fact-finding mission in *Georgia v. Russia (II)* investigated the active stage of hostilities, demonstrating that it was at least not clear to the Court from the beginning that Russia had no jurisdiction over the events between August 8–12, 2008. Even the decision on admissibility in *Georgia v. Russia (II)* that the ECtHR delivered in 2011 did not suggest that the active stage of hostilities is partially excluded from Russia's jurisdiction.[13]

Another significant consequence of this case is that it implies that the Court may be willing to give up on widespread human rights violations because they are too difficult to deal with. The majority effectively makes a statement to that effect at paragraph 141 of the judgment, quoted above. In response, the dissenting Judges Yudkivska, Wojtyczek, and Chanturia pointed out:

> We are simply astonished by these arguments. In our view, the role of this Court consists precisely in dealing in priority with difficult cases characterised by "the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances."[14]

A court designed to be a bulwark against totalitarianism and war is here deciding not to deal with human rights violations because they are too complex and demanding. One might argue that the Court is thus denying justice to multiple victims of violations of the most fundamental human rights as a matter of convenience. If the ECtHR goes further in this direction and decides that conflicts like those in Eastern Ukraine and Nagorno-Karabakh also do not fall within jurisdiction of the contracting parties to the Convention due to their complexity, the Court will deny justice to multiple victims of violations of the most fundamental human rights.

As several dissenting judges pointed out, the ECtHR in *Georgia v. Russia (II)* has arguably ruptured European public order. The Court's references to this notion usually mean that it does not allow gaps in human rights protection within the Convention space. "European Public Order is used as the border guard of the Convention which ensures that it is effective within the boundaries of the Council of Europe and does not spread outside them without

[11] Kanstantsin Dzehtsiarou, *Can the European Court of Human Rights Prevent War? Interim Measures in Interstate Cases*, PUB. L. 254 (2016); Kanstantsin Dzehtsiarou, *Catch 22: The Interim Measures of the European Court of Human Rights in the Conflict Between Armenia and Azerbaijan*, STRASBOURG OBSERVERS (Oct. 9, 2020), *at* https://strasbourgobservers.com/2020/10/09/catch-22-the-interim-measures-of-the-european-court-of-human-rights-in-the-conflict-between-armenia-and-azerbaijan; Kanstantsin Dzehtsiarou & Vassilis Tzevelekos, *Interim Measures: Are Some Opportunities Worth Missing?*, __ EUR. CONV. HUM. RTS. L. REV. __ (forthcoming 2021).

[12] Isabella Risini, *Human Rights in the Line of Fire:* Georgia v. Russia (II) *Before the European Court of Human Rights*, VERFBLOG (Jan. 28, 2021), *at* https://verfassungsblog.de/human-rights-in-the-line-of-fire.

[13] Georgia v. Russia (II) [GC], Admissibility, App. No. 38263/08 (Eur. Ct. Hum. Rts. Dec. 13, 2011).

[14] *Id.*, partly diss. op., Yudkivska, Wojtyczeck, Chanturia, JJ., para 9.

good reason."[15] Prior to this judgment, the Court would always find a party responsible for human rights violations if these violations happened within the Convention's territorial space. Yet, here, the ECtHR failed to establish jurisdiction in relation to people living on a territory who would otherwise be protected by the Convention. The Court's solution to the problem of jurisdiction in this case does not sit well with either its previous case law or practice. It may well be subject to major corrections in the future.

KANSTANTSIN DZEHTSIAROU
University of Liverpool
doi:10.1017/ajil.2021.7

European Convention on Human Rights—right to life—extraterritorial assassinations—prohibition of discrimination—hate crimes—pardons and impunity—attribution of conduct not committed in official capacity—attribution of conduct on the basis of state acknowledgment and adoption

MAKUCHYAN AND MINASYAN V. AZERBAIJAN AND HUNGARY. App. No. 17247/13. *At* https://hudoc.echr.coe.int.
European Court of Human Rights, May 26, 2020.

The judgment of the European Court of Human Rights (ECtHR or Court) in *Makuchyan and Minasyan v. Azerbaijan and Hungary* is remarkable both on account of its facts and the peculiar legal issues it raised. In 2004, an ax-wielding Azerbaijani army officer (R.S.) beheaded one Armenian officer, and attempted to kill another, while attending a NATO-organized English language course in Budapest, Hungary. R.S. was prosecuted in Hungary and given a life sentence. Eight years later, R.S. was transferred to Azerbaijan to serve the remainder of his sentence. However, upon his arrival, R.S. received a hero's welcome. He was released, pardoned, promoted, and awarded salary arrears for the period spent in prison, as well as the use of a state apartment in the capital. Many high-ranking Azerbaijani officials expressed their approval of R.S.'s conduct and pardon. (The long-standing Nagorno-Karabakh conflict between Armenia and Azerbaijan of course looms in the background of this story.)[1]

The applicants before the European Court were the surviving Armenian soldier and a relative of the slain soldier. They complained that Azerbaijan violated Article 2 (right to life) of the European Convention on Human Rights (Convention),[2] in both its substantive and procedural aspects: the former because the killer was a soldier in the Azerbaijani military and thus a state agent; the latter because the state released him from prison. The applicants additionally claimed a violation of Article 14 (prohibition of discrimination), read together with the right to life, alleging that R.S.'s attack and his release were both motivated by anti-Armenian animus. Finally, the applicants complained that Hungary also violated the procedural limb of

[15] KANSTANTSIN DZEHTSIAROU, CAN THE EUROPEAN COURT OF HUMAN RIGHTS SHAPE EUROPEAN PUBLIC ORDER (forthcoming 2021).

[1] The European Court has dealt with aspects of that conflict in *Chiragov and Others v. Armenia* [GC], App. No. 13216/05 (2015) and *Sargsyan v. Azerbaijan* [GC], App. No. 40167/06 (2015), and is considering several interstate cases regarding the outbreak of the conflict in 2020.

[2] European Convention on Human Rights, Nov. 4, 1950, ETS No. 5, 213 UNTS 222 [hereinafter ECHR].