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Victims of International Armed Conflicts Should Be Protected by the European Court of Human Rights

Le Droit sera un jour le souverain du Monde
Mirabeau[1]

1. Introduction

By Resolution CM/Res (2022)2 of 16 March 2022 the Committee of Ministers of the Council of Europe terminated the membership of the Russian Federation to the Council of Europe. According to Article 58 (3) of the European Convention on Human Rights (ECHR or the Convention), cessation of the membership of a member to the Council of Europe terminates also the membership of the member to the ECHR in six months. Indeed, the European Court of Human Rights (ECtHR of the Court) declared the membership of the Russian Federation to the ECHR will be finished on 16 September 2022. Until that day Russia will remain responsible for all human rights violations under the Convention.[2]

That might be a discouraging development for people in Ukraine who might be under Russian occupation after 16 September 2022 and for people in Russia who might oppose the Russian aggression against Ukraine after that day. Unfortunately, that will not be of a great importance for victims of Russian armed activities in Ukraine, since they have not been under the protection of the ECtHR even before that day. Civil victims in Donbas might not have also any benefit from the fact that Ukraine has been a party to the ECHR.

The ECtHR has interpreted Article 1 of the Convention in sense that the Article provides jurisdiction of the parties regarding military occupation, but not regarding waging war outside national territory. Applications concerning extra-territorial acts of war are thus inadmissible. Victims of human rights violation in such circumstances remain without protection of the ECtHR. Minority of judges in the *Georgia v. Russia* case of 2021 advocated a new interpretation of Article 1. This paper was written to support the new

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1 Pasqual Fiore placed the inspiring words of Mirabeau from 18th century as the motto of his textbook *International Law Codified and Its Legal Sanctions*, published in New York in 1918. The author of this paper believes that the world is going toward the mentioned day, but the road is long and, besides, the world is going sometimes astray.

2 Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights adopted on 22 March 2022. Available at https://echr.coe.int/Documents/Resolution_ECHR_cessation_membership_Russia_CoE_ENG.pdf

interpretation. The fundaments of the old interpretation were laid down in the *Banković and Others v. Belgium and Others* case of 2001. *Banković* was a step in a wrong direction. Hopefully, it will not be the first step on the road of a thousand miles. Unfortunately, twenty years since *Banković* the *Gorgia v. Russia* case remained on the same road.

After a short review of the relationship between international humanitarian law and international human rights law, the paper will present the *Georgia v. Russia* case and the *Banković and Others v. Belgium and Others* case. The paper will then introduce critiques of the old interpretation by some judges of the ECtHR and some writers. Concluding the paper, the author will add some arguments in favor of the new interpretation.

2. International Humanitarian Law and International Human Rights Law

There is no any doubt about applicability of human rights in armed conflicts. The International Court of Justice (ICJ) confirms that the protection provided by human rights treaties does not cease in the case of an armed conflict.[3] The ICJ treats international humanitarian law as *lex specialis* of human rights law.[4] Three situations may be perceived, according to the ICJ: some rights are exclusively in domain of international humanitarian law, others are exclusive object of human rights law, and third group of rights belongs to both branches of international law.[5] Human rights, guaranteed by human rights treaties, are applied in armed conflict, but under certain limitation, allowed by the treaties. As general rights, they may be specialized, limited or upgraded by humanitarian law.

Article 15(1) of the ECHR authorizes the parties to "take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law" in time of war. Paragraph 2 forbids derogation regarding the right to life, except when loss of life is a consequence of lawful acts of war. It forbids also derogation regarding the prohibition of torture, inhuman and degrading punishment and treatment, the prohibition of slavery and regarding the principle *nullum crimen, nulla poena, sine lege*. Paragraph 3 obliges a party to inform the Secretary General of the Council of Europe about taken measures and their cessation. Article 4(2) of the 1966 International Covenant on Civil and Political Rights provides a longer list of rights which cannot be derogated in war. The list includes the right to life, the prohibition of torture, inhuman and degrading treatment and punishment, prohibition of slavery and servitude, prohibition of depriving liberty on a ground of impossibility of fulfillment a contractual obligation, the principle *nullum crimen, nulla poena, sine lege*, the right to recognition everywhere as a person before the law and the freedom of thought, conscience and religion. The broader list might have a bearing to interpretation of the ECtHR.

A lot of rights have been protected by human rights law and humanitarian law in

3 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, p. 178, para 106.

4 *Ibid*.

5 *Ibid*.

parallel. Just to mention the right to life of civilians and war prisoners, dignity of all, the right to property and the freedom of thought, conscience and religion. In other words, by acts of war a State may violate at the same time its obligation under human rights treaties and its obligation under international humanitarian law.

3. *Georgia v. Russia*, 2021

Georgia lodged an application against the Russian Federation on 11 August 2008.[6] The application was lodged almost at the end of a five-days-war which began in the night between 7 and 8 August 2008. The Russian forces invaded the Georgian territory supporting local forces of the South Ossetia and Abkhazia. Ceasefire was agreed on 12 August 2008. According to a report of the EU Fact Finding Mission of 2009, Georgia claimed that 228 civilians lost life and 1747 persons were wounded.[7] The South Ossetia reported 365 persons killed.[8] The Applicant alleged that

> through indiscriminate and disproportionate attacks against civilians and their property on the territory of Georgia by the Russian army and/or the separatist forces placed under their control – the Russian Federation had permitted or caused to exist an administrative practice, resulting in a violation of Articles 2, 3, 5, 8 and 13 of the Convention, Articles 1 and 2 of Protocol No. 1, and Article 2 of Protocol No. 4.[9]

The Respondent objected admissibility of the application alleging that the events occurred beyond its jurisdiction and effective control. The Chamber found that the ECtHR had jurisdiction, but objections regarding jurisdiction *ratione loci* and *ratione materiae* joined to the merits and relinquished its jurisdiction in favor of the Grand Chamber.[10] In view of jurisdiction of the Court, the Grand Chamber made distinction between active phase of hostilities (between 8 and 12 August) and occupation phase, which began after the ceasefire agreement of 12 August.

Investigating its jurisdiction in the case, the Grand Chamber observed that the Court was invited to establish its jurisdiction regarding an armed conflict the first time since its decision in *Banković and Others* concerning the NATO bombing of the Radio-Television Serbia headquarters in Belgrade[11] and that its case-law has evolved in meantime.[12] Development of case-law resulted in two relevant criteria regarding the jurisdiction of a State in cases of extra-territorial activities: "effective control" by a State over an area and "State agent authority and control" over individuals.[13] The ECtHR explains the first criterion as "the spatial concept of jurisdiction" and the second as "the personal concept

6 *Georgia v. Russia* (II) (app. no. 38263/08) Judgment, Merits 21 January 2021.
7 *Ibid*., para 32.
8 *Ibid*.
9 *Ibid*., para 8.
10 *Georgia v. Russia* (II) (dec.), (app.no. 38263/08) Decision, 13 December 2011)
11 *Georgia v. Russia* (II) (app. no. 38263/08) Judgment, Merits 21 January 2021, para 113.
12 *Ibid*., para 114.
13 *Ibid*., para 115.

of jurisdiction".[14]

A State pursues effective control over its territory. All what has occurred in its territory falls under the jurisdiction of the party under Article 1 of the ECHR. Pursuing effective control over an area outside its territory may depend, according to established practice of the ECtHR, on "strength of the State's military presence in the area" or on "extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region."[15] Establishing the exercise of effective control of a party outside of its territory by the Court is a matter of assessment of fact against the stated criteria. Military occupation has been treated by the Court as effective control over the occupied territory. On the other side, armed attacks outside the territory have not been considered by the Court to satisfy the criterion of effective control. The Grand Chamber explained that: "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."[16]

The personal concept of jurisdiction, as developed in previous cases, indicates "the exercise of physical power and control over the persons in question."[17] "The very reality of armed confrontation and fighting between enemy military forces," the Grand Chamber stated "also exclude any form of 'State agent authority and control' over individuals".[18] Having been aware of sensibility of the issue, the Grand Chamber invoked certain practical reasons as an obstacle for developing its case-law. It referred to "the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances and the fact that such situations are predominantly regulated by legal norms other than those of the Convention."[19]

In spite of a general conclusion that possible violations of human rights, perpetrated during the active phase of hostilities, did not fall under the jurisdiction of Russia in sense of Article 1 of the ECHR, the Grand Chamber found that an obligation of investigating possible war crimes, perpetrated in the same phase, did fall under the jurisdiction of Russia. The Grand Chamber referred to the *Güzelyurtlu and Others v. Cyprus and Turkey* case of 2019 where the Court took position that a jurisdictional link regarding procedural aspect of Article 2 could be established if the party had instituted an investigation in respect of a death which had occurred outside its jurisdiction.[20] Having in view that Russia established effective control over the territory shortly after termination of hostilities, that the Russian authorities took steps to investigate allegations on war crimes committed during the active phase and that Georgia was unable to do that due to circumstances of the case, Grand Chamber concluded that the Russian jurisdiction in sense of Article 1 of the Convention existed in that regard.[21]

14 *Ibid*.
15 *Ibid*., para 116.
16 *Ibid*., para 126.
17 *Ibid*., para 130.
18 *Ibid*., para 137.
19 *Ibid*., para 141.
20 *Ibid*., para 330.
21 *Ibid*., paras 331, 332.

By eleven votes to six the Grand Chamber decided that the events which occurred during the active phase of the hostilities (8 to 12 August) did not fall within the jurisdiction of the Russian Federation. Still, unanimously, the Grand Chamber decided that "that the Russian Federation had a procedural obligation under Article 2 of the Convention to carry out an adequate and effective investigation not only into the events which occurred after the cessation of hostilities (from the date of the ceasefire agreement of 12 August 2008), but also into the events which occurred during the active phase of the hostilities (8 to 12 August 2008)". In connection with this, by sixteen votes to one, the Grand Chamber decided that Russia was responsible for a violation of the procedural aspect of Article 2. Thus, according the Grand Chamber, the issue of lawfulness of deprivation of lives in an armed attack has remined beyond the jurisdiction of a party, as it is defined by Article 1 of the Convention, but the issue of investigation of the lawfulness has been within the jurisdiction.

4. *Banković and Others v. Belgium and Others*, 2001

During the NATO aggression against the FR of Yugoslavia, on 23 April 1999, a NATO forces' aircraft bombed the Radio-Television Serbia headquarters in Belgrade. Sixteen persons were killed and another sixteen were seriously injured. Some of the victims lodged an application against seventeen members of the NATO, which were also the parties to the European Court of Human Rights, on 20 October 1999.[22] The applicants alleged violations of the right to life, the freedom of expression and the right to effective remedy. The Responded States objected admissibility of the application for various reasons, but the main argument was that the applicants did not fall within the jurisdiction of respondent States and consequently the application was not compatible *ratione personae* with the Convention.[23] The jurisdiction of the parties is defined in Article 1 of the Convention as follows:

> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Key issue was, thus, who had been under the jurisdiction of the parties in sense of Article 1 of the Convention. To answer the question, the Grand Chamber interpreted the expression "within their jurisdiction" by applying the rules on interpretation of treaties, expressed in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. The Grand Chamber chose to use some of interpretative means which were indicated in the articles: the ordinary meaning of a term, subsequent practice in the application of a treaty, general rules of international law applicable between the parties and *travaux préparatoires*.[24] It considered also previous case-law.

Viewing "ordinary meaning" of the term "jurisdiction" from the standpoint of

22 *Banković and others v. Belgium and others* (app. no. 52207/99) Grand Chamber Decision as to the Admissibility, 12 December 2001.

23 *Ibid*., para 31.

24 *Ibid*., paras 56-58.

public international law, the Grand Chamber observed that the term indicated "primarily territorial" jurisdictional competence of a State.[25] The Grand Chamber noted, also, that international law did not exclude extra-territorial jurisdiction of a State such as "nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality."[26] Referring to international law literature, it remarked that the extra-territorial jurisdiction is "as a general rule, defined and limited by the sovereign territorial rights of the other relevant States".[27] The Grand Chamber was of the view, "therefore, that Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case."[28]

Absence of notifications of derogation of human rights, which the parties might have done under Article 15 of the Convention, when they were involved in extra-territorial military missions, the Grand Chamber saw as subsequent practice of the parties in the implementation of the Convention, which reflected their understanding on a lack of their extra-territorial responsibility in comparable situations.[29] Turkey and the United Kingdom used opportunity offered by Article 15 notifying derogations, but in respect of internal armed conflict.[30] Having that in view, the Grand Chamber disagreed with the applicants that the term "war" in Article 15 meant any war emphasizing that the term meant war in the limits of jurisdiction as it was defined in Article 1.[31]

The Grand Chamber used *travaux préparatoires* to confirm rightfulness of the interpretation of the expression "within their jurisdiction" in sense "within their territories".[32] The preparatory worked informed that the Expert Intergovernmental Committee replaced the originally proposed phrase "all persons residing within their territories" with a broader formulation "within their jurisdiction" wishing to expand the Convention's application to all individuals on the territory of a party.[33] Thus, the Grand Chamber was guided in its interpretation by the ordinary meaning of terms, subsequent practice in the application of the Convention and the preparatory work.

The Grand Chamber considered that evolutive interpretation would not be proper for the matter. It recalled the practice of the Court regarding broad application of this interpretative method and reminded that in the *Loizidou v. Turkey* case, in preliminary objection phase, the Court took the position that the evolutive interpretation was applicable to certain jurisdictional issue.[34] The Court stated in that case and repeated more times in later cases that "the Convention could not be interpreted solely in accordance with the intentions of their authors expressed more than forty years previously."[35] The

25 *Ibid*., para 59.
26 *Ibid*.
27 *Ibid*.
28 *Ibid*., para 61.
29 *Ibid*., para 62.
30 *Ibid*.
31 *Ibid*.
32 *Ibid*., para 63.
33 *Ibid*.
34 *Ibid*., para 64.
35 *Ibid*.

Grand Chamber made however distinction between character of jurisdictional issues in *Loizidou* and in *Banković*. In time of *Loizidou*, the jurisdiction of the European Court of Human Rights and the European Commission of Human Rights was optional and the disputed issue was whether Turkey's reservations were compatible with the provisions of the Convention concerning the jurisdiction of the two bodies. The Court stated in *Loizidou* that even the reservations might have been considered as permissible in time of the conclusion of the Convention, that should not mean that the reservations were valid in time of the interpretation. However, in *Banković*, the Grand Chamber stressed that the scope of Article 1 was "determinative of the very scope of the Contracting Parties' positive obligations and, as such, of the scope and reach of the entire Convention system of human rights' protection as opposed to the question, under discussion in the Loizidou case (preliminary objections), of the competence of the Convention organs to examine a case".[36]

Having examined previous case-law regarding extra-territorial jurisdiction of the parties, the Grand Chamber found that common element was the effective control over a territory and its inhabitants abroad, which was exercised by all or some public powers in situations of military occupation, consent or invitation of the Government of the territory.[37] Thus, the effective control over a territory extends the jurisdiction of the party, as envisaged in Article 1, to that territory.

Referring to the northern Cyprus cases, the applicant claimed that the scope of positive obligation under Article 1 should be proportional to the level of effective control over the territory.[38] The respondent Governments asserted that "cause-and-effect" jurisdictional link was not contemplated by Article 1.[39] The Grand Chamber agreed with the respondent Governments. It declared that "the applicants' submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting 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."[40] "Had the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by the applicants," the Grand Chamber argued "they could have adopted a text the same as or similar to the contemporaneous Articles 1 of the four Geneva Conventions of 1949"[41] Article 1 of the Geneva Conventions obliges the parties "to respect and to ensure respect for the present Convention in all circumstances." The Grand Chamber found support for its interpretation also in Article 2(1) of the 1966 International Covenant on Civil and Political Rights and in Article 1 of the 1978 American Convention on Human Rights.[42]

The Grand Chamber rejected argument that its interpretation of the phrase "within their jurisdiction" left legal vacuum in the human-rights protection. It was an argument, used by the Court in *Cyprus v. Turkey* judgment (para 78). The Grand Chamber in *Banković*

36 *Ibid*., para 65.
37 *Ibid*., para 71.
38 *Ibid*., para 75.
39 *Ibid*.
40 *Ibid*.
41 *Ibid*.
42 *Ibid*., para 78.

made distinction between the two cases stressing the fact that Cyprus was a party of the Convention and that the FR of Yugoslavia was not a party.[43] The FR of Yugoslavia was not within the legal space of the Convention, which was a regional treaty.[44] Thus, the Grand Chamber found that the applicants and their deceased relatives were not capable to fall within the jurisdiction of the respondent States by effect of their extra-territorial act in question and rejected the application as inadmissible.[45]

5. Critiques of *Banković* by dissenting Judges in *Georgia v. Russia*

A critique of the interpretation in the *Banković* case by Judge Serghides was based on a distinction between positive and negative obligations under the ECHR and its jurisdictional consequences.[46] The Judge asked whether *Banković* was focused on a wrong issue, namely effective control regarding fulfillment of positive obligations?[47] The right issue was, according to the Judge, whether negative obligations are applied irrespective of any territoriality criterion and outside the scope of Article 1".[48] Looking at the principle of effectiveness and the text of the Convention as a whole, Judge Serghides inclined to positive answer. The Judge asked "Would human rights protection be effective without being full or complete or global?"[49] He remarked that the jurisdiction of the Court was defined by Article 32 of the Convention and that the article did not refer to the territorial principle or Article 1.[50] Reading provisions of the Convention which the Court interprets and applies under Article 32, Judge Serghides noted that each of them began by words "everyone" or "no one" without any and distinction regards jurisdiction *ratione personae* or *ratione loci*.[51] The Judge referred to the object and purpose of the Convention and observed that

> the purpose and object of the Convention is not fulfilled, and that its role as a human rights court is therefore not achieved, when it allows gross human rights violations arising from a breach of the States' negative obligations to go unnoticed, or remains passive and closes its eyes completely, citing lack of jurisdiction?[52]

In their joint partly dissenting opinion, Judges Yudkivska, Pinto de Albuqurque and Chanturia did not refer explicitly to *Banković*, but they answered to the disputed question differently.[53] Relying on Article 31(2) of the Vienna Convention on the Law of Treaties,

43 *Ibid*., para 80.
44 *Ibid*.
45 *Ibid*., para 82.
46 Partly Concurring Opinion of Judge Serghides, *Georgia v. Russia, op. cit*., infra n. 6, paras 3-
47 *Ibid.,* para 14.
48 *Ibid*.
49 *Ibid*., para 15.
50 *Ibid*., para 16.
51 *Ibid.*, para 18.
52 *Ibid*., para 22.
53 Joint Partly Dissenting Opinion of Judges Yudkivska, Pinto de Albuqurque and Chanturia, *Georgia v. Russia, op. cit*., infra n. 6

they believed that the Convention should be read as a whole and that the term "war" in Article 15 of the Convention referred to any armed conflict, including international conflict and non-international conflict.[54] Having considered the relationship between protection of the right to life by Article 2 of the Convention and by international humanitarian law, they stated:

> if States have difficulties in upholding their Article 2 obligations during armed conflicts, at home or abroad, inside or outside Europe, they have only one way out of these difficulties: to derogate from the Convention and to comply with both the Article 15 proportionality clause ('to the extent strictly required') and 'the other obligations under international law', namely with international humanitarian law, which sets the lowest permissible level of rights protection.

Contrary to the interpretation in *Banković*, the three Judges found that the Convention was applicable to all armed conflicts, including international conflicts.

Relying on the case-law, Judges Yudkivska, Wojtyczek and Chanturia, made distinction between the jurisdiction of a State, as it is defined by applicable rules of international law, and the exercise of public power of a State. They stated that if a party "cannot effectively exercise full territorial jurisdiction over part of its territory, the Convention applies only to the extent that the State can effectively exercise public power".[55] That is very close to the argument of the applicants in *Banković*. The three Judges departed then obviously from the interpretation in *Banković*. They declared that: „if a State exercises public power beyond its internationally recognised scope of jurisdiction, the actions undertaken by the State beyond this domain nonetheless fall within the scope of the Convention and must comply with the rights guaranteed by that treaty".[56] They came thus to the conclusion that the term "jurisdiction" in Article 1 referred to "the scope of public power effectively exercised by the State".[57] According to them "[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."[58]

Judge Pinto de Albuquerque was really sharp in his critique of *Bankvić*. He stated:

> Quite abruptly, the Court abandoned this consistent line of case-law in the most regrettable *Banković and Others* decision, by taking an extremely restrictive approach to jurisdictional issues. Interpreting extraterritorial jurisdiction in the light of general international law, the Court limited it to legally permitted extensions of domestic jurisdiction 'including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality', defined against the background of the sovereign territorial rights of the other relevant States. By so doing, the Court confused the essentially facts-centered concept of jurisdiction in Article 1 of the Convention with the legal grounds of extraterritoriality in general international law. In a sign of narrow-minded parochialism, it further confined the applicability of the Convention

54 *Ibid*., para 14. See also para 25.
55 Joint Partly Dissenting Opinion of Judges Yudkivska, Wojtyczek and Chanturia, *Georgia v. Russia, op. cit*., *infra* n. 6 p. 186, para 3.
56 *Ibid*.
57 *Ibid*.
58 *Ibid*., para 6.

to the European territory of the Contracting Parties, the so-called 'European legal space', ignoring the express provision of Article 56 of the Convention – which is a clear indication of the founding fathers' wish that the Convention should be applied all over the world, in the overseas territories of the Contracting Parties, save for some exceptional cases – and disregarding the agenda heralded in its Preamble, which does not suggest any geographical limitation to the observance of the rights and freedoms enshrined in the Convention.[59]

6. Critiques of *Banković* in Literature

Being limited by space and time, the presentation of critiques of *Banković* in literature will not be exhaustive. Only some opinion will be exposed. Crucial critique challenges compatibility of *Banković* with "the very idea of human rights". Three authors wrote that *Banković* was based on moral values which are incompatible with "the very idea of human rights."[60] The basic idea of human rights is that they are inherent to all human beings.[61] States are obliged not to interfere in universal human rights by which all human beings are endowed. These negative obligations of States are owed to everyone everywhere. They exist as part and parcel of the object and purpose of the Convention, beyond Article 1. Article 1 is limited only to positive obligations.[62] Other writers believed also that the interpretation of the phrase "within their jurisdiction" was contrary to the object and purpose of the Convention.[63] In connection with that, some authors observed that one of most powerful interpretative tool-the principle of effectiveness was put aside.[64] Really, the Court repeated in many cases that "the Convention is intended to guarantee not rights that are theoretical and illusory but rights that are practical and effective". The application of the principle was not considered in *Banković.*

The subject-matter of the case concerns State responsibility and attribution of acts to a State. These issues have not been discussed in *Banković*. An author understood the term "jurisdiction" in sense of attribution of a violation of the Convention to a party.[65] The issue of attribution is missing in relevant case-law.[66]

59 Partly Dissenting Opinion of Judge Pinto de Albuquerque, *Georgia v. Russia, op. cit*., infra n. 6 p. 203, para 5.

60 Erik Roxstrom, Mark Gibney and Terje Einarsen, "The NATO Bombing Case (Bankovic et al. v. Belgium et al.) and the Limits of Western Human Rights Protection." *Boston University International Law Journal*, vol. 23, no. 1, Spring 2005, pp. 55-136, at 62.

61 Erik Roxstrom, Mark Gibney and Terje Einarsen, "The NATO Bombing Case (Bankovic et al. v. Belgium et al.) and the Limits of Western Human Rights Protection., *Boston University International Law Journal*, vol. 23, no. 1, Spring 2005, pp. 55-136, at 66, 69-72.

62 Erik Roxstrom, Mark Gibney and Terje Einarsen, "The NATO Bombing Case (Bankovic et al. v. Belgium et al.) and the Limits of Western Human Rights Protection," *Boston University International Law Journal*, vol. 23, no. 1, 2005, pp. 55-136, at 72, 73.

63 Alexander Orakhelashvili, "Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights," *European Journal of International Law*, vol. 14, no. 3, 2003, pp. 529-568 at 547. Kerem Altiparmak, Bankovic: "An Obstacle to the Application of the European Convention on Human Rights in Iraq," *Journal of Conflict and Security Law*, vol. 9, no. 2, 2004, pp. 213-252 at 226. Matthew Happold, "Bankovic v. Belgium and the Territorial Scope of the European Convention on Human Rights," *Human Rights Law Review*, vol. 3, no. 1, 2003, pp. 77-90, at 88.

64 Matthew Happold, *op. cit*., at 87.

65 Alexander Orakhelashvili, *op. cit*., at 540.

66 Cedric Ryngaert, "Clarifying the Extraterritorial Application of the European Convention on Human Rights,"

The methods by which interpretative means had been used in *Banković* were criticized. By consulting related international law literature, the Grand Chamber used some information found in the literature, but neglected others which related precisely to the disputed issue and led to contrary meaning.[67] Some writers took as quite obvious that jurisdiction includes "State's control over its troops operating abroad"[68] and that "a state is held responsible for the conduct of its air forces wherever it occurs."[69] An author asserted that the use of subsequent practice, that is inferences of the Court from absence of notification of derogation of human rights under Article 15 of the Convention was improper.[70] Similarly, a writer observed that reading Article 2(1) of the International Covenant on Civil and Political Rights by the Court does not correspond with interpretation of the Article by the Human Rights Committee in the *Lopez v. Uruguay* case.[71]

7. Conclusions

Abandonment of Banković's spatial model has been expected,[72] but has not occurred. Still, certain modification has happened. Invoking ECHR espace juridique, as defined in *Banković*, the UK House of Lords considered in *Al-Skeini* that Iraqis who were killed by UK troops did not fall within the UK's ECHR jurisdiction.[73] Abandoning ECHR espace juridique and promoting a version of jurisdiction in form of "State agent authority and control over individuals," the ECtHR found in *Al-Skeini* that six applicants fell under ECHR jurisdiction of the UK.[74] Besides, the *Georgia v. Russia* case confirms that under certain conditions a procedural obligation of investigating loss of life during hostilities may emerge.

The Banković's spatial model includes an inherent absurd. Defining jurisdiction as a territorial jurisdiction, it excludes from jurisdiction, in sense of Article 1 of the Convention, hostile armed activities beyond the territory of a party. At the same time, hostile armed activities within the territory fall under jurisdiction. The armed conflict between the Russian Federal Army and Chechen fighters on the territory of Russia in 1999 fell under jurisdiction of Russia.[75] Let's imagine an international armed conflict between two States on a territory of one of them. Each of them file application against another alleging violations of the ECHR committed by its forces during hostilities. The application against a State on whose territory armed conflict occurred would be admissible. Contrary, the application against aggressor State would not be admissible. Isn't that an absurd? It is

Merkourios: Utrecht Journal of International and European Law, vol. 28, no. 74, 2012, pp. 57-60. at 60.

67 Erik Roxstrom, Mark Gibney and Terje Einarsen, *op. cit*., at 68.

68 Kerem Altiparmak, *op. cit*., at 224.

69 *Ibid*., at 225.

70 Alexander Orakhelashvili, *op. cit*., at 542.

71 Mark Gibney, "A Sense of Space: Human Rights and the West's Legal Framework," *International Studies Journal*, vol. 2, no. 1, 2005, pp. 1-18

72 Cedric Ryngaert, *op. cit*., at 58.

73 *Ibid*., at 59.

74 *Ibid*.

75 *Isayeva, Yusupova and Bazayeva v. Russia* (app. nos. 57947/00, 57948/00 and 57949/00) Judgment, 24 February 2005.

difficulty to see any difference concerning effective control which the two parties might have over their armed activities in such circumstances. Whether the fact that the hostilities are running on a territory of a party provides the party by higher level of the control? That would be very doubtful. The Banković's spatial model is thus inherently unjust.