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The Invasion of Ukraine from the Point of View of the European Court of Human Rights: Extraterritorial Responsibility of Russia and (Un)Control of International Humanitarian Law

Sergio Salinas Alcega

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Résumé de l'article

L'impact négatif de l'invasion de l'Ukraine par la Russie sur le droit international a de nombreuses dimensions, la violation massive et flagrante des droits de l'homme étant l'une des plus importantes. Dans cette perspective, le rôle des mécanismes internationaux de protection de ces droits, y et notamment le système de la *Convention européenne des droits de l'homme* (*CEDH*) et de la Cour européenne des droits de l'homme, devient particulièrement important. L'approche de la Cour de Strasbourg peut se subdiviser en deux aspects, bien qu'évidemment liés. Dans l'immédiate, l'aspect principal porte sur l'étendue de la responsabilité de la Russie. Cette question, considérant que les actes pertinents sont commis par la Russie en dehors de son territoire, conduit aux questions liées à l'application extraterritoriale de la *Convention*. Le deuxième aspect renvoie à la manière dont les juges de Strasbourg voient l'interaction entre la *CEDH* et le droit international humanitaire, et en particulier le rôle qu'ils peuvent jouer pour exercer un certain contrôle sur son application. En effet, la Cour pourrait aider à combler le vide qui existe actuellement en termes de disponibilité de mécanismes spécifiques pour exiger la responsabilité des États pour la violation des normes de ce domaine du droit international. Concernant les deux aspects, il existe déjà une jurisprudence à Strasbourg qui est devenue de plus en plus élaborée, sans étant pour autant exempte de critiques. Les actes commis par la Russie en Ukraine pourraient permettre de revisiter cette jurisprudence et, à leur tour, aider à la développer pour aider à dépasser certaines lacunes inhérentes à la présente situation.

THE INVASION OF UKRAINE FROM THE POINT OF VIEW OF THE EUROPEAN COURT OF HUMAN RIGHTS: EXTRATERRITORIAL RESPONSIBILITY OF RUSSIA AND (UN)CONTROL OF INTERNATIONAL HUMANITARIAN LAW

Sergio Salinas Alcega[*]

The negative impact of the invasion of Ukraine by Russia on international law has many dimensions, the massive and flagrant violation of human rights being one of the most relevant. From this perspective, the role of international mechanisms for the protection of these rights, and notably the European Convention system and the European Court of Human Rights (ECtHR), has become particularly important. The Strasbourg Court's approach can be divided into two different aspects, which are obviously interrelated. The main aspect relates to the scope of the *European Convention on Human Rights*' (*ECHR*) responsibility regarding Russia. Considering that relevant acts are committed by Russia outside its territory, the question of the extraterritorial application of the *Convention* becomes crucial. The second aspect relates to how the Strasbourg judges see the interplay between the *ECHR* and international humanitarian law, and especially their role in exercising a certain amount of control over the latter's application. Here, the Court could help remedy the shortcomings that currently exist in terms of the availability of specific mechanisms to demand responsibility from the States for the violation of norms in this domain of international law. Regarding both aspects, there is already a rich and developing Strasbourg jurisprudence even if, of course, it is not exempt from criticism. The acts committed by Russia in Ukraine may make it possible to revisit this jurisprudence and allow it to overcome certain shortcomings which have been identified.

L'impact négatif de l'invasion de l'Ukraine par la Russie sur le droit international a de nombreuses dimensions, la violation massive et flagrante des droits de l'homme étant l'une des plus importantes. Dans cette perspective, le rôle des mécanismes internationaux de protection de ces droits, y et notamment le système de la *Convention européenne des droits de l'homme* (*CEDH*) et de la Cour européenne des droits de l'homme, devient particulièrement important. L'approche de la Cour de Strasbourg peut se subdiviser en deux aspects, bien qu'évidemment liés. Dans l'immédiate, l'aspect principal porte sur l'étendue de la responsabilité de la Russie. Cette question, considérant que les actes pertinents sont commis par la Russie en dehors de son territoire, conduit aux questions liées à l'application extraterritoriale de la *Convention*. Le deuxième aspect renvoie à la manière dont les juges de Strasbourg voient l'interaction entre la *CEDH* et le droit international humanitaire, et en particulier le rôle qu'ils peuvent jouer pour exercer un certain contrôle sur son application. En effet, la Cour pourrait aider à combler le vide qui existe actuellement en termes de disponibilité de mécanismes spécifiques pour exiger la responsabilité des États pour la violation des normes de ce domaine du droit international. Concernant les deux aspects, il existe déjà une jurisprudence à Strasbourg qui est devenue de plus en plus élaborée, sans étant pour autant exempte de critiques. Les actes commis par la Russie en Ukraine pourraient permettre de revisiter cette jurisprudence et, à leur tour, aider à la développer pour aider à dépasser certaines lacunes inhérentes à la présente situation.

El impacto negativo de la invasión de Ucrania por parte de Rusia sobre el Derecho Internacional tiene múltiples dimensiones, siendo la violación masiva y flagrante de los derechos humanos una de las más relevantes. En esta perspectiva, el papel de los mecanismos internacionales de protección de estos derechos, y en particular el sistema de la *Convención Europea de Derechos Humanos* (*CEDH*) y del Tribunal Europeo de Derechos Humanos, adquiere especial relevancia. El enfoque del Tribunal de Estrasburgo puede subdividirse en dos aspectos diferentes, aunque obviamente interrelacionados. De forma más inmediata, el aspecto principal estaría relacionado con el alcance de la responsabilidad de Rusia ante la *CEDH*. Teniendo en cuenta que los actos relevantes son cometidos por Rusia fuera de su territorio, la cuestión de la aplicación extraterritorial de la *Convención* se vuelve crucial. El segundo aspecto se refiere a cómo ven los jueces de Estrasburgo la interacción entre la *CEDH* y el Derecho Internacional Humanitario, y especialmente su papel

* Professor of International Law and International Relations at University of Zaragoza.

a la hora de ejercer cierto control sobre la aplicación de este último. En este sentido, el Tribunal podría contribuir a llenar el vacío que existe actualmente en cuanto a la disponibilidad de mecanismos específicos para exigir responsabilidad a los Estados por la violación de normas en este ámbito del Derecho Internacional. Respecto de ambas aproximaciones existe ya una jurisprudencia de Estrasburgo que se ha ido haciendo cada vez más frecuente y que desde luego no está exenta de crítica. Los actos cometidos por Rusia en Ucrania permiten revisitar esa jurisprudencia y a su vez presentan características que pueden conducir quizá a cambios en la misma.

A necessary consequence of Russia's invasion of Ukraine on 24 February 2022, which was initially labeled a *Special Military Operation*, is accountability for human rights violations committed, especially given its gravity. Numerous processes are underway to establish accountability in different contexts, notably before the International Court of Justice (ICJ) for war crimes.[1]

This study analyzes the role of Strasbourg judges in determining Russia's responsibility from the perspective of the *European Convention on Human Rights*[2] (*ECHR*) for the violations committed. Following Russia's expulsion from the Council of Europe effective as of 16 March 2022,[3] the European Court of Human Rights (ECtHR) indicated in a declaration on 22 March 2022, that it retains its competence to hear claims against that State relating to events occurring until 16 September 2022, the date on which Russia ceased to be a Party to the *ECHR* (following the expiry of the six-month period provided for in Article 58).[4] The Committee of Ministers, for its part, has indicated that it will continue to supervise the execution of all judgments against Russia.[5]

Returning to the issue being studied, two points deserve to be addressed in terms of the role of the ECtHR in relation to these events, which explain why this paper focuses on Russia's responsibility in the context of this conflict.[6] The first concerns the extraterritorial application of the *ECHR*, with the consequent responsibility of that State for acts committed outside its territory, and the second concerns the guarantees that the norms of international humanitarian law (IHL) are respected.[7]

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1 Among key events one may cite the decision of 28 February 2022 by the prosecutor of the ICJ to open an investigation for war crimes and crimes against humanity and the ICJ's decision on 16 March 2022 to order Russia to immediately suspend its military operations in Ukraine. It is also recalled that on 2 March 2022 the United Nations General Assembly deplored the "aggression" committed by Russia against Ukraine and on 12 October 2022 one calling on countries not to recognize the four regions claimed by Russia following so-called referendums held in September and demanding Moscow to reverse on its attempted illegal annexation. See "The UN and the War in Ukraine: Key Information" (last visited 10 September 2023), online: *UN Regional Information Centre for Western Europe* <unric.org/en/the-un-and-the-war-in-ukraine-key-information>.

2 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

3 See Council of Europe, Committee of Ministers, 1428ter meeting, *Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe* (2022).

4 See "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*" (22 March 2022), online (pdf): *European Court of Human Rights* <echr.coe.int/Documents/Resolution_ECHR_cessation_membership_Russia_CoE_ENG.pdf>.

5 See Council of Europe, Committee of Ministers, 1429bis meeting, *Resolution CM/Res(2022)3 Legal and Financial Consequences of the Cessation of Membership of the Russian Federation in the Council of Europe* (2022); Council of Europe, Committee of Ministers, 1451st meeting, *Preparation of the Next Human Rights Meeting,* CM/Del/Dec(2022)1451/A2a (2022).

6 This should not be understood as forgetting that Ukraine has also engaged in behaviour that requires its own accountability to be established. A recent example is the possible execution of Russian soldiers by Ukrainian troops, which was captured in a video published at the end of November 2022. See Daniel Boffey, "Russia says Ukrainian Soldiers Executed Prisoners of War in Donbas Region" (18 November 2022), online: *The Guardian* <www.theguardian.com/world/2022/nov/18/russia-says-ukrainian-soldiers-executed-prisoners-of-war-in-donbas-region>.

7 Both dimensions are noted in the Memorandum of the Commissioner for Human Rights, which warns that Russia's attack has led to massive and serious violations of the International Human Rights Law

In fact, the Russian aggression against Ukraine represents a further opportunity to analyze both issues, including in light of earlier cases involving Russia, either with other States, such as *Georgia v Russia (II) (Georgia II)*,[8] or with Ukraine itself, such as *Ukraine v Russia (Re Crimea)*.[9] The *Special Military Operation* as such has already had repercussions in Strasbourg, since several applications were filed, notably the *Inter-State Application* filed by Ukraine on February 28, 2022, which gave rise to the ECtHR's decision to adopt interim measures, which we will return to later.[10]

I. Russia's Responsibility for Its Intervention in Ukraine from the Perspective of the *European Convention on Human Rights*

The question of the extraterritorial application of the *ECHR*, resulting from the interpretation of the concept of *jurisdiction* as set out in Article 1,[11] has never been called into question in Strasbourg.[12] However, the case law generated has been subject to criticism, both internally and externally, for a certain incoherence and casuistry which, ultimately, seem to be due to the Strasbourg judges' sensitivity in certain complex cases, both legally and politically. The key aspects of the ECtHR's approach to this issue and its application to the current scenario of the Russian invasion of Ukraine will be discussed below.

A. Extraterritorial Application of the *European Convention on Human Rights* from the Perspective of the European Court of Human Rights

The approach of the organs of the Convention system to the extraterritorial application of the *ECHR* remained rather straightforward until the beginning of the 21st century, based on the idea of the effective control of the State party over an area or persons outside its territory, with the judgment of the Grand Chamber in the *Loizidou* case[13] as a major reference point. With the turn of the millennium, several factors have led to an increase in the number of cases in Strasbourg concerning the application of the *ECHR* to acts of States Parties outside their territory. This period has also seen an increase in the complexity of many cases, notably relating to armed conflicts, either

(IHRL) and IHL, both sectors of the International Legal Order to which both countries are bound. See Commissioner for Human Rights, "Memorandum of the Commissioner for Human Rights on the Human Rights Consequences of the War in Ukraine" (8 July 2022) at 17, online (pdf): *Council of Europe* <rm.coe.int/memorandum-on-the-human-rights-consequences-of-the-war-in-ukraine/1680a72bd4>.

8 *Georgia v Russia (II)* [GC], No 38263/08, [2021] ECHR [*Georgia (II)*].

9 *Ukraine v Russia (Re Crimea)* [GC], No 20958/14 [2020] ECHR.

10 About these applications see later, especially footnote 36.

11 That it imposes on States parties the obligation to secure to everyone within their jurisdiction the rights and freedoms defined in the *Convention*, without any mention of a limitation of that jurisdiction exclusively to the territory of individual States parties.

12 As first manifestations in this sense can be noted, as far as the European Commission of Human Rights is concerned, its inadmissibility decision of 25 September 1965, *X v Federal Republic of Germany* (1965), *ECHR* (Ser A) 158, and as far as the ECtHR is concerned the judgment *Drozd and Janousek v France and Spain* (1992) *ECHR* (Ser A) 14 EHRR 745 at para 91.

13 *Loizidou v Turkey* [GC] (1995) *ECHR* (Ser A) at para 62 [*Loizidou*].

because of the participation of States Parties in military interventions outside of the territory of the Member States of the Council of Europe, especially in the context of the fight against terrorism after 9/11, or because of disputes related to a number of new Member States and their relations.[14] This is where the Russian Federation comes to the fore, whose *Special Military Operation* in Ukraine is, for the moment, the latest of these conflicts to end up before the Strasbourg judges.

It is precisely in these particularly complex cases that the ECtHR's approach to the extraterritorial application of the *ECHR* is subject to criticism for inconsistency due to excessive deference to political considerations, seemingly arising from a need to safeguard certain balances in order not to be hampered in its functioning. The ECtHR has been seen, in a number of cases, as trying to promote *ad hoc* approaches that facilitate the acceptance and proper enforcement of its judgments by respondent States and certain other States concerned to the detriment of the clarity and coherence of its jurisprudence.

However, the search for necessary balances manifests itself in all the different "dialogues" which take place within the system, both those inherent in the ECtHR proceedings and those of the Committee of Ministers when ensuring that States abide by judgments rendered against them and when examining the proper functioning of the *ECHR* system more generally. The Committee's support has been very visible in the supervision of the execution of the ECtHR judgments, where it has on several occasions foregone the natural tendency to rely on consensus[15] (evidently the easiest way to get execution); and used the voting rules to impose respect for the obligation to abide by the ECtHR's judgments; as well as even engaged infringement proceedings against recalcitrant States to ensure compliance.[16] Similar support has been given by other bodies of the Council of Europe, notably by the Parliamentary Assembly through its own execution monitoring. In view of the unfaltering support given, one may well wonder whether the ECtHR's perceived deference is really warranted, especially if weighed against the basic interests underpinning the system, notably that of protecting European public order.

A paradigmatic example, indeed, the first of the perceived importance of the political context of the ECtHR's response to certain complex cases is the inadmissibility decision in *Banković and others v Belgium and others* (*Banković*),[17] which represented

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[14] See Conall Mallory, *Human Rights Imperialists. The Extraterritorial Application of the European Convention on Human Rights* (London: Bloomsbury Publishing, 2020) at 3.

[15] See for example, CM's refusal to accept the Russian Government's position in the Ilascu case and adoption of an interim resolution stressing Russia's obligation to comply. See Council of Europe, Committee of Minister, *Memorandum prepared by the Secretariat for the 1002nd meeting of the Ministers' Deputies*, (2007) CM/Inf/DH(2006)17-rev33 at paras 51ff.

[16] The simple majority of Member States, and a 2/3 majority of those voting of the Statute and in case of infringement proceedings, 2/3 of Member States. See Council of Europe*, Statute of the Council of Europe*, ETS 1[1949], arts 20(d), 46(4). As a preliminary it is not unusual that the Committee invites competent ministers to come to Strasbourg and explain their positions to the other Governments of the Council of Europe. A survey of the practice under the Interlaken period shows that more than 20 ministers have thus come before the Committee.

[17] *Banković and others v Belgium and others* [*GC*], No. 52207/99, [2001] ECHR at paras 59ff.

a certain departure from previous positions taken by the *ECHR* bodies with its insistence on territorial control. The political connection results from the adoption of this decision just 3 months after the 9/11 "attack" and with States parties already heavily involved in the renewed global fight against terrorism which followed this "attack". In this context, the risk could not be ruled out that a decision in favor of the extraterritorial application of the *ECHR* would have negatively affected the consideration due to the ECtHR by the governments of the States Parties concerned and a large part of their citizens, who could interpret it as a curb from Strasbourg on the reaction to the terrorist threat.[18]

The perception of the political contexts and the need to safeguard certain balances, considered by many to underlie the criticisms of *Banković*, remains very present. The fears regarding the lack of coherence of the Court's approach to the scope of states extraterritorial jurisdiction have thus not been fully dissipated; and this notwithstanding the strong support demonstrated by the Committee of Ministers for the full execution for all judgments, including those which are or have been very unpopular in respondent States, as well as in other States.[19] Admittedly, there has been a certain positive evolution in the ECtHR's subsequent case law, which has qualified some of its more controversial statements in *Banković*. Still there has been no shortage of other cases in which attempts by the Strasbourg judges to reconcile different interests at stake in an *ad hoc* manner have been perceived.

This is where Russia appears once again, especially because of its importance (at the time) as a State Party and because of the Committee of Ministers ambition to maintain the dialogue necessary for an adequate execution of the ECtHR's judgments.[20] The special need to safeguard balances in relation to this State may well have been one of the reasons behind the ECtHR's position in *Georgia II*. Another may have been the absence of necessary resources in the Court, whose budget had not increased for a long period of time, to operate, which led to the conclusion that the victim was subject to the jurisdiction of the United Kingdom.

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18 This risk could be perceived in ECtHR President Luzius Wildhaber's opening speech of the 2002 judicial year, in which he warned of the need to accommodate human rights law to the fight against terror. See "Annual Report 2001" (2002) at 20, online (pdf): *European Court of Human Rights* <www.echr.coe.int/Documents/Annual_report_2001_ENG.pdf> at 20 The impact of this issue on the ECtHR's approach to the extraterritorial application of the *ECHR* leads Sarah Miller to describe it as a transformative factor in moving the issue from a doctrinal abstraction to one with profound and very real political and legal implications. Sarah Miller, "Revisiting Extraterritorial Jurisdiction: A Territorial Justification for an Extraterritorial Jurisdiction Under the *European Convention*" (2009) 20:4 Intl Eur L J 1223 at 1224.

19 See among great numbers of examples the Committee of Ministers Interim resolution DH(96)251 in the case *Stran Greek Refineries & Stratis Andreadis v Greece*; Interim resolution DH (2000)105 in the case *Loizidou*; Interim resolutions CM/ResDH (2006)26 and (2007)106 in the case *Ilascu v Russia*; Interim resolution CM/ResDH(2010)33 in the case *Xenides Arestis v Turkey* or the two recent infringement proceedings lodged; Interim resolution CM/ResDH (2017)429 in the case *Ilgar Mammadov v Azerbaijan*; Interim resolution CM/ResDH(2021)432 in the case *Kavala v Turkey*.

20 A circumstance that may explain the ECtHR's attempt, alluded to by Bill Bowring, to maintain good relations with Russia in all circumstances, despite that state's drift regarding its rulings. See Bill Bowring, "Russia and the European Convention (or Court) of Human Rights: The End?" (Hors-série - décembre 2020) RQDI 201 at 211ff.

Regarding the practical difficulty of gathering evidence related to an ongoing conflict and the ensuing consequences for the question of jurisdiction, some special comments are required. This difficulty was said to result from the large number of victims and the procedural complexity of fulfilling the ECtHR's function—numerous incidents, a large volume of evidence and difficulty in establishing the circumstances.[21] However, these circumstances, which have also been invoked in previous cases before the ECtHR have not so far led the *Convention* organs to decide in the same direction. Indeed, there were ways out, as pointed out by Judge Chanturia in his partly dissenting opinion. The European Commission in its time chose the model of "illustrative" cases, for example, in *Cyprus v Turkey*.[22] It is probably fair to say that the resources available for this kind of fact-finding has largely decreased since, especially in view of the ECtHR's very difficult financial situation at the time of *Georgia II* and since the ECtHR's budget has not been increased for many years. As a result, the recourse to friendly settlements and unilateral declarations increased rapidly to allow the handling of large numbers of new applications in a simplified manner. The budgetary situation might partly explain the major divergence in the opinions we have seen in treating this topic.

B. Further Considerations Relating to the Reasons Underlying the Decision of the European Court of Human Rights in *Georgia v Russia* and its Application to the Invasion of Ukraine

In view of the above, it may be noted that it does not seem unreasonable to think that, as in *Banković*, the context surrounding *Georgia II* may be on the basis of the position adopted by the ECtHR in this case.

Indeed, not only was the majority's conclusion of the Court met with some contestation from within the Court, reflected in the separate opinions, concurring or dissenting, submitted by various judges, but the very text of the judgment seemed to acknowledge the flawed, or at least limited, the nature of that response. It should be recalled that there were as many as 9 separate opinions submitted, individually or collectively, by 9 of the ECtHR judges.

Among these were the dissenting opinion of Judge Lemmens, which ruled out the position of the majority that the very nature of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos not only means that there is no effective control over the area, but also excludes any form of State agent authority and control over individuals was a valid excuse for rejecting the extraterritorial application of the *Convention*.[23]

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[21] *Georgia (II), supra* note 8 at paras 139–41. To which the ECtHR added, as an element of confirmation of this exclusion, the failure of the States to formulate a derogation in accordance with Article 15 of the *ECHR*. This circumstance is interpreted in the judgment as the consideration by the States Parties that in these situations they are not exercising their jurisdiction within the meaning of Article 1 of the *ECHR*.

[22] *Ibid*, partly dissenting opinion of Judge Chanturia at para 21; *Cyprus v Turkey*, (1976) I Eur Comm'n Hr Dr 125 [*Cyprus v Turkey*].

[23] Judge Lemmens here referred to para 137 of the judgment (*Georgia* (*II*)). Not only did the judge find no difference between isolated and specific acts of use of force by state agents against individuals and

However, as noted above, even the majority seems to implicitly admit that, in reality, the ECtHR opted for this position in order to avoid hearing the merits of the case. This is clear from the explicit recognition of the judgment of the unsatisfactory nature of the limitation of the notion of *jurisdiction*, both for the victims and for the States in which the violations are committed.[24] This explicit recognition seems to be another reason to revisit the approach adopted by the ECtHR.[25] Indeed, from the point of view of the victim's protection, it seems illogical to rule out the ECtHR's capacity to exercise jurisdiction at a moment during which numerous violations can be committed. In reality, the acts carried out in the active phase of hostilities originated in the planning and adoption of decisions made by military authorities, which per se is an exercise of public power and, consequently, of jurisdiction.[26]

In light of these arguments, it seems clear that the Court's approach is based on the complexity of the issue at hand—especially the difficulties faced by the ECtHR in fulfilling its functions—as well as the political context, and especially on Russia's involvement. The perception remains that the importance of this State in the ecosystem of the *ECHR* has conditioned the Court to attempt to safeguard this fragile balance. This political sensitivity in the ECtHR's decision has led to question whether the majority's position would have been similar if the extraterritorial intervention had been carried out by Georgia instead of Russia.[27]

Further arguments against a strict reading of the *Georgia II* judgment appear to emerge from the 28 February 2022 application requesting the urgent adoption of interim measures against Russia in relation to the massive human rights violations being committed by its troops during the military aggression against the sovereign territory of Ukraine.[28] To prevent such violations, and in accordance with Rule 39 of the *Rules of the Court*,[29] the ECtHR decided during the fighting to instruct Russia to refrain from military attacks against civilian targets and to immediately ensure the safety of medical facilities, personnel and emergency vehicles in the territory under attack or besieged by

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bombardments by which a state seeks to acquire control over areas of another state; he considered even greater gravity in cases of large-scale activities. *Ibid* Partly Dissenting Opinion of Judge Lemmens at para 2.

24 *Georgia (II), supra* note 8 at para 140.

25 In this sense, Julie Grignon and Thomas Roos can be quoted, who ask whether this approach by the ECtHR does not reflect an acknowledgement of its powerlessness or, at the very least, its intention not to have to judge these possible violations. Julie Grignon & Thomas Roos, "L'affaire Géorgie v. Russie II : Six ans après l'affaire Hassan, la clarification tant attendue sur l'appréhension des conflits armés par la Cour européenne des droits de l'homme" (10 March 2021) at 3ff, online: *Quid Justitiae*, <quidjustitiae.ca/fr/blogue/CEDH_Géorgie_contre_Russie_II>.

26 See Mariagiulia Giuffré, "A Functional-Impact Model of Jurisdiction: Extraterritoriality Before the European Court of Human Rights" (2021) 82 Questions Intl L 53 at 65ff.

27 See Julie Grignon & Thomas Roos, "La juridiction extraterritoriale des États parties à la *Convention européenne des droits de l'Homme* en contexte de conflit armé : Analyse de la jurisprudence de la Cour européenne des Droits de l'Homme" (2020) 33:2 RQDI 1 at 16ff [Grignon & Roos, "Juridiction extraterritoriale"].

28 See *Ukraine v Russia (X)* [GC], No 11055/22, [2022] ECHR. See also, *Ukraine v Russia (VIII)*, No 55855/18, [2018] ECHR; *Ukraine v Russia (IX),* No 10691/21, [2021] ECHR.

29 See "Rules of Court" (23 June 2023), online (pdf): *European Court of Human Rights* <echr.coe.int/documents/d/echr/Rules_Court_ENG>.

its troops.[30] A few days later, on 4 March 2022, the ECtHR, in response to numerous individual requests for interim measures, ordered Russia to abide by its commitments under the *ECHR*, in ensuring the unimpeded access of the civilian population to safe evacuation routes, health, food and other essential supplies, as well as rapid and unrestricted access to humanitarian aid, including humanitarian workers. On 1 April the ECtHR recalled these interim measures and asked Russia to allow civilians to seek refuge in safe regions within Ukraine.[31] Finally, on June 23, Ukraine's application to the ECtHR was filed, alleging Russia's responsibility for numerous violations of the *ECHR* such as Articles 2, 3, 4, 5, 8, 9, 10, 11, 13 and 14 as well as Articles 1 and 2 of *Protocol 1*, and Articles 2 and 3 of *Protocol 4*.[32]

This approach cannot have been based on the Grand Chamber's judgment in *Georgia II*. If followed, its restrictive approach would have led to a finding that many of the victims of these acts during this phase of active fighting would not have been subject to Russia's jurisdiction. Consequently, Russia's obligations under the Interim Measures would not have extended to them. But there is no indication of any such limitation.

One additional element may further help to understand the divergences of the ECtHR's position on the extraterritoriality issue taken by the Court in the *Special Military Operation* decision and the *Georgia II* judgment. This divergence could be explained by the departure of Russia from both the Council of Europe and the *ECHR* system itself, including the Committee of Ministers in the context of the ECtHR's mechanism for controlling the enforcement of judgments. Even if the Committee continues to supervise the execution of judgments in Russian cases and Russia is expected to provide an action plan and clarifications, the fact is that Russia no longer has the right to vote in the Committee.

In other words, the ECtHR would appear to be relieved of the need to safeguard the delicate balances as referred above. In contrast, in *Georgia II* it could be argued that Strasbourg had to deal with the complex fact findings and other work necessary for usefully assuming jurisdiction over the phase of active hostilities.

As to the unprecedented distinction made by the ECtHR, between violations occurring during the active phase of hostilities of an international armed conflict and those taking place in the subsequent occupation phase, after the cessation of hostilities,[33] one may note that no discussion was engaged as to the pertinence of the

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30 Registrar of the Court, Press Release, ECHR 068 (2022), "The European Court Grants Urgent Interim Measures in Application Concerning Russian Military Operations on Ukrainian Territory" (1 March 2022).

31 Registrar of the Court, Press Release, *ECHR* 116 (2022), "Expansion of Interim Measures in Relation to Russian Military Action in Ukraine" (1 April 2022).

32 *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, ETS 9 (entered into force 18 May 1954); *Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the first Protocol thereto.* 16 September 1963, ETS 46 (entered into force 2 May 1968); Registrar of the Court, Press release, ECHR 206(2022) "Forthcoming Judgments and Decisions" (22 June 2022).

33 *Georgia (II), supra* note 8 at para 138 f).

positions adopted in *Cyprus v Turkey* in the first interstate cases launched by Cyprus following Turkey's military intervention in 1974.[34] In these cases, the Committee of Ministers, under its former decision-making powers (original Article 32 of the *Convention*), accepted the Commission's position that the *ECHR* did apply, and had indeed been violated, also during the "phases of actual fighting".[35] The ECtHR also did not take its own recent conclusion in the *Hassan*[36] case into account (at least not for this issue).[37] In this case, the ECtHR had held that upholding the UK's argument to exclude the extraterritorial application of the *ECHR* during the active phase of hostilities in an international armed conflict would run counter to the jurisprudence of the ICJ, which provides for the simultaneous application of international human rights law (IHRL) and IHL.[38] Accordingly, the ECtHR inferred the application of the *ECHR* in the context of an armed conflict in which IHL also considered the necessity of ensuring that Russia enforced its judgments and that the normal functioning and prestige of the entire system would not be negatively affected. In the *Special Military Operation* situation, upholding these balances does not seem necessary given that Russia's pressure means inside the organization have disappeared due to its exclusion.

The negative element, however, would be the gloomy outlook regarding any enforcement by Russia of existing or future judgments. Obligations incurred would, however, survive and could well become executable at some point in the future with a new government, or through the freezing of assets. Judgments will also make progress in establishing the extension of the obligations imposed by the *ECHR* to the activities of its States parties abroad. A favorable indication of this new turn in its jurisprudence can be seen in the adoption of the aforementioned provisional measures by the ECtHR.

II. The Role of the European Court of Human Rights in Monitoring International Humanitarian Law and its Projection on Russia's Activity in Ukraine

The second part of this study focuses on the role that could be played by the ECtHR as a monitoring body to ensure the compliance of Russia's actions with its obligations under IHL in relation to the conflict in Ukraine. To this end, we will begin by clarifying the relationship between IHL and IHRL and notably the place of bodies monitoring compliance with the IHRL in IHL. We shall then focus on the case of the ECtHR, especially regarding the acts committed by Russia during its *Special Military Operation*.

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34 See *Cyprus v Turkey*, *supra* note 22, to find numerous violations and confirmed by the Committee of Minsters in its resolution adopted 20 January 1979.

35 See *Ibid* at paras 107ff.

36 *Hassan v The United Kingdom* [GC], No 29750/09, [2014] ECHR [*Hassan*].

37 *Ibid* at para 77.

38 See Grignon & Roos, *supra* note 26.

A. The Relationship Between International Humanitarian Law and International Human Rights Law and the Role of International Human Rights Tribunals

IHL and IHRL are two legal frameworks that share similar objectives, such as the protection of the individual, but they certainly differ in terms of their scope of application. In contrast to the general nature of the IHRL, IHL is a legal framework only applicable in times of armed conflicts. Some international tribunals have taken the view that IHRL can also be applicable in the context of armed conflicts. The ICJ, for example, in its Opinion of 9 July 2004, in the case of the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[39], recalled that the protection offered by human rights conventions does not cease in times of armed conflict, except through the effect of provisions for derogation.[40]

In a similar approach, certain regional human rights courts have also been in favor of maintaining the obligations arising from human rights conventions in the event of armed conflicts, as did the old *ECHR* Commission in the first *Cyprus* cases lodged in 1974 and 1975 and subsequently the present ECtHR in the *Hassan* case.[41] For its part, the Inter-American Court of Human Rights (IACHR), in its ruling of February 4, 2000, in the *Las Palmeras v Colombia* case; in addition to affirming the applicability of the *American Convention on Human Rights* (*ACHR*)[42] for the case at hand, specified its role noting its competence to judge the compatibility of State's conduct with the *ACHR*, in times of peace or armed conflict.[43]

The consequence of this, beyond some nuances in the case of the ECtHR, such as its non-jurisdiction during the active phase of hostilities in an international armed conflict, is the possibility that the same conduct, carried out in a context of armed conflict, can give rise to violations under both areas of international law and that non-compliance must be examined accordingly. This interconnection between IHL and IHRL has both positive and negative elements. Among the latter, one can mention that the different levels of protection, especially of certain rights, are frequently a consequence of the context in which the events complained to take place. A major divergence between those two areas of international law can be

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39 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] ICJ Rep.

40 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004], ICJ, at para 106. Previously, in the Opinion of 8 July 1996, in the legality of the threat or use of nuclear weapons case, the ICJ had already warned of this interaction between the two legal systems with respect to the *International Covenant of Civil and Political Rights*, stating that, although the non-applicability of the derogation clause of Article 4 with respect to the right to life was maintained, the test of what is an arbitrary deprivation of life falls to be determined by the applicable *lex specialis*, the law applicable in armed conflict ICJ Rep; *Legality of the Threat or Use of Nuclear Weapons*, Advisory opinion [1996] ICJ at para 25.

41 See Grignon & Roos, *supra* note 26.

42 *American Convention on Human Rights,* 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978).

43 *Las Palmeras v Columbia* (2000), Judgment Preliminary Objections Inter-Am Ct HR (Ser C) No 67, at para 32 [*Las Palmeras v Columbia*].

illustrated with the right to life, as IHL is seen as a more permissive regime to use deadly force compared to IHRL.[44]

One of the positive aspects of the interconnection between the two legal frameworks is that it raises IHRL standards as regards the threshold for a derogation from the ordinary level of human rights protection in case of a public danger threatening the institutions or the population. IHL here maintains a more restricted approach, limiting the possibility of derogation to the existence of an armed conflict.[45]

However, one of these positive aspects is particularly relevant for this paper. It is the possibility of filling, through the IHRL, an important gap in IHL, namely the more limited protection accorded by international bodies responsible for monitoring State compliance with its norms. This shortcoming would be *resolved through* the role that can be played in this respect by the bodies that monitor compliance with the obligations imposed on these States by human rights conventions, in particular the regional courts.[46]

Nonetheless, the possibility of filling the absence of specific bodies for monitoring compliance with IHL through regional courts is far from being ideal. In this regard, it should be recalled what the IACHR pointed out in the *Las Palmeras v Colombia* case, in the sense that the guarantee of respect of IHL norms does not fall within their competence *ratione materiae*.[47] In other words, the function of these tribunals is in no way to monitor respect for IHL by the States parties to the human rights conventions in the framework of which they were created. In any case, human rights courts could indirectly monitor respect for IHL by integrating this legal framework in their reasoning when assessing the possible violations of human rights conventions under which they have jurisdiction.[48]

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44 Severine Meier uses this right, among others, to warn of the absurd results that a strict approach to certain rights from the perspective of the IHRL in the event of conflict can lead to. She mentions as examples the prohibition of shooting enemy combatants in the context of the right to life, or the capture of prisoners of war in the context of the right to liberty and security. Severine Meier, "Reconciling the Irreconcilable? The Extraterritorial Application of the *ECHR* and its Interaction with IHL" (2019) Goettingen J Intl L 9:3 395 at 414ff.

45 This is the opinion of Jean-François Flauss, who presents the *humanitarianisation* of regional human rights litigation, both European and American, as a more or less inevitable evolution of the jurisdictional protection of human rights, which is part of the general movement of a growing taking into account of customary or general international law by human rights jurisdictions. Jean-François Flauss, "Le droit international humanitaire devant les instances de contrôle des conventions européenne et interaméricaine des droits de l'homme" in Jean-François Flauss, ed, *Les nouvelles frontières du droit international humanitaire : Actes du colloque du 12 avril 2022* (Bruxelles : Bruylant, 2003) 117 at 119 [Flauss].

46 The significance of this positive contribution is underlined by Marko Milanovic, for whom it serves to consider the complementarity between the two sectors as positive, even in those cases in which recourse to the ILHR does not give rise to a substantive advantage in terms of the level of protection of individuals resulting from IHL. Marko Milanovic, *Extraterritorial Application of Human Rights Treaties. Law, Principles, and Policy* (Oxford: Oxford University Press, 2011) at 230.

47 On that occasion the IACHR warned of its ability to determine the compatibility of State acts with the *ACHR* and not with the *Geneva Conventions* of 1949. *Las Palmeras v Columbia, supra* note 43 at para 33.

48 In this regard, the IACHR, in its judgment of 25 November 2000, in the case of *Bámaca Velásquez v Guatemala* (Series C No 70, at paras 208–09) warns of the possibility that the relevant provisions of the *Geneva Conventions* may be taken into account as elements of interpretation of the *ACHR* itself.

B. The Role of the European Court of Human Rights in Monitoring International Humanitarian Law and its Projection on Russia's Activity in Ukraine

Having clarified the role of regional human rights courts in relation to IHL, we will focus on the specific case of Strasbourg, first in attempting to analyze the ECtHR's approach to these areas of international law, and then looking at its possible role in relation to Russian's actions in Ukraine.

In this regard, it should be noted that Strasbourg has been increasingly confronted with the problem of interaction between IHL and IHRL and has increasingly made explicit references to the former, although, as we shall see, with certain limitations depending on the conflict in question. In the first cases, Strasbourg judges implicitly relied on the norms and principles of IHL without referring to it expressly in cases where violations of IHL and of the *ECHR* were allegedly committed.[49] An example of this is the evocation by the ECtHR of the principles of distinction and proportionality in the *Güleç*[50] and *Ergi*[51] cases; in the former case, the Court judged that law enforcement officers used an excessive amount of force in light of the objective sought to be achieved,[52] and in the latter case, the Court stated that insufficient precautions had been taken to protect the civilian population.[53] A similar approach, in relation to Russia, can be noted in the case of *Isayeva, Yusupova and Bazayeva*, concerning the shelling of a civilian convoy in the context of hostilities in Chechnya in 1999.[54]

Progressively the ECtHR is evolving towards more explicit consideration of IHL in its decisions. This evolution can be seen in cases such as *Varnava*, which states that Article 2 of the *ECHR* should be interpreted as much as possible in the light of the general principles of international law, including those of IHL.[55] A similar approach has been taken by the Court in various cases, especially in relation to the action of the United Kingdom in Iraq. In this regard, the *Al-Jeddah* case is of interest, as the ECtHR clearly refers to the obligations of the Occupying Powers under IHL.[56]

The *Hassan* case is considered the high point of this evolution; as the ECtHR itself recalled, it was the first time in which a defendant State requested the non-

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49 According to Jean-François Flauss, does not imply an absolute indifference of the ECtHR, and the European Commission of Human Rights, towards IHL. Flauss, *supra* note 45. See also Linos-Alexandre Sicilianos, "L'articulation entre droit international humanitaire et droits de l'homme dans la jurisprudence de la Cour européenne des droits de l'homme" (2017) 27 RSDIE 663 at 667ff.

50 *Güleç v Turkey*, (1998) ECHR (Rep A) [*Güleç*].

51 *Ergi v Turkey*, (1998) ECHR (Rep A) [*Ergi*].

52 *Güleç*, *supra* note 50 at para 71.

53 *Ergi, supra* note 51 at para 81.

54 *Isayeva, Yusupova and Bazayeva v Russia*, No 57947/00, [2005] ECHR at paras 157, 168ff. In this case the ECtHR avoids any mention of IHL, even though it is invoked by the claimants (at para 157).

55 *Varnava and others v Turkey [GC],* No 16064/90, [2009] ECHR at 185.

56 *Al-Jedda v The United Kingdom*, No 27021/08, [2011] ECHR at paras 78, 104, 107. The ECtHR refers, more precisely, to Articles 42 and 43 of *The Hague Regulations Concerning the Laws and Customs of War on Land* (1907) as well as the *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War* (1949).

application of Article 5 of the *ECHR* or its interpretation in the light of IHL obligations to detain.[57] In this respect, the judgment recalls the integration of IHL norms among the rules of international law in harmony with which the *ECHR* must be interpreted[58] in accordance with Article 31.3.(c) of the *Vienna Convention on the Law of Treaties*.[59] It is pointed out, on the one hand, that the lack of a formal derogation in accordance with Article 15 of the *ECHR* does not prevent IHL from being taken into account when interpreting Article 5; on the other hand, in view of the simultaneous application of IHL and the *ECHR*, it is necessary to accommodate the grounds for detention in Article 5 (a) to (f) as provided under IHL in relation to prisoners of war under the *Third Geneva Convention*[60] and civilian internees under the *Fourth Geneva Convention*.[61]

However, the risk of such an interpretation of the *ECHR* based on IHL is noted in the partially dissenting opinion to that judgment. For the dissenting judges, in view of the differences between IHL and IHRL, priority should be given to the *ECHR* provision when these do not lend themselves to *automatic assimilation* with the provisions of IHL.[62] They mention derogation under Article 15 of the *ECHR* as the only legal mechanism for States parties to apply IHL's rules on detention without violating Article 5(1) of the *ECHR*.[63]

In any case, from this evolution in terms of the approach to IHL since Strasbourg, a *summa divisio* can be identified, which takes as its distinguishing criterion that of the international or internal nature of the conflict in question. Thus, the ECtHR expressly turns to IHL in cases such as *Hassan*, looking at the phase of active hostilities during an international armed conflict, but adopts a different approach in cases of non-international armed conflict, such as in the *Kurdish* or *Chechen* cases.[64] The reason for this distinction is explained by the Steering Committee for Human Rights, which points to the additional complexity of transferring the legal frameworks of IHRL and IHL as regards international armed conflicts to non-international armed conflicts. Several aspects are pointed out, including the reluctance of States parties to the *ECHR* to qualify a situation on their own territory as a non-international armed conflict. The explicit reference to IHL in a Strasbourg decision could be interpreted as an implicit recognition of a non-international armed conflict and therefore seen as an interference by the ECtHR in the internal affairs of a State — a risk that does not present itself in the cases

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57 Cit, paras 71–73.

58 *Hassan*, *supra* note 36 at paras 77, 102.

59 *Vienna Convention on the law of the treaties*, 23 May 1969, 1155 UNTS 18232 (entered into force 27 January 1980); *Hassan*, *supra* note 36 para 100.

60 *Geneva Convention (III) Relative to the Treatment of Prisoners of War,* 12 August 1949, 75 UNTS 135, Can. T.S. 1965 No. 20 (entered into force 21 October 1950).

61 *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 RTNU 287 (entered into force 21 October 1950); *Hassan, supra* note 36 at paras 99ff.

62 *Ibid*, partly dissenting opinion of Judge Spano Joined by Judges Nicolaou, Bianku and Kalaydjieva at para 17. Assumptions in respect of which Nicolas Hervieu describes the work of the ECtHR as an attempt to reconcile the irreconcilable. Nicolas Hervieu, "La jurisprudence européenne sur les opérations militaires à l'épreuve du feu. Droit européen des droits de l'homme et droit international humanitaire (Arts 2, 3, 5 and 15 ECHR)" (octobre 2014) Rev dr homme at 1.

63 *Ibid* at para 9.

64 See Julie Grignon & Thomas Roos, "La Cour européenne des droits de l'homme et le droit international humanitaire" (Hors-série décembre 2020) RQDI 663 at 677ff [Grignon & Roos].

of international armed conflicts. In addition, there are other legal arguments in favor of caution in making such a transfer, such as the fact that the rules applicable in non-international armed conflicts may be difficult to determine even if they are largely derived from customary international law.[65]

This evolution took a turn with the *Georgia v Russia (II)* case during which the respondent State pleaded that, without prejudice to the legitimacy of its military response from the perspective of international law and IHL, the ECtHR lacks jurisdiction to assess its compliance with this legal framework.[66] In fact, the ECtHR seems to follow this line when it supports its conclusion regarding the lack of jurisdiction to hear Russia's conduct during the active phase of hostilities, in addition to the arguments noted above, on the fact that these situations are mainly regulated by norms other than the *ECHR*.[67]

However, some comments should be made in this regard. Firstly, the exclusion of its own jurisdiction during the active phase of hostilities from which had not occurred in previous cases before the ECtHR as can be recalled from the *Hassan* case. While the Court recalls that such types of situations are regulated under IHL, it seems to forget the relative weakness of the bodies set up to control compliance with the rules of this area of international law, which makes attempts to repair violations suffered by the victims very difficult.

In any event, the position adopted by the ECtHR in this case is perceived as an attempt to circumvent criticism received in previous cases, in which the interpretation of the *ECHR* in harmony with IHL was seen as a dilution of the level of protection exercised by the ECtHR. In this respect, one can again point to the *Hassan* case as an example, where the criticism came from the judges themselves, and more specifically from Judge Spano's dissenting opinion, regarding the interpretation of Article 5 of the *ECHR*. This new approach by the ECtHR is seen as an attempt to avoid finding itself in the same position again, although this time regarding Article 2, given that the protection of the right to life under IHL is drastically different than the *ECHR*.[68]

This impression of a certain break by the ECtHR in this case with respect to previous positions can also be perceived in its interpretation, already noted above, that the usual non-recourse by States of Article 15 of the *ECHR*, with the possibility of derogating from rights, when they act in the context of armed conflicts of an international character, is interpreted as meaning that they do not consider themselves

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65 Council of Europe, Steering Committee for Human Rights (CDDH), 92nd meeting, *CDDH Report on the place of the European Convention on Human Rights in the European and International Legal Order,* CDDH(2019)R92 Addendum1 (2019) at para 256.

66 *Georgia (II), supra* note 8, at para 86.

67 *Ibid* at para 141.

68 Julie Grignon & Thomas Roos warn of this risk that the interpretation of Article 2 in accordance with what happens in the context of armed conflicts would have given the impression of a capitulation of the *ECHR* vis-à-vis IHL, by reducing the protection offered by the former. Grignon & Roos, "Juridiction extraterritoriale", *supra* note 27 at 4.

bound by the *ECHR* in such cases.[69] With this approach, the ECtHR seems to contradict what was stated in the *Hassan* case, in which it is considered that the modification of the commitments imposed on States parties by the *ECHR* cannot be presumed, but must be clearly stated to avoid that not resorting to this article is interpreted rather as an advantage, releasing that State from its obligation to comply with the *ECHR*, and exonerating it from responsibility if it does not.[70]

The consequence of this new pronouncement by the ECtHR is the confirmation of its non-recourse to IHL in the case of international armed conflicts, but adding a new nuance, such as the commission of acts during the active phase of hostilities.[71] This establishes a double standard that is only justified by the apparently legal, but in fact mainly political, complexity of this type of case, as pointed out by the Steering Committee for Human Rights, and the necessary balance that the ECtHR is obliged to strike.

These developments allow a similar conclusion to be drawn regarding the role of the ECtHR in relation to the control of Russia's compliance with IHL during the invasion of Ukraine to the role noted regarding the extraterritorial responsibility of that State for these acts. If the ECtHR were to follow its own jurisprudence, namely *Georgia v Russia (II)*, it would refrain from referring to IHL as an instrument of interpretation of the *ECHR*, given that, as noted above, these acts take place in the active phase of hostilities. This does not preclude the possibility that the change of context, and especially Russia's exit from the Council of Europe and the *ECHR* system, cannot be considered by the ECtHR as factors resulting in the existence of a different political context that would allow it to make other considerations.

But even in this case, it should not be forgotten that its approach to IHL will never equate to a monitoring body ensuring compliance with this body of law. Rather, the ECtHR will probably continue to use IHL as a legal framework to be interpreted with the obligations that the *ECHR* imposes on States.

This conclusion may be disappointing with regard to the monitoring of respect of IHL, but in any case, it does not seem realistic to place on the shoulders of the judicial bodies for the protection of human rights, and in particular on those of the ECtHR, the responsibility for filling the void created by the States themselves when negotiating the instruments in which IHL is articulated, specifically the lack of judicial bodies to control its application. In this sense, it should be borne in mind that it is this inaction

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69 An interpretation which Linos-Alexandre Sicilianos focuses on by pointing out that for the ECtHR, the possible application of IHL goes through the derogation clause of Article 15 of the *ECHR*, so that if this is not invoked by the respondent state, the ECtHR applies the provisions of the *ECHR* without accepting derogations that could result from IHL. Sicilianos, *supra* note 53 at 669.

70 *Hassan*, *supra* note 36 at para 107. See Grignon & Roos, "Juridiction extraterritoriale", *supra* note 27 at 4.

71 Indeed, in this case, while the ECtHR does not refer to IHL in the part of its argument relating to events occurring during the active phase of hostilities, in the case of those taking place during the occupation phase, after the ceasefire agreement of 12 August 2008, it does refer to the rules of that legal system, such as Articles 42 and 43 of *The Hague Regulations Concerning the Laws and Customs of War on Land* or the *Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*.

on the part of the States that seems to leave no other option than to turn to bodies that were not created for this purpose and whose competence does not allow them to rule on such a violation in order to obtain redress for violations of IHL. In other words, although the activity of the ECtHR makes it possible to make violations of this area of international law visible, it would be unrealistic to think that this would definitely fill this evident shortcoming.

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The application of the European system for the protection of human rights is one of the issues of international law to which the impact of the Russian invasion of Ukraine extends. These events allow us to revisit and develop two aspects of this application: that of the extension of the responsibility of States parties under the *ECHR* for acts beyond their territory and that of the ECtHR taking IHL into account, in relation to which the *Strasbourg* case law has not been free of criticism.

In relation to the first of these aspects, this development, understood as progress according to the ECtHR, is the result of the change of scenario that has occurred on this occasion, specifically Russia's exit from the Council of Europe and the different scenario that this creates in relation to the balances that the ECtHR must safeguard in order to preserve its functioning. In this respect, it may be thought that, although this makes it difficult, not to say illusory, to think of the enforcement of Strasbourg judgments, it gives the ECtHR the possibility of making progress in clarifying the extension of the obligations imposed by the *ECHR* to acts carried out by states outside their territory.

Regarding the application of IHL, this same change of scenario offers the ECtHR the opportunity to put an end to the dichotomy between the active phase of hostilities and the occupation phase in the context of a conflict, which is difficult to justify from the perspective of the protection of human rights. All of this without forgetting the role that the ECtHR, as an organ of the IHRL, must play in this respect in relation to the control of IHL, which, as has already been pointed out, cannot go beyond an indirect control of IHL by integrating it into the reasoning of the *ECHR*.