

Post-Ceasefire Nagorno-Karabakh: Limits to the ECtHR's Approach to Jurisdiction over Secessionist Entities under the ECHR

Júlia Miklasová*

University of Cologne, Cologne, Germany

julia.miklasova@uni-koeln.de

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Abstract

This paper examines whether (and if so, on what basis) the events taking place in Nagorno-Karabakh after the signature of a trilateral ceasefire agreement in November 2020 would fall within the jurisdiction under the European Convention on Human Rights (ECHR) of Azerbaijan as a territorial State; Armenia as potentially exercising effective control there; or Russia given the presence of its peacekeeping mission in the region. It also outlines the future developments after Russia ceases to be the party to the ECHR. On the example of Nagorno-Karabakh, the paper demonstrates the limits to the European Court of Human Rights' approach to jurisdiction over secessionist entities under the ECHR. In particular, it highlights the relativity of the requirement of the presence of the

* Postdoctoral Researcher, University of Cologne, Germany. I wish to thank Professor Erika de Wet for her insightful comments on an earlier version of this paper. I also thank the participants of the conference 'Jurisdiction – Who Speaks International Law?' held at the University of Bonn.

‘boots on the ground’ as the element of the effective control test under a spatial extra-territorial model of jurisdiction.

Keywords

Nagorno-Karabakh – Jurisdiction – ECHR – Russia – effective control

I. Introduction

Jurisdiction under Article 1 of the European Convention on Human Rights (ECHR or the Convention) is a ‘threshold criterion’¹ that triggers its applicability. This is so even in the secessionist entities – areas in the *espace juridique* of the Convention, which claim to be States, but are not recognised as such by the international community, over which the territorial State has lost control and where the control is instead frequently exercised by the third (controlling) State. Over time the European Court of Human Rights (ECtHR or the Court) has developed a rich case law concerning jurisdiction under Article 1 ECHR over such entities central to which are two elements. First, the Court elaborated benchmarks and indicators of the notion of effective control as the basis for the controlling State’s *spatial* extra-territorial jurisdiction. Second, it established *reduced* jurisdiction of the territorial State that had lost control over parts of its territory.

The question of whether the third State exercises effective control beyond its borders under ECHR is ‘a question of fact’.² To establish whether a State genuinely exercises such control, the Court ‘will primarily have reference to the strength of the State’s military presence in the area’.³ ‘Other indicators may also be relevant, such as the extent to which its military, economic, and political support for the local subordinate administration provides it with influence and control over the region.’⁴ Once the third State exercises such control, it is under obligation to secure in this territory full range of the rights and freedoms set out in the Convention.⁵

¹ ECtHR (Grand Chamber), *Al-Jedda v. the United Kingdom*, judgement of 7 July 2011, no. 27021/08, para. 74.

² ECtHR (Grand Chamber), *Al-Skeini and Others v. the United Kingdom*, judgement of 7 July 2011, no. 55721/07, para. 139. See Marko Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford: Oxford University Press 2011), 41.

³ *Al-Skeini* (n. 2), para. 139.

⁴ *Al-Skeini* (n. 2), para. 139.

⁵ ECtHR (Grand Chamber), *Catan and Others v. Moldova and Russia*, judgement of 19 October 2012, nos 43370/04, 8252/05 and 18454/06, para. 106.

When the third State exercises control and authority over an individual beyond its national territory (i. e. *personal* model of jurisdiction), it is under the obligation to secure any such individual rights and freedoms under the ECHR ‘*relevant to the situation of that individual*’.⁶ While this paper occasionally refers to personal model of jurisdiction, it mainly focuses on a territorial and spatial extraterritorial model of jurisdiction under Article 1 ECHR.

Despite the Court’s explicit pronouncements to the contrary,⁷ the ECtHR seems to have derived the attribution test for the purposes of responsibility under the ECHR from the jurisdiction-triggering test of effective control.⁸ Importantly, the effective control test used by the ECtHR is looser than the effective control test used by the International Court of Justice (ICJ) to attribute the conduct for the purposes of State responsibility in *Nicaragua* and *Genocide* cases.⁹ Specifically, the former test does not require examination of the third State’s detailed control over specific conduct of the subordinate local administration.¹⁰ Despite these blurred lines and terminological overlaps, this paper does not engage with the question of attribution and responsibility. It is limited to jurisdiction, including the jurisdiction-triggering test of effective control under ECHR.

The paper argues that a post-ceasefire Nagorno-Karabakh (i. e. Nagorno-Karabakh after the active phase of hostilities of the 2020 War) offers one of the most challenging factual situations in the *espace juridique* of the Convention in terms of establishing jurisdiction under Article 1 ECHR. Given the factual changes after the 2020 War, the paper asks whether events occurring

⁶ *Al-Skeini* (n. 2), para. 137 (emphasis added).

⁷ *Catan* (n. 5), para. 115.

⁸ Stefan Talmon, ‘Responsibility of Outside Powers for Acts of Secessionist Entities’, ICLQ 58 (2009), 493-517 (508); Remy Jorritsma, ‘Unravelling Attribution, Control and Jurisdiction: Some Reflections on the Case Law of the European Court of Human Rights’ in: Hélène Ruiz Fabry (ed.), *International Law and Litigation: A Look Into Procedure* (Baden-Baden: Nomos 2019), 659-694 (691); James Crawford and Amelia Keene, ‘The Structure of State Responsibility Under the European Convention on Human Rights’ in: Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford: Oxford University Press 2018), 178-198 (195).

⁹ ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), merits, judgement of 27 June 1986, ICJ Reports 1986, 14 (para. 115); ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), merits, judgement of 26 February 2007, ICJ Reports 1986, 43 (paras 396-412); Crawford and Keene (n. 8), 195. See also ILC, ‘Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries’, ILCYB (2001), Vol. II, Part Two, 31, Art. 8.

¹⁰ *Catan* (n. 5), para. 106. See Ralph Wilde, ‘Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties’, *Isr. L. R.* 40 (2007), 503-526 (524).

in Nagorno-Karabakh after the 2020 War would fall within the jurisdiction of Armenia, Azerbaijan, or Russia.¹¹

The article begins by summarising the background to the Nagorno-Karabakh conflict. Next, it asks whether events occurring in the post-ceasefire Nagorno-Karabakh would fall within the jurisdiction of Azerbaijan, Armenia, or Russia (based on the factual situation as of the date of completion of this paper in April 2022 and in the context of all three States being parties to the ECHR). Next, it also asks to what extent the fact that Russia will cease to be the party to the ECHR on 16 September 2022¹² will affect these conclusions on jurisdiction. Given the Russia-Ukraine War's repercussions on Nagorno-Karabakh, the paper also outlines the possible medium-term developments in Nagorno-Karabakh and their impact on jurisdiction under the ECHR. Lastly, the paper summarises its conclusions.

II. Historical Background to Nagorno-Karabakh

In Soviet times, Nagorno-Karabakh formed part of the Azerbaijan Soviet Socialist Republic as the autonomous region of Nagorno-Karabakh (NKAO). Since the end of the first secessionist war between Armenia and Azerbaijan (1992-1994) – in which Azerbaijan lost control of the former NKAO, along with seven surrounding districts of Azerbaijan proper – Nagorno-Karabakh has been a secessionist entity that has existed *de facto*. Despite its claim to statehood, no United Nations (UN) Member State, including Armenia, has ever recognised Nagorno-Karabakh as an independent State. Under international law the region – populated by a majority of Karabakh Armenians – remains *de iure* part of Azerbaijan.¹³ In *Chiragov* the

¹¹ There are currently the following inter-State applications lodged before the ECtHR: *Armenia v. Azerbaijan* (no. 42521/20), *Azerbaijan v. Armenia* (no. 47319/20) and *Armenia v. Turkey* (no. 43517/20). The applications allege violations of the ECHR by the respondent State during the hostilities and therefore do not seem to concern the post-ceasefire situation. According to available information, Azerbaijan also submitted that Armenia is responsible for violations of the ECHR in Nagorno-Karabakh and surrounding territories since 1992. It is not yet clear to what extent the Azerbaijan's application lodged in January 2021 also covers the situation in the post-ceasefire Nagorno-Karabakh. ECtHR, 'Receipt of Applications in Two Inter-State Cases Related to Conflict in Nagorno-Karabakh', 4 February 2021; ECtHR, 'Receipt of a Completed Application Form in the Inter-State Case Armenia v. Turkey', 18 May 2021. The present analysis is relevant to any application alleging violations of the ECHR in Nagorno-Karabakh after the end of the 2020 War.

¹² ECtHR Resolution 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 of 22 March 2022, para. 1.

¹³ See UNSC Res. 853 of 29 July 1993, S/RES/853, para. 9; UNGA Res. 62/243 of 14 May 2008, A/RES/62/243, para. 4.

ECtHR found Armenia exercising effective control over the territory of Nagorno-Karabakh and the surrounding districts.¹⁴

This *status quo* was transformed after the 2020 War. The conflict ended upon the signature of the Russia-mediated ceasefire agreement on 9 November 2020.¹⁵ As a result, Azerbaijan regained control of all seven districts surrounding Nagorno-Karabakh and parts of the former NKAO.¹⁶ The rest of Nagorno-Karabakh, including the capital of Stepanakert, remains in the hands of separatists but is completely cut off from Armenia save for the Lachin Corridor.¹⁷ Under the ceasefire agreement, the Lachin Corridor is a 5-km wide corridor connecting Nagorno-Karabakh and Armenia through the Lachin District (now returned to Azerbaijan) under the control of Russian peacekeepers.¹⁸

Apart from the corridor, the Russian peacekeepers are deployed ‘along the contact line in Nagorno-Karabakh’ and ‘concurrently with the withdrawal of the Armenian troops’.¹⁹ The term of the mission is five years, but it can be automatically extended for subsequent five-year periods unless either of the parties announces its intention to terminate it six months before the end of the current term.²⁰

The ceasefire deal did not touch upon a final status for Nagorno-Karabakh.²¹ Regardless, as of April 2022, the self-proclaimed Republic of Nagorno-Karabakh, albeit within a much smaller territory, has continued to exist.²² Potential disbanding or disarming of local forces (Nagorno-Karabakh Defence Army) seems to be out of the question for now.²³ The question arises as to jurisdiction under the ECHR over the post-ceasefire Nagorno-Karabakh and the Lachin corridor.

¹⁴ ECtHR (Grand Chamber), *Chiragov and Others v. Armenia*, judgement of 16 June 2015, no. 13216/05, para. 186.

¹⁵ ‘Statement by President of the Republic of Azerbaijan, Prime Minister of the Republic of Armenia and President of the Russian Federation’, 10 November 2020 (‘Ceasefire Agreement’).

¹⁶ Ceasefire Agreement (n. 15), Arts 1-2 and 6. Júlia Miklasová, ‘The Recent Ceasefire in Nagorno-Karabakh: Territorial Control, Peacekeepers and Question of Status’, EJIL:Talk!, 4 December 2020.

¹⁷ Miklasová (n. 16).

¹⁸ Ceasefire Agreement (n. 15), Art. 6. While the agreement uses the term ‘peacemaking forces’, this paper employs the term ‘peacekeeping forces’ and its variations since the latter term is widely used in the discourse concerning Nagorno-Karabakh today.

¹⁹ Ceasefire Agreement (n. 15), Arts 3-4.

²⁰ Ceasefire Agreement (n. 15), Art. 4.

²¹ Miklasová (n. 16).

²² International Crisis Group, *Improving Prospects for Peace after the Nagorno-Karabakh War* (ICG 2020), 9. Miklasová (n. 16).

²³ Kirill Krivosheev, ‘No Statuses Except *Quo*. Why the Conflict in Karabakh is Far from Over’, Carnegie Moscow Center, 21 December 2020 (in Russian).

III. Jurisdiction Over the Post-Ceasefire Nagorno-Karabakh

1. Azerbaijan

a) Legal Principles Relevant to Jurisdiction of Azerbaijan

According to the ECtHR, jurisdiction under Article 1 ECHR is ‘primarily territorial’ and ‘is presumed to be exercised normally throughout the State’s territory’.²⁴ In *Assanidze*, the Court explained the importance of the presumption as ‘the need to maintain equality between the State Parties and ensure the effectiveness of the Convention’.²⁵ In *Ilaşcu*, it introduced the presumption’s rebuttal in ‘exceptional circumstances’, such as when ‘a State is prevented from exercising its authority in part of its territory’ as a result of military occupation, ‘acts of war or rebellion, or the acts of a foreign State supporting the installation of a separatist State within the territory of the State concerned’.²⁶

To assess whether such circumstances exist, the Court examines ‘on the one hand all the objective facts capable of limiting the effective exercise of a State’s authority over its territory, and on the other hand the State’s own conduct’.²⁷ If the presumption is rebutted, a territorial State’s jurisdiction is *reduced* to discharging positive obligations, which include two types: (i) those obligations that relate to the measures needed to re-establish the State’s control over the territory and (ii) those obligations that relate to measures to ensure respect for the rights of individual applicants.²⁸

In *Assanidze*, such exceptional circumstances were not present, as Georgia’s Ajarian Autonomous Republic had ‘no separatist aspirations’ and no other State exercised ‘effective overall control there’.²⁹ *Sargsyan* asked whether Azerbaijan’s jurisdiction was reduced in the frontline area of Gulistan – internationally recognised as part of Azerbaijan, but uninhabited and, according to Azerbaijan, ‘rendered inaccessible by the circumstances’.³⁰ The Court found no exceptional circumstances either, as no other State or separatist regime exercised effective control there.³¹

²⁴ ECtHR (Grand Chamber), *Ilaşcu and Others v. Moldova and Russia*, judgement of 8 July 2004, no. 48787/99, para. 312.

²⁵ ECtHR (Grand Chamber), *Assanidze v. Georgia*, judgement of 8 April 2004, no. 71503/01, para. 142.

²⁶ *Ilaşcu* (n. 24), para. 312.

²⁷ *Ilaşcu* (n. 24), para. 313.

²⁸ *Ilaşcu* (n. 24), para. 339. See also ECtHR (Grand Chamber), *Sargsyan v. Azerbaijan*, judgement of 16 June 2015, no. 40167/06, para. 131. Antal Berkes, *International Human Rights Law Beyond State Territorial Control* (Cambridge: Cambridge University Press 2021), 79 and 94 et seq.

²⁹ *Assanidze* (n. 25), para. 140.

³⁰ *Sargsyan* (n. 28), para. 146.

³¹ *Sargsyan* (n. 28), para. 149 in connection with para. 142.

The reduction of a territorial State's jurisdiction exemplifies various intersecting principles. First, positive obligations derive from the State's *sovereignty* over the area.³² This is seen as a deviation from a standard theory of the factual basis of jurisdiction under the ECHR.³³

But, second, the principle of effective protection plays a certain role here too.³⁴ The limitation of the territorial State's jurisdiction is the expression of this State's reduced (but not completely inexistent) capacity to influence the developments in its *de iure* territory given the loss of its control there.³⁵ The Court is *even* cognisant of the limited capability of the State to secure its positive obligations. The State 'has a duty to take all the appropriate measures which it is still within its power to take'.³⁶ In general, these obligations have been criticised for their inherent vagueness, internal contradiction, and eventual ineffectiveness.³⁷

Third, the Court bears 'in mind the special character of the Convention as a constitutional instrument of European public order (*ordre public*) for the protection of individual human beings'.³⁸ In *Sargsyan*, the Court held that the limitation of the territorial State's jurisdiction in cases concerning Moldova 'was compensated by the finding that another Convention State exceptionally exercised jurisdiction outside its territory and thus had full responsibility under the Convention'.³⁹

Nevertheless, the Court was arguably not entirely coherent in its reasoning. On one hand, it would seem that the reduction of a territorial State's

³² Marko Milanović and Tatjana Papić, 'The Applicability of the ECHR in Contested Territories', ICLQ 67 (2018), 779-800 (794-795).

³³ Milanović and Papić (n. 32), 795; Ganna Yudkivska, 'Territorial Jurisdiction and Positive Obligations of an Occupied State: Some Reflections on Evolving Issues Under Article 1 of the Convention' in: Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford: Oxford University Press 2018), 135-151 (138).

³⁴ See Berkes (n. 28), 82; See generally Angelika Nußberger, *The European Court of Human Rights* (Oxford: Oxford University Press, 2020), 74-76.

³⁵ According to Berkes, jurisdiction in this situation is 'equally based on law and facts.' Berkes (n. 28), 81, 82. However, generally, this approach seems to deviate from general international law, where a temporary loss of a State's territorial control 'does not affect the scope of its obligations or jurisdiction, doing nothing more than limiting the scope of its responsibility.' Szymon Zaręba, 'Responsibility for the Acts of Unrecognised States and Regimes' in: Władysław Czapliński and Agata Kleczkowska (eds), *Unrecognised Subjects in International Law* (Warsaw: SCHOLAR Publishing House 2019), 159-194 (176).

³⁶ *Ilaşcu* (n. 24), para. 313. See on the functional approach to the scope of positive obligations Berkes (n. 28), 82. Stuart Wallace, *The Application of the European Convention on Human Rights to Military Operations* (Cambridge: Cambridge University Press 2019), 35-36.

³⁷ Wallace (n. 36), 27-29 and 35-36. Yudkivska (n. 33), 142-143.

³⁸ *Sargsyan* (n. 28), para. 147.

³⁹ *Sargsyan* (n. 28), para. 148. See also ECtHR, *Azemi v. Serbia*, decision of 5 November 2013, no. 11209/09, paras 46-47. Ultimately, Kosovo represents the exact vacuum in the Convention protection that the Court seeks to avoid. Milanović and Papić (n. 32), 793.

jurisdiction is only possible when another *State* exercises spatial jurisdiction and thus has *full* range of obligations under the ECHR. This would be in line with the effort to avoid a vacuum in the *espace juridique* of the Convention. Elsewhere in the judgement, on the other hand, the Court sees the exceptional circumstances in the exercise of effective control over an area by ‘another State or separatist regime’.⁴⁰ A separatist regime’s territory does not necessarily have to be under the effective control of another *State*. Thus, while the scenario is highly dependent on facts of the existence of a separatist regime/loss of control by the territorial State, the Court did not completely exclude the possibility of reduction of a territorial State’s jurisdiction even in situations when no other State exercises effective control there.⁴¹

b) Azerbaijan’s Positive Obligations

Azerbaijan remains a *de iure* sovereign in Nagorno-Karabakh; it consented to the presence of the Russian peacekeepers in the region. Following the war, it has also adopted an assertive stance vis-à-vis Armenia’s influence over Nagorno-Karabakh.⁴² But it is not clear to what extent (if at all) it can influence developments in Nagorno-Karabakh through diplomatic backchannels and negotiations. In any case, these activities express the assertion of its sovereignty, and thus are in line with positive obligations.⁴³ Azerbaijan does not have any direct influence on matters in Nagorno-Karabakh through its own governmental authorities,⁴⁴ and thus it has no *de facto* control over it. In light of the above case law, it follows that Azerbaijan’s jurisdiction in Nagorno-Karabakh is reduced to positive obligations given the presence of ‘exceptional circumstances’.⁴⁵

2. Armenia

a) Elements of Armenia’s Effective Control in Light of the Case Law of the Court

To establish third State’s effective control beyond its national territory, the Court has attached the greatest importance to the criterion of the number of

⁴⁰ *Sargsyan* (n. 28), para. 142. Similarly the Court referred to ‘acts of war or rebellion’ *Ilaşcu* (n. 24), para. 312. Wallace (n. 36), 29-35.

⁴¹ *Contra* with respect to previous case law, especially *Ilaşcu* Kjetil Mujezinović Larsen, “Territorial Non-Application” of the European Convention on Human Rights’ Nord. J. Int’l L. 78 (2009), 73-93 (82-85).

⁴² ‘Aliyev: Visits of Armenian Officials to Nagorno-Karabakh Hinder the Normalization of Relations’, TASS, 7 January 2021 (in Russian).

⁴³ See *Ilaşcu* (n. 24), para. 345.

⁴⁴ Krivosheev (n. 23).

⁴⁵ *Ilaşcu* (n. 24), para. 312. See *infra*.

soldiers deployed in a particular territory.⁴⁶ In fact, generally, the effective control test ‘requires boots on the ground’.⁴⁷ This scenario, however, entails a variety of situations, including 30,000 Turkish troops in northern Cyprus,⁴⁸ 1,500 Russian troops and a large stockpile of weapons and ammunition in Transnistria,⁴⁹ 3,285 servicemen and 305 items of military equipment in Russian military base no. 4 in South Ossetia,⁵⁰ 3,923 servicemen and 873 items of military equipment in Russian military base no. 7 in Abkhazia,⁵¹ and around 20,000 Russian troops in Crimea at the time of Russia’s takeover.⁵² In *Chiragov*, the Court was unable to determine the exact number of Armenian soldiers in Nagorno-Karabakh, but in light of other factors it took such military presence into account.⁵³ Among other things, it considered the military agreement according to which Armenian conscripts could serve their time in Nagorno-Karabakh.⁵⁴ Thus, while the presence of boots on the ground is important for establishing effective control, this is viewed in a larger context.⁵⁵ For example, in *Ilaşcu*, the Court acknowledged that the number of Russian troops had decreased significantly since 1992, but it also highlighted that, in light of the important stockpiles of ammunition and weaponry, its ‘military importance in the region and its dissuasive influence persist’.⁵⁶

As to Armenia’s military presence as of April 2022, under Article 4 of the ceasefire agreement, the Russian peacekeepers are deployed ‘concurrently with the withdrawal of the Armenian troops’.⁵⁷ Armenia and Azerbaijan interpret this provision – particularly the term ‘Armenian troops’ and the relevant geographical zone subjected to withdrawal – differently.⁵⁸ Arguably,

⁴⁶ ECtHR, *Guide on Article 1 of the European Convention on Human Rights* (31 December 2020), para. 58.

⁴⁷ Milanović (n. 2), 141.

⁴⁸ ECtHR (Grand Chamber), *Loizidou v. Turkey*, judgement of 18 December 1996, no. 15318/89, paras 16 and 56.

⁴⁹ *Ilaşcu* (n. 24), para. 387; *Catan* (n. 5), paras 117-118.

⁵⁰ ECtHR (Grand Chamber), *Georgia v. Russia (II)*, judgement of 21 January 2021, no. 38263/08, para. 150 in connection with para. 165.

⁵¹ *Georgia v. Russia (II)* (n. 50), para. 151 in connection with para. 165.

⁵² ECtHR (Grand Chamber), *Russia v. Ukraine (re Crimea)*, decision of 16 December 2020, nos 20958/14 and 38334/18, para. 321 in connection with paras 318-319.

⁵³ *Chiragov* (n. 14), paras 175-180.

⁵⁴ *Chiragov* (n. 14), paras 175 and 180.

⁵⁵ See Kjetil Mujezinović Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (Cambridge: Cambridge University Press 2012), 188.

⁵⁶ *Ilaşcu* (n. 24), para. 387; *Catan* (n. 5), para. 118.

⁵⁷ Ceasefire Agreement (n. 15), Art. 4.

⁵⁸ International Crisis Group (n. 22), 4; Kirill Krivosheev and Hay Khalatyan, ‘Armenia and Azerbaijan Unleashed the War of Interpretations’, *Kommersant*, 16 December 2021 (in Russian); Thomas de Waal, ‘Unfinished Business in the Armenia-Azerbaijan Conflict’, *Carnegie Europe*, 11 February 2021.

it is possible to deduce from the Russian version of the deal (Art. 4 in connection with Art. 3) that it requires the withdrawal of the Armenian armed forces (not local forces) from the zones of deployment for peacekeepers, i. e. Nagorno-Karabakh itself.

However, what matters for effective control is the situation on the ground. While after the war it was unclear whether the Armenian troops had left Nagorno-Karabakh,⁵⁹ today, the credible reports confirm that they have withdrawn from the region and access to Nagorno-Karabakh is restricted.⁶⁰ According to an International Crisis Group (ICG), ‘Armenia withdrew almost all its troops and stopped sending weaponry to the conflict zone. The local troops were thus left to their own devices’.⁶¹ Moreover, as confirmed by *de facto* authorities, Armenian conscripts are not being called to do their service in Nagorno-Karabakh anymore.⁶² Thus, the strength of the Armenian military presence in the region is much less significant than in *Chiragov*. Indeed, many observers consider Russia and not Armenia the security guarantor in Nagorno-Karabakh now.⁶³

Regarding other elements of effective control, in *Chiragov*⁶⁴ and other cases,⁶⁵ the Court has taken into account the provision of arms and military equipment to the separatists. It is difficult to imagine how Armenia would be able to deliver military equipment, arms, and supplies to local Karabakh forces through the Lachin corridor – now under the control of the Russian peacekeepers.⁶⁶ Indeed, according to reports, Armenia ceased sending such support.⁶⁷

In addition, Nagorno-Karabakh’s local ‘army’ is to become more professional.⁶⁸ The hiring of contractors is thus another sign of the diminished influence of the Armenian military. However, it could be expected that Armenia will fund the salaries of these contractors and thereby still exert indirect influence on the local army. In *Chiragov*, the Court held that the

⁵⁹ Arshaluis Mgdesyan, Pavel Tarasenko and Kirill Krivosheev, ‘Armenia and Azerbaijan Are Counting Prisoners of War’, *Kommersant*, 30 March 2021 (in Russian).

⁶⁰ Thomas de Waal, *The Nagorny Karabakh Conflict in Its Fourth Decade*, Centre for European Policy Studies (CEPS) 2021, 8.

⁶¹ International Crisis Group, *Post-War Prospects for Nagorno-Karabakh War* (ICG 2021), 1 fn. 4 and see 7.

⁶² ‘Bet on Contractors: Balasanyan on Recruits from Armenia in the Karabakh Defense Army’, *Sputnik Armenia*, 22 March 2021 (in Russian); ‘“Nobody Gives any Guarantees”: Parents of Conscripts in Karabakh Hold a Rally’, *Sputnik Armenia*, 8 January 2021 (in Russian).

⁶³ See *infra*.

⁶⁴ *Chiragov* (n. 14), para. 180.

⁶⁵ *Ilaşcu* (n. 24), para. 380; *Catan* (n. 5), para. 118.

⁶⁶ Dmitry Kuznets, ‘Six-Week War in Nagorno-Karabakh: Results’, *Meduza*, 12 November 2020 (in Russian); Miklasová (n. 16).

⁶⁷ International Crisis Group (n. 61), 1 and 7.

⁶⁸ ‘Bet on Contractors: Balasanyan on Recruits from Armenia in the Karabakh Defense Army’ (n. 62).

armed forces of Armenia and Nagorno-Karabakh were ‘highly-integrated’.⁶⁹ It seems that, due to practical obstacles and logistical interruptions, this integration is less significant now.

Another important factor of effective control is the State’s direct participation in the fighting on the side of separatists.⁷⁰ In *Chiragov*, the Court held that ‘it is hardly conceivable’ that Nagorno-Karabakh was able to win against Azerbaijan ‘without the substantial military support of Armenia’.⁷¹ Similarly, Armenia fought on the side of the separatists in the 2020 War.

Moreover, to establish effective control, the Court also takes into account the economic and financial support such as subsidies, grants, or free gas.⁷² Armenia continues to provide the separatists with significant financial and economic assistance.⁷³ Political support and staffing of political or military positions in the secessionist entity are also elements of effective control.⁷⁴ Signing of the ceasefire agreement by the Armenian prime minister exemplifies Armenia’s political influence over the separatists.⁷⁵ The residents of Nagorno-Karabakh possess Armenian passports for travel and its legislation continues to be modelled according to Armenian laws.⁷⁶ Nevertheless, it is rather unlikely that Armenian law-enforcement bodies are able to continue to operate in the territory.⁷⁷

Thus, a very complex picture emerges. While Armenia’s direct military presence and military support is now far less significant,⁷⁸ without its participation in the war Nagorno-Karabakh would not have survived. Armenia also continues to exert critical influence over the region through significant economic, financial, and political support. Given that the Court has not yet found the State exercising effective control outside direct military presence, applying the existing criteria could lead to the conclusion that Armenia does not exercise effective control in Nagorno-Karabakh.

b) Alternative Approaches and Their Implications

The effectiveness principle presumes that a State has a full capacity to fulfil its obligations and to ensure that rights are not illusory, but effective. In light of the case law, the presence of military forces is seen as the key guarantee of effective-

⁶⁹ *Chiragov* (n. 14), para. 180.

⁷⁰ *Ilaşcu* (n. 24), para. 380; *Catan* (n. 5), para. 118; *Chiragov* (n. 14), paras 173-174.

⁷¹ *Chiragov* (n. 14), para. 174.

⁷² *Ilaşcu* (n. 24), para. 390; *Catan* (n. 5), para. 120; *Chiragov* (n. 14), para. 183; *Georgia v. Russia (II)* (n. 50), para. 166.

⁷³ ‘Prime Minister Nikol Pashinyan’s Speech at the National Assembly During the Discussion of the Performance Report of the Government Action Plan for 2021,’ 13 April 2022.

⁷⁴ *Ilaşcu* (n. 24), para. 381; *Georgia v. Russia (II)* (n. 50), paras 167-170; *Chiragov* (n. 14), para. 182.

⁷⁵ See similarly *Ilaşcu* (n. 24), para. 381. Miklasová (n. 16).

⁷⁶ *Chiragov* (n. 14), para. 182.

⁷⁷ *Chiragov* (n. 14), para. 182.

⁷⁸ Compare *Chiragov* (n. 14), para. 180.

ness – the hard power and consequent capacity to abide by all obligations under the ECHR. ‘Jurisdiction does require effectiveness, and a relatively stable presence of troops on the ground appears to be the only way of securing it, at least for the foreseeable future.’⁷⁹

A lowered threshold would risk watering down the notion of effective control. It could expose it ‘to the charge of utopia as an ideal completely divorced from practical considerations’.⁸⁰ The test freed of the requirement of military presence would also be less clear and less predictable.⁸¹ Moreover, as mentioned, scholars highlight that the line between the attribution test for the purposes of responsibility under the ECHR and the jurisdictional test is blurred in the ECtHR’s case law.⁸² A more flexible approach to the latter would thus arguably reflect in the former, further relaxing the attribution test.

However, this reliance on hard power might lead to outcomes that are too rigid and creating protection gaps. Indeed, other factors than ‘boots on the ground’ can translate into a significant influence over the region and can arguably yield the State with enough power to secure all rights under the ECHR.⁸³ This position reflects other developments in international law such as the definition of ‘occupation by proxy’, which does not require a direct presence of State’s troops, but State’s overall control over the proxies;⁸⁴ functional approach with respect to territorial State’s obligations under ECHR;⁸⁵ and most significantly a functional approach to end of occupation.⁸⁶ Regarding the latter, the International Committee of the Red Cross (ICRC) took the position that given technological and military developments it is ‘possible to assert effective control over a foreign territory (or parts thereof) without a continuous foreign military presence in the concerned area’.⁸⁷ What matters is ‘the extent of authority retained by the foreign forces’ rather than ‘the means by which it is actually exercised’.⁸⁸

⁷⁹ Milanović (n. 2), 147.

⁸⁰ Milanović (n. 2), 147.

⁸¹ The argument is used with respect to functional approach to territorial State’s jurisdiction by Milanović and Papić (n. 32), 799.

⁸² *Supra* (n. 8).

⁸³ See Berkes (n. 28) 32.

⁸⁴ See Tristan Ferraro, ‘Determining the Beginning and End of an Occupation Under International Law’, *Int’l Rev. of the Red Cross* 94 (2012), 133-166 (158-160); Alexander Gilder, ‘Bringing Occupation Into the 21st Century: The Effectiveness Implementation of Occupation by Proxy’, *Utrecht Law Review* 13 (2017), 60-81.

⁸⁵ Milanović and Papić (n. 32), 798-799.

⁸⁶ Milanović and Papić (n. 32), 798-799. However, the Court’s own approach to the notion of ‘occupation’ has been rather rigid so far, requiring the presence of boots on the ground. *Sargsyan* (n. 28), para. 94; *Georgia v. Russia (II)* (n. 50), para. 195.

⁸⁷ ICRC, *International Humanitarian Law and the Challenges of Contemporary Conflicts*, (Geneva: ICRC 2015), 12.

⁸⁸ ICRC (n. 87).

Thus, arguably, a complicated factual setup in Nagorno-Karabakh warrants a fresh approach. In particular, the Court should dispense with the requirement of the direct military presence as the essential element of effective control test. As said, Armenia still exerts significant influence over the region, which yields it with effective control over it. Allowing such power to go unchecked by the countermanding obligations under the ECHR would ultimately be detrimental to the protection of human rights. In fact, it could create a considerable gap (remedied only by Azerbaijan's positive obligations) in human rights protection in the *espace juridique* of the Convention.

3. Russia's Jurisdiction Until 16 September 2022

a) Overview of the Russian Peacekeeping Mission in Nagorno-Karabakh

To assess Russia's jurisdiction in respect of Nagorno-Karabakh until 16 September 2022, it is first necessary to outline its military presence there.⁸⁹ Under Article 3 of the Ceasefire Agreement, the Russian peacekeeping mission consists of '1,960 troops armed with firearms, 90 armoured vehicles and 380 motor vehicles and units of special equipment'.⁹⁰ Reportedly, the number of Russian troops currently exceeds the parameters under the deal.⁹¹ According to Azerbaijani sources, together with the civilian personnel, the Russian contingent in Nagorno-Karabakh exceeds 5,000 people.⁹² One author claims that the military equipment of the mission is also higher than foreseen by the deal.⁹³

In the Lachin Corridor (where about 100 inhabitants continue to live),⁹⁴ Russian peacekeepers assure safe passage in both directions and monitor the observance of the ceasefire.⁹⁵ Azerbaijan's military convoys pass through the corridor accompanied by Russian peacekeeping forces.⁹⁶ 'No soldiers and no weapons except those belonging to the peacekeepers themselves are per-

⁸⁹ The analysis concerning Russia's military presence in Nagorno-Karabakh is carried out as of 20 April 2022. It is not excluded that its parameters might change until 16 September 2022.

⁹⁰ Ceasefire Agreement (n. 15), Art. 3.

⁹¹ De Waal (n. 58).

⁹² András Rácz, *In Russia's Hands: Nagorno-Karabakh after the Ceasefire Agreement*, European Union Institute for Security Studies (ISS), 2021, 6.

⁹³ Rácz (n. 92).

⁹⁴ Andrey Kots, 'A Strategically Important Highway Opened in Karabakh', RIA Novosti, 19 November 2020 (in Russian); Artur Avakov, 'The Pain Does Not Go Away: What Is Happening Now in Nagorno Karabakh', MKRU, 24 November 2021 (in Russian).

⁹⁵ Kots (n. 94).

⁹⁶ 'Lachin: Life Under the Supervision of Russian Peacekeepers', BBC Russian Service, 2 March 2021 (in Russian).

mitted on this route.⁹⁷ Altogether, there are twenty-seven Russian observation posts in Nagorno-Karabakh and the Lachin Corridor.⁹⁸ Russia and Turkey operate a joint military centre in Azerbaijan's Aghdam region to monitor the ceasefire's implementation.⁹⁹

The parties have not agreed on the mandate of the Russian mission yet;¹⁰⁰ therefore, it is unclear what rules govern peacekeepers' responses to incidents or whether they can assist *de facto* officials in governance or policing.¹⁰¹ The mission's 'terms of deployment are currently governed by just three sentences in the hastily agreed ceasefire statement'.¹⁰²

Russia has also sent a civilian mission to Nagorno-Karabakh, which has so far operated only under the 2020 decree of the Russian president.¹⁰³ Its functions include, for example, assistance in the return of refugees and displaced persons, assistance to Azerbaijan and Armenia in reconstructing civilian infrastructure, and creating conditions of normal life for Nagorno-Karabakh's population.¹⁰⁴

The entry applications for foreigners are examined by the Russian peacekeeping mission 'for security purposes' before approval.¹⁰⁵ Russian became an official language in Nagorno-Karabakh in March 2021,¹⁰⁶ and there are rumours that Karabakh Armenians will obtain Russian passports.¹⁰⁷

According to the ICG, Russia sees its overall mandate as a broad one.¹⁰⁸ According to De Waal, while Russia maintains that Nagorno-Karabakh belongs to Azerbaijan, *de facto* it is now a 'Russian enclave'.¹⁰⁹ 'Russia has become the security patron, not Armenia.'¹¹⁰

⁹⁷ International Crisis Group (n. 61), 9.

⁹⁸ 'Situation in the Area of Peacekeeping Operation (as of 20 April 2022)' <https://mil.ru/russian_peacekeeping_forces/infograf.htm>.

⁹⁹ Joshua Kucera, 'Russia and Turkey Open Joint Military Center in Azerbaijan', *eurasianet*, 2 February 2021.

¹⁰⁰ Rác (n. 92), 5.

¹⁰¹ International Crisis Group (n. 22), 9.

¹⁰² Olesya Vartanyan, 'A Risky Role for Russian Peacekeepers in Nagorno-Karabakh', International Crisis Group, 10 November 2021.

¹⁰³ Decree of the Russian President on the Interdepartmental Humanitarian Response Centre of 13 November 2021, No. 705 (in Russian).

¹⁰⁴ Decree of the Russian President (n. 103), para 2 (a) and 3.

¹⁰⁵ Joshua Kucera, 'Visitors to Karabakh to Require Russian Permission', *eurasianet*, 10 February 2021.

¹⁰⁶ 'Russian Language Became Official in Self-Proclaimed Karabakh', Radio Liberty, 25 March 2021 (in Russian).

¹⁰⁷ Kucera (n. 105).

¹⁰⁸ International Crisis Group (n. 22), 9.

¹⁰⁹ 'Interview: Thomas De Waal on What's Next for Nagorno-Karabakh, Armenian-Azerbaijani Relations', Radio Free Europe/Radio Liberty, 7 December 2020.

¹¹⁰ Interview: Thomas De Waal (n. 109).

b) Russia's Jurisdiction in Light of the Case Law of the Court

Russian peacekeepers are present in Nagorno-Karabakh with the consent of the warring parties, including a sovereign Azerbaijan. It is not an Occupying Power there. Based on the existing case law, the State exercises extraterritorial jurisdiction when 'through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government'.¹¹¹ Thus, until 16 September 2022, Russia would have jurisdiction under a personal model in situations when its peacekeepers would exercise control and authority over individuals in Nagorno-Karabakh – for example when they are detained¹¹² or when they pass through checkpoints manned and commanded by Russian soldiers.¹¹³

Moreover, as Russia controls the Lachin Corridor to the exclusion of Armenia, Azerbaijan, and Nagorno-Karabakh separatists, the question can be asked whether it exercises effective control over the corridor, rather than having jurisdiction under a personal model (where applicable). The United Nations Peacekeeping Force in Cyprus (UNFICYP) exercises control over the buffer zone, which is characterised by the fact that neither Cyprus or Turkey exercise authority or jurisdiction in the zone and by the exercise of limited public powers there.¹¹⁴ The Court has not pronounced directly on the issue of the UNFICYP's *effective* control over the buffer zone.¹¹⁵ Broadly, it would seem that the Russian mission's control over the Lachin corridor is similar to that of the UNFICYP's over the buffer zone. But the buffer zone is considerably larger than the corridor. Moreover, the lack of the Russian mission's mandate – even if not decisive – and the difficulty of accessing information on the ground, complicate the conclusive assessment. In any case, Russia's potential effective control would not exclude the other

¹¹¹ *Al-Skeini* (n. 2), para. 135 and see para. 137.

¹¹² ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, decision of 30 June 2009, no. 61498/08, paras 88-89; ECtHR (Grand Chamber), *Al-Jedda* (n. 1), para. 85; ECtHR (Grand Chamber), *Hassan v. the United Kingdom*, judgement of 16 September 2014, no. 29750/09, paras 79-80.

¹¹³ ECtHR, *Pisari v. the Republic of Moldova and Russia*, judgement of 21 April 2015, no. 42139/12, para. 33; ECtHR (Grand Chamber), *Jaloud v. the Netherlands*, judgement of 20 November 2014, no. 47708/08, para. 152.

¹¹⁴ In addition to security mandate, the UNFICYP has mandate to 'contribute to the maintenance of law and order and a return to normal conditions'. 'Note to the Assistant Secretary-General for Peacekeeping Operations', 17 August 2007, United Nations Juridical Yearbook, 2007, 451, para. 4; See UNSC Res 186 of 4 March 1964, S/RES/186, para. 5 and Berkes (n. 28), 37 and 10 fn. 47.

¹¹⁵ The Court held that the UNFICYP 'has control over the buffer zone'. ECtHR, *Kyriakoula Stephens v. Cyprus, Turkey and the United Nations*, decision of 11 December 2008, no. 45267/06, 7. Larsen (n. 55), 199-200.

States' jurisdiction under a personal model in cases where they would exercise authority and control over individuals in the corridor.¹¹⁶

Nevertheless, for the violations of the ECHR occurring in Nagorno-Karabakh until 16 September 2022, a critical question arises as to whether (and if so when) the presence of Russian peacekeepers would entail effective control over Nagorno-Karabakh.¹¹⁷ The effective protection principle plays an important role here too. If the effective control translates in the obligation of States to secure the full range of Convention rights, 'then the degree of control required must be such as to allow states to *realistically* comply with this obligation'.¹¹⁸ On the one hand, the imposition of the full range of obligations under the ECHR on the State exercising peacekeeping in unwarranted circumstances could disincentive States from participating in such operations.¹¹⁹ On the other hand, when the State exercises control beyond the threshold of effective control, its actions must be subjected to the highest and fullest scrutiny under the ECHR.

While the strength of military presence is a decisive criterion, it follows from a closer look at the Court's case law that it is not seen in isolation, but in the context of other factors.¹²⁰ Different types of situations in which the Court has found or allowed for the possibility of effective control can be derived from the Court's case law.¹²¹ The Russian peacekeeping mission in Nagorno-Karabakh can be distinguished from all of them.

First, the Court held that 'the concept of "occupation" for the purposes of international humanitarian law includes a requirement of "effective control"', but the latter term is 'broader and covers situations that do not necessarily amount to a situation of "occupation" for the purposes of international humanitarian law'.¹²² As mentioned, Russia's military presence in Nagorno-Karabakh does not constitute occupation under international humanitarian law.

Second, in the context of the takeover of Crimea (from 27 February to 18 March 2014), the Court examined not only the increased number of troops (their 'actual size and strength') in Crimea at the relevant time, as

¹¹⁶ See e.g. ECtHR, *Isaak and Others v. Turkey*, decision of 28 September 2006, no. 44587/98, 21; ECtHR, *Solomon and Others v. Turkey*, judgement of 24 June 2008, no. 36832/97, para. 51. Berkes (n. 28), 37; Larsen (n. 55), 200.

¹¹⁷ See (n. 89). The question of a potential concurrent extra-territorial jurisdiction with that of Armenia depends on the outcome of the analysis as to Russia's effective control.

¹¹⁸ Milanović (n. 2), 141 (emphasis added).

¹¹⁹ Wouter Vandehole, 'The "J" Word: Driver or Spoiler of Change in Human Rights Law?' in: Stephen Allen and others (eds.), *The Oxford Handbook of Jurisdiction in International Law* (Oxford: Oxford University Press 2019), 414-430 (420).

¹²⁰ See Larsen (n. 55), 187. See *infra* in detail.

¹²¹ See for a different classification Berkes (n. 28), 24-44.

¹²² *Georgia v. Russia (II)* (n. 50), para. 196. See also *Al-Skeini* (n. 2), para. 142; *Jaloud* (n. 113), para. 142.

compared to limits agreed upon with Ukraine,¹²³ but also their objectives and conduct in light of the said agreement.¹²⁴ In fact, it pointed to different types of actions taken by Russian troops – gaining control of entry and exit points to Crimea, immobilising and detaining Ukrainian soldiers, participating in the transfer of power to new local authorities – as they were underpinned by statements by Russian President Putin and other high-ranking officials.¹²⁵ No similar conduct has taken place in Nagorno-Karabakh.

Third, in *Issa*, the Court did not exclude the possibility of temporary effective overall control by Turkey over northern Iraq, but did not see it established on the facts.¹²⁶ It distinguished the large number of Turkish troops in military operations in northern Iraq from Turkey's effective control of northern Cyprus by pointing to the extent of geographic control ('the whole of the territory of northern Cyprus') and temporal control ('over a very much longer period of time').¹²⁷ The latter patrolled the territory and had checkpoints on all the main lines of communication.¹²⁸ The Court also did not refer here to the criterion of 'public powers', which was mentioned in *Banković* and *Al-Skeini*; its relevance for spatial extra-territorial jurisdiction is unclear.¹²⁹ The position of the Russian peacekeepers does not match that of Turkey in northern Cyprus; in any case *Issa* involved the situation beyond the Convention legal space.¹³⁰

Fourth, in *Behrami and Saramati*, the Court held that Kosovo was 'under the effective control of international presences' which exercised the public powers normally exercised by the Government of the FRY'.¹³¹ Referring to

¹²³ *Russia v. Ukraine (re Crimea)*, (n. 52), para. 320.

¹²⁴ *Russia v. Ukraine (re Crimea)*, (n. 52), paras 315-337.

¹²⁵ *Russia v. Ukraine (re Crimea)*, (n. 52), paras 328-337.

¹²⁶ ECtHR, *Issa and Others v. Turkey*, judgement of 16 November 2004, no. 31821/96, para. 75.

¹²⁷ ECtHR, *Issa* (n. 126).

¹²⁸ ECtHR, *Issa* (n. 126).

¹²⁹ ECtHR (Grand Chamber), *Banković and Others v. Belgium and Others*, decision of 12 December 2001, no. 52207/99, para. 71; *Al-Skeini* (n. 2), paras 135, 144 and 149. Rick Lawson, 'Really Out of Sight?: Issues of Jurisdiction and Control in Situations of Armed Conflict Under the ECHR' in: Antoine Buyse, *Margins of Conflict: The ECHR and Transitions to and from Armed Conflict* (Cambridge: Intersentia 2010), 57-76 (60); Milanović (n. 2), 137.

The presence of the Russian armed forces in Transnistria can be classified as the exercise of some public powers, but this was not the real issue in *Ilaşcu* – the key question was 'whether Russia exercised authority through its support of the Transnistrian authorities, not whether Russia itself exercised the public powers of the government.' Larsen (n. 55), 189.

¹³⁰ See for the analysis of the case law concerning armed conflicts outside of the territories of the Council of Europe Member States Lawson (n. 129), 57-76.

¹³¹ ECtHR (Grand Chamber), *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, decision of 2 May 2007, nos 71412/01 and 78166/01, para. 70. Aurel Sari, 'Autonomy, Attribution and Accountability: Reflections on the Behrami case' in: Richard Collins and Nigel D. White (eds), *International Organizations and the Idea of Autonomy* (London: Routledge 2011), 265.

United Nations Security Council (UNSC) resolution 1244, the Court highlighted that Kosovo Force (KFOR) ‘was mandated to exercise complete military control in Kosovo’ and that the United Nations Mission in Kosovo (UNMIK) ‘was to provide an interim international administration’ comprising all legislative, executive power and ‘the authority to administer the judiciary’.¹³²

Thus, the analogy between Russian mission in Nagorno-Karabakh and the international administration of Kosovo does not work either, as the agreed and exercised powers of the mission do not seem to match those of KFOR and UNMIK. Russia is not implicated in the administration of territory, the assurance of civil order or policing in the region.¹³³ The comparison with KFOR alone does not work, as KFOR was tasked to support the expansive objectives of the civilian presence.¹³⁴ For now, while assisting Armenia and Azerbaijan with humanitarian relief and infrastructure reconstruction of Nagorno-Karabakh, the Russian peacekeepers do not seem to be implicated with the separatist regime *per se* or advancing its cause.

Fifth, regarding the controlling State, as highlighted above, effective control has been so far derived from military presence, underpinned by the fact that a controlling State props up the separatist regime and provides it with military, economic, and political support. The mere presence of forces ‘is not necessarily in itself sufficient, as it is also a requirement that the troops contribute decisively to the survival and existence of the local authorities’.¹³⁵

Despite deviations from the ceasefire agreement, to which Azerbaijan seems to acquiesce, Russia does not support separatists by political proclamations; outside of humanitarian aid, it does not provide economic or financial aid to the region. Most importantly, its military presence does not serve to prop up the separatists but to supervise the ceasefire, as follows from the deal.¹³⁶ Contrary to opinions of some political observers, Nagorno-Karabakh is not a ‘Russian enclave’ for the purposes of spatial extra-territorial jurisdiction under the ECHR. Despite having troops on the ground, it is difficult to see Russia as exercising effective control over the territory of Nagorno-Karabakh at the moment.

¹³² *Behrami and Saramati* (n. 131), para. 70. See UNSC Res. 1244 of 10 June 1999, S/RES/1244, paras 9 and 11.

¹³³ According to Berkes, the difference between an international administration and a peacekeeping operation is ‘a degree of authority: an international administration substitutes for the State’s authority, while a peacekeeping operation only exceptionally does so and usually has limited public powers.’ Berkes (n. 28), 10.

¹³⁴ UNSC Res. 1244 of 10 June 1999, S/RES/1244, para. 9(f); Larsen (n. 55), 192 and 187.

¹³⁵ Larsen (n. 55), 187.

¹³⁶ Compare Larsen (n. 55), 187.

4. Implications of Russia Ceasing to Be the Party to the ECHR and Prospective Developments

As of writing in April 2022, the events in Nagorno-Karabakh do not fall within Russia's spatial extra-territorial jurisdiction, as it does not exercise effective control there. Its jurisdiction is limited to the instances when the Russian peacekeepers exercise authority and control over individuals in the region. Once Russia ceases to be the party to the ECHR on 16 September 2022, even this limited conclusion will no longer apply. Nevertheless, even after this date, the events in Nagorno-Karabakh would still arguably fall (subject to potential changes outlined below) within Armenia's spatial extra-territorial jurisdiction. Azerbaijan, as a territorial State, would still have positive obligations there. The ECHR would thus still largely apply to the region.

Nevertheless, given the Russia-Ukraine War's repercussions, it cannot be excluded that the situation in Nagorno-Karabakh might change significantly. First, the perceived weakening of Russia's military power has triggered the fear of the renewed conflict and a potential Azerbaijan offensive to retake the remaining parts of Nagorno-Karabakh by force.¹³⁷ The limited escalation of mid-March 2022 would seem to point in this direction.¹³⁸ While as of writing no major further escalation has taken place, it is worth noting that the issue of jurisdiction under the ECHR during the active phase of hostilities would be presumably guided by the rationales developed by the Court in *Georgia v. Russia (II)*.¹³⁹

Second, at the same time, following the 6 April 2022 meeting between the President of Azerbaijan and the Prime Minister of Armenia hosted by the President of the European Council in Brussels, both parties instructed their foreign ministries 'to work on the preparation of a future peace treaty'.¹⁴⁰ This development was preceded by the new framework proposal by Azerbaijan in mid-March 2022 and the Armenian response – the steps indicating the window of opportunity for the settlement of Nagorno-Karabakh's conflict.¹⁴¹ Any such settlement (if reached) would be the basis for the renewed assessment of jurisdiction under the ECHR.

¹³⁷ Laurence Broers, 'With Russia Distracted, Azerbaijan Escalates in Karabakh', Chatham House, 30 March 2021.

¹³⁸ Broers (n. 137).

¹³⁹ *Georgia v. Russia (II)* (n. 50), paras 125-144.

¹⁴⁰ Statement of European Council President Charles Michel following the Second Trilateral Meeting with President Ilham Aliyev and Prime Minister Nikol Pashinyan of 6 April 2022; Heydar Isayev, Joshua Kucera and Ani Mejlumyan, 'Armenia and Azerbaijan Make Diplomatic Progress in Brussels', eurasianet, 7 April 2022.

¹⁴¹ Joshua Kucera, 'Armenia Signals Willingness to Cede Control over Karabakh', eurasianet, 1 April 2022.

Lastly, it is, however, also not excluded that Russia's position in Nagorno-Karabakh will become more robust at some point after 16 September 2022. For example, the parties could agree to extend the powers of the Russian peacekeeping mission, or Russia could assume such powers unilaterally. In fact, after the beginning of the Russia-Ukraine War, some separatists in Nagorno-Karabakh have called for its unification with Russia.¹⁴² Thus, it is not excluded that the situation in Nagorno-Karabakh might evolve in a way comparable to Russia's current position in Transnistria, South Ossetia, and Abkhazia where it exercises effective control. Therefore, a legal situation in these regions after 16 September 2022 might be taken as a prospective model.

After that date, Russia's effective control over these territories will no longer translate into extra-territorial spatial jurisdiction under the ECHR. Therefore, presumably, the territorial State's position will be crucial – on the condition that the applications will be filed against this State and will 'specify the capacity that the territorial State failed to use to prevent or mitigate the challenged human rights violation'.¹⁴³

It is not yet clear how the Court would approach the limitation of the territorial State's jurisdiction in case non-party to the Convention (Russia) would exercise effective control over the former State's territory. As mentioned above, the Court has taken several rationales into account. Specifically, this jurisdictional limitation has always been 'compensated by the finding that another Convention State exceptionally exercised jurisdiction outside its territory and thus had full responsibility under the Convention'.¹⁴⁴ This compensation will, however, no longer be possible after Russia ceases to be the party to the ECHR.

However, as mentioned above,¹⁴⁵ the Court has also outlined (but not applied yet) the exceptional circumstances justifying the limitation of the territorial State's jurisdiction, such as acts of rebellion or 'a constraining *de facto* situation'.¹⁴⁶ These examples do not necessarily involve another ECHR-party's jurisdiction and therefore suggest that even the exercise of effective control over parts of territorial State by the non-party to the ECHR might lead to the same outcome.¹⁴⁷

¹⁴² Ani Mejlumyan, 'Officials in Karabakh Break with Armenia Over Negotiations', eurasianet, 15 April 2022.

¹⁴³ Berkes (n. 28), 82-83.

¹⁴⁴ *Sargsyan* (n. 28), para. 148 and see para. 147. See ECtHR, *Azemi* (n. 39); Milanović and Papić (n. 32), 793.

¹⁴⁵ See (n. 40).

¹⁴⁶ *İlaşcu* (n. 24), paras 312 and 333.

¹⁴⁷ Berkes (n. 28), 79.

Moreover, the Court has also taken into account the territorial State's limited capacity to fulfil even its positive obligations under the ECHR.¹⁴⁸ To impose the full range of obligations under the Convention on the State, which has lost control over its territory in favour of another State, would presumably be seen as rendering the rights and freedoms under the Convention illusory and thus contrary to the Court's postulates.¹⁴⁹ Thus, even though the issue is always facts-dependent, it would seem unlikely for the Court to revert the limitation of territorial State's jurisdiction in cases of its loss of control in favour of a non-party to the ECHR. This would leave vacuum in the Convention protection in the separatist territories under Russia's effective control (remedied only by the territorial State's positive obligations). In any case, it could be expected that after 16 September 2022, the applicants will pay renewed attention to the territorial State's positive obligations in these territories. This would also apply to Nagorno-Karabakh in case Russia's presence there would become more robust after 16 September 2022.

IV. Conclusion

Effective human rights protection – a guiding criterion in the context of extra-territorial spatial jurisdiction – has been reflected primarily in the requirement that the foreign military be present in the secessionist entity. The presence of 'boots on the ground' has been seen as a key guarantee that the protection of human rights will not be illusory, but effective even in an extra-territorial spatial context. However, the complexity of the current factual setting in the post-ceasefire Nagorno-Karabakh shows the limits to this approach.

On the one hand, Armenia's links with Nagorno-Karabakh show that, despite the diminished direct military presence, its influence on Nagorno-Karabakh through other channels remains significant and decisive. The article argues for dispensing with the requirement of 'boots on the ground' as an essential requirement of effective control. Any other approach could result in a significant gap in the Convention protection in Nagorno-Karabakh. Undoubtedly, maximum caution should be taken when lowering the threshold, but as this borderline scenario highlights, hard power is hardly the only way States can yield significant power vis-à-vis a secessionist entity.

¹⁴⁸ See Berkes (n. 28), 82. See (n. 34-36).

¹⁴⁹ See for example ECtHR, *Airey v. Ireland*, judgement of 9 October 1979, no. 6289/73, para. 24.

On the other hand, Russia's peacekeeping presence demonstrates that mere 'boots on the ground' outside a State's borders cannot be decisive either. In the context of spatial extra-territorial jurisdiction, the greatest importance is attached to the strength of the State's military presence, but as shown the Court's has adopted a contextual approach to this issue. Arguably, as of April 2022, the presence of the Russian peacekeepers in Nagorno-Karabakh does not constitute Russia's effective control there. Russian peacekeepers are nevertheless obliged to align their conduct with the ECHR where they exercise authority and control over individuals. Nevertheless, this latter conclusion applies only until 16 September 2022, when Russia ceases to be the party to the ECHR.

Following this date, as argued in this paper, Armenia will have effective control over Nagorno-Karabakh, and, in parallel, Azerbaijan as a *de iure* holder of sovereignty in Nagorno-Karabakh, will retain a jurisdiction reduced to positive obligations. Undoubtedly, the bases for this assessment might change. The paper highlighted the scenarios of renewed conflict and a potential diplomatic solution. The paper also showed how the more robust Russia's presence in Nagorno-Karabakh after 16 September 2022 would likely lead to a protection gap in the *espace juridique* of the Convention (remedied only by the territorial State's positive obligations).

Overall, on the example of the current situation in the post-ceasefire Nagorno-Karabakh, the paper highlights the relativity of the function of hard power as the criterion of the effective control test and a spatial extra-territorial jurisdiction.