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# Territorial jurisdiction during the active phase of hostilities: *Shavlokhova and Others v Georgia*

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## Abstract

In *Shavlokhova and Others v Georgia*, the Chamber of the European Court of Human Rights held that Georgia's territorial jurisdiction during the Russo-Georgian five-day war had been limited due to ""acts of war", in a context of chaos". The claim was therefore found to be inadmissible, an outcome reached by the Chamber relying on the same rationale it developed for Russia's extraterritorial jurisdiction in *Georgia v Russia (II)*. This case note delves into the Chamber's approach in *Shavlokhova,* which in the authors' view ignores the inherent differences of territorial and extraterritorial jurisdiction. By combining *Ilaşcu and Others v Moldova* with *Georgia v Russia (II)* and conflating jurisdiction with attribution, the Chamber developed a controversial test for territorial jurisdiction in times of war; this led also to a legal vacuum, whereby neither Georgia nor Russia exercised (extra)territorial jurisdiction during the time period concerned.

Keywords: *Armed conflict; Attribution; ECHR; Extreterritoriality; Jurisdiction*

## Introduction

In January 2021, the European Court of Human Rights ("ECtHR" or "the Court") handed down its much-awaited judgment in the inter-State case of *Georgia v Russia (II).*[1] This included determination of Russia's extraterritorial jurisdiction in Georgia under Article 1 European Convention on Human Rights ("ECHR"), *inter alia* during the five-day war between the two States from 8 to 12 August 2008. During this specific timeframe, the Court essentially held that in the "context of chaos" during the conflict's "active phase of hostilities", Russia's extraterritorial jurisdiction could not be established.[2] This aspect of the Court's ruling has received much critical scholarly attention.[3]

Whilst the above pertained to Russia's extraterritorial jurisdiction under the ECHR, on the flipside, the Chamber decision in the application of *Shavlokhova and Others v Georgia*, handed down in October 2021, addressed Georgia's territorial jurisdiction within the same timeframe of the five-day war.[4] To our knowledge, this is the first time the ECtHR has

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[1] *Case of Georgia v Russia (II)* (Application no 38263/08) Grand Chamber Judgment, 21 January 2021.
[2] ibid [126]-[144].
[3] See, for example, Marko Milanovic, 'Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos' EJIL: Talk! 2021 <https://www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/> (accessed 10 June 2023); Helen Duffy, 'Georgia v Russia: Jurisdiction, Chaos and Conflict at the European Court of Human Rights' Just Security 2021 <https://www.justsecurity.org/74465/georgia-v-russia-jurisdiction-chaos-and-conflict-at-the-european-court-of-human-rights/> (accessed 25 July 2022); Gaiane Nuridzhanian, 'Control in the context of chaos: the war in Ukraine and Russia's jurisdiction under the ECHR' EJIL:Talk! 2022 https://www.ejiltalk.org/control-in-the-context-of-chaos-the-war-in-ukraine-and-russias-jurisdiction-under-the-echr/ (accessed 10 June 2023); Kanstantsin Dzehtsiarou, 'Georgia v. Russia (II)' (2021) 1 American Journal of International Law.
[4] *Case of Shavlokhova and Others v Georgia* (Application No 45431/08) Chamber Decision, 5 October 2021.

addressed an application against a territorial State for alleged violations in the course of an international armed conflict ("IAC").

In *Shavlokhova,* the Chamber struggled to develop a coherent and persuasive framework of territorial jurisdiction. Given that it presents the first decision of its kind, and in light of the ongoing armed conflict between Ukraine and Russia, exploring the framework for territorial jurisdiction is just as crucial as the attention given to extraterritorial jurisdiction. Beyond a blog post simply summarising the Court's decision,[5] and a remark that it shows the "repercussions" of the Grand Chamber's ruling in *Georgia v Russia (II)*,[6] the decision has received little other scholarly attention.[7] This contribution fills this gap by examining the Court's approach towards Georgia's jurisdiction, which in our view presents a new framework for territorial jurisdiction in times of armed conflict but fails to do so with a clear rationale and criteria. Rather, it represents a mash-up of various different standards and frameworks without taking into account the nuances of this case, thereby leading to a number of inconsistencies and uncertainties.

Following a brief summary of the facts of the case, and the Court's main findings, the remainder of this contribution provides a critical analysis of the Court's approach towards jurisdiction from three interrelated angles. We argue that *Shavlokhova* (i) has set out a new and controversial test for territorial jurisdiction in times of war, which is based on (ii) conflation of jurisdiction with attribution, and leads to (iii) a legal vacuum. In the conclusion we discuss *Shavlokhova* in light of the more recent case of *Ukraine and the Netherlands v. Russia*, in which the Grand Chamber engaged, albeit briefly, with *Shavlokhova* and more generally territorial jurisdiction in times of war.

**Facts of the case**

The decision pertained to five applicants who were Russian nationals residing in the Tskhinvali area of South Ossetia (Georgia) at the time of the conflict and who claimed that Georgia violated a number of their rights under the ECHR. Whilst the first applicant evacuated the city on 2 August 2008 with the assistance of Russian authorities, the remainder of the applicants initially stayed at their homes in the Tskhinvali area. They were thus in the proximity of intense shelling that broke out in the night of 7 August 2008 and either remained in their homes or sought shelter in the basements of their homes, before also evacuating between 10 and 12 August 2008 with the assistance of Russian authorities. The conditions under which they evacuated were also dangerous due to shelling and bombing in the area. The five applicants returned to their homes at the end of August 2008 and all but one claimed that their residences had been heavily damaged by air strikes or artillery fire. Moreover, on 9 August 2008, the Chief Prosecutor's Office of Georgia opened a general criminal investigation into war crimes against civilians; this was discontinued in March 2015 *inter alia* due to domestic authorities' inability to access South Ossetia in order to carry out investigations.

Consequently, the ECHR rights invoked by the applicants were the right to life (Article 2); the prohibition of torture (Article 3); the right to liberty and security (Article 5); the right to respect for private and family life (Article 8); the right to peaceful enjoyment of possessions (Article 1

[5] Şeymanur Yönt, 'ECtHR Rules Shavlokhova v Georgia Inadmissible' (*American Society of International law*, 22 October 2021) <https://www.asil.org/ILIB/ecthr-rules-shavlokhova-v-georgia-inadmissible> (accessed 21 March 2022).
[6] Dr Marco Longobardo, University of Westminster, Tweet on 26 October 2021 <https://twitter.com/MarcoLongobardo/status/1452940990021611520> (accessed 21 March 2022).
[7] See Katharine Fortin, 'The relationship between international human rights law and international humanitarian law: Taking stock at the end of 2022?' (2022) 40 Netherlands Quarterly of Human Rights 4.

of Protocol No. 1), claiming that the conduct of Georgian armed forces placed them and their family members' lives under real and immediate danger, obliging them to spend several days in anxiety and fear, restricting their physical liberty and causing damage to their flats. The applicants further invoked Article 14, on freedom from discrimination in the enjoyment of ECHR rights, on the basis that the aforementioned violations by Georgia took place due to their ethnic Ossetian origin. They further claimed a violation to the right to an effective remedy under Article 13 ECHR.

In response to the claims, Georgia made three lines of argument. First, the applications were inadmissible due to the applicants not exhausting domestic remedies, by lodging either criminal or civil complaints with the Georgian authorities. Second, the applications were inadmissible due to being manifestly ill-founded or constituting an abuse of the right to individual petition, on the basis that the claims were brought for Russian propaganda purposes. Third, it could not be established beyond reasonable doubt that Georgia carried out the acts complained of, due to the Russian Federation also operating in the same area at the time.[8]

In response, the applicants submitted that there were special circumstances absolving them from the obligation to exhaust domestic remedies. Namely, they feared travelling to Tbilisi or elsewhere to directly contact the central authorities and being persecuted for their Russian nationality or Ossetian ethnic origin. They further claimed that complaints could not be lodged by mail due to suspension of postal services between Georgia and Russia in the immediate aftermath of the conflict. Moreover, they did not wish to pursue civil proceedings against the State for damages but wished to see the criminal prosecution of those responsible, which the Georgian state ought to have instigated of its own volition. As regards Georgia's third argument, they considered that it could be established beyond reasonable doubt that the military actions were attributable to Georgian armed forces due to them being the only military power in control of Tskinvali and its surrounding areas at the time, Russian armed forces being at least 10km away and it was implausible that the of South Ossetian militia would shoot at their fellow residents. The Court noted that this final argument was made without producing appropriate evidence.[9]

The Russian Federation intervened as a third party in support of the applicants. Accordingly, it supported the applicants' claim that they be absolved from the obligation to exhaust domestic remedies, further arguing that Georgia had failed to prove that the available civil and criminal remedies were effective. Most notably, it claimed that the burden of proof regarding which State's armed forces had carried out the alleged violations rested with Georgia. To the extent that this burden is not discharged, the Russian Federation invited the Court to make negative inferences regarding Georgia's responsibility for the alleged acts.[10]

**The Court's assessment**

Whilst not raised by any of the parties' submissions, the Court deemed the application inadmissible on the basis that Georgia did not exercise jurisdiction for the purposes of Article 1 ECHR over the relevant parts of its territory when the alleged acts took place.[11] In finding

[8] *Shavlokhova* [22]-[23].
[9] ibid [24]-[25].
[10] ibid [26].
[11] ibid [35].

such limitation to jurisdiction, the Court began by delving into the framework for territorial jurisdiction. Accordingly, the starting point is the position that a State is presumed to exercise jurisdiction normally throughout its territory,[12] as per previous jurisprudence confirming that jurisdiction is "primarily territorial".[13] The Court, however, then proceeded by setting out that this presumption may be limited in exceptional circumstances when the State is prevented from exercising its authority in part of its territory. The Court referred to *Ilaşcu v Moldova and Russia* which established the test that this limitation can be the result of "military occupation by the armed forces of another State which effectively controls the territory concerned, (ii) acts of war or rebellion, or (iii) the acts of a foreign State supporting the installation of a separatist State within the territory of the State concerned".[14] In such circumstances, the limitation to the State's jurisdiction means it merely owes some "reduced" positive obligations. These include taking "diplomatic, economic, judicial or other measures" to secure the applicants' rights under the ECHR.[15]

Having set out the above preliminary framework, the Court proceeded to examine the context of these claims. In particular, although the alleged acts took place on Georgia's internationally recognised borders, they did so during the five-day war between Georgia and Russia. It therefore set out that the "major question" of whether there was a limitation to the normal exercise of territorial jurisdiction would be addressed against the "acts of war" in the relevant geographical areas at the time of the alleged acts.[16]

In answering this question, the Court referred to the earlier *Georgia v. Russia (II)* inter-State judgment. In particular, it recalled that "State agent authority and control" for the purposes of extraterritorial jurisdiction could not be established in the course of "massive bombing, shelling and ground attacks" which lacked an "element of proximity" otherwise found in "isolated and specific" military actions.[17] The Court thereafter applied the same considerations to limiting the presumption of jurisdiction for Georgia: during the "massive bombing and shelling of the territories within the same period of time, it would be impossible to track either direct and immediate cause or even sufficiently close proximity between the actions of the Georgian army proper and the effects produced on the applicants".[18] The Court also referred to Georgia's submission that during the same timeframe, Russian armed forces might have also used the same artillery system to shell Tskvinvali, whereas the applicants failed to adduce evidence that they suffered harm at the hands of Georgian forces.

The Chamber therefore concluded that the "massive fighting" between the armed forces of the two States constituted ""acts of war", in a context of chaos", which prevented Georgia from exercising authority over the relevant territory at the time of the accused acts on 8 and 9 August 2008.[19] It further noted that it would have been a contradictory outcome if Georgia, simply by virtue of its territorial title, was found to exercise jurisdiction in the same circumstances in which Russia's extraterritorial jurisdiction could not be established.[20]

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[12] *Case of Ilaşcu and Others v. Moldova and Russia* (Application no 48787/99) Grand Chamber Judgment, 8 July 2004, [312].
[13] *Case of Banković and Others v Belgium and Others* (Application No 52207/99) Grand Chamber Decision, 12 December 2001, [59].
[14] *Ilaşcu*; *Shavlokhova* [29].
[15] *Ilaşcu* [330]-[331]; *Shavlokhova* [29].
[16] *Shavlokhova* [30].
[17] ibid [31].
[18] ibid [32].
[19] ibid [33].
[20] ibid.

Deciding otherwise, according to the Chamber, would have been against the "spirit" of the inter-State ruling.

Finally, the Chamber returned to the reduced positive obligations which are expected "as a matter of principle" when there is a limitation to the normal exercise of jurisdiction as per *Ilaşcu.* In these circumstances, the Chamber effectively downplayed the reduced positive obligations ("diplomatic, economic, judicial or other measures") as "unrealistic" due to being "impossible to implement" and "of no real value".[21] Whilst in previous cases the Court has referred to what these measures include, such as actively attempting to re-establish control over the territory in question,[22] and taking appropriate practical and technical means to resolve the applicants' situation,[23] here the Court did not go into any analysis in relation to these being met. Rather, it noted that "in times of war", measures of a public order nature could not have "meaningfully contributed to the protection of the applicants' rights".

**Analysis**

In assessing the Court's decision, one remark ought to be made at the outset. Namely, the parties' submissions seemingly pre-date the ruling in *Georgia v Russia (II)*, given that none of them referred to it, whether to distinguish or rely upon this. Neither did Georgia raise the argument that it did not exercise jurisdiction as per the limiting factors in *Ilaşcu.* Given the Chamber's subsequent reference to and reliance on these cases to find the application inadmissible, this raises questions as regards legal certainty and the upholding of the adversarial principle. When it comes to domestic courts and Article 6 ECHR on the right to a fair trial, the ECtHR has held that judges deciding a case on the basis of grounds they raise of their own motion, parties should be afforded the opportunity to reply.[24] By evidently not allowing parties to make renewed submissions regarding the applicability of *Ilaşcu* and the inter-State judgment, the Chamber paradoxically fell below this standard it imposes on domestic courts. The remainder of this paper examines the Chamber's approach towards the issue of jurisdiction.

i. A new test for territorial jurisdiction in times of war: combining *Ilaşcu* with *Georgia v Russia* (II)

As noted above, the Chamber in *Shavlokhova* applied a new test of territorial jurisdiction by practically combining *Ilaşcu* with *Georgia v Russia* (II). In our view, by seeking to apply the *Ilaşcu* test alongside also the "context of chaos" rationale from *Georgia v Russia (II),* the decision creates uncertainty as to the relationship between the two frameworks. In particular, given that the Court relied upon the ""acts of war" in a context of chaos" to find a limitation of jurisdiction, how do these terms interrelate and do they now establish a cumulative test? Looking closely at the decision, the Court states ""acts of war" or, borrowing the language of the inter-State judgment, the "active phase of the hostilities"", indicating that these two terms have the same or equivalent meaning. In *Shavlokhova*, the Court found that there were ""acts

[21] ibid [34].
[22] *Ilaşcu* [345]
[23] *Case of Catan and Others v Republic of Moldova and Russia* (Applications nos 43370/04, 8252/05 and 18454/06) Grand Chamber Judgment, 19 October 2012, [147]; see also ECtHR, 'Guide on Article 1 ECHR - Obligation to respect human rights - Concepts of "jurisdiction" and imputability' (Updated 30 April 2022) 35, division into "general" and "special" obligations.
[24] *Case of Prikyan and Angelova v Bulgaria* (Application no 44624/98) 16 February 2006, [42]; *Case of Skondrianos v. Greece* (Application nos 63000/00, 74291/01 and 74292/01) 18 December 2003, [29]-[30].

of war", in a context of chaos"; similarly, in *Georgia v Russia (II)* during the active phase of hostilities there was "armed confrontation and fighting… in a context of chaos".[25]

Thus, it seems that if "acts of war" equate to the "active phase of the hostilities", it is the "context of chaos" which is required to rebut the presumption of territorial jurisdiction. This would therefore seemingly establish a cumulative test, adding a condition to the "acts of war" required under *Ilaşcu.* This is not ground-breaking, since not necessarily all acts of war will rebut the presumption of jurisdiction – for example, if it were the case of a targeted killing of one combatant, as opposed to large-scale shelling and exchange of fire in an area. But requiring "acts of war" to take place within a "context of chaos" would bring with it the uncertainties and criticisms that have accompanied this aspect of the *Georgia v Russia (II)* ruling.

Whether the Court did in fact intend to establish such a cumulative test when it comes to "acts of war" is unclear. Indeed, it places emphasis on the fact that the claims in *Shavlokhova* arise from the same circumstances it had already examined in *Georgia v Russia (II)*, so the framework may be limited to these cases for purposes of consistency without necessarily intending to establish a new standard. Particularly given the criticism which has plagued the "context of chaos" rationale, it would not be surprising if the Court seeks to distance itself from this approach in future analyses.

A second uncertainty arises with regards to where the line will be drawn *vis-à-vis* the "context of chaos" rationale developed by the ECtHR in *Georgia v Russia (II)*. Whilst *Georgia v Russia (II)* pertained to extraterritorial jurisdiction and could have arguably therefore been limited to IACs, *Shavlokhova* extends the rationale to a State's jurisdiction within its own territory. This could potentially make it an applicable argument also in non-international armed conflicts ("NIACs") between the State and one or more armed groups within its territory, leading to another situation in which there could be a jurisdictional vacuum.

Interestingly, the Court's Guide on Article 1 contains the framework from *Georgia v Russia (II)* and *Shavlokhova* under a heading "The active phase of an international armed conflict".[26] Based on this, one might view the jurisdictional vacuums arising from these cases to be limited to IACs. In principle, however, there is no reason why the same reasoning cannot also extend to NIACs. Quite the opposite, at times the Court frames its rationales broadly such that they could be read to extend to NIACs. For example, part of its reasoning for the finding of limited jurisdiction included "the fact that such situations are predominantly regulated by legal norms other than those of the Convention, notably international humanitarian law and/or the law of armed conflict".[27] Setting aside the question of what "predominantly" means for the purposes of the interrelationship of IHL/LOAC with the ECHR, this broad statement can apply equally to situations in NIACs.

One seeming limitation to the "context of chaos" rationale is the intensity of the armed conflict between Georgia and Russia, which the Court described as being of "exceptionally large-scale nature".[28] In addition, States will presumably not willingly admit that they cannot exercise

[25] *Georgia v Russia (II), [126].*
[26] ECtHR, 'Guide on Article 1 ECHR - Obligation to respect human rights - Concepts of "jurisdiction" and imputability' (Updated 30 April 2022), 17.
[27] *Shavlokhova [32].*
[28] ibid.

authority over their territory due to non-State actors.[29] However, as seen here, even if not an argument raised by States themselves, the Court may nonetheless make a finding of lack of jurisdiction. Arguably, this was done so here due to its unwillingness to address complex questions on the interrelationship of IHL and ECHR, as well as political considerations bearing in mind that Georgia was the "passive State sustaining a foreign military operations in its territory".[30] Thus, despite previous academic suggestions that the "context of chaos" reasoning might not be equally applicable to the territorial State,[31] the Court's decision in *Shavlokhova* imports the reasoning of extra-territorial jurisdiction seen in *Georgia v Russia (II)* into the realm of territorial jurisdiction. This is also one step towards the applicability of the rationale to NIACs.

ii. Conflating jurisdiction with attribution

The Court's decision raises questions as regards attribution of conduct to the respondent State, as it took an inconsistent approach in its analysis of jurisdiction and fact-finding for the purposes of attribution. Early in the decision, the Court referred to jurisdiction as a "threshold criterion" in order to attribute violations to a State,[32] seemingly considering these two steps to be separate. In other words, once the threshold of jurisdiction is met, the Court is able to consider whether the alleged conduct was in fact carried out by the respondent State and if so, whether it amounts to a violation of the rights invoked.

In reality, however, the Court's reasoning in *Shavlokhova* blurred these two lines of enquiry and the inability to establish the facts to the requisite standard fed into the finding of a lack of jurisdiction. In particular, the Court cited excerpts from a report by Human Rights Watch, noting that within this it "could not always conclusively attribute specific battle damage to a particular belligerent" and that there were contradictory witness accounts as to how Georgian troops approached and treated civilians in South Ossetia.[33] The Court considered these accounts alongside the Georgian government's uncontested argument that "the Russian armed forces might also have used the same artillery system to shell Tskhinvali". To this end, the Court remarked that "while the applicants assert that the civilian population of Tskhinvali had been singled out by Georgian soldiers… such allegations seem to be unsupported by the available fact-finding materials...".[34]

The above "difficulty in establishing the relevant circumstances" was one of the factors relied upon by the Court in its finding of lack of jurisdiction. Interestingly, leading up to this conclusion the Court referred to the case of *Yilmaz v Turkey* for comparison purposes.[35] In this case, the Court did not find a violation due to it being impossible to establish beyond reasonable doubt who was responsible for a civilian death during clashes between state security forces and the PKK. Contrary to *Shavlokhova,* however, this inability to attribute the conduct did not affect the prior decision on the case's admissibility.

Some 'light' has been shed onto the Court's approach by virtue of its Guide on Article 1 ECHR, updated in April 2022. Accordingly, in relation to limiting territorial jurisdiction, the Guide reads

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[29] Kjetil Mujezinović Larsen, ''Territorial Non-Application' of the European Convention on Human Rights' (2009) 78 Nordic Journal of International Law 73, 83.
[30] Borrowing the language used by the ECtHR in its Guide on Article 1 ECHR (n 23), 17.
[31] Marco Milanovic, 'The Russia-Ukraine War and the European Convention on Human Rights' Article of War 2022 https://lieber.westpoint.edu/russia-ukraine-war-european-convention-human-rights/ (accessed 28 July 2022)
[32] *Shavlokhova* [31].
[33] ibid [15].
[34] ibid [32].
[35] *Case of Yilmaz v Turkey,* Application No. 35875/97, 29 July 2004.

"[i]n order to be able to conclude that such an exceptional situation exists, the Court must examine, 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, the State's own conduct."[36] But what if the "objective facts" and/or "State's own conduct" cannot themselves be established, as in *Shavlokhova*? This highlights the ill-fitted application of *Ilaşcu* to this case, given that the Court could not identify these two aspects, and in turn conflated the line of enquiry between jurisdiction and fact-finding for the purposes of attribution once jurisdiction has been established.

This conflation is potentially significant from a practical perspective, as it indicates a lowering of the threshold for arguing a limitation to the ordinary exercise of jurisdiction. It potentially opens the door for respondent States to rely upon a lack of certainty regarding the facts in order to argue a lack of jurisdiction, thereby leading to a vacuum in circumstances where it cannot be established who carried out the conduct. Thus, rather than finding that there was no violation as in *Yilmaz v Turkey*, the Court's analysis ended one step earlier, by finding a limitation to the State's ordinary jurisdiction. In our view, the same finding as in as in *Yilmaz v Turkey* would have been in line with the Court's traditional approach of treating the two lines of enquiry as distinct and would have also avoided the uncertainties arising from the Court's reliance on *Ilaşcu* and *Georgia v Russia (II)*.

iii. Establishing a legal vacuum

The significant way in which *Shavlokhova* differs from *Ilaşcu* is the fact that it leads to a jurisdictional no man's land *vis-à-vis* the ECHR. In *Ilaşcu,* the Court held that Moldova did not exercise authority over Transnistria, such that its jurisdiction under Article 1 ECHR had been limited;[37] this gap, however, was filled by the extraterritorial jurisdiction exercised by Russia due to its authority/influence over the non-State entity which controlled the territory.[38] This pattern has been followed in subsequent cases.[39] In the case of *Sargsyan v Azerbaijan*, where occupation by another State was held not to exist, the Court took into account "the need to avoid a vacuum in Convention protection" and accordingly, the "exceptional circumstances" as per *Ilaşcu* did not exist.[40] This led to the observation that the Court "does not appear to allow for a "vacuum" in the human rights protection, which would have been the result if a State was relieved of its obligations without there being another State to take over".[41]

Georgia itself in its submissions did not dispute its jurisdiction under Article 1 ECHR,[42] perhaps indicating that it did not entertain the applicability of *Ilaşcu* and the ensuing possibility of a jurisdictional vacuum. This could also explain the absence of the Court's analysis in relation to the reduced positive obligations, since the parties provided no specific evidence or arguments pertaining to the discharge of these. Without any substantive arguments to engage with, the Court was able to approach the residual obligations in the minimalist manner it did, as though a tick-box exercise.

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[36] ECtHR Guide on Article 1 (n 23) 33.
[37] *Ilaşcu* [330].
[38] ibid [394].
[39] For example, *Case of Mozer v The Republic of Moldova and Russia* (Application No 11138/10) Grand Chamber Judgment, 23 February 2016.
[40] *Case of Sargsyan v Azerbaijan* (App No 40167/06) Grand Chamber Judgment, 16 June 2015.
[41] Larsen (n 26) 84.
[42] Georgia's submissions centred around the non-exhaustion of domestic remedies and inability to establish beyond reasonable doubt that the acts were committed by Georgian armed forces, as opposed to Russian; see *Shavlokhova* [22]-[23].

The lack of any reference in *Shavlokhova* to the need to avoid a vacuum begs the question of whether the Court purposefully turned a blind eye to the nuances of this case given its highly political context. Given that Russia constituted the aggressor and Georgia the victim State of the 2008 conflict, it no doubt would have stirred controversy if the latter was held at a higher standard as regards obligations owed to individuals caught in the crossfire between the two States. Thus, the reference to *Ilaşcu* seems to serve as a convenient hook for the Chamber to introduce the "context of chaos" rationale and thereby hold both States to the same standard.

## Conclusion

*Shavlokhova* is a unique decision that provides insight into how the Chamber struggled to navigate the complex issue of territorial jurisdiction during an IAC, and more specifically the active phase of hostilities. We argue that the Chamber's approach in *Shavlokhova* ignores the inherent differences of territorial and extraterritorial jurisdiction: the former exists as a rebuttable presumption whereas the latter can be established only as an exception when certain circumstances are satisfied. The approaches towards establishing each have traditionally been distinct, the latter having developed over time through the Court's pronouncements on complex and controversial cases.[43] In *Shavlokhova,* however, the Chamber goes as far as stating that the inter-State ruling of *Georgia v Russia (II)* "comprehensively examined" the repercussions of the five-day war for the "overall jurisdictional test" in Article 1 ECHR; [44] in reality, this is a stretch given that the primary focus of the case was on extraterritorial jurisdiction, a complex issue which has so far been kept distinct from examining the presumption of territorial jurisdiction. Linking the two, as the Chamber did in *Shavlokhova*, leads to a number of inconsistencies and uncertainties. In particular, by combining *Ilascu* and *Georgia v Russia II,* the Court established a new jurisdictional vacuum and omitted a careful analysis on the differences between territorial and extraterritorial jurisdiction during an IAC, and more specifically the active phase of hostilities. With this approach it is unclear where the line can be drawn vis-à-vis the context of chaos rationale in IACs but also NIACs.

In future cases, the Grand Chamber may be faced with similar questions, having to confirm whether *Shavlokhova* is a new test on territorial jurisdiction during the active phase of hostilities or an incidental one. The 2023 decision on admissibility in the case of *Ukraine and the Netherlands v Russia* shed some light in this regard. Even though this case concerns extraterritorial jurisdiction, the Grand Chamber found it relevant to clarify the general principles of jurisdiction in times of war and peace. With regards to extraterritorial jurisdiction, the Grand Chamber maintained that during the active phase of hostilities in a context of chaos, a State may not always exercise jurisdiction.[45] However, in explaining territorial jurisdiction, the Court did not confirm that the active phase of hostilities could lead to the loss of jurisdiction.[46] No doubt the ECtHR will be faced with similar applications arising from the ongoing armed conflict between Ukraine and Russia, where the question of territorial jurisdiction may be at the heart

[43] See Işıl Karakaş and Hasan Bakırcı 'Extraterritorial Application of the European Convention on Human Rights: Evolution of the Court's Jurisprudence on the Notions of Extraterritorial Jurisdiction and State Responsibility' in Anne van Aaken and Iulia Motoc (eds) *The European Convention on Human Rights and General International Law* (2018, OUP).
[44] *Shavlokhova* [34].
[45] *Case of Ukraine and the Netherlands v Russia* (App nos 8019/16, 43800/14 and 28525/20) Grand Chamber Decision, 30 November 2022, [556]-[558].
[46] ibid [554].

of the issue. It is therefore a missed opportunity and unfortunate that *Shavlokhova* has failed to set clear standards of territorial jurisdiction during an IAC and thus raises more questions than it answers.