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The EU as a Global Security Provider: Countering Transnational Crime and New Cooperation Architectures

Collected Papers of the Jean Monnet Module (2023-2026) Transnational Crime & EU Law: Towards Global Action against Cross-border Threats to Common Security, Rule of Law and Human Rights (EU-GLOBACT) – (Coordinator: Prof. Dr. Anna Oriolo)

THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS REGARDING CONTESTED TERRITORIES: "DIFFERENTIATED" JURISDICTION AS A PANACEA OR AS AN ACHILLE'S HEEL?

Elisa Ruozzi*

SUMMARY: 1. Introduction. – 2. Jurisdiction in contested territories: effective control as a benchmark or as a justification? – 3. The application of primary norms: the articulation between positive and negative obligations as a complex allocation of tasks. – 4. Just satisfaction between right to redress for human rights breaches, judicial integrity and evidentiary difficulties. – 5. Some concluding remarks.

1. Introduction

Over recent decades, the growing number of cases brought before international courts and tribunals concerning human rights violations in contested territories found clear reflection in the case law of the European Court of Human Rights (ECtHR). The turbulent relationships between several States of the international community, often surviving as a long-term legacy of dramatic political events, progressively made their way into courtrooms, raising complex and intertwined legal issues linked involving, *inter alia*, the assessment of human rights breaches in contexts of prolonged armed conflicts. In this scenario, the Court is confronted with a *de facto* situation capable of affecting many, if not all, aspects of its judicial activity, stemming from the concurrent exercise of at least certain sovereign functions by two States: on the one hand, the State to which the territory where the alleged human rights violations occur officially belongs and, on the other hand, a State that occupies or otherwise exercises influence over the same area, including through support to a non-State actor.[1] In this respect, it is important to underline that, for the purposes of the present article, by the term "contested territory" it is meant any situation where control over the area where the

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* Associate Professor of International Law, University of Turin. E-mail: elisa.ruozzi@unito.it.
[1] As has been observed by Milanovic and Papić, the term "contested territory" may refer to different situations, that the authors classify under two main scenarios: the loss of control by a State of part of its territory due to the presence of a non-State actor and the attempt by a third State to exercise control over an area officially belonging to another State (M. MILANOVIC, T. PAPIĆ, *The Applicability of the ECHR in Contested Territories*, in *International and Comparative Law Quarterly*, 2018, no. 4, p. 783).

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alleged breach occurred is uncertain, regardless of the historical or political origin of this scenario.

This type of complaints gives rise to specific challenges in the interpretation and application of the European Convention on Human Rights (ECHR), foremost among them the determination of jurisdiction, with respect to which the Court is required to adapt its analytical framework – in particular the notion of "effective control" – to the above-mentioned circumstances. Moreover, the involvement of two States renders the identification and application of the relevant primary norms more complex, especially as regards the determination of their scope and substantive content. The concurrent presence of two States has, moreover, a significant impact on the application of secondary norms, in particular as far as reparations are concerned. In this context, judicial activity is likely to face remarkable challenges, such as factual uncertainty and prolonged time lapse between the alleged breaches and the judgment, that are a recurrent feature of situations of military occupation. Finally, the foregoing considerations cannot be viewed in isolation from the institutional characteristics of the ECtHR system, not originally designed in order to deal with mass violations of human rights, and whose subsidiary nature is premised on the assessment of facts being manly entrusted to national judiciaries.

As a methodological note, it is beyond the scope of this article, also in the light of the abundant existing literature on the subject, to offer an exhaustive analysis of all the legal issues characterising ECtHR case law in scenarios of contested territories. Rather, the present contribution aims at examining this subset of judgments in the light of one dominant element, *i.e.* the influence exerted along the whole legal reasoning by the presence, at the factual or processual level, of two States endowed with different degrees of jurisdiction. More precisely, it is submitted that the legal construct – differentiated jurisdiction – applied in these cases ends up forming a sort of *fil rouge*, rooted in ECtHR jurisprudence on extraterritorial jurisdiction but distinct from it, both informing the approach by the Court and reflecting a peculiar *de facto* situation. The rulings mentioned in this contribution have therefore been selected based on this common aspect, notably when the author was of the opinion that differentiated jurisdiction formed their "centre of gravity" regardless of other aspects, such as the underlying right invoked or the qualification of the scenario from an international law viewpoint. Consistently with that, the order through which cases are presented to the reader and, notably, the choice between a chronological or thematic criterion are merely functional to the analysis itself.

The paper is structured as follows: after a short introduction (Section 1), it begins by examining the issues related to the establishment of jurisdiction (Section 2). It then turns to the identification of the relevant primary norms and their allocation between the States concerned (Section 3). The question of just satisfaction under Article 41 of the Convention is addressed by outlining the general features emerging from the Court's case law to date and by analysing the specific aspects characterising interstate applications (Section 4). The paper concludes by sketching some final observations (Section 5).

2. Jurisdiction in contested territories: effective control as a benchmark or as a justification?

As underlined in the previous Section, the dominant feature of human rights disputes involving contested territories lies in the involvement of two States as potential or actual respondents for the alleged breach, owing to the influence that each of them, albeit to differing degrees, might exercise over an area. Such overlapping presence requires the ECtHR, when called upon to determine jurisdiction for the purposes of Article 1 of the Convention, to adapt the legal categories ordinarily applied in this regard, particularly those relating to the extraterritorial reach of its provisions.[2] Before taking this aspect into account more closely, it is important to underline that, far from being an exclusive feature of this system, the extraterritorial application of human rights obligations has been consistently affirmed by the International Court of Justice (ICJ) since the delivery of its 2004 Advisory Opinion concerning the construction of the "wall" by Israel.[3] In this respect, it is noteworthy that the language employed by the ICJ closely mirrors that used in the *Banković* case of the ECtHR,[4] which will be discussed shortly, thereby suggesting a process of cross-fertilisation between courts and the circulation of the view that the very purpose of these treaties requires overcoming a strictly territorial approach.

As is well-known, the ECtHR laid down the foundations of the Convention's extraterritorial application in the *Loizidou v Turkey*[5] and *Cyprus v Turkey*[6] judgments,

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[2] The extraterritorial application of the ECHR has been extensively analysed by doctrine. Among the several contributions in this respect, see: P. De Sena, *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo*, Torino, 2002, pp. 67 ff.; M. Milanovic, *Extraterritorial Application of Human Rights Treaties : Law, Principles, and Policy*, Oxford, 2011; W.A. Schabas, *The European Convention on Human Rights : A Commentary*, New York, 2015, pp. 99 ff.; Y. Shany, *The Extraterritorial Application of International Human Rights Law*, in *Recueil des Cours*, Leiden, 2020, pp. 52 ff.; P. Mazzeschi, *International Human Rights Law. Theory and Practice*, Cham, 2021, pp. 163 ff.; F. Sudre, *Droit européen et international des droits de l'homme*, XVI ed., Paris, pp. 326 ff.; P. Pustorino, *Introduction to International Human Rights Law*, The Hague, 2023, pp. 42 ff.

[3] International Court of Justice, judgment of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, paras. 107-113.

[4] The reference is to the passage where the ICJ defines States' jurisdiction as being "primarily territorial" (*ibid*., para. 109). European Court of Human Rights, Grand Chamber, judgment of 12 December 2001, application no. 52207/99, *Banković and others v Belgium and 16 contracting States*, para. 59.

[5] European Court of Human Rights, Grand Chamber, judgment of 18 December 1996, application no. 15318/89, *Loizidou v Turkey*, paras. 62-64. The approach elaborated by the Court in these cases, based on control over an area, was ideally complemented, in the *Al-Skeini* case, by the notion of control over individuals exercised by the State through its agents (European Court of Human Rights, Grand Chamber, judgment of 7 July 2011, application no. 55721/07, *Al-Skeini and others v United Kingdom*, para. 136). As noted by doctrine, the need to overcome the dichotomy between the "spatial" and "personal" models might point towards the emergence of a "functionalist model" grounded in the existence of an interference on human rights, each time this latter may be traced back, in a foreseeable manner, to the

where it clarified that jurisdiction for the purposes of Article 1 may be established in respect of acts committed in the "Turkish Republic of Northern Cyprus", since that entity survived "by virtue of" Turkish support.[7] On the basis of the "effective control"[8] exercised by Turkey over the area through its officials, as well as of the need to avoid any legal *vacuum* in human rights protection,[9] acts of the local administration were considered capable of engaging Turkey's responsibility in respect of the full range of substantive rights. The point was further developed in the *Banković* case, where the Court referred to "effective control" resulting from the military occupation of an area as one of the circumstances capable of justifying the application of the ECHR beyond the territorial boundaries of its Member States, thereby establishing an exception to the "essentially territorial" conception of jurisdiction reflected in Article 1.[10]

Clear as these criteria may have appeared, their application was subjected to considerable strain when an individual application was lodged against two States – Moldova and the Russian Federation – accused of violations of the Convention taking place in the "Moldovan Republic of Transdniestria". The area where the alleged breaches occurred was recognised by the Court as being "under the effective authority, or at the very least under the decisive influence", of the Russian Federation, thereby entailing the establishment of jurisdiction.[11] At the same time, in the Court's view, the absence of effective control by Moldova gave rise to a form of "residual"[12] jurisdiction over the area: although reduced, this latter was not extinguished by the military occupation or the existence of a separatist regime, with the consequence that Moldova remained bound by positive obligations.[13] Of particular interest in the *Ilasçu* case is its characterisation of jurisdiction as a "necessary condition" for a Contracting State to be

exercise of public powers (*ex multis* see: S. VEZZANI, *Recenti sviluppi in tema di applicazione extraterritoriale delle convenzioni internazionali sui diritti umani*, in *Rivista di diritto internazionale*, 2021, no. 3, pp. 661 ff.). The tension between this tendency and the Court's caution against the progressive extension of its jurisdiction clearly emerged in recent jurisprudence concerning rescue operations at sea (European Court of Human Rights, judgment of 20 May 2025, application no. 21660/18, *S.S. and others v Italy*, paras. 106-108).

[6] European Court of Human Rights, Grand Chamber, judgment of 10 May 2001, application no. 25781/94, *Cyprus v Turkey*, paras. 76-77.

[7] *Ibid*., para. 77.

[8] *Idem*.

[9] *Ibid*., para. 91.

[10] European Court of Human Rights, *Banković*, cit., para. 61. The "effective control test" has been notably applied by the Grand Chamber of the Court in the admissibility decision relating to one of the complaints submitted by Ukraine against Russian Federation (European Court of Human Rights, Grand Chamber, judgment of 16 December 2020, applications nos. 20958/14 and 38334/18, paras. 315 ff.). On the approach followed by the Court in this ruling see R. PISILLO MAZZESCHI, *Il contenzioso tra Ucraina e Federazione Russa davanti alla Corte europea dei diritti dell'uomo*, in this *Journal*, 2022, no. 2, pp. 88 ff.; C. DANISI, *L'applicazione della CEDU nel contesto del conflitto russo-ucraino*, in *Rivista di diritto internazionale*, 2023, no. 1, pp. 87 ff.

[11] European Court of Human Rights, judgment of 8 July 2004, application no. 48787/99, *Ilaşcu and others v Moldova and Russia*, para. 392.

[12] M. MILANOVIC, TATJANA PAPIĆ, *The Applicability of the ECHR in Contested Territories*, in *International and Comparative Law Quarterly*, cit., p. 787.

[13] European Court of Human Rights, *Ilaşcu,* cit., para. 33.

held responsible for breaches of the Convention,[14] as this statement underpins the distinction, consistently reaffirmed in the Court's case law, between jurisdiction within the meaning of Article 1 and questions relating to State responsibility. The idea of jurisdiction being a sort of requirement to fulfil in order to establish responsibility has been effectively restated in the *Catan* judgment, by defining jurisdiction under Article 1 as a "threshold" criterion,[15] expression that will be frequently adopted in the following cases.[16]

The approach sketched out so far subsequently found application in the context of the conflict between Armenia and Azerbaijan over Nagorno-Karabakh,[17] that gave rise to several individual applications, as well as to two "mirror" interstate complaints, currently pending before the ECtHR Grand Chamber.[18] On 16 June 2015, the Court delivered two judgments, against Armenia and Azerbaijan respectively, in which it had to balance the aim of avoiding a *vacuum* in human rights protection, as articulated in its previous jurisprudence, with the reality on the ground. In both judgments, which concerned the applicants' access to and enjoyment of their home and property, the Court assessed jurisdiction through the lens of the "effective control test", concluding that this latter had been satisfied.[19] In particular, in the *Chiragov* case against Armenia, jurisdiction was found to exist following a rather concise passage where, despite acknowledging the lack of conclusive evidence as to the composition of the armed forces in Nagorno-Karabakh, the Court declared that the respondent exercised effective control over the area on the basis of deductive reasoning. According to the ruling, the establishment of a defence force by the "Republic of Nagorno-Karabakh" ("NKR") would have been "hardly conceivable" without substantial military support from Armenia, particularly in light of the significant disparity in the two States' populations.[20] Although such a conclusion was further grounded in additional

[14] *Ibid*., para. 311.

[15] European Court of Human Rights, Grand Chamber, judgment of 19 October 2012, applications nos. 43370/04, 8252/05 and 18454/06, *Catan and others v Moldova and Russia*, para. 103.

[16] See, among others, European Court of Human Rights, Grand Chamber, judgment of 23 February 2016, application no. 11138/10, *Mozer v Moldova and Russia*, para. 98; European Court of Human Rights, Grand Chamber, judgment of 29 January 2019, application no. 36925/07, *Güzelyurtlu and Others v Cyprus and Turkey*, para. 178.

[17] For a general analysis of the historical and legal aspects of the conflict, in particular starting from the declaration of independence by Nagorno-Karabakh, see: N. RONZITTI, *Il conflitto del Nagorno-Karabakh e il diritto internazionale*, Torino, 2014, 18 ff.

[18] European Court of Human Rights, application no. 42521/20, *Armenia v Azerbaijan*; application no. 47319/20, *Azerbaijan v Armenia*.

[19] European Court of Human Rights, Grand Chamber, judgment of 16 June 2015, application no. 40167/06, *Sargsyan v Azerbaijan*, para. 150; Grand Chamber, judgment of 16 June 2015, application no. 13216/05, *Chiragov and others v Armenia*, para. 186.

[20] European Court of Human Rights, *Chiragov*, cit., para. 174. The case has been commented, among others, by: S. FORLATI, *The ECHR and the Nagorno-Karabakh Conflict - Applications Concerning "Historical Situations" and the Difficult Quest for Legal Certainty*, in *Diritti umani e diritto internazionale*, 2012, no. 2, pp. 402 ff.; A. SPAGNOLO, *Attribuzione delle condotte e accertamento della giurisdizione in casi di violazioni di massa dei diritti fondamentali: sulla recente giurisprudenza della Corte europea*, in *Diritti umani e diritto internazionale*, 2015, no. 3, pp. 690 ff.

arguments, such as the existence of political and financial support,[21] as well as the strong integration between Armenia and "NKR" at the judicial and legislative levels,[22] authoritative commentators underlined the "ease" through which control was established, pointing out, in particular, that the Court failed to attribute any specific conduct to the respondent.[23]

This impression appears even stronger when one compares the judgment discussed above with that adopted in the *Sargsyan* ruling against Azerbaijan, where the applicant similarly alleged a violation of his rights relating to the possession and enjoyment of private property, arising from his inability to return to a village located in an area along the frontline between Armenia and Azerbaijan and rendered inaccessible by the circumstances of the conflict. Proceeding from the presumption that the territorial State (in this case, the respondent) had jurisdiction over the area, the Court required persuasive evidence to demonstrate the existence of exceptional circumstances capable of limiting responsibility under Article 1.[24] After rejecting all the arguments advanced by Azerbaijan, and in particular the contention that an official declaration in this sense was capable of restricting the territorial application of the Convention,[25] the judges concluded that its limited and uncertain control was nonetheless sufficient to trigger jurisdiction, albeit solely for the purposes of positive obligations.[26] In reaching this conclusion, decisive weight was assigned to the absence of effective control by Armenia, given that, according to the Court, international humanitarian law rules on occupation require, for the latter to exist, a State's "foot on the ground", *i.e*. the physical presence of foreign troops.[27]

The reasoning followed in this delicate case has been strongly criticised, primarily due to the ECtHR's decision to attribute exclusive jurisdiction to Azerbaijan, despite the "no-man's-land" character of the region.[28] More precisely, the high standard required for occupation to exist, coupled with the Court's dismissive reasoning in establishing jurisdiction, may be seen as functional to the necessity, explicitly stated in the judgment, of avoiding a *vacuum* in the protection of human rights,[29] given that Armenia was not named as a respondent.[30] Although the judges' unease was reflected in the rather unusual acknowledgment of the "difficulties at a practical level" faced by

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[21] European Court of Human Rights, *Chiragov*, cit., paras. 181-185.
[22] *Ibid*., para. 176.
[23] M. MILANOVIC, *The Nagorno-Karabakh Cases*, in *EJIL: Talk!*, 23 June 2015, available at https:// https://www.ejiltalk.org/the-nagorno-karabakh-cases, last accessed 18 May 2026. In a similar sense see: E. MILANO, *Occupation*, in A. NOLLKAEMPER, I. PLAKOKEFALOS (eds.), *The Practice of Shared Responsibility in International Law*, Oxford, 2017, p. 748.
[24] European Court of Human Rights, *Sargsyan*, cit., para. 139.
[25] *Ibid*., para. 143.
[26] *Ibid*., para. 151.
[27] *Ibid*., para. 94.
[28] *Ibid*., Concurring Opinion of Judge Ziemele, para. 2.
[29] *Ibid*., para. 148.
[30] In this sense see, among others, K.U. GALKA, *The Jurisdiction Criterion in Article 1 of the ECHR and a Territorial State: Considerations Inspired by the "Sargsyan v. Azerbaijan" Case*, in *International Community Law Review*, 2015, no. 4-5, p. 492.

Azerbaijan in exercising its jurisdiction, such caution was unable to remedy what, according to some dissenting judges, amounted to an incorrect application of the principles developed in the context of military occupation.[31]

The impression that the Court struggled to apply the "effective control" standard consistently across this varied range of circumstances re-emerged in the *Georgia v Russian Federation (II)* case, where jurisdiction under Article 1 was excluded during the "active phase of hostilities" between the two States. Building on the *Banković* jurisprudence, the Court made clear that "military operations cannot, in themselves, give rise to effective control", particularly in a situation of "chaos" such as the one at issue, where the territorial State has lost control of the area concerned and the other State does not exercise "State agent authority and control" over individuals beyond its borders.[32] More precisely, the Court pointed out that the isolated and sporadic nature of the military acts, though involving an element of proximity, was not sufficient to establish jurisdiction, as the opposite conclusion would equate this latter notion with that of a victim.[33] At the same time, through an *excusatio non petita*, the Court acknowledged the potential negative impact of its approach on victims' rights, while making clear not to be "in a position" to develop its jurisprudence in a direction of a further broadening of the notion of jurisdiction.[34]

The complex relationship between the use of international armed force and the assessment of jurisdiction recently arose in the interstate dispute against Russian Federation brought by Ukraine and the Netherlands. In the case at issue, the Court strikingly reached an opposite conclusion, by affirming the jurisdiction of the respondent over the concerned area.[35] Building on its finding in the *Al-Skeini* case mentioned above, the Court held that, by carrying out a systematic military attack with a view to acquiring effective control over Ukraine, the Russian Federation assumed "a degree of responsibility" over the individuals concerned, through the exercise of control by its armed forces.[36]

In reaching this conclusion, judges emphasised that military attacks, though not tantamount to effective control, were "at odds with any notion of chaos" and entailed the attribution to the Russian Federation of acts by members of separatist forces, acting as *de jure* and *de facto* organs of this latter State.[37] Notwithstanding this statement, which underscores the distance between the present dispute and the immediately

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[31] European Court of Human Rights, *Sargsyan*, cit., para. 150.

[32] European Court of Human Rights, Grand Chamber, judgment of 21 February 2021, application no. 38263/08, *Georgia v Russia (II)*, para. 126.

[33] *Ibid*., paras. 132-134.

[34] *Ibid*., paras. 141 ff.

[35] European Court of Human Rights, Grand Chamber, judgment of 9 July 2025, application nos. 8019/16, 43800/14, 28525/20 and 11055/22, *Ukraine and the Netherlands v Russia*, paras. 362-366. For a comment on this judgment, including the aspects relating to jurisdiction, see M. DE SALVIA, *Arrêt (Grande Chambre) Ukraine et Pays-Bas v Russie du 9 juillet 2025*, in *Ordine internazione e diritti umani*, 2026, no. 2, pp. 453 ff.

[36] European Court of Human Rights, Ukraine, cit., para. 361.

[37] *Idem*.

previous one, the application of such a different standard appears to indicate that the context of the complaint – specifically, an act of aggression – is capable of heavily influencing the assessment of jurisdiction. This impression becomes even stronger when one considers that, by linking the "degree of responsibility" assumed by Russia to the notion of jurisdiction, the Court appeared to overlook the distinction between Article 1 and the merits of the case, whose importance it has consistently emphasised in its previous jurisprudence.

3. The application of primary norms: the articulation between positive and negative obligations as a complex allocation of tasks

Once having settled, despite the uncertainties illustrated above, the knot of establishing jurisdiction for the purposes of Article 1, in the contexts here at issue the Court is confronted with the task of identifying and applying primary norms. The close link between these two aspects stems directly from the distinction between the State entitled to exercise jurisdiction and the State that occupies the territory or otherwise exercises decisive influence over it. Although the identification of relevant primary norms was implicit in any judgement where the Court reached the stage of merits, it is submitted that the main logical and legal underpinnings of the Court's approach may be traced back to the *Ilaşcu* case and then developed along the whole jurisprudence. Within this framework, the *Chiragov* and *Sargsyan* judgments offer particularly interesting insights, stemming from the Court's effort to give consistency to its reasoning throughout the delicate passage from the stage of jurisdiction to that of compliance with primary norms.

As mentioned in the previous Section, since the *Ilaşcu* judgment, the Court has declared that, while the State trying to exercise control outside its boundaries is responsible for the full range of rights stemming from the ECHR by virtue of its effective control, the "official" State is only accountable for the fulfilment of positive obligations.[38] In other words, the occupied State retains a *de facto*, reduced jurisdiction, under which it "must endeavour, with all the legal and diplomatic means available to it", to guarantee the enjoyment of the rights and freedoms defined in the Convention.[39] While, in the ruling at issue, the Court further articulated positive obligations in two categories – namely, measures required to re-establish control and (less clearly defined) measures aimed at ensuring respect for rights, compliance with which was then assessed separately[40] – this did not become a recurring pattern.[41]

[38] European Court of Human Rights, *Ilaşcu*, cit., para. 392.
[39] *Ibid*., para. 333.
[40] *Ibid*., para. 339.
[41] It is the case, for example, of other cases concerning Moldova and Russia, where the Court avoided this articulation and limited itself to the more generic formula used in para. 333 of the *Ilaşcu* judgment. See European Court of Human Rights, judgment of 30 January 2017, applications nos. 28648/06 and

In light of the elements summarised above, the "reduced" scope of jurisdiction consequently spills over into the definition of primary norms and gives birth to two distinct sets of obligations, not only adding to the previously noted confusion between jurisdiction and merits, but also raising a series of issues, the first of which is the identification of primary norms themselves. This is particularly evident when conduct giving rise to jurisdiction is not directly attributable to a State agent, but instead results from a broad notion of control, based for example on military and economic support, as it was the case with Armenia in the above-mentioned *Chiragov* case. As noted by some authors, the Court's failure to attribute any specific conduct to the latter State would have warranted the imposition of positive obligations alone, rather than the full range of rights under the Convention.[42] At the same time, it is submitted that this latter approach would entail the creation of two sets of positive obligations, one incumbent on the applicant and the other on the respondent, giving rise to inevitable difficulties both in maintaining a clear distinction between them and in reconciling this overlap with the gradation of jurisdiction established by the ECtHR itself. These complexities are particularly evident in contexts concerning the protection of private property and its enjoyment, if one considers that, as underscored by the Court, despite the similarity of applicable principles, in the application of Article 1 of the First Additional Protocol "the boundaries of the State's positive and negative obligations […] do not lend themselves to precise definition".[43] In this respect, it is not surprising that, in the *Sargsyan* judgment, the Court supported its conclusion that the alleged breach of this provision should be analysed through the lens of positive obligations in a rather concise manner, repeatedly emphasizing the role of proportionality in this type of assessment.[44]

While the peculiarities of the rights protected by Article 1 of the First Protocol make these cases particularly complex, they also highlight a more general issue: the absence of a precise correspondence between the categories of positive and negative obligations as traditionally applied when the territorial State exercises full jurisdiction, and as applied across the judgments under consideration. From this perspective, it is

18832/07, *Turturica and Casian v Moldova and Russia*, para. 28; judgment of 18 June 2019, application no. 5659/07, *Coţofan v. Moldova and Russia*, para. 16.

[42] M. MILANOVIC, *Nagorno-Karabakh*, op. cit.

[43] European Court of Human Rights, *Sargsyan*, cit., para. 220. On the lack of a clear-cut distinction between positive and negative obligations in the ECHR system see F. SUDRE, *Droit européen et international des droits de l'homme*, cit., pp. 249-250.

[44] *Ibid*., paras. 225,227. The orientation adopted in the *Sargsyan* judgment has been supported by the Court through reference to the *Doğan* ruling, where Turkey was held responsible for not having enabled internally displaced persons to return to their village, nor having provided them with "alternative housing or employment" (European Court of Human Rights, judgment of 10 November 2004, applications nos. 8803-8811/02, 8813/02 and 8815-8819/02, *Doğan and others v Turkey*, para. 154). However, as underlined by Judge de Albuquerque in its dissenting opinion appended to the *Sargsyan* judgment, that reference was "misplaced" *inter alia* because, unlike the applicants in *Doğan*, in the case at issue the applicant was not an internally displaced person (European Court of Human Rights, *Sargsyan*, cit., para. 39). The risks inherent in the "transplant" of the *Doğan* jurisprudence to scenarios involving two States have been analysed by D. KURBAN, *Forsaking Individual Justice: The Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations*, in *Human Rights Law Review*, 2016, no. 4, pp. 231 ff.

worth questioning whether a State whose jurisdiction is partially reduced should bear more burdensome duties, such as those potentially arising from "classical" positive obligations, while a State exercising effective control might be only required to comply (depending on the Convention right involved) with a non-interference obligation, particularly given that the latter does not necessarily amount to a full-fledged obligation of result.[45] One possible solution to this problem is to conceive of the negative obligations of the occupying State not as a mere duty not to interfere, but rather as a residual category encompassing all the activities aimed at ensuring the enjoyment of rights that are not to be undertaken by the territorial State. The latter, in turn, would be bound only by the obligations set out in the *Ilaşcu* ruling, which, although not rigorously defined, convey the notion of "a minimum effort", according to the expression employed by the Court itself.[46]

These elements, in turn, may influence the different margin of appreciation recognised by the Court to the States, especially when the complaint is addressed against both. A general tendency emerging from the judgments based on complaints introduced against Moldova and Russia suggests that, whereas the State with reduced jurisdiction tends to be found in compliance, the State exercising effective control is generally held responsible for a violation of rights under the Convention[47] and even when, as in the *Ilaşcu* judgment, the territorial State is deemed to be responsible for a breach, this is not without recognition of the complexity of the situation and of the limited options available to it.[48] This pattern may, in turn, be explained based on a twofold logic: as the consequence of the differing scope of obligations incumbent on the two States – and, more specifically, of the "minimum effort" expected by the State with reduced jurisdiction – or as a result of judicial policy considerations favouring a stricter approach toward the State trying to extend control beyond its boundaries.[49]

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[45] The relationship between negative and positive obligations is closely related to the long-debated issue of the scope and content of prevention obligations that, as made clear by the ICJ, are obligations of conduct and not of result, basically coinciding with the notion of due diligence (International Court of Justice, judgment of 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, para. 430). For an accurate reconstruction of this theoretical debate, including relevant doctrine, see A. OLLINO, *A "Missed" Secondary Rule? Causation in the Breach of Preventive and Due Diligence Obligations*, in G. KAJTÁR, B. CALI, M. MILANOVIC (eds.), *Secondary Rules of Primary Importance in International Law: Attribution, Causality, Evidence, and Standards of Review in the Practice of International Courts and Tribunals*, Oxford, 2023, pp. 105 ff., pp. 118-119 (with specific reference to the *Genocide* case).

[46] European Court of Human Rights, *Ilaşcu*, cit., para. 334.

[47] See European Court of Human Rights, judgment of 4 June 2012, application no. 23687/05, *Ivanţoc and others v Moldova and Russia*, para. 111; *Catan*, cit., para. 148; *Mozer*, cit., para. 154; judgment of 17 July 2018, applications nos. 21034/05 and 7 others, *Sandu and others v Moldova and Russia*, para. 87.

[48] European Court of Human Rights, *Ilaşcu*, cit., para. 337. In this respect, some authors underscored the "generic terms" used by the Court to define the obligations at stake, together with the recognition of the Court's inability to provide a precise description of their content (R. NIGRO, *Giurisdizione e obblighi positivi degli Stati parti della Convenzione europea dei diritti dell'uomo: il caso Ilaşcu*, in *Rivista di diritto internazionale*, 2005, no. 2, pp. 436-437).

[49] In this regard, Stoyanova underlines the complexity of carrying out "extraterritorial balancing", given the absence of communality between the respondent State and affected individuals (V. STOYANOVA,

Broadening the perspective to general international law, the identification of two distinct categories of obligations governing the conduct of the two States aligns with efforts, over the past decades, to challenge classical categories of international law by identifying forms of shared responsibility, as reflected in the publication of the 2020 *Guiding Principles on Shared Responsibility in International Law*.[50] Notably, Part II of the Principles sets out a series of "specific situations" of shared responsibility, including the control of one international actor over another (principle 8.1), and it then addresses the "content" of such responsibility, which, as clarified by the Commentaries, includes forms of joint and several liability. Without entering into the merits of this complex instrument, it is sufficient, for the purposes of the present article, to note that the concept underlying the notion of "shared responsibility" lies in the contribution of the parties "to an indivisible injury" (principle 2), as part of a single course of conduct. It is precisely this aspect that distinguishes the *Principles* from the approach followed by the ECtHR, whose case law is based on an articulation of primary obligations, rather than on the notion of a common course of conduct leading to a shared outcome. As it has already been observed, the root of the Court's reasoning lies in the *continuum* between jurisdiction and primary norms that, maybe driven by the fear of a *vacuum* in the protection of rights, led the Court to the allocation of mutually exclusive tasks between States.

4. Just satisfaction between right to redress for human rights breaches, judicial integrity and evidentiary difficulties

As is well known, Article 41 of the ECHR grants the Court the power to "afford just satisfaction to the injured party" where a breach has been found and the domestic legal system provides only limited redress to the victims. The question therefore arises whether the application of the Convention to contested territories, including the articulation of jurisdiction and primary norms discussed in the preceding Sections, can influence this stage of the Court's judicial activity. As it will be seen, this question may be given a positive answer, since the presence of two potentially concerned States and the context of protracted conflict give rise to a set of factors – such as factual uncertainty – that profoundly affects the legal analysis. Seen under this light, the assumption of a differentiated or reduced jurisdiction plays a twofold role: on the one side, being the main legal underpinning of these cases, it inevitably impacts the reasoning concerning compensation, including the Court's discretion on issues such as the *an* and the *quantum*. On the other side, this assumption reflects and is a consequence of a set of factual circumstances that the Court is bound to take into account and that,

Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries, Oxford, 2023, pp. 298 ff.)

[50] A. NOLLKAEMPER and others, *Guiding Principles on Shared Responsibility in International Law*, in *European Journal of International Law*, 2020, no. 1, pp. 15 ff.

via another route, lead to the same result, *i.e*. the tendency towards a certain restraint in the application of Article 41 ECHR.

Although only in few cases has Article 41 been the object of a specific judgment, a *noyau dur* of legal principles applying to situations of contested territories has begun to emerge, the main features of which will be outlined below. The first general aspect concerns the relationship between just satisfaction under Article 41 ECHR and the "logic of reparation" as codified by the Permanent Court of International Justice (PCIJ) in the *Factory at Chorzów* case.[51] Consistent with this premise and with the work of the International Law Commission (ILC) on international responsibility,[52] the Court has, in the judgments considered here, applied general principles concerning reparation and compensation for damage, such as the priority generally accorded to *restitutio in integrum*[53] and the requirement of a causal link between damage and compensation.[54] Regarding the scope of complaints under Article 41, the judges recognised reparation for both pecuniary and non-pecuniary damage, emphasising that, for the latter, its assessment is guided by the broader context, principles of equity and flexibility, and objective considerations of fairness and reasonableness.[55] The award of punitive damages has consistently been declined,[56] although this has not prevented some judges, in certain instances, from defining the amounts of compensation awarded as "excessive and exaggerated".[57] Finally, under this jurisprudence the applicants' right to obtain reparations is based on the date on which the respondent State ratified the Convention, since only damage sustained from that moment onward may be remedied. Nevertheless, conduct preceding ratification may be considered in determining whether a continuous illegal act occurred.[58]

More specifically related to the existence of a contested territory is the requirement of general consistency between the reparation sought and the principal judgment. Notably, the Court refused to take into account, for the purposes of just satisfaction, goods or persons not mentioned in the main ruling, as well as harm not directly

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[51] Permanent Court of International Justice, judgment of 13 September 1928, *Factory at Chorzów*, p. 47.
[52] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001.
[53] European Court of Human Rights, Grand Chamber, judgment of 12 December 2017, application no. 13216/05, *Chiragov and others v Armenia (just satisfaction)*, para. 53.
[54] *Ibid*., para. 54.
[55] *Ibid*., para. 57. On the role of equity in the determination of non-pecuniary damages see, among others, S. ALTWICKER-HÁMORI, T. ALTWICKER, A. PETERS, *Measuring Violations of Human Rights - An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage under the European Convention on Human Rights*, in *Heidelberg Journal of International Law*, 2016, no. 1, pp. 15 ff.
[56] European Court of Human Rights, Grand Chamber, judgment of 31 January 2019, application no. 13255/07, *Georgia v Russia (I) (just satisfaction)*, para. 75.
[57] European Court of Human Rights, Grand Chamber, judgment of 28 July 1998, application no. 15318/89, *Loizidou v Turkey (just satisfaction)*, Partly Dissenting Opinion of Judge Mifsud Bonnici, para. 2. On this point see V. FIKFAK, *Non-pecuniary Damages before the European Court of Human Rights: Forget the Victim; It's All About the State*, in *Leiden Journal of International Law*, 2020, no. 2, p. 344.
[58] European Court of Human Rights, *Chiragov*, cit., para. 171.

connected to the initial claims.[59] In this regard, a crucial point is represented by the non-compensable nature of certain types of harm, such as loss of salary or other income, that are considered as a direct consequence of displacement rather than of the breaches addressed by the judgment on the merits (e.g. protection of property).[60] Beyond the immediate impact on the claims submitted by the applicants, this approach raises the question of whether a Convention right always exists that is capable of establishing the causal link necessary to obtain compensation, or whether this reasoning potentially creates a significant *lacuna* in the right to redress, given that displacement is one of the most serious and frequent condition suffered by local populations during conflicts.[61]

The relevance of a causal link also arises with respect to the long-debated issue of the scope and content of States' obligations: as blatantly emerged in the ICJ *Genocide* case quoted above,[62] where reparations were not granted, the establishment of "a sufficiently direct and certain causal nexus"[63] between the breach of the obligation to prevent and the injury suffered is all but a straightforward operation. In a similar way, it is submitted that the articulation between the two types of obligations mentioned in the previous Section offers no easy solution in this respect. In the case of contested territories, the difficulties evoked by the ICJ appear even the more evident as regards positive obligations that, as it has been seen, only require a "minimum effort" and that, on a reasonable basis, may hardly make the difference in the arising out of a prejudice.

A parallel reason for excluding claims at the reparations stage lies in evidentiary difficulties, that, in most of these cases, are directly connected to long-term military occupation or other types of control. Consistently with the idea, recognised by the Court among the general principles on just satisfaction, that "the greater the lapse of time involved, the more uncertain the link becomes between the breach and the damage",[64] compensation has been denied when the passage of time made damage assessment impossible, as this would have entailed speculation about the current situation.[65] Similar consequences may arise from the lack of precise and well-documented evidence: in the *Chiragov* case, the Court based its refusal to award just satisfaction for the destruction of the applicants' houses on the practical impossibility of deriving sufficient information from the aerial images provided, whose quality was deemed

[59] European Court of Human Rights, Grand Chamber, judgment of 28 April 2023, application no. 38263/08, *Georgia v Russia (II) (just satisfaction)*, paras. 34,44; judgment of 14 October 2025, *Georgia v Russia (IV) (just satisfaction)*, application no. 39611/18, paras. 11,16,18.
[60] European Court of Human Rights, *Chiragov (just satisfaction)*, cit., para. 71.
[61] However, as underlined by some authors with reference to the *Sargsyan* ruling, the choice of the Court to declare the State responsible for denying access to property after the conflict might be interpreted as an indirect way to repair damage directly stemming from State's illegal conduct without being obliged to assess it from a legal point of view (F.E. TORRES, *Reparations: To What End? Developing the State's Positive Duties to Address Socio-economic Harms in Post-conflict Settings through the European Court of Human Rights, in European Journal of International Law*, 2021, no. 3, pp. 829-830).
[62] See *supra* footnote no. 45.
[63] International Court of Justice, *Genocide*, cit., para. 462.
[64] European Court of Human Rights, *Chiragov (just satisfaction)*, cit., para. 56.
[65] *Ibid*., para. 71.

unsatisfactory.[66] Along the same line of reasoning, pecuniary damage was declined in respect of land plots not listed in the "technical passports" submitted in the case, due to the impossibility of deriving rental income from these documents or of obtaining any other valuation.[67]

These factors may explain why, in many of the complaints examined, the applicants limited their request to non-pecuniary damages, as well as the relatively small sums awarded, primarily intended to acknowledge the stress and suffering endured as a result of prolonged occupation.[68] In the *Chiragov* and *Sargsyan* cases, where pecuniary damage was sought, the Court decided, in light of the "imponderables" involved in the assessment, that prevented a precise calculation of the loss, to award a single aggregate sum covering both pecuniary and non-pecuniary damage.[69] Notably, the judgements made clear that compensation must be determined "at the Court's discretion, having regard to what it finds equitable".[70] The overall picture emerging from these judgments is therefore that of a high level of scrutiny that, in turn, results in a certain restraint in the application of Article 41, partially counterbalanced by a certain flexibility regarding the entitlement of family members to claim compensation.[71]

If these considerations, especially those relating to evidentiary issues, may broadly apply to situations concerning occupation or reduced control over the territory, interstate complaints pose further challenges. Before focussing on these latter, however, it is worth recalling some principles articulated by the Court in its 2014 judgment on just satisfaction in the *Cyprus v Turkey* case. On that occasion, the ECtHR first of all clarified that the application of Article 41 to interstate disputes – that cannot be excluded despite the absence of any explicit reference to it in the Convention – is subject to a case-by-case assessment, based, *inter alia*, on the type of complaint, the identification of victims, and the purpose of the proceedings.[72] This latter aspect is of particular importance given that, according to the ruling, an award of just satisfaction would not be appropriate as a form of redress for "systemic problems";[73] similarly,

[66] *Ibid*., para. 64.
[67] *Ibid*., paras. 67-68. As underlined by the Court, a crucial factor in this respect was the absence of a private property system at the time the plots were allocated, as well as the long period during which the land had been occupied and devastated.
[68] See, among others: European Court of Human Rights, judgment of 20 October 2021, application no. 12999/15, *Avanesyan v Armenia*, para. 63, where the Court awarded 9,000 euros in respect of non-pecuniary damage.
[69] European Court of Human Rights, *Chiragov (just satisfaction)*, cit., paras. 78-80; Grand Chamber, judgment of 12 December 2017, application no. 40167/06, *Sargsyan v Azerbaijan (just satisfaction)*, paras. 56-57.
[70] European Court of Human Rights, *Chiragov (just satisfaction)*, cit., para. 79; *Sargsyan (just satisfaction)*, cit., para. 57.
[71] European Court of Human Rights, *Chiragov (just satisfaction)*, cit., paras. 76-78; *Sargsyan v Azerbaijan (just satisfaction)*, cit., paras. 53-55.
[72] European Court of Human Rights, Grand Chamber, judgment of 12 May 2014, application no. 25781/94, *Cyprus v Turkey (just satisfaction)*, para. 43. The case has been commented by P. PUSTORINO, *La riparazione dei danni nella sentenza della Corte Europea nel caso Cipro c. Turchia*, in *Rivista di diritto internazionale*, 2014, no. 4, pp. 1108 ff.
[73] European Court of Human Rights, *Cyprus v Turkey (just satisfaction)*, cit., para. 44.

Article 41 should not be applied when the purpose is to compensate a State for a violation of its own rights through the prism of diplomatic protection.[74] By endorsing an approach that has gained increasing acceptance in international law,[75] the ECtHR emphasised that the ultimate beneficiary of compensation should be the individual, with the consequence that claims aimed at implementing a State's responsibility for an injury caused by an internationally wrongful act to a natural or legal person of the complainant must be confined to these legal and conceptual limits.[76]

Looking more specifically at the legal issues the Court might face in these contexts, the identification of victims definitely represents one of the most delicate ones, also in the light of the high number of claims often involved. Aware of the potential implications of its decision in this respect, in *Georgia v Russia (I)* the ECtHR immediately addressed the issue of defining a "sufficiently precise and objectively identifiable group of people", for the purpose of recognizing non-pecuniary damage. As a "preliminary consideration", a number of victims were excluded from compensation due to the applicant Government's inability to produce the documents (expulsion orders and court rulings) that, according to the Court, should have been made available in compliance with the duty to cooperate.[77] In this regard, it is noteworthy that, when faced with the respondent's request to exercise its own fact-finding powers to gather relevant information, the Court emphasised both its subsidiary role and its inability to manage a large number of victims, particularly in interstate cases, which inherently differ from complaints arising from a group of individual applications.[78] Once this aspect was settled, the analysis in the same ruling shifted to the methodology employed and, notably, to the allocation of the burden of proof: the Court proceeded on the assumption that the individuals identified by the applicant Government would be granted victim status, unless the respondent State, on whose territory the breaches occurred, could convincingly demonstrate otherwise.[79] This assumption was counterbalanced by a set of exclusions grounded in nationality issues, in the principle prohibiting double compensation, and, more generally, in the prevention of any abuse of rights.[80] Based on these factors, as well as on the general principles governing non-pecuniary damage, the applicant Government was awarded a sum as just satisfaction, with the obligation to distribute it to the individual victims identified by the Court.[81]

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[74] *Ibid*., para. 45.
[75] See International Court of Justice, judgment of 9 February 2022, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Separate opinion of Judge Yusuf, paras. 37-46; judgment of 19 June 2012, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Separate Opinion of Judge Cançado Trindade, paras. 47,59.
[76] European Court of Human Rights, *Cyprus (just satisfaction)*, cit., para. 46.
[77] European Court of Human Rights, Grand Chamber, judgment of 31 January 2019, application no. 13255/07, *Georgia v Russia (I) (just satisfaction)*, paras. 49-60.
[78] *Ibid*., paras. 65-66. The point is underlined by R. REMEZAITE, *Introductory Note to Chiragov and Others v Armenia & Sargsyan v Azerbaijan (EUR. CT. H.R.)*, in *International Legal Materials*, 2018, no. 6, p. 406.
[79] European Court of Human Rights, *Georgia (I) (just satisfaction)*, cit., para. 69.
[80] *Ibid*., para. 70.
[81] *Ibid*., paras. 73, 76-77.

The *Georgia v Russia (I)* ruling, and particularly the approach adopted for the identification of victims, was heavily criticised in a partially concurring opinion appended by four judges, who emphasised that the lack of information, that led to the reduction in the number of recognised victims, was essentially attributable to the respondent State, in whose territory the breaches occurred and that, based on a reasonable assumption, had withheld the legal records of expulsions.[82] Similar considerations were expressed in a joint dissenting opinion in the *Georgia v. Russia (II)* ruling, where, once again, the lack of evidence of property title prevented the award of just satisfaction to approximately 1,400 individuals whose houses had been torched and looted.[83] In addition to noting that, in a context of occupation, a list of residents should suffice for identification purposes, the dissenting judges emphasised the distorted functioning of the adversarial system in the case, where the number proposed by the applicant was rejected by the Court and, in the absence of any objection by the respondent, was not subjected to further scrutiny.[84] Likely influenced by these opinions, in the *Georgia v. Russia (IV)* case, the Court adjusted its line of reasoning by easing the burden of documentary evidence through the adoption of a plausibility standard, ensuring that claims were "adequately substantiated".[85] More specifically, victims were identified solely on the basis of the figures submitted by the applicant and were considered "unchallenged" in the absence of any objection by the respondent;[86] this *revirement* notably affected the part of the claim concerning the right to education, for which no list of victims was produced.[87]

A further consideration regarding the identification of victims concerns the structure of the Court's reasoning: as highlighted above, in *Georgia v. Russia (I)*, the decision to exclude certain claims from compensation due to the absence of documentary evidence was framed as a "preliminary aspect" of the identification the eligible group. It is submitted that the Court's decision to treat as a preliminary matter what is ultimately a central aspect of the merits, and to separate it from methodological issues and other criteria, facilitated the application of a high level of judicial scrutiny. This approach was abandoned in the following rulings where, conversely, decisions regarding the identification of the group were integrated into the application of the relevant principles to the situation at hand. This new line of reasoning may constrain the Court's discretion by calling for a more careful balancing between judicial policy considerations on the one hand and legal arguments justifying the denial of the sole available remedy on the other, also considering the essentially irreversible nature of the harm at stake.

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[82] *Ibid*., Partly Concurring Opinion of Judges Yudkivska, Mits, Hüseynov and Chanturia, paras. 6-7.
[83] European Court of Human Rights, *Georgia (II) (just satisfaction)*, cit., para. 41.
[84] *Ibid*., Jointly Partly Dissenting Opinion of Judges Bošnjak, Pastor Vilanova, Wojtyczek, Serghides, Chanturia, Jelić, Sabato and Schembri Orland, paras. 8-11.
[85] European Court of Human Rights, *Georgia* (IV) *(just satisfaction)*, cit., para. 14.
[86] *Idem*.
[87] *Ibid*., para. 12.

5. Some concluding remarks

In light of the elements analysed above, some concluding observations can be made regarding the application of the ECHR in contested territories, focussing in particular on the role played by the notion of "reduced" or "differentiated" jurisdiction that, since the outset, characterised this body of case law. In this respect, it is submitted that any attempt in this direction must necessarily take into account, as a cross-cutting element of the analysis, the institutional features of the ECHR system. As vehemently underlined by the Court in both the *Sargsyan* and *Chiragov* judgments with regard to just satisfaction, its subsidiary nature renders it ill-equipped to handle cases, such as those here at stake, marked by significant factual uncertainty, that would be better suited to domestic jurisdictions.[88] Although not expressed in an equally explicit manner, the unease of the Court is also directly related to the treatment of mass claims, that falls outside the European Convention's original rationale. The Convention is, in fact, an instrument designed to protect individual rights, whose *erga omnes* character – rather than the ambition to settle long-term controversies between States – may explain the availability of interstate claims. As clearly spelled out on those occasions, in a situation simultaneously object of "mirror" interstate complaints, the resolution of ultimately political problems lies with the States.[89] Under this perspective, the reluctance shown by the European Court in addressing the aforementioned issues clearly shows its awareness of the mismatch between the non-reciprocal logic underpinning human rights and the necessarily reciprocal logic of armed conflict.

Focussing more closely on the analysis developed so far, it has been shown that the application of the "effective control" criterion to scenarios where, at the factual or at the processual level, two States are involved has produced variable results, apparently depending on the context and on the severity of the violations at stake. This pattern may be easily explained not only with the potential political impact of the Court's judgments in contexts of protracted conflict, but also with the fact that this subset of cases constitutes a distinct, specific form of extraterritorial application of the European Convention. Notably, if resort to the notion of "effective control" was the most obvious solution in order to establish jurisdiction, it is beyond doubt that in the ECtHR jurisprudence such conceptual tool has basically been designed to deal with situations where a part of a State's territory is basically under another State's control. As a

[88] European Court of Human Rights, *Chiragov (just satisfaction)*, cit., para. 115; *Sargsyan (just satisfaction)*, cit., para. 115.

[89] European Court of Human Rights, *Chiragov (just satisfaction)*, cit., para. 80; *Sargsyan (just satisfaction)*, cit., para. 57. In this perspective, it is not by chance that some of the cases before the ECtHR also appear before the International Court of Justice where, in a similar manner, reciprocal allegations of human rights violations are made in the context of prolonged armed conflicts. In 2024 the ICJ released its judgment on preliminary objections on both cases introduced by Armenia and Azerbaijan against each other: International Court of Justice, judgment of 12 November 2024, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v Azerbaijan)*; International Court of Justice, judgment of 12 November 2024, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v Armenia)*.

consequence, its application to a grey area such as that of contested territories poses inevitable legal and conceptual challenges.

In the judgments issued so far, the application of primary norms appears to reflect these difficulties, as shown by the cumbersome division into positive obligations on the one hand and "residual rights" on the other, as well as by their allocation between the involved States. More specifically, the choice by the Court to define primary norms based on the categories of negative and positive rights appears as an attempt to find a *pendant*, at the merit's stage, with the notion of differentiated jurisdiction by resorting to the existing legal toolbox. However, this approach faces several hurdles stemming from the origin of this distinction that, as it is known, has been designed in order to widen the scope of ECHR rights by imposing additional obligations on the State and that is in no way related to different degrees of territorial control.

Finally, the relationship between the notion of differentiated jurisdiction and just satisfaction under Article 41 ECHR may be framed both as an issue of consistency and as an issue of fact. Starting from this latter aspect, it is reasonable to assume that cases concerning contested territories – and, even the more so, those involving a large number of claims – by definition display a set of features difficult to reconcile with a rigid application of relevant legal principles in this area (e.g. the existence of a causal link between the breach and the damage). Under the second perspective, the search for consistency with the notion of "differentiated" jurisdiction may explain why, where the complaint is directed against two States, the decision on reparations tends to align with the binary classification of primary norms, entailing that the reparation burden will be likely to fall on the State that, at least in principle, bears more extensive obligations, *i.e.* the State exercising control outside its boundaries. At the same time, as the *Sargsyan* ruling demonstrates, such consistency is considerably strained when the complaint is directed at a single respondent, as the need to avoid a legal *vacuum* may require that State to repair damage despite its lack of control. As a consequence, the decision on just satisfaction may therefore "inherit" the same *lacunae* that characterise the establishment of jurisdiction, which may help explain the judicial restraint often showed by the ECtHR in the application of Article 41. As the Court's jurisprudence shows, however, the "checks and balances" of this judicial system may allow to adjust this approach and to orientate it towards more favourable outcomes in terms of human rights protection, while waiting for these disputes to find a political, long-term solution.

ABSTRACT: This article analyses the jurisprudence of the European Court of Human Rights concerning human rights violations in contested territories, where both a territorial State and an occupying or influencing State are involved. More precisely, the contribution focuses on how the Court has adapted the concept of "effective control" to the peculiarities of this kind of scenario and how this reflected both on the definition of relevant primary norms and on the application of Article 41 of the

Convention. Also, in light of the specific institutional features of the ECHR system, the overall idea emerging from this case law is that the notion of “differentiated jurisdiction” might pose complex challenges to the Court all along the judicial process.

KEYWORDS: Human Rights – ECHR – Jurisdiction – Occupation – Reparations.