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## European Court of Human Rights' Ruling in Georgia v. Russia (II) and Its Application to the Current Crisis in Ukraine

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# EUROPEAN COURT OF HUMAN RIGHTS' RULING IN *GEORGIA V RUSSIA (II)* AND ITS APPLICATION TO THE CURRENT CRISIS IN UKRAINE

Edward N. Cain\*

## Abstract

*Georgia v Russia (II)* represents an important decision in the European Court of Human Rights case law. The Court sets out an important interpretation of Article 1 of the European Convention on Human Rights regarding the jurisdiction of signatory parties during times of invasion and war. The Court articulated that during active hostilities, there is no positive or negative obligation on the invading country to uphold or defend the human rights of the civilians of the invaded country. This is because they do not have effective control over the local population due to the dynamic nature of war. This precedent is very dangerous when applied to the current crisis in Ukraine. Following the Court's logic, because Ukraine is in an active state of war with Russia, the Russian government potentially would not be liable for human rights violations because they do not have "effective control" over the captured Ukrainian territory. If the human rights violations were to be presented before the Court, the Court could find this because of their holding in *Georgia v Russia (II)* that war is constantly changing the territory controlled by either side of the conflict. However, when examining the facts of the current invasion, there are three key differences between the facts in *Georgia v Russia (II)* and the current invasion that could lead to a different outcome in the case of the Ukraine conflict.

First, Russia has implemented a stronger political apparatus in Ukraine than they did in Georgia by actively installing Russian "mayors" and "regional administrative councils" in captured territories. These mayors and administrative councils place Ukrainian citizens under Russia's administrative control, satisfying the effective control test to determine jurisdiction. Second, looking at the Court's 2008 case of *Solomou and Others v. Turkey*, the Court outlined a cause-and-effect analysis for determining effective control over a population by examining the cause and effect of military intervention between two signatories to the European Charter of Human Rights. Because there has been widespread Russian military action leading to a direct effect on Ukrainian citizens and their human rights, Russia can be seen as to be exerting "effective control" over Ukraine. The administrative move in the four regions bordering Russia to annex them through a referendum vote directly places those Ukrainian citizens under Russian administrative control. This annexation means that Russia would incur all obligations, both positive and negative, to uphold human rights in those regions because they are now "Russian territory" (notwithstanding the claims of a sham referendum vote and reports of coercion and extortion to secure the vote in favor of joining

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Russia). Lastly, determining whether Belarus would fall under Russian effective control, and if they can be held accountable, would require a full detailed factual finding mission, which likely will not happen until the war is over.

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### I. Introduction

On February 4, 2022, the world entered a new paradigm of global security. On that day, the Russian Federation ("Russia") invaded Ukraine and with it ushered in a war which, at this time, has no end.<sup>1</sup> Many industries and sectors in our global and interconnected world have been disrupted by the war.<sup>2</sup> The war also caused turmoil in the international financial markets when the United States ("US") and its allies removed Russia from the international banking mechanism, SWIFT, effectively removing Russia's access to international banks and financial

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<sup>1</sup> See John Psaropoulos, *Timeline: The First 100 Days of Russia's War in Ukraine*, AL JAZEERA (June 3, 2022), <https://www.aljazeera.com/features/2022/6/3/timeline-the-first-100-days-of-russias-war-in-ukraine>.

<sup>2</sup> *Id.*

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markets.<sup>3</sup> Additionally, the energy crunch felt by US and European Union (“EU”) citizens alike can be attributed, in part, to the war.<sup>4</sup> Grain exports from Ukraine and Russia have significantly dropped as a result of the war, causing fear of famine and food insecurity in developing nations who rely on inexpensive Ukrainian and Russian wheat.<sup>5</sup> Lastly, Finland has joined the North American Treaty Organization (“NATO”) and Sweden is still working on joining.<sup>6</sup> Their accession to NATO is a clear break in precedent by each country of non-antagonism towards Russia and acting as a buffer between other NATO countries and Russia.<sup>7</sup>

With the backdrop of crisis and what likely will be a long grinding war and possible frozen conflict,<sup>8</sup> this article investigates whether Ukraine has any recourse against Russia in international court. There is case precedent that could provide insight into how this conflict could be resolved, or at least legal precedent that Ukraine could rely on, if they were to attempt to hold Russia accountable for any crimes committed during their invasion and occupation of Ukraine.<sup>9</sup>

In August 2008, Russia briefly invaded the country of Georgia, which is Russia's neighbor to the south and was a former satellite state before the dissolution of the Soviet Union.<sup>10</sup> After the Russo-Georgian conflict ended, Georgia brought

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<sup>3</sup> See Amanda Marcias, *EU, UK, Canada, US Pledge to Remove Selected Russian Banks from Interbank Messaging System SWIFT*, CNBC (Feb. 28, 2022, 12:27 AM), <https://www.cnbc.com/2022/02/26/eu-uk-canada-us-pledge-to-remove-selected-russian-banks-from-swift.html>.

<sup>4</sup> See Scott Patterson & Sam Goldfarb, *Why Are Gasoline Prices So High? Ukraine-Russia War Sparks Increases Across U.S.*, WALL ST. J. (Apr. 1, 2022, 2:00 PM), <https://www.wsj.com/articles/why-gas-prices-expensive-11646767172>; see also Eleanor Beardsley, *Russia's Effort to Break European Energy Unity Seems to be Failing — At Least for Now*, NPR (Sept. 2, 2022, 5:00 AM), <https://www.npr.org/2022/09/02/1120518928/russia-europe-energy>; see also *EU, G7, Australia to Cap Price on Russian Oil at \$60 Per Barrel*, AL JAZEERA (Dec. 2, 2022), <https://www.aljazeera.com/news/2022/12/2/eu-agrees-to-60-russian-oil-price-cap>.

<sup>5</sup> See Food and Agriculture Organization of the U.N. (“FAO”), *The Importance of Ukraine and the Russian Federation for Global Agricultural Markets and the Risks Associated with the War in Ukraine*, 1 (Jun. 10, 2022), <https://www.fao.org/3/cb9013en/cb9013en.pdf>. “A large number of food- and fertilizer-importing countries, many of which fall into the Least Developed Country (LDC) and Low-Income Food-Deficit Country (LIFDC) groups, rely on Ukrainian and Russian food supplies to meet their consumption needs.”

<sup>6</sup> See *Türkiye, Finland, and Sweden Sign Agreement Paving the Way for Finnish and Swedish NATO Membership*, NORTH ATLANTIC TREATY ORGANIZATION (NATO) (June 30, 2022), [https://www.nato.int/cps/en/natohq/news\\_197251.htm](https://www.nato.int/cps/en/natohq/news_197251.htm). Author's note: this would be the first time since that a new member has joined the group since Northern Macedonia in 2020. See Jim Garamone, *Finland's Accession to NATO Strengthens Alliance Security*, U.S. DEP'T OF DEF. NEWS (Apr. 4, 2023), <https://www.defense.gov/News/News-Stories/Article/Article/3351900/finlands-accession-to-nato-strengthens-alliance-security/>.

<sup>7</sup> See Michael M. Gunter, *Some Implications of Sweden and Finland Joining NATO*, 2 THE COMMENTARIES 91, 92 (2022), <https://journals.tplondon.com/com/article/view/2710>.

<sup>8</sup> See Denis Corboy et al., *Hitting the Pause Button: The “Frozen Conflict” Dilemma in Ukraine*, THE NAT'L INT. (Nov. 6, 2014), <https://nationalinterest.org/feature/hitting-the-pause-button-the-frozen-conflict-dilemma-ukraine-11618?nopaging=1>. “‘Frozen conflicts’ describe places where fighting took place and has come to an end, yet no overall political solution, such as a peace treaty, has been reached.”

<sup>9</sup> See generally *Georgia v. Russia (II)*, App. No. 38263/08 (Jan. 21, 2021), <https://hudoc.echr.coe.int/eng?i=001-207757> [hereinafter ECHR Ruling].

<sup>10</sup> See generally *Georgia Country Profile*, BBC (Mar. 6), <https://www.bbc.com/news/world-europe-17301647>; see also *Q&A: Conflict in Georgia*, BBC (Nov. 11, 2008), <http://news.bbc.co.uk/1/hi/world/europe/7549736.stm>

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claims against Russia in both the International Court of Justice (“ICJ”) and the European Court of Human Rights (“ECtHR”).<sup>11</sup> Although the ICJ case is important, the focus of this paper will show how the ECtHR would likely handle a case brought by Ukraine using the Georgia case as precedent. The comparison between the current crisis in Ukraine and the situation in Georgia in 2008 is apt because like Georgia, Ukraine also has a complicated history with Russia, and Russia appears to be employing a very similar military strategy in Ukraine to the one employed in Georgia.<sup>12</sup>

### A. Roadmap of Investigation

For practical reasons, the focus of this article is only on the present conflict that is happening in Ukraine, and therefore Russia’s annexation of Crimea in 2014 will not be discussed.<sup>13</sup> Furthermore, this article does not discuss the Court’s 2023 ruling in *Ukraine and the Netherlands v. Russia*, joining the complaints of *Netherlands v. Russia* (no. 28525/20), *Ukraine v. Russia (re Eastern Ukraine)* (no. 8019/16), and *Ukraine v. Russia II* (no. 43800/14).<sup>14</sup> Although the ruling is important and concerns Russia’s jurisdiction over events occurring in Eastern Ukraine and Crimea at that point in time, they are beyond the scope of this article.<sup>15</sup> This article only focuses on the territorial and alleged human rights violations that Russia committed when its troops invaded in February 2022, and the annexation of four Ukrainian provinces.<sup>16</sup>

This paper first outlines the 2008 invasion and brief war in Georgia and provide contextual background, including a discussion of the ethnic conflict between residents of Abkhazia and South Ossetia, and the main Georgian population, which set the stage for the Russian invasion in 2008. Then, the paper turns to the complaints filed and the ruling of the ECtHR regarding Georgia’s complaint. Lastly, this paper applies the holdings and facts of the Georgia conflict to the current situation in Ukraine to develop an understanding of what would hypothetically happen if Ukraine were to launch a legal challenge against Russia, and what the outcome might be both legally and practically.

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<sup>11</sup> Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ. Fed’n), Preliminary Objections, Judgment, 2011 I.C.J. 70 (April 1), [*hereinafter* ICJ Case]; ECtHR Ruling, *supra* note 9; *see also* Information Note on the Court’s Case-Law 247 (Georgia v Russia II), EUROPEAN COURT OF HUMAN RIGHTS (Jan. 2021), <https://hudoc.echr.coe.int/fre#%22itemid%22:%22002-13102%22>}.

<sup>12</sup> *See* Sergi Kapanadze, *Putin’s Invasion Playbook All Too Familiar to Georgia*, CEPA (Feb. 24, 2022), <https://cepa.org/article/putins-invasion-playbook-all-too-familiar-to-georgia/>.

<sup>13</sup> *See* *Russia Approves Armed Forces Use*, DW (Mar. 1, 2014), <https://www.dw.com/en/russian-parliament-approves-use-of-armed-forces-in-crimea/a-17467100>.

<sup>14</sup> *See generally* Council of the Europe, *Press Release: Eastern Ukraine and Flight MH17 Case Declared Partly Admissible*, EUR. CT. HUM. RTS. (Jan. 25, 2023).

<sup>15</sup> Council of the Europe, *Press Release*, *supra* note 14.

<sup>16</sup> *Putin Announces Russian Annexation of Four Ukrainian Regions*, AL JAZEERA (Oct. 1, 2022, 6:38 AM), <https://www.aljazeera.com/news/2022/9/30/putin-announces-russian-annexation-of-four-ukrainian-regions>.

## II. Background

To understand the basis of the complaint that Georgia launched against Russia after the 2008 invasion and the applicability of the decision to the current crisis in Ukraine, it is necessary to understand the nature of the “problem” that Russia was trying to fix by invading Georgia. In its simplest form, the pretext for the Russian invasion was to prevent further conflict between ethnic Georgians and ethnic Abkhazians and South Ossetians.<sup>17</sup> However, the root of the conflict between Georgians and Abkhazians/South Ossetians goes much deeper than the 2008 hot conflict.

### A Early 1920s – Rise of Communism and Korenizatsiia<sup>18</sup>

The conflict in 2008 is a manifestation of decades of Russian and Soviet policy towards the region to create ethnic tension and to weaken states to create dependency on Soviet assistance.<sup>19</sup> Following the Bolshevik Revolution and the absorption of Georgia into the Soviet empire, there was a move towards respecting ethnic differences. An example of this was the first Georgian Communist Party's congressional directive on how to communicate with regions in Georgia with ethnic minorities, like Abkhazia and South Ossetia, who primarily spoke local dialects or Russian.<sup>20</sup> This led to the rise of popular leaders, such as Nestor

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<sup>17</sup> COMM'N ON SEC. & COOP. IN EUR, HELSINKI COMMISSION REPORT, IN BRIEF: THE RUSSIAN OCCUPATION OF SOUTH OSSETIA AND ABKHAZIA 2 (Jul. 16, 2018), <https://www.csce.gov/sites/helsinkicommission.house.gov/files/Occupation%20of%20Georgia%20Designed%20FINAL.pdf>. “Following increased clashes between Georgian and separatist forces earlier in the month, hostilities erupted on August 7 between Georgia and separatist Ossetian forces, creating the pretext for an overwhelming Russian military intervention.”

<sup>18</sup> GERHARD SIMON, NATIONALISM AND POLICY TOWARD THE NATIONALITIES IN THE SOVIET UNION: FROM TOTALITARIAN DICTATORSHIP TO POST-STALINIST SOCIETY 13 (Westview Press 1991) (noting this term was commonly used to refer to “the internal processes of change that convert an ethnic community into a nation”); see generally Ronald Grigor Suny, *Nationalist and Ethnic Unrest in the Soviet Union*, 6 WORLD POL'Y J. 503, 506 (1989), <https://www.jstor.org/stable/40209117>.

<sup>19</sup> See generally Theda Skocpol, *France, Russia, China: A Structural Analysis of Social Revolutions*, 18 COMPAR. STUD. IN SOC'Y & HIST. 175 (1976) (stating a strong state is generally characterized as a functioning unit with lots of oversight, where the governmental apparatus can exert control over its citizens. The capacity of the state and the degree to which it implements control constitutes a strong state. Therefore, weak states are often lacking in buy in from people to agree to the proffered ideology of the state).

<sup>20</sup> INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA, REPORT VOL. II at 62 (Sept. 2009), [https://www.mpil.de/files/pdf4/IIFMCG\\_Volume\\_II.pdf](https://www.mpil.de/files/pdf4/IIFMCG_Volume_II.pdf) [hereinafter Georgia Report Vol 2.] “Soviet federal policies radically transformed the relations between nations. It formally recognised certain rights and granted administrative powers to national elites. This increased their self-awareness and political aspirations, particularly with regard to their political status.”; see also Timothy K. Blauvelt, *From Words to Action! National Policy in Soviet Abkhazia (1921-38)*, in THE MAKING OF MODERN GEORGIA, 1918-2012: THE FIRST GEORGIAN REPUBLIC AND ITS SUCCESSORS 1918-2009, 232, at 238 (Stephen Jones ed., 2014). “The Communist Party organization of Georgia, in its turn, declared at its First Congress that ‘for communicating with central agencies of the republic, in accordance with the expressed will of the workers of each autonomous unit, the native language of the given people will be used, and they must receive replies to their appeals in that same language.’ This principle was enshrined in the first constitution of Soviet Georgia in 1922.”

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Lakoba, with deep ethnic ties to the land and people that they represented.<sup>21</sup> This period was a time of overall stability in the region.<sup>22</sup> In these early days, the policy of Korenizatsiia led to the brief recognition of Abkhazia as a distinct region.<sup>23</sup>

Following the rise of Joseph V. Stalin, “all important elements of ethnic culture were undermined by forced modernization, industrialization, and collectivization of agriculture under the Soviet state.”<sup>24</sup> Forced modernization along with the murder or imprisonment of local officials weakened distinct ethnic cultures across the Soviet Union.<sup>25</sup> In Abkhazia, the beloved leader, Nestor Lakoba, died under mysterious circumstances, leaving a power vacuum that was filled by Lavrentiy Beria.<sup>26</sup> Following an uprising by the Bolsheviks in 1924, the Soviet response was characterized as, a “decapitation of the Georgian nation” which in 1936 gave way to Georgia’s absorption into the USSR.<sup>27</sup> Full Soviet control set the back drop for an escalation of tensions in Georgia and Abkhazia that would carry through to 2008. Following the deaths of Beria and Stalin, the region was left in Soviet control, but with the deep scars of the policies outlined above until the dissolution of the Soviet Union in 1992.<sup>28</sup>

### B. Post Collapse of the Soviet Union

Following the breakup of the Soviet Union, there were hopes for a shift in Georgian-Abkhaz relations, however, that was not the case. Upon the dissolution of the Soviet Union and Georgian independence, “Abkhazia reinstated its 1925 constitution and declared independence, which the international community refused to recognize.”<sup>29</sup> During this time, civil conflict broke out between South Ossetia and Georgia, with the conflict taking place on South Ossetian territory, a

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<sup>21</sup> Blauvelt, *supra* note 20, at 236. “[Nestor] Lakoba appears to have been genuinely popular among the ethnic Abkhazian population. Thus unlike most indigenes elites in other ‘Eastern’ republics who were distrusted by the center and seen by their own populations as central government representatives, Lakoba and his subordinates had strong support both from Moscow and from the local population (especially among Abkhazians).”; *see also Nestor Lakoba (1893-1936)*, ABKHAZ WORLD, <https://abkhazworld.com/aw/abkhazians/personalities/1500-nestor-lakoba-1893-1936> (last visited Apr. 5, 2023).

<sup>22</sup> Georgia Report Vol 2, *supra* note 20, at 63.

<sup>23</sup> Blauvelt, *supra* note 20, at 234. “On 31 March [1920], Abkhazia received the status of a Soviet Socialist Republic (SSR). . . In February 1922, this status was changed to “treaty republic” (dogovornaia respublika), and Abkhazia was attached to the Georgian SSR. . . Abkhazia’s status was downgraded in February 1931 to an Autonomous Soviet Socialist Republic within Georgia, which itself remained part of the TSFSR until the latter’s dismantling in 1936.”

<sup>24</sup> Suny, *supra* note 18, at 507.

<sup>25</sup> *Id.*

<sup>26</sup> AMY KNIGHT, *BERIA: STALIN’S FIRST LIEUTENANT* 72 (Princeton University Press 1993); Evan Sarafian, *The Dangers of Drawing Borders: Interethnic Tension in Soviet Abkhazia and the Emergence of an Ongoing Frozen Conflict* (Apr. 18, 2020) (B.A thesis, Occidental College) (on file with author).

<sup>27</sup> Georgia Report Vol. 2, *supra* note 20, at 4. “In December 1936, all three Republics [Georgia, Azerbaijan, and Armenia] were incorporated into the USSR.”

<sup>28</sup> *Id.* at 64.

<sup>29</sup> *Independent Georgia*, BRITANNICA, <https://www.britannica.com/place/Georgia/Independent-Georgia> (last visited Dec. 15, 2022).

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prelude to what was to come in 2008.<sup>30</sup> This mini-conflict ended with the Sochi Agreement and an unsteady peace between South Ossetia and Georgia.<sup>31</sup>

Following the 1992 conflict, there was another instance of conflict in 1993.<sup>32</sup> The 1993 conflict involved Abkhazia and Georgia, and was resolved when Russia, through the association of independent states, deployed Russian peacekeepers to the area.<sup>33</sup> Following the Sochi Agreement and the installation of Russian peacekeepers in South Ossetia and Abkhazia, both regions remained "facially independent"<sup>34</sup> of Georgia. Furthermore, Russia offered special treatment to South Ossetia and Abkhazia.<sup>35</sup> Following a highly fractured government in 2003, revolution overtook Georgia in what would be called the "Rose Revolution."<sup>36</sup>

Following the revolution, there were hopes for democracy and a reset in relations between Georgia and Abkhazia/South Ossetia.<sup>37</sup> It is not practical to cover the entire history of conflict between 2003-2008. However, during this time, there were "serious and largely successful efforts to stabilise the situation on the ground and to reinvigorate the Georgian-Abkhaz peace process were made in the period between mid-2002 and mid-2006."<sup>38</sup> However, the euphoria of the Rose Revolution did not last and by 2008 the region was ready for armed conflict.<sup>39</sup>

### C. The 2008 Conflict

Following the 2008 conflict, the Council of Europe created the Independent International Fact-Finding Mission on the Conflict in Georgia led by Swiss diplo-

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<sup>30</sup> Georgia Report Vol. 2, *supra* note 20, at 76. "The entry of the Georgian troops into Abkhazia on 14 August 1992, officially with the task of protecting the railway linking Russia with Armenia and Azerbaijan through Georgia's territory, resulted in armed hostilities."

<sup>31</sup> See generally Agreement on Principles of Settlement of the Georgian - Ossetian Conflict, Russ. Fed'n-Geor., Jun. 24, 1992, Peace Agreements Database [*hereinafter* Sochi Agreement], available at <https://www.peaceagreements.org/view/1699>.

<sup>32</sup> Georgia Report Vol 2 *supra* note 20, at 77.

<sup>33</sup> *Id.* at 78. "The Moscow Agreement provided, inter alia, for a ceasefire, and the deployment of international observers and a peacekeeping force of the Commonwealth of Independent States (CIS PKF). The separation of forces was reinforced by the establishment of Security Zones and Restricted Weapons Zones on both sides of the ceasefire line, which at that time basically went along the Inguri River, coinciding with the Georgian-Abkhaz administrative boundary."; see generally S.C. Res. 937 (Jul. 21, 1994).

<sup>34</sup> STAFF OF COMM. OF SECURITY AND COOPERATION IN EUROPE, 108TH CONG., GEORGIA'S ROSE REVOLUTION I (2004).

<sup>35</sup> GEORGIA'S ROSE REVOLUTION, *supra* note 34, at 1. "Moscow also imposed a discriminatory visa regime with Georgia, from which Abkhazia and South Ossetia were exempted."

<sup>36</sup> *Id.* at 4.

<sup>37</sup> *Id.* at 7; LINCOLN A. MITCHELL, UNCERTAIN DEMOCRACY: U.S. FOREIGN POLICY AND GEORGIA'S ROSE REVOLUTION 79, 84, (Univ. of Penn. Press 2009). "Mikheil Saakashvili's election raised hopes both in Georgia and internationally that a new political era would begin in Georgia, one in which democracy, transparency, and the rule of law would replace the old regime of corruption, stolen elections, and kleptocracy."

<sup>38</sup> See generally Georgia Report Vol 2, *supra* note 20, at 88.

<sup>39</sup> *Id.* at 89-90. "Regretfully, the positive momentum the peace process had gained in the period between mid-2002 and mid-2006 was not fully utilised and kept alive later on. . . the overall situation in the conflict zone began to deteriorate speedily in spring 2008, in both the security and political spheres."



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mat Heidi Tagliavini.<sup>40</sup> Tagliavini's comprehensive report supplies much of the facts that underpin this section. The conflict started the night of August 7, 2008, which stretched into August 8 with "a massive Georgian artillery attack [on South Ossetia]."<sup>41</sup> According to Georgian officials, the goal of the operation was to protect Georgian sovereignty from Russia and to combat what the Georgian officials describe as a build-up of Russian troops in South Ossetia.<sup>42</sup>

However, Russia told a different story. Russia claimed that they were responding "to stop an allegedly ongoing genocide of the Ossetian population by the Georgian forces, and also to protect Russian citizens residing in South Ossetia and the Russian contingent of the Joint Peacekeeping Forces deployed in South Ossetia in accordance with the Sochi Agreement of 1992."<sup>43</sup> Georgia called for a ceasefire on August 10th, but it was swiftly rejected by Russia, who "entered deeper into Georgian territory by crossing the administrative boundaries of both South Ossetia and Abkhazia and set up military positions in a number of Georgian towns, including Gori, Zugdidi, Senaki and Poti".<sup>44</sup>

On a different front, on the same day, "Abkhazian units supported by Russian forces attacked the Georgian positions in the upper Kodori Valley and seized this territory, which had been vacated by the Georgian forces."<sup>45</sup> After reaching a peace agreement, with questionable compliance by the South Ossetian forces, Russian troops left Georgian territory and returned to Abkhazian and South Ossetian territory.<sup>46</sup> On September 8, 2008, "the theatre of events ceased to be in the military sphere of operations and went back to the realm of political and diplomatic action."<sup>47</sup>

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<sup>40</sup> INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA, REPORT VOLUME 1 at 2 (Sept. 2009) [https://www.echr.coe.int/Documents/HUDOC\\_38263\\_08\\_Annexes\\_ENG.pdf](https://www.echr.coe.int/Documents/HUDOC_38263_08_Annexes_ENG.pdf) [hereinafter Georgia Report Vol. 1]. "By its decision of 2 December 2008 the Council of the European Union established an Independent International Fact-Finding Mission on the Conflict in Georgia (IIFMCG). This is the first time in its history that the European Union has decided to intervene actively in a serious armed conflict. It is also the first time that after having reached a ceasefire agreement the European Union set up a Fact-Finding Mission as a political and diplomatic follow-up to the conflict. In its work, the Mission has been assisted and advised by a Senior Advisory Board (see Acknowledgements). The present Report is the result of the mandated inquiry. . . It should be stressed that the Fact-Finding Mission is strictly limited to establishing facts and is not a tribunal."; *see also* Council Decision 2008/901 of Dec. 2 2008, Concerning an Independent International Fact-Finding Mission on the Conflict in Georgia, 2008 O.J. (L 323).

<sup>41</sup> Georgia Report Vol. 1, *supra* note 40, at 19.

<sup>42</sup> *Id.* at 19. "The official Georgian information provided to the Mission says in this regard that to protect the sovereignty and territorial integrity of Georgia as well as the security of Georgia's citizens"; "The Georgian allegations of a Russian invasion were supported, inter alia, by claims of illegal entry into South Ossetia of a large number of Russian troops and armour, prior to the commencement of the Georgian operation." *Id.* at 20.

<sup>43</sup> Georgia Report Vol. 2, *supra* note 20, at 221.

<sup>44</sup> Georgia Report Vol. 1, *supra* note 40, at 21.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 22.

<sup>47</sup> *Id.*

### III. Discussion

Following the 2008 conflict, Georgia launched two cases in international courts. They petitioned the ICJ and the ECtHR for relief with differing outcomes.<sup>48</sup> For the scope of this investigation into Ukraine's legal options, the focus will be on the ECtHR case as there was a finding of wrongdoing by Russia.<sup>49</sup> On the contrary, the ICJ held that one of Russia's preliminary objections to the jurisdiction of the ICJ was supported, which halted any further proceedings on the merits of the complaint.<sup>50</sup>

The best approach to understand how the ECtHR ruled in *Georgia v Russia (II)* is to “. . . divide [the ruling] into two parts: First, the ECtHR considered if the respondent state (Russia) had jurisdiction over the territory where violations were taking place. Second, if the respondent state did exercise jurisdiction, whether it is responsible for any human rights violations.”<sup>51</sup> This framework will guide subsequent analysis of the case. This analysis will cover the jurisdictional finding and rationale of the Court to allegations during active combat and post-combat. However, there will only be a cursory discussion of the findings of the Court regarding the substantive allegations. This is because the human rights violations in the Georgian-Russo conflict may be different from those in the ongoing Russo-Ukrainian conflict and may be based on different facts and factors which prevent an effective comparison. However, the jurisdictional rulings provide key insight into Ukraine's path forward with litigating Russian violations of the European Charter of Human Rights (“ECHR”).

#### A. Georgia's Allegations

Georgia advanced three main allegations against Russia for their role in the 2008 conflict. First, Georgia argued that Russia was responsible for the alleged atrocities because they “exercised effective authority and control over the relevant areas where the violations took place and/or exercised jurisdiction through state agent authority and control .”<sup>52</sup> Put simply, Georgia argued that Russia incurred liability for any human rights violations committed in Georgia and South Ossetia because it was either occupied by Russia or by either South Ossetian

<sup>48</sup> See generally ICJ Case, *supra* note 11; see generally ECtHR Ruling, *supra* note 9.

<sup>49</sup> ECtHR Ruling, *supra* note 9 at 142. “Holds, by sixteen votes to one, that there was an administrative practice [by Russia] contrary to Articles 2, 3 and 8 of the Convention and Article 1 of Protocol No. 1 as regards the killing of civilians and the torching and looting of houses in Georgian villages in South Ossetia and in the “buffer zone.” Author's note: this is one of many findings that the ECtHR made regarding Russia's conduct during the war.

<sup>50</sup> ICJ Case, *supra* note 11, at 73. “As neither of the two modes of dispute settlement constituting preconditions to the seisin of the Court was attempted by Georgia, the Court does not need to examine whether these two preconditions are cumulative or alternative. [Therefore the] [s]econd preliminary objection of the Russian Federation upheld — Court not required to consider other preliminary objections raised by the Russian Federation — Case cannot proceed to the merits phase.”

<sup>51</sup> Kanstantsin Dzehtsiarou, *The Judgement of Solomon That Went Wrong: Georgia v. Russia (II) by the European Court of Human Rights*, VÖLKERRECHTSBLOG 1 (Jan. 1, 2021). [https://intr2dok.vifa-recht.de/receive/mir\\_mods\\_00009921](https://intr2dok.vifa-recht.de/receive/mir_mods_00009921).

<sup>52</sup> See ECtHR Ruling, *supra* note 9, at ¶ 48.

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troops or Russian troops.<sup>53</sup> Second, Georgia claimed that Russia did not investigate alleged abuses or violations of human rights when they had a legal duty to do so, and the failure to do so was part of an administrative action of omission.<sup>54</sup> Lastly, Georgia alleged that Russia violated Articles 1, 2, 3, 5, 8, and 13 of the ECHR, and other provisions found within the ECHR.<sup>55</sup>

### B. The Findings of the Court

#### *i. Jurisdiction as a Threshold Question to Any Claim*<sup>56</sup>

For any allegation of a violation of the ECHR, the perpetrating country must have jurisdiction over that person or territory for the claim to be heard on its merits.<sup>57</sup> As a universal principle of international relations and international law, it is unquestioned that states have jurisdiction within their borders.<sup>58</sup> However, in a case like the one before the ECtHR, given that South Ossetia and Abkhazia were effectively “Georgian territory,” although disputed and with some history of autonomy<sup>59</sup>, the ECtHR needed to determine whether Russia extended their sovereign jurisdiction to and over South Ossetia and occupied territories during and at the end of hostilities.<sup>60</sup>

The Court articulated that a finding of extraterritorial jurisdiction requires an analysis, “with reference to the particular facts [of the alleged violations].”<sup>61</sup> Furthermore, “as an exception to the principle of territoriality, a [perpetrating] State’s jurisdiction under Article 1<sup>62</sup> may extend to acts of its authorities which

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<sup>53</sup> ECtHR Ruling, *supra* note 9, at ¶ 48.

<sup>54</sup> See *id.* at ¶ 48; see also *id.* at ¶ 102. “An administrative practice comprises two elements: the ‘repetition of acts’ and ‘official tolerance’” (citing *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 9940-9944/82, Commission decision of 6 December 1983, Decisions and Reports 35, p. 163, § 19, and *Cyprus v. Turkey* [GC], no. 25781/94, § 99). (“Official tolerance is defined as ‘the superiors of those immediately responsible, though cognizant of such acts, take no action to punish them or to prevent their repetition; or that a higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings a fair hearing of such complaints is denied.’”) (Quoting *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 9940-9944/82 pp. 163-64, § 19)).

<sup>55</sup> ECtHR Ruling, *supra* note 9, at ¶ 48; Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 222. [*hereinafter* ECHR]. (Article 1 (Obligation to Respect Human Rights), Article 2 (Right to Life), Article 3 (Prohibition on Torture), Article 5 (Right to Liberty and Security), Article 8 (Right to Respect for Private and Family Life), Article 13 (Right to an Effective Remedy)).

<sup>56</sup> ECtHR Ruling, *supra* note 9, at ¶ 129. “‘Jurisdiction’ under Article 1 is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions attributable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.”

<sup>57</sup> *Id.*

<sup>58</sup> See *Banković and Others v. Belgium and Others*, 2001-XII Eur. Ct. H.R. (2001) ¶ 59.

<sup>59</sup> BRITANNICA, *supra* note 29.

<sup>60</sup> ECtHR Ruling, *supra* note 11, at ¶ 84.

<sup>61</sup> *Id.* ¶ 132.

<sup>62</sup> ECHR, *supra* note 55, at art. 1 “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

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produce effects outside its own territory.”<sup>63</sup> Under Article 1, lawful or unlawful military intervention qualifies as an event that produces effects outside of one's territory.<sup>64</sup> Regardless of legality, ECtHR case law establishes that, under Article 1 of the ECHR, if an invader acquires more land or territory through military conquest or intervention, that invader becomes accountable to the citizens of the conquered territory.<sup>65</sup>

To make this determination, the ECtHR applies a test to the facts of the case. Under the test, jurisdiction can be found if the invading country had, “effective control”<sup>66</sup> over the area or if the invading country set up “state agent authorized control over the area [or individuals].”<sup>67</sup> Procedurally, the Court held that all substantive claims brought by Georgia must first fall within the jurisdiction of Russia as a result of their invasion before being heard on their merits.<sup>68</sup>

### ii. *Jurisdiction and Claims during Active Hostilities*

Georgia submitted two claims of Russian ECHR violations during the active hostilities between the two countries.<sup>69</sup> It alleged a violation of the right to return for displaced Georgian nationals and a violation of the right to education.<sup>70</sup> The threshold question before a decision on the merits is whether Russia exercised jurisdiction over the territory. The first way to show jurisdiction over an area, effective control, requires an analysis of whether Russia's conduct in Georgia put them in effective control over the invaded Georgian territory.<sup>71</sup> On this point, the Court ruled that there was no effective control due to the dynamic nature of war and there was no established line for where Russia's jurisdiction began and Georgia's ended.<sup>72</sup> Therefore, the Court turned to the second avenue to prove jurisdiction, which required a determination of whether state agents or authorized authorities established control over individuals.<sup>73</sup>

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<sup>63</sup> ECtHR Ruling, *supra* note 11, at ¶ 133 (Referencing, *Drozdz v France and Janousek v Spain*, 26 June 1992, § 91[Series A no. 240]).

<sup>64</sup> *Id.* ¶ 81.

<sup>65</sup> *Id.* “The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration.”

<sup>66</sup> *Id.* ¶ 115; *Id.* ¶ 116. “[The] Court will primarily have reference to the strength of the State's military presence in the area. Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region.”

<sup>67</sup> *Id.* ¶ 115; *Id.* ¶ 117. “What is decisive in such cases is the exercise of physical power and control over the person in question.”

<sup>68</sup> *Id.* ¶ 84.

<sup>69</sup> *Id.* ¶ 110.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* ¶ 115.

<sup>72</sup> *Id.* ¶ 126. “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.”

<sup>73</sup> *Id.* ¶ 115.

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Under their analysis of the second avenue, the Court made a similar finding that due to the dynamic nature of war there was no established jurisdiction over individuals.<sup>74</sup> The Court went further and distinguished the facts of the case from prior case law regarding state agent authority and control jurisdiction by noting, "those cases [regarding a finding of administrative control] concerned isolated and specific acts involving an element of proximity."<sup>75</sup> Because the Court did not find that Russia had jurisdiction over the invaded regions of Georgia directly or vicariously through either South Ossetia or Abkhazia during the active hostilities, they dismissed Georgia's claims of human rights violations during the active fighting between Georgia and Russia/South Ossetia.<sup>76</sup>

### *iii. Jurisdiction and Claims Post Active Hostilities*

The second section of claims of human rights violations is alleged to have occurred after the cessation of hostilities.<sup>77</sup> Turning to the preliminary question of whether Russia had jurisdiction in the post-conflict occupation of Georgia, the Court found that Russia did.<sup>78</sup> To make this determination, the Court examined the two pathways starting with an effective control analysis.<sup>79</sup> The Court primarily looked at the military presence in the region following the conflict and noted that Russia had many troops in South Ossetia and the buffer zone.<sup>80</sup> Furthermore, the Court looked at the economic and political ties that South Ossetia and Abkhazia had with Russia.<sup>81</sup> Examining the economic ties, the Court took particular note of the emergency financial package given to South Ossetia and Abkhazia with the only difference being that Abkhazia did not receive oil from Russia.<sup>82</sup>

The Court concluded its analysis by discussing the political ties between the two countries, notably the Friendship, Cooperation, and Mutual Assistance Treaty between Russia and South Ossetia.<sup>83</sup> Then Prime Minister Vladimir Putin commented, "Russia is going to continue rendering all-round political and eco-

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<sup>74</sup> ECtHR Ruling, *supra* note 11, at ¶ 137.

<sup>75</sup> *Id.* ¶ 131; *id.* ¶ 132 (finding that the court noted that there were other cases that "applied the concept of 'State agent authority and control' over individuals to scenarios going beyond physical power and control exercised in the context of arrest or detention" however because level of proximity was different they were distinguishable from the case at hand.)

<sup>76</sup> *Id.* ¶ 144.

<sup>77</sup> *Id.* ¶ 146 (noting the court's headings and subsequent paragraph 146 show that there were different claims launched during active hostilities and after hostilities concluded).

<sup>78</sup> *Id.* ¶ 174.

<sup>79</sup> *Id.* ¶ 146.

<sup>80</sup> *Id.* ¶ 165.

<sup>81</sup> *Id.* ¶ 166.

<sup>82</sup> *Id.* ¶ 166.

<sup>83</sup> *Id.* ¶ 171 (explaining that Former Prime Minister Vladimir Putin stated, "In September 2008, we [Russia] signed a Treaty on Friendship, Cooperation, and Mutual Assistance, and last April, the Agreement on Cooperation in the Protection of South Ossetia's State Frontier. The Russian border guards have assumed responsibility for securing peace and tranquillity in the region.")

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conomic support both to South Ossetia and Abkhazia.’”<sup>84</sup> These factors led the Court to conclude that Russia was in effective control of South Ossetia and Abkhazia and therefore, the claims of human rights violations made by Georgia could proceed to be decided on their merits.<sup>85</sup>

### *iv. Merits of Post-Hostilities Claims*

Following the culmination of active hostilities, Georgia alleged violations of Articles 2, 3, and 8 of the ECHR.<sup>86</sup> These allegations come from, “killings, ill-treatment, looting and burning of homes had been carried out by the Russian armed forces and the South Ossetian forces in South Ossetia and the adjacent ‘buffer zone’”.<sup>87</sup> These claims were summarized by the Court, quoting witnesses W30 and W31, as, “. . . ‘ethnic cleansing’ of Georgian villages had been committed by South Ossetian militias and gangs.”<sup>88</sup> The Court made a finding that, “[t]he Russian forces, who had allegedly often attempted to interpose themselves and protect the Georgian villages, had not been in a position to prevent every incident and in any case had not controlled the South Ossetians, who had often been criminals.”<sup>89</sup>

However, to square with their jurisdictional findings, the Court found that the Russian forces were responsible for the ethnic cleansing committed by the South Ossetian forces because of the strong economic and political ties.<sup>90</sup> The Court justified this claim by further stating that although there may have been some attempts by Russian forces to prevent the cleansing, the forces mostly sat idly by while the South Ossetian troops engaged in ethnic cleansing and other crimes.<sup>91</sup> The Court found the testimony of the witnesses present at trial compelling enough to find beyond a reasonable doubt that there was a violation of, “Articles 2 and 8 of the Convention and Article 1 of Protocol No. 1 as regards the killing of civilians and the torching and looting of houses in Georgian villages in South Ossetia and in the ‘buffer zone.’”<sup>92</sup> The Court squarely says that Russia is the perpetrator of these violations.<sup>93</sup>

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<sup>84</sup> ECtHR Ruling, *supra* note 11, at ¶ 171.

<sup>85</sup> *Id.* ¶ 175.

<sup>86</sup> *Id.* ¶ 176.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* ¶ 205.

<sup>89</sup> *Id.* ¶ 213.

<sup>90</sup> *Id.* ¶ 214.

<sup>91</sup> *Id.* ¶ 217. (“Nevertheless, from all the testimonies collected, it appears that the Russian authorities did not take the necessary measures to prevent or stop the widespread campaign of looting, burning and other serious violations committed after the ceasefire.”).

<sup>92</sup> *Id.* ¶ 220.

<sup>93</sup> *Id.* ¶ 222.

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### v. *Additional Claims*

Additional claims were submitted by Georgia regarding the treatment of civilian detainees and the lawfulness of their detention,<sup>94</sup> specifically citing Articles 3 and 5 of the ECHR.<sup>95</sup> Examining the claims under Article 3, the Court found that they were meritorious and that violations of the Article 3 occurred when civilians were imprisoned in South Ossetian jails.<sup>96</sup> The Court went into detail describing the horrific circumstances at the prison, including the unsanitary conditions of the prison<sup>97</sup>, physical beatings<sup>98</sup>, and inadequate accommodations.<sup>99</sup> Even though the prison was exclusively run by the South Ossetian authorities,<sup>100</sup> because it was operating under Russian jurisdiction, the Court concluded that Russia was responsible.<sup>101</sup> Examining the claims under Article 5, the Court used the same set of facts as their determination of Article 3 and came to the same conclusion that there was a violation of Article 5 and that Russia was responsible.<sup>102</sup>

The next substantive claims related to the treatment of prisoners of war ("POWs") under Article 3.<sup>103</sup> Without repeating the horrific accounts of Georgian POWs, the Court concluded, "[it is] beyond reasonable doubt that Georgian prisoners of war were victims of treatment contrary to Article 3 of the Convention inflicted by the South Ossetian forces."<sup>104</sup> The Court then noted that, although these atrocities were committed by the South Ossetian forces, Russian forces were present and did not stop the torture.<sup>105</sup> Because of these findings and the Court's prior determination of Russia's jurisdiction over South Ossetia post-

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<sup>94</sup> ECtHR Ruling, *supra* note 11, ¶ 223.

<sup>95</sup> ECHR, *supra* note 55, art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."); ECHR, *supra* note 55, art. 5 (Author's note: for brevity I selected the main article not including sub articles under para 1) "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law, 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him, 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial. 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

<sup>96</sup> ECtHR Ruling, *supra* note 11, ¶ 250.

<sup>97</sup> *Id.* ¶ 242.

<sup>98</sup> *Id.* ¶ 244.

<sup>99</sup> *Id.* ¶ 243.

<sup>100</sup> *Id.* ¶ 248.

<sup>101</sup> *Id.* ¶ 252.

<sup>102</sup> *Id.* ¶¶ 254, 256.

<sup>103</sup> *Id.* ¶ 257; ECHR, *supra* note 55, at § 1, art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").

<sup>104</sup> ECtHR Ruling, *supra* note 11, ¶ 275.

<sup>105</sup> *Id.* ¶ 277.

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conflict, the Court concluded that Russia was responsible for the violation of Article 3 by the South Ossetian forces toward Georgian POWs.<sup>106</sup>

The Court then examined Georgia's allegation of interference with the freedom of movement of displaced persons under Protocol No. 4, Article 2 of the ECHR.<sup>107</sup> This allegation is not as straightforward as the proceeding ones. Regarding the right to return, Georgia alleged that the "South Ossetian and Abkhazian authorities [refused] to allow the return of many ethnic Georgians to their respective homes."<sup>108</sup> Furthermore, the return of Georgians to their homes in South Ossetia is still a politically divisive question, as evidenced by the Court's notation in this 2021 opinion that there are ongoing negotiations regarding this issue in Geneva.<sup>109</sup> However, the Court still made a finding that Russia was responsible for this impasse and failure to grant the right of return under Protocol No. 4, Article 2.<sup>110</sup>

Georgia also claimed under Protocol No.1, Article 2, a violation of the right to education.<sup>111</sup> The Court did not find enough evidence to decide on the merits of this claim and therefore dismissed the claim.<sup>112</sup> The final claim that Georgia made was a procedural claim under Article 2 of the ECHR, specifically alleging that Russia had an obligation to investigate the conduct of the South Ossetian forces.<sup>113</sup> Recalling the jurisdiction analysis, the Court established that Russian military and peacekeeping forces in South Ossetia constituted effective control of the area and made Russia liable under Article 1 of the ECHR for any human rights violations that occurred in their jurisdiction.<sup>114</sup> Because Russia failed to

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<sup>106</sup> ECtHR Ruling, *supra* note 11, ¶ 252.

<sup>107</sup> *Id.* at 120 (examining the header); ECHR, *supra* note 55, at protocol no. 4 art. 2 ("1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own. 3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. 4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.").

<sup>108</sup> *Id.* ¶ 297.

<sup>109</sup> *Id.* ¶ 298; *see also id.* ¶ 299 ("That situation [the prohibition of ethnic Georgian's to return to their homes in South Ossetia] was still ongoing on [as of] 23 May 2018, the date of the hearing on the merits in the present case, when the parties submitted their most recent (oral) observations to the Court.").

<sup>110</sup> *Id.* ¶ 301 (caveating that their ruling on this allegation only extends to May 23, 2018).

<sup>111</sup> *Id.* ¶ 302; ECHR, *supra* note 55, at protocol no. 1 art. 2 ("No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.").

<sup>112</sup> ECtHR Ruling, *supra* note 11, at ¶ 314.

<sup>113</sup> *Id.* ¶ 315; ECHR, *supra* note 55, at §1 art. 2 ("1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:(a) in defense of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.").

<sup>114</sup> ECtHR Ruling, *supra* note 11, ¶ 332.



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investigate the legitimate allegations of ethnic cleansing, looting, and other atrocities, the Court found Russia to be in violation of Article 2.<sup>115</sup>

### IV. Analysis

The Court's ruling is comprised of two parts: first, the court's jurisdictional findings on the active hostilities phase and the post hostilities phase; and second, the Court's decision on the substantive violations of the ECHR articles. Although the Court ultimately came to a near-unanimous conclusion that Russia had jurisdiction over Abkhazia and South Ossetia after hostilities ended and was responsible for the ECHR violations,<sup>116</sup> the majority opinion is not without flaws. The Court's analysis in both the determination of what is effective control and the burden of proof required to make a finding of jurisdiction during active hostilities raise concerns about the future application of Article 1 and the concept of jurisdiction and effective control.

#### A. Examining the Active Hostilities Ruling

##### i. *Banković and Others v Belgium and Others*

In their description of the law regarding Article 1 and the concept of jurisdiction and effective control, the ECtHR majority's reasoning, in part, relied on the precedent set out in *Banković and Others v Belgium and Others*.<sup>117</sup> In a partially dissenting opinion, Judge Lemmens and others stated that the majority had "re-suscitated" *Banković* with little regard to more modern case law.<sup>118</sup> Before addressing the critiques of the majority opinion by the dissenters, it is necessary to give an overview of *Banković*.

*Banković* concerned the conflict in Kosovo where a NATO rocket launched on April 23, 1999 hit a radio building which collapsed and subsequently killed relatives and family members of the petitioners.<sup>119</sup> The petitioners argued that NATO forces violated various Articles of the ECHR.<sup>120</sup> However, before assessing the merits of the violation of the ECHR articles, the *Banković* Court focused on, "whether the applicants and their deceased relatives were, as a result of that extra-territorial act, capable of falling within the jurisdiction of the respondent States [Belgium and other NATO countries]."<sup>121</sup>

In *Banković*, the Court recognized several exceptions to the general rule of territory and jurisdiction.<sup>122</sup> These special exceptions have been characterized as,

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<sup>115</sup> ECtHR Ruling, *supra* note 11, ¶ 337.

<sup>116</sup> *See generally id.*, ¶¶ 142-44.

<sup>117</sup> *Banković and Others v. Belgium and Others*, 2001-XII Eur. Ct. H.R. (2001) [*hereinafter Banković*]; ECtHR Ruling, *supra* note 11, at ¶ 81.

<sup>118</sup> ECtHR Ruling, *supra* note 11, at ¶ 2 (Lemmens, J., dissenting).

<sup>119</sup> *Id.* at 56-57.

<sup>120</sup> *Banković*, *supra* note 117, at ¶ 28.

<sup>121</sup> *Id.* ¶ 54.

<sup>122</sup> Erik Roxstrom et al., *The NATO Bombing Case (Bankovic et. al. v. Belgium et. al.) and the Limits of Western Human Rights Protection*, 23 B.U. INT'L. L. J. 55, 87 (2005).

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"1) de jure jurisdiction, 2) military occupation (of another contracting state), and 3) special relationship jurisdiction."<sup>123</sup> Diving into the military occupation exception to territoriality, the Court developed the concept of effective control, and how once an invading (contracting) party has established effective control over a territory they assume responsibilities to protect human rights.<sup>124</sup> In *Banković*, the Court ultimately ruled that Belgium and others did not have jurisdiction over the airspace or the building.<sup>125</sup> The Court rationalized this decision by stating:

The [petitioner's] submission is tantamount to arguing that anyone adversely affected by an act imputable to a [foreign state], wherever in the world 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.<sup>126</sup>

One major critique is that *Banković* is ambiguous and only outlines a highly general principle of what is within the jurisdiction of a state per Article 1.<sup>127</sup> The Court in *Georgia v Russia (II)* used this overly broad rationale as a means to show that during the active hostilities there was no effective control.<sup>128</sup> This was seen by the dissenting judges as a butchered application of the law and ignorant of other case precedents that draw on the concept of effective control but in a much broader sense, contrary to *Banković*.<sup>129</sup>

A large part of the criticism of the majority's holding in *Georgia v Russia (II)* is that the petitioners in *Banković* are former Yugoslavia citizens, and at the time Yugoslavia was not a signatory to the ECHR.<sup>130</sup> This is quite important because it shows a crucial deficiency in the way that the majority applies *Banković*. The Russo-Georgian conflict is between two parties to the convention, with Russia signing the convention in 1998<sup>131</sup> and Georgia in 2005.<sup>132</sup> The fact that both Russia and Georgia are signatories is a key premise for why Judge Grozev is not convinced by the majority's opinion.<sup>133</sup> Grozev presents a contrary, yet balanced

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<sup>123</sup> *Banković*, *supra* note 117, at 88.

<sup>124</sup> *Id.* at ¶ 70; *see* Roxstrum, et al., *supra* note 122, at 91; *see Solomou and Others v. Turkey*, App. No. 36832/97, (2008), [hereinafter Cyprus Case] (developing the idea of effective control).

<sup>125</sup> *Banković*, *supra* note 117, ¶ 82.

<sup>126</sup> *ECHR, Bankovic and Others v. Belgium and 16 Other States*, INT'L COMM. RED CROSS, <https://casebook.icrc.org/case-study/echr-bankovic-and-others-v-belgium-and-16-other-states> (last visited May 23, 2023).

<sup>127</sup> Roxstrom et al., *supra* note 122, at 75.

<sup>128</sup> ECtHR Ruling, *supra* note 11, at ¶ 126 (judgment).

<sup>129</sup> *See generally id.* ¶ 2 (Lemmens J. dissenting).

<sup>130</sup> *Id.* ¶ 11 (Yudkivska, Wojtyczek and Chanturia J., partially concurring partially; dissenting); *see also Serbia Fact Page*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/impact-convention-human-rights/serbia> (last visited Dec 14, 2022) (Serbia became a signatory to the ECHR in 2004); *see additionally Map and Members*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/tbilisi/the-coe/objectives-and-missions> (last visited Dec. 14, 2022) (note that Kosovo is still not a signatory to the ECHR).

<sup>131</sup> *See Russia and the European Court of Human Rights*, STITCH JUSTICE INITIATIVE, <https://www.srji.org/en/echr/russia/#:~:text=the%20Russian%20Federation%20ratified%20the,against%20Russia%20came%20in%202002> (last visited Dec.16, 2022).

<sup>132</sup> *See Georgia Fact Page*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/european-social-charter/georgia#:~:text=Georgia%20ratified%20the%20Revised%20European,the%20Revised%20Charter's%2098%20paragraphs> (last visited Dec. 16, 2022).

<sup>133</sup> ECtHR Ruling, *supra* note 11, at 169 (Grozev J., dissenting).

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approach, contrasted with the narrow approach of the majority. Without suggesting *Bancoviæ* is a fundamentally flawed interpretation of Article 1, Grozev finds that the majority's reliance on *Banković* would be proper if the case was between a party to the ECHR and a non party (i.e. Australia).<sup>134</sup>

However, a conflict between two parties to the convention requires a different approach because the petitioning party, in the case of an international conflict, carries the immense burden of fitting their jurisdiction argument into one of the limited exceptions to the general territory rule established in *Banković*.<sup>135</sup> Because of the high pleading burden, the majority had to do little work to find that there was no jurisdiction during the active hostilities phase of the conflict. The relevant facts of the case highlighted by both Grozev's dissent and the majority's opinion touch on the fact Russia's goal in invading Georgia was to gain territory.<sup>136</sup> The unsolved question is to what degree a country's military action in another country constitutes control. Grozev's distinction between a conflict with a third party and a contracting party and between two contracting parties presents a simpler way to decide what is sufficient control.<sup>137</sup> It makes perfect sense that a non-contracting party to the convention would not incur responsibility under the convention should it invade a country that is a party to the convention. This is the rationale of *Banković*.

What Grozev proffers is that, in a war between two contracting parties, when one contracting party acquires new land and implements new laws and policies, the obligations under the ECHR remain.<sup>138</sup> Grozev continues on to say that both countries have the same obligations under the ECHR to the citizens regardless of the changes in local laws and customs, the only thing that changes is who is the guarantor of those rights.<sup>139</sup> In the case between Georgia and Russia, this means that even as the Russian military advanced, the general rights of the Georgian citizens under the ECHR never changed. The only thing that changed was the guarantor of the rights of Georgian citizens. Considering this distinction, the majority seems to have misapplied *Banković* and extra-judicially stripped Georgians of their rights under the ECHR during the active hostilities phase. This ruling created a dead zone where neither state had an obligation to secure the rights of Georgian citizens because the Court's findings absolved Russia of their duty to administer those rights, and Georgia could not effectively administer the rights as they were not physically present in the occupied areas.

The creation of a grey area in a conflict between two contracting parties where there is no administrator of rights is quite dangerous. This presents a slippery slope where the rights of citizens in the case of invasion by a foreign party who is also a party to the convention are determined by how well the petitioner/petitioning country can effectively establish that their claim falls under one of the three

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<sup>134</sup> ECtHR Ruling, *supra* note 11, at 169-170 (Grozev J., dissenting).

<sup>135</sup> *Id.* at 170.

<sup>136</sup> *Id.* at 168.

<sup>137</sup> *See id.*

<sup>138</sup> *Id.* at 171.

<sup>139</sup> *See id.* at 171.

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*Banković* exceptions.<sup>140</sup> This seems to point to an unintentional consequence of the Court's decision to limit the jurisdiction of Article 1. However, the Court seems content with this direction. The potential problem that the Court supposedly saw in *Banković*<sup>141</sup> is overstated given the numerous other safeguards in place before a decision on the merits is heard, such as the exhaustion of domestic remedies or that there must also be a substantive violation of the ECHR articles or protocols.<sup>142</sup> Therefore, the jurisdiction decision in *Banković* as applied in *Georgia v Russia (II)* is reflective of a court that is stuck in the old sense of territory, one that focuses on the geographic border of a country. A situation that is dynamic, like that in Georgia during the war, falls outside of the realm of jurisdiction.

### ii. *The Cause and Effect of Military Intervention*

The joint dissenting opinion of Judges Yudkivska, Wojcyczek, and Chanturia raises a very compelling point. These dissenters focus on *Banković* and criticize its narrow interpretation and application to the facts in *Russia v Georgia (II)*.<sup>143</sup> They also focus on the role of the military as an extension of a state's capacity to craft and implement policy on citizens both domestic and abroad.<sup>144</sup> This focus ties in with the second avenue of determining jurisdiction, through state agent authority control.<sup>145</sup> This route is quite interesting and undermines the credibility of the majority's "fog of war" argument where they saw the dynamic and back-and-forth nature of military conflict as inhibiting the establishment of "effective control" under Article 1.<sup>146</sup>

These dissenters make the argument that a military used to quell a rebellion in their own country is akin to a military fighting a foreign military because the end goal is the same, to bring order and control over the individual civilians.<sup>147</sup> In a nod to *Banković*, the dissent states, "[a]n order to bomb specific targets in a city is an act of public power, not only in respect of the troops which will execute it but also over the persons who are in the city in question and who will suffer."<sup>148</sup> Taking this idea and putting it as a foil to the majority's "fog of war" argument

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<sup>140</sup> See generally Roxstrum, et al., *supra* note 122, at 87.

<sup>141</sup> That by ascribing a non-member state obligation under the ECHR akin to member states it would mean that anybody anywhere could bring a claim against a member state for a violation of the ECHR regardless of whether the petitioner/petitioner state was a party.

<sup>142</sup> See ECHR, *supra* note 55, at art. 35 § 1; see generally ECHR, *supra* note 55, at art. 34; see also EUROPEAN COURT OF HUMAN RIGHTS, RULES OF COURT: RULE 47, 2016/1, (Oct. 5, 2015) [https://www.echr.coe.int/Documents/Rule\\_47\\_ENG.pdf](https://www.echr.coe.int/Documents/Rule_47_ENG.pdf).

<sup>143</sup> See ECtHR Ruling, *supra* note 11, at ¶ 11 (Yudkivska, Wojcyczek, and Chanturia J., partially concurring, partially dissenting).

<sup>144</sup> See generally *id.* ¶ 6 (Yudkivska, Wojcyczek, and Chanturia J., partially concurring, partially dissenting).

<sup>145</sup> See *id.* ¶¶ 115, 117 (judgment).

<sup>146</sup> *Id.* ¶ 137.

<sup>147</sup> *Id.* ¶ 6. (Yudkivska, Wojcyczek, and Chanturia J., partially concurring, partially dissenting).

<sup>148</sup> *Id.*

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shows that the majority's argument fails to take into account what the dissent calls the "public power" of military intervention.<sup>149</sup>

There is a link between military activity and public life, regardless of whether the military action is domestic or foreign, and to ignore that link when addressing armed conflict would ignore the change in the lives of civilian population as a result of that war and invasion. For example, during the invasion of Georgia, the Russian/South Ossetian troops caused the widespread displacement of ethnic Georgians from the invaded towns closest to South Ossetia and Abkhazia.<sup>150</sup> As a result of the invasion, there was a cause and effect on individuals in Georgia. The court in *Banković* specifically addressed the cause-and-effect argument<sup>151</sup> and dismissed it. However, as outlined above, when examined in the light that the Russo-Georgian conflict was between two signatory parties to the ECHR, this cause-and-effect argument becomes a powerful tool to determine effective control.

However, this specific analysis should be limited to armed conflict between high contracting parties and not extended to any situation beyond that, lest the court fully reverse *Banković*. Therefore, in light of the cause and effect between Russian military activity in Georgia and a noticeable impact on Georgian individuals, there should have been a finding that Russia had jurisdiction in Georgia during the active hostilities. This cause-and-effect argument is also reflected in the case of *Solomou and Others v. Turkey*<sup>152</sup> which the dissent summarizes the findings of the Court as "the act of firing shots beyond a territory under a State's control brings the affected persons under that State's control."<sup>153</sup>

Although the majority in *Georgia v Russia (II)* did not use *Solomou and Others*, they instead relied on other cases to dismiss the cause-and-effect argument. The majority's dismissal of the cause-and-effect argument found in *Solomou and Others* and their reliance on *Banković* seems to ignore the hardship and suffering of Georgian citizens at the hand of the Russian and South Ossetian troops.<sup>154</sup> The majority's ruling also dangerously narrows the ability of future courts to apply Article 1 jurisdiction to situations of active conflict.

## V. Impact

This section investigates how the *Georgia v Russia (II)* decision could impact the ability of the Ukrainian government to bring successful claims of ECHR vio-

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<sup>149</sup> ECtHR Ruling, *supra* note 11, at ¶ 6. (Yudkivska, Wojczech, and Chanturia J., partially concurring, partially dissenting).

<sup>150</sup> *Id.* ¶ 297 (judgment).

<sup>151</sup> *Banković*, *supra* note 117, at ¶ 75.

<sup>152</sup> See generally Cyprus Case, *supra* note 124 (noting where a person was shot by Turkish-Cypriot forces operating close to the UN neutral buffer zone in Northern Cyprus. The court found that Turkey had jurisdiction over the person because of the cause and effect. Determining that 'an agent of the state' shot a Greek-Cypriot during their attempt to cross the buffer zone and get into Turkish-Cypriot territory killing them as a result of the state's exercise of power over that person).

<sup>153</sup> ECtHR Ruling, *supra* note 11, at 4. (Yudkivska, Wojczech, and Chanturia J., partially concurring, partially dissenting).

<sup>154</sup> *Id.* ¶ 131-32 (judgment).

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lations against Russia for their invasion. This section will focus entirely on the jurisdictional analysis of Russia and Belarus over the invaded and currently occupied Ukrainian territories.

### A. Jurisdiction

#### *i. The Jurisdiction Analysis in General*

At the time of writing this article, there has been no treaty or cessation of active hostilities in Ukraine. There are reports of continued attacks by Russia on Ukraine and more allegedly on the way.<sup>155</sup> Based on Court's jurisdictional finding in *Georgia v Russia (II)*, there would likely not be a finding of effective control or control by an administrative agent of Russia in Ukraine. Recalling that in the majority's effective control analysis, they relied on the "fog of war" argument, saying that because of active war there is no delineating line between Russian and Georgian territory for the purpose of deciding whether there is effective control.<sup>156</sup> Here, should the Court follow its rationale in *Georgia v Russia (II)* there will likely be a finding that Russia did not establish effective control over the territory that they control in Ukraine.

Looking at *Banković*, it will be hard for Ukraine to fit into one of the three exceptions to the general rule of what is effective control and jurisdiction of a contracting party.<sup>157</sup> The most promising of these three paths is military occupation<sup>158</sup> and specifically the holding from *Solomou and Others*.<sup>159</sup> In light of the *Georgia v Russia (II)* majority's findings, Ukraine should rely heavily on the cause-and-effect argument from *Solomou and Others* to show that Russia has effective control over the occupied parts of Ukraine. To support the cause-and-effect argument, Ukraine should argue that the sieges at Mariupol are an example of Russian military intervention directly impacting people on the ground.<sup>160</sup> Similar to the forced expulsion of ethnic Georgians from their homes, the Russian bombing of a movie theater in Mariupol, filled with women and children, is a clear military action with an effect on Ukrainian civilians.<sup>161</sup> Additionally, this bombing alone is quite factually similar to the facts in the *Solomou and Others* case, and examining this specific situation through the lens of *Solomou and*

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<sup>155</sup> Andrew E. Kramer, *Zelensky Warns Ukrainians That Russia Might Strike the Electrical Grid before New Year's Eve*, N. Y. TIMES (Dec 26, 2022), <https://www.nytimes.com/live/2022/12/26/russia-ukraine-news?smid=url-share#zelensky-warns-ukrainians-that-russia-might-strike-the-electrical-grid-before-new-years-eve> (last updated May 3, 2023).

<sup>156</sup> See ECtHR Ruling, *supra* note 11, ¶ 126.

<sup>157</sup> Roxstrum, et al., *supra* note 122, at 87-88.

<sup>158</sup> *Id.* at 91.

<sup>159</sup> See generally Cyprus Case, *supra* note 124 (holding that Turkey by virtue of its role in the maintenance of the Turkish Republic of Northern Cyprus (TRNC) are liable for activities that occur within the TRNC. Additionally holding, that agents of the TRNC or individual citizens who engage in illegal conduct with the knowledge of state agents can be held liable for violating articles of the ECHR).

<sup>160</sup> Hugo Bachega, *Russia's Attack on Mariupol Theatre a Clear War Crime, Amnesty Says*, BBC (Jun. 30, 2022), <https://www.bbc.com/news/world-europe-61979873>.

<sup>161</sup> Bachega, *supra* note 160.

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*Others* would lead to a finding of effective control by Russia.<sup>162</sup> To further reinforce this finding, Russia subsequently occupied the city of Mariupol and is rebuilding it in Russia's image.<sup>163</sup>

Even if the Court dismisses the effective control argument, the second prong of jurisdiction is easily satisfied because Russia is trying to establish administrative control over Ukrainian citizens by implementing Russian state agents as mayors.<sup>164</sup> The implementation of Russian mayors in cities like Kharkiv who were brought from Russia and who work on behalf of the Russian government would clearly be designated as state agents and therefore bring the citizens of Kharkiv under Russia's effective control. In *Georgia v Russia (II)*, the Court specifically stated that there was not an element of proximity between Russian control and the Georgian people for the state agent criteria to be satisfied.<sup>165</sup>

However, in Ukraine, the proximity between the Russian war effort and the Ukrainian citizens is different. The reported goal of the new mayor is to head a new Russian-appointed council of ministers in the Kharkiv province.<sup>166</sup> This changes the proximity analysis dramatically and shows that Russia is trying to control and make decisions on a more granular level rather than on a broader military level. In light of this development, the proximity element is most likely satisfied, and therefore the state agents that Russia implemented in the region establish Russia's jurisdiction over the areas where these "mayors" and "councils" are implemented. On the tail end of these appointed "mayors," there is a larger question that needs to be addressed regarding Russia's jurisdiction over the regions of Zaporizhzhia, Kherson, Donetsk, and Luhansk.<sup>167</sup>

### ii. What about the "Annexed Territories"?

According to almost all Western sources, the "referendums" that happened in the disputed territories of Zaporizhzhia, Kherson, Donetsk, and Luhansk were a sham.<sup>168</sup> Regardless of the validity of these referendums, the fact that they took

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<sup>162</sup> See generally *Cyprus Case*, *supra* note 124.

<sup>163</sup> *In Occupied Mariupol, Russia's Rebuild is Erasing Ukrainian Identity and Any Evidence of War Crimes*, EURONEWS (Dec. 12, 2022), <https://www.euronews.com/2022/12/22/in-occupied-mariupol-russias-rebuild-is-erasing-ukrainian-identity-and-any-evidence-of-war>.

<sup>164</sup> See ECtHR Ruling, *supra* note 11, at ¶ 115; see also *Former Russian Mayor Appointed Head of Russian-Occupied Kharkiv*, TASS Reports, REUTERS (Aug. 19, 2022), <https://www.reuters.com/world/europe/former-russian-mayor-appointed-head-russian-occupied-kharkiv-tass-citing-local-2022-08-19/>.

<sup>165</sup> ECtHR Ruling, *supra* note 11, at ¶¶ 132-33.

<sup>166</sup> *Council of Ministers Formed in the Liberated Part of Kharkiv Region*, TASS (Aug. 19, 2022) [https://tass.ru/mezhdunarodnaya-panorama/15513713?utm\\_source=google.com&utm\\_medium=organic&utm\\_campaign=google.com&utm\\_referrer=google.com](https://tass.ru/mezhdunarodnaya-panorama/15513713?utm_source=google.com&utm_medium=organic&utm_campaign=google.com&utm_referrer=google.com).

<sup>167</sup> See Jason Beaubien, et al., *Occupied Regions of Ukraine Vote to Join Russia in Staged Referendums*, NPR (Sept. 27, 2022), <https://www.npr.org/2022/09/27/1125322026/russia-ukraine-referendums> [hereinafter *Referendum Article*].

<sup>168</sup> See *Referendum Article*, *supra* note 167; see additionally Pavel Polityuk, *Russia Holds Annexation Votes; Ukraine Says Residents Coerced*, REUTERS (Sept. 24, 2022), <https://www.reuters.com/world/europe/ukraine-marches-farther-into-liberated-lands-separatist-calls-urgent-referendum-2022-09-19/>; see also *Former Russian Mayor Appointed Head of Russian-Occupied Kharkiv*, TASS Reports, REUTERS (Aug. 19, 2022), <https://www.reuters.com/world/europe/former-russian-mayor-appointed-head-russian-occupied-kharkiv-tass-citing-local-2022-08-19/>.

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place and that the regions voted to join Russia<sup>169</sup> moves the jurisdiction analysis in these specific regions from a hypothetical concept requiring legal arguments and comparisons to prior case law like *Banković* and *Solomou and Others* and the general effective control/state agent control analysis into a realm of direct control or *de-jure* control. These regions now a part of Russia, at least in the minds of Russian officials, means that Russia automatically assumes all the obligations, both positive and negative<sup>170</sup>, under the ECHR to the citizens in the regions. This means that the citizens of these regions can bring a complaint against Russia for any human rights violations regardless of the ongoing active hostilities.

This would also be a strong argument should Ukraine bring claims of violations against Russia for activities in the regions because the regions are a clear extension of Russia both territorially and administratively. However, this analysis would change if Ukraine recaptures these territories or if Ukraine's military action questions Russia's administrative jurisdiction over them. When or if this happens, the jurisdiction analysis would flip back to a question of whether Russia has effective control or state agent control over the disputed territories.

### iii. *The Question of Belarus*

The last question to be explored is regarding Russia's neighbor to the west, Belarus, and whether their activities in Ukraine are an extension of Russia and therefore fall under Russian jurisdiction. It does not matter that Belarus is not a signatory to the ECHR because its actions would be under the jurisdiction of Russia. The theory underlying this analysis is akin to the actions of South Ossetia in the Russo-Georgian conflict, where the Court found that South Ossetia was acting on behalf of Russia in the war and therefore Russia had administrative and effective control over South Ossetia.<sup>171</sup> The Court in *Russia v Georgia* (II) examined the economic and military ties between Russia and South Ossetia.<sup>172</sup> Following this framework, it is necessary to examine the relationship between Russia and Belarus.

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<sup>169</sup> *Ukraine 'Referendums': Full Results for Annexation Polls as Kremlin-Backed Authorities Claim Victory*, EURONEWS (Sept. 28, 2022), <https://www.euronews.com/2022/09/27/occupied-areas-of-ukraine-vote-to-join-russia-in-referendums-branded-a-sham-by-the-west> (Kherson voted to join Russia with 87 percent "yes" votes, Luhansk voted to join Russia with 98.4 percent "yes" votes, Zaporizhzhia voted to join Russia with 93.1 percent "yes" votes, and Donetsk voted to join Russia with 99.2 percent "yes" votes).

<sup>170</sup> EUROPEAN COURT OF HUMAN RIGHTS, GUIDE ON ARTICLE 1 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS 79, (Aug. 31, 2022), [https://www.echr.coe.int/documents/guide\\_art\\_1\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_1_eng.pdf) (noting when a state has jurisdiction over a person they incur "a positive obligation to guarantee respect for the rights and freedoms secured under the Convention" they also incur a "a negative obligation to refrain from actions incompatible with the Convention" (quoting *Ila?cu and Others v. Moldova and Russia* [GC], 2004, §§ 320-321)).

<sup>171</sup> See ECtHR Ruling, *supra* note 11, at ¶ 174.

<sup>172</sup> ECtHR Ruling, *supra* note 11, ¶ 165-66.



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For brevity, Belarus and Russia have a long history of cooperation as Belarus was a former satellite state during the Soviet Union, similar to Georgia.<sup>173</sup> Following the dissolution of the USSR, Belarus and Russia made several agreements, the most important of which is the Union State Treaty of 1999.<sup>174</sup> This agreement, “established the infrastructure for a potential complete integration between the two states.”<sup>175</sup> The agreement laid the groundwork for significant economic and cultural integration, however, the “[a]greement explicitly state[d] that the two states would retain sovereignty, independence, territorial integrity, state structure, constitutions, state flags, coats of arms, and other attributes of statehood.”<sup>176</sup> In light of the Union State Treaty and despite subsequent disputes between Russia and Belarus regarding Russian oil discounts, mineral tariffs, and weapons sales, “[t]he economic, political, and military ties between Belarus and Russia indicate the two states are vastly interconnected. However, this connection is mostly one-sided because Russia holds most of its power and resources over the head of its former state.”<sup>177</sup> Given the historically complex relationship between Russia and Belarus, and the protests against Belarusian President Alexander Lukashenko’s re-election in 2020, which turned into a broader pro-democracy protest,<sup>178</sup> the jurisdiction analysis in the current Russia-Ukraine conflict is not as clear-cut as the analysis of South Ossetia and Russia. In the current war Belarus has been accused of:

[S]upporting the Russian military aggression against Ukraine – inter alia – by allowing Russia to fire ballistic missiles from the Belarusian territory, enabling transportation of Russian military personnel and heavy weapons, tanks, and military transporters, allowing Russian military aircraft to fly over Belarusian airspace into Ukraine, providing refuelling points, and storing Russian weapons and military equipment in Belarus.<sup>179</sup>

Two questions require answers: first, did Russia assert effective control over Belarus when Russia fired the rockets and invaded Ukraine from Belarus?; and second, could any action be taken against Belarus in light of their passivity and

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<sup>173</sup> See Anthony Adamovich, *Belarus*, BRITANNICA, <https://www.britannica.com/place/Belarus> (last visited Dec. 18, 2022) (“[F]ormerly known as Belorussia or White Russia, was the smallest of the three Slavic republics included in the Soviet Union (the larger two being Russia and Ukraine).”).

<sup>174</sup> See *Union State: The Republic of Belarus and the Russian Federation Signed the Union State Treaty on 8 December 1999*, PRESS SERVICE OF THE PRESIDENT OF THE REPUBLIC OF BELARUS, <https://president.gov.by/en/belarus/economics/economic-integration/union-state> (last visited Dec. 19, 2022).

<sup>175</sup> Trevor Eck, *Unrest in Belarus: The Legal Perspective for Effective Russian Integration and the Potential Western Response*, 50 GA. J. INT’L. & COMP. L. 194, 199 (2021).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 203.

<sup>178</sup> News Wires, *Protestors Pack Belarus Capital, Russia Offers Lukashenko Military Help*, FRANCE24 (Aug. 17, 2020), <https://www.france24.com/en/20200817-protestors-pack-belarus-capital-russia-offers-lukashenko-military-help>.

<sup>179</sup> See Council of the European Union, *Press Release: Belarus’ role in the Russian military aggression of Ukraine: Council Imposes Sanctions on Additional 22 Individuals and Further Restrictions on Trade* (Mar. 2, 2022), <https://www.consilium.europa.eu/en/press/press-releases/2022/03/02/belarus-role-in-the-russian-military-aggression-of-ukraine-council-imposes-sanctions-on-additional-22-individuals-and-further-restrictions-on-trade/>.

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the fact that they did not put any troops in Ukraine nor are there any reports of Belarus housing Ukrainian POWs?

There is a strong argument that Russia is in effective control over Belarus, through the invitation prong articulated in *Banković*.<sup>180</sup> Given the long history of Russia and Belarus and the Union State Treaty and their intense economic connection it is easy to see how Russia (the more economically stable country) was able to control Belarus via oil and minerals.<sup>181</sup> Furthermore, following the protests, Lukashenko accepted loans from Russia with the promise of deeper economic and military ties.<sup>182</sup> When considering all of these factors, there is a strong argument that like South Ossetia, Russia has immense control over Belarus, such that Russia could be in effective and administrative control of Belarus. With this finding, however, comes the question of whether Belarus can be found in violation of any ECHR provisions.

The answer to whether Belarus is in violation of the ECHR would require a more complete factual record that has not been developed yet. In *Georgia v Russia (II)*, the Court found that Georgian POWs were housed in South Ossetian prisons facilitated by the South Ossetian government.<sup>183</sup> The Court in *Georgia v Russia (II)* also noted that Russia, despite their best efforts, failed to reign in the South Ossetian troops when they committed human rights violations.<sup>184</sup> Without a deeper understanding of the situation in Belarus, which would include information about Belarusian troops, whether individuals or troops in Ukraine are acting in the name of the Belarusian government, or whether Belarus launched rockets into Ukraine, there will likely be no way for Ukraine to pursue a claim against Belarus.

## VI. Conclusion

The Court in *Georgia v Russia (II)* created a legal precedent that will fundamentally shift how the Court views active hostilities and human rights violations that happen during them. The dissenting opinions articulate ways in which the facts of the Russo-Georgian conflict can satisfy both the effective control test and the state agent control test. Additionally, the dissenting opinions show how the majority narrowly used prior case law to conclude that Russia had no jurisdiction during the active hostilities.<sup>185</sup> However, the majority's jurisdiction analysis is not a fatal blow to holding Russia accountable for its actions in Ukraine. The fatal blow came when the Council of Europe ("COE") suspended Russia from the

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<sup>180</sup> Roxstrom et al., *supra* note 122, at 88.

<sup>181</sup> Eck, *supra* note 175, at 202-03.

<sup>182</sup> Alla Leukavets, *The Role of Belarus in the Ukrainian Crisis*, WILSON CTR, (Apr. 4, 2022), <https://www.wilsoncenter.org/blog-post/role-belarus-ukrainian-crisis>.

<sup>183</sup> ECtHR Ruling, *supra* note 11, at ¶¶ 213, 275.

<sup>184</sup> *Id.* ¶ 213. ("The commanders of the Russian armed forces and Russian peacekeeping forces who had testified at the witness hearing had also stated that their troops had done everything in their power to protect the civilian population, but had often not had sufficient men to prevent every incident.")

<sup>185</sup> ECtHR Ruling, *supra* note 11, at ¶¶ 142-44 (judgment); *see also id.* ¶ 2 (Lemmens J. dissenting); *see id.* ¶ 6. (Yudkivska, Wojyczek, and Chanturia J., partially concurring, partially dissenting).

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council.<sup>186</sup> This triggered an immediate response from Russia who in on March 10, 2022 threatened to leave the COE, but was voted out on March 16, 2022.<sup>187</sup> Russia also withdrew from the ECHR effective September 16, 2022.<sup>188</sup>

However, the Court is still able to hear cases that were filed against Russia before or on September 16, 2022.<sup>189</sup> Russia's withdrawal from the ECHR is a fatal blow to the analysis above and to hopes of accountability for Russia's actions in Ukraine beyond September 16, 2022. However, there still is hope for accountability under other international treaties that Russia is still a signatory to like the International Covenant on Civil and Political Rights, International Convention on the Elimination of All Forms of Racial Discrimination, and Convention on the Elimination of All Forms of Discrimination Against Women.<sup>190</sup> Until Russia rejoins the COE and accepts the ECHR again, there will likely be very little oversight and legal accountability for its actions in Ukraine.

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<sup>186</sup> Council of Europe, *Resolution on Legal and Financial Consequences of the Suspension of the Russian Federation from its Rights of Representation in the Council of Europe*, CM/Res/(2022), 1, (Mar. 2, 2022), <https://rm.coe.int/2022-cm-resolution-1/1680a5b463>.

<sup>187</sup> Micaela del Monte, *Russia's War on Ukraine: Russia Ceases to Be a Member of the Council of Europe*, EUR. PARLIMENTARY RSCH. SERVS., (Mar. 2022) [https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/729296/EPRS\\_ATA\(2022\)729296\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/729296/EPRS_ATA(2022)729296_EN.pdf). "On 10 March, the Russian Federation declared its intention to leave the Council of Europe, though at that time it did not submit a formal declaration of withdrawal to the Council Secretary-General, as required by Article 7 of the Council Statute. On 15 March, the formal notification reached the Council Secretary-General together with a declaration of Russia's intention to denounce the European Convention on Human Rights."

<sup>188</sup> See European Court of Human Rights, *Press Release No. 286: The Russian Federation Ceases to be a Party to the European Convention on Human Rights*, (Sept. 16, 2022), <https://hudoc.echr.coe.int/eng-press#%22itemid%22:%22003-7435446-10180882%22>].

<sup>189</sup> *Id.* "The Court remains competent to deal with applications directed against the Russian Federation in relation to acts or omissions capable of constituting a violation of the Convention provided that they occurred up until 16 September 2022."

<sup>190</sup> See generally *Ratification Status of the Russian Federation*, UNITED NATIONS HUMAN RIGHTS TREATY DATABASE, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=144&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=144&Lang=EN) (last visited Dec. 20, 2022).