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"A LITTLE WAR THAT SHOOK THE COURT": COMMENT ON THE JUDGEMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE CASE GEORGIA V. RUSSIA (II) OF 21 JANUARY 2021

Abstract: The long-awaited judgement of the European Court of Human Rights in the case of *Georgia v. Russia (II)* of 21 January 2021 evokes rather ambivalent assessment. On the one hand, the Court found that the Russian authorities were responsible for systematic violations of human rights related to Russia's participation in the "five-day war", and on the other hand, the Court limited this responsibility only to the "occupation phase", i.e. the period after the ceasefire on 12 August 2008. As for the "active phase of hostilities", i.e. the period of armed clashes from 8 to 12 August 2008, the Court found that due to the lack of "effective control" by Russia, the Court could not apply any model of jurisdiction to any of the alleged violations of the Right to Life under the ECHR. This comment is an analysis of the reasoning of the Court in relation to the most important issues in this case: extraterritorial jurisdiction in the context of international armed conflict (including the issues of effective control over an area and State agent authority and control over individuals), the relationship between the ECHR and international humanitarian law and the investigative obligation under Article 2 of the ECHR.

Keywords: European Convention on Human Rights, European Court of Human Rights, Georgian-Russian Armed Conflict of 2008, active phase of hostilities, extraterritorial jurisdiction

1. Introduction

On 21 January 2021, the Grand Chamber of the European Court of Human Rights (ECtHR) delivered its long-awaited judgement in the inter-State case of *Georgia v Russia (II)*.[1] The application under Article 33 of the European Convention on Human Rights (ECHR) was lodged by Georgia in the context of the hostilities between Russia and Georgia in South Ossetia and Abkhazia in August 2008, also referred to as the "five-day war". The Court's task was to assess whether the Russian Federation lived up to its treaty obligations under the ECtHR in the context of this war. The Georgian authorities complained to the ECtHR that Russia committed human rights violations both during and after the war. The Court found Russia responsible for serious human right abuses in the immediate aftermath of the conflict (including unlawful killing, torture and arbitrary detentions), but, by 11 votes to 6, refused to look at any of the alleged substantive violations of the Right to Life during the "active hostilities" phase of the conflict.

The judgement in *Georgia v. Russia (II)* required ECtHR judges to consider many complex issues related to, *inter alia*, the principle of territorial and personal jurisdiction during international armed conflict, the relationship between human rights and international humanitarian law from the perspective of the ECHR, and the "effective control" of the Russian authorities over South Ossetia, Abkhazia and the "buffer zone" after the active part of hostilities, but in the end not everything was fully clarified and some questions remained unanswered, triggering a wave of criticism and opinions among commentators of the ECtHR jurisprudence and human rights specialists.[2] This ruling is doubtlessly extraordinary, for at least

[1] *Georgia v. Russia (II)*, No. 38263/08, judgement of 21 January 2021 (Merits).

[2] See, e.g.: Duffy, "Georgia v. Russia: Jurisdiction, Chaos and Conflict at the European Court of Human Rights", accessed 7 June 2021, https://www.justsecurity.org/74465/georgia-v-russia-jurisdiction-chaos-and-conflict-at-the-european-court-of-human-rights/; Dzehtsiarou, "International Decisions: Georgia v. Russia (II), Merits. App. No. 38263/08. European Court of Human Rights (Grand Chamber), January 21, 2021", 288-294; *idem*, "The Judgement of Solomon that went wrong: Georgia v. Russia (II) by the

several reasons. The ruling was issued in a case between States (in practice, such cases happen very rarely)[3], and this is the first ruling since the *Banković* case[4] that relates to an armed conflict between States-parties to the ECHR. Thus, this judgement will have significant ramifications for ongoing and future cases involving issues of the relationship between human rights and international humanitarian law, or problems with determining jurisdiction during hostilities. On the other hand, it is difficult to say whether the ruling in question will become a precedent, given that the ruling contains nine separate opinions, seven of which are partly dissenting opinions issued jointly or individually by a total of seven judges of the Court.[5] It is worth emphasising that the volume of separate opinions and the firm and sometimes harsh wording of judges used in them, mainly pertaining to jurisdictional issues, may prove the scope of the controversy caused by the discussed case. It can even be said that the five-day war has become "a little war that shook the Court"[6] and it is possible that *Georgia v. Russia (II)*, despite its controversial nature, may turn out to be a turning point in the

European Court of Human Rights", accessed 7 June 2021, https://voelkerrechtsblog.org/the-judgement-of-solomon-that-went-wrong-georgia-v-russia-ii-by-the-european-court-of-human-rights/; Milanovic, "Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos", accessed 7 June 2021, https://www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/; Risini, "Human Rights in the Line of Fire: Georgia v Russia (II) before the European Court of Human Rights", accessed 7 June 2021, https://verfassungsblog.de/human-rights-in-the-line-of-fire/; Tan, Zwanenburg, "Case Note: One Step Forward, Two Steps Back? Georgia v Russia (II), European Court of Human Rights, App. No. 38263/08", 1–20 (forthcoming).

[3] As Judge Keller noted in her separate opinion to the judgement in question, this is the fourth inter-State case ever to be resolved on the merits by the ECtHR (see *Georgia v. Russia (II) – Concurring Opinion of Judge Keller*, para. 9).

[4] See *Banković and Others v. Belgium and 16 Other States*, No. 52207/99, Grand Chamber admissibility decision of 12 December 2001.

[5] As Conall Mallory rightly noticed, "[t]he tone of the dissents in *Georgia v Russia (II)* were highly emotive for a Court which tends to operate with a considerable degree of collegiality." (Mallory, "A second coming of extraterritorial jurisdiction at the European Court of Human Rights?", 46).

[6] This phrase is a paraphrase of the title of the book *A Little War That Shook the World: Georgia, Russia, and the Future of the West* of 2010 by Ronald D. Asmus. Judge Chanturia referred directly to this title in his dissenting opinion to the judgement in question (see *Georgia v. Russia (II) – Partly Dissenting Opinion of Judge Chanturia*, para. 1).

jurisprudence of the Court, in particular with regard to the extraterritorial application of the ECHR.[7]

This comment provides an analysis and assessment of the ECtHR judgement in *Georgia v. Russia (II)*, with regard to issues such as the question of jurisdiction under Article 1 of the Convention during the "active phase of hostilities" and during "effective occupation", the relationship between the ECHR and international humanitarian law in the course of an international armed conflict, and the procedural duty to investigate. This comment is preceded by a general presentation of the facts concerning the above case and the summary of main legal findings of the Court.

2. Factual Background

When presenting the facts of the case under discussion, the ECtHR referred to the detailed findings contained in the report of the Independent International Fact-Finding Mission on the Conflict in Georgia (hereinafter: IIFFMCG), established by a decision of the Council of the European Union in 2008.[8] The armed conflict between Georgia and Russia, later to become known as the "five-day war", began on the night of 7-8 August 2008, after an extended period of ever-mounting tensions and incidents between Georgia and the separatist government of South Ossetia. The culmination of this long-standing tense situation in the region, often leading to the escalation of violence and armed activities, was artillery fire on Tskhinvali (the administrative capital of South Ossetia) carried out by Georgian forces. On the morning of 8 August, Russian armed forces entered the territory of South Ossetia and Abkhazia. The Kremlin justified its military reaction due to the Georgian attack on Russian peacekeepers stationed in South Ossetia, although the Georgian government denied this accusation. From 10 August 2008, Georgian armed forces withdrew from the Tskhinvali region and then from the Gori district, and Russian troops progressively invaded Georgian territory.[9] In their counter-movement, Russian armed forces, covered by air strikes and by part of its Black Sea fleet, penetrated deep into Georgia, cutting across the country's main east-west road, reaching the port of

[7] *Cf.* Tan, Zwanenburg, "Case Note", 2.

[8] See: Independent International Fact-Finding Mission on the Conflict in Georgia, *Report*, vol. I, II and III, European Union, 30 September 2009.

[9] *Georgia v. Russia (II)*, paras. 35-39.

Poti and stopping short of Georgia's capital city, Tbilisi. The confrontation developed into a combined inter-State and intra-State conflict, opposing Georgian and Russian forces at one level of confrontation as well as South Ossetians together with Abkhaz fighters and the Georgians at another.[10]

After five days of fighting, a ceasefire agreement was concluded on 12 August 2008 between the Russian Federation and Georgia under the auspices of the European Union, providing amongst other that the parties would refrain from the use of force; immediately end hostilities; provide access for humanitarian aid; and that Georgian military forces would withdraw to their usual bases and Russian military forces to the lines prior to the outbreak of hostilities.[11] Since then, a significant military contingent of Russian troops has remained in South Ossetia and Abkhazia. Several days later, by a decree of 26 August 2008, Russian President, Dmitry Medvedev, recognised South Ossetia and Abkhazia as independent States following a unanimous vote of the Russian Federal Assembly to that end.[12] That recognition was not followed by the international community, however, both regions are currently outside the *de facto* control of the Georgian government.

3. Judgement of the Court

In their complaint to the Court, the Georgian authorities indicated systemic violations of ECHR by the Russian Federation, both during and after hostilities. According to Georgia, the violations committed by Russia included Articles 2 (Right to Life), 3 (Prohibition of Torture), 5 (Right to Liberty) and 8 (Right to Privacy) of the ECHR, its Protocol No. 1 (Article 1 – Right to Private Property and Article 2 – Right to Education), and Protocol No. 4 (Article 2 – Freedom of Movement). The Court first had to consider whether the respondent State had jurisdiction over the territory where violations were taking place, and then if the respondent State did execute its jurisdiction and whether it had committed any violations of the ECHR.

Regarding jurisdiction, the Court decided to divide the period of conflict into an active hostilities phase (during the "five-day war" which

[10] IIFFMCG Report, vol. I, 10.
[11] *Georgia v. Russia (II)*, para. 40.
[12] Ibid., para. 41.

lasted 8 to 12 August 2008) and the subsequent events, after the EU-mediated ceasefire on 12 August (i.e. the aftermath of the hostilities).[13] This division of time between 'during' and 'after' actual hostilities in fact determines the Court's analysis of alleged violations of the Convention and influences its final assessment of responsibility for those violations. This is undoubtedly one of the most important, but also highly controversial, findings of the Court as, in its opinion, Russia did not have jurisdiction over the territory covered by armed struggles during the active phase of hostilities. In this regard, the Court considered two models of jurisdiction: territorial (effective control over territory) and personal (control over the victim by a State agent).[14] As regards the issue of "effective control by a State over an area", the Court, referring to its findings on jurisdiction in previous rulings (amongst others *Al-Skeini and Others*[15], *Banković and Others*, *Chiragov and Others*[16]) found that there was no reason to assign Russia effective control over the territory of South Ossetia and Abkhazia during the active phase of hostilities. In the Court's view:

> in the event of military operations – including, for example, armed attacks, bombing or shelling – carried out during an international armed conflict one cannot generally speak of "effective control" over an area. The very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos means that there is no control over an area. This is also true in the present case, given that the majority of the fighting took place in areas which were previously under Georgian control.[17]

Therefore, in the opinion of the ECtHR, a chaotic situation prevails in the so-called theatre of military operations, making it impossible to determine who then exercises effective control over this area. The Court reached similar conclusions when considering the determination of personal jurisdiction during active hostilities on the basis of "State agent authority and control over individuals" (i.e. the direct victims of the alleged violations). Again, citing its findings in previous cases (amongst

[13] Ibid., para. 83.
[14] Ibid., para. 81.
[15] *Al-Skeini and Others v. the United Kingdom*, No. 55721/07, judgement of 7 July 2011.
[16] *Chiragov and Others v. Armenia*, No. 13216/05, judgement of 16 June 2015.
[17] *Georgia v. Russia (II)*, para. 126.

others *Al-Skeini and Others*, *Issa and Others*[18], *M.N. and Others*[19]), the Court indicated that the decisive factor in establishing "State agent authority and control" over individuals outside the State's borders was the exercise of physical power and control over the persons in question.[20] However, cases related to the use of force, considered so far before the Court, concerned isolated and specific acts involving an element of proximity, while the active phase of hostilities in the context of an international armed conflict analysed by the Court in the present case is a completely different case, as it concerns "bombing and artillery shelling by Russian armed forces seeking to put the Georgian army *hors de combat* and to establish control over areas forming part of Georgia".[21] In justifying its position, the Court explained that:

> […] having regard in particular to the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances and the fact that such situations are predominantly regulated by legal norms other than those of the Convention (specifically, international humanitarian law or the law of armed conflict), the Court considers that it is not in a position to develop its case-law beyond the understanding of the notion of "jurisdiction" as established to date.[22]

As a result, the ECtHR stated that the scale of the hostilities in the *Georgia v. Russia (II)* case prevented it from establishing extraterritorial jurisdiction of the respondent State. The Court could not apply either the spatial model or the personal model of jurisdiction to any of the alleged substantive violations of Article 2 of the ECHR (Right to Life) committed between 8-12 August 2008.

It should be noted, however, that although the Court did not find any grounds for establishing Russian jurisdiction over areas where hostilities took place, it did not fully exempt the Russian Federation from responsibility for certain human rights violations that resulted from events taking place during the active phase of hostilities. Russia was obligated to carry out effective investigation of deaths in the context of an armed conflict, even if the "arbitrary killing by agents of the State" occurred

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[18] *Issa and Others v. Turkey*, No. 31821/96, judgement of 16 November 2004.
[19] *M.N. and Others v. Belgium*, No. 3599/18, decision of 5 May 2020.
[20] *Georgia v. Russia (II)*, para. 130.
[21] Ibid., para. 133.
[22] Ibid., para. 141.

during the hostilities. According to the Court, although the events which occurred during that period did not fall within the jurisdiction of the Russian Federation, it established "effective control" over the territories in question shortly afterwards. Furthermore, all the potential suspects among the Russian service personnel were located either in the Russian Federation or in territories under the control of Russia, therefore Georgia was prevented from carrying out an adequate and effective investigation into the allegations, thus, the obligation in question rested with Russia.[23]

With regard to the events after August 12, defined by the ECtHR as the "occupation phase after the cessation of hostilities", the Court found that Russia had effectively controlled the territories of the separatist Abkhazia and South Ossetia, as well as the adjoining 'buffer zone' created by Russian forces on the territory of Georgia proper. The Court applied a spatial model of jurisdiction in the sense of Article 1 of the ECHR, as control over territory, and found that Russia exercised control over the above-mentioned areas either directly through its own forces or indirectly through organised armed groups. The Court also pointed to the significant military presence of Russia in the area of Abkhazia and South Ossetia, as well as political, military and economic support provided by Russia to its allies in these regions.[24] After establishing jurisdictional issues, the Court resolved to consider whether the Russian authorities had committed human rights violations, first by examining whether homicide, torture and ill-treatment, looting, destruction and burning of houses had occurred in areas controlled by Russia. For this purpose, the Court used both testimonies of witnesses and reports and statements of international intergovernmental and non-governmental organisations. Taking these sources of information into account, in the light of the Court's findings:

> [...] it has sufficient evidence in its possession [...] to conclude beyond reasonable doubt that there was an administrative practice contrary to Articles 2 and 8 of the Convention and Article 1 of Protocol No. 1 as regards the killing of civilians and the torching and looting of houses in Georgian villages in South Ossetia and in the 'buffer zone'. Having regard to the seriousness of the abuses committed, which can be classified as 'inhuman and degrading treatment' owing to the feelings of anguish and distress suffered by the victims [...], the

[23] Ibid., para. 331.
[24] Ibid., paras. 165-173.

> Court considers that this administrative practice was also contrary to Article 3 of the Convention.[25]

Moreover, the Court noted that this practice was defined not only by a "repetition of acts", but also "official tolerance" by the Russian authorities, as is also shown by the fact that Russia did not carry out effective investigations into the alleged violations.[26]

The Court also attributed to Russia a breach of the ECHR's provisions relating to ill-treatment of arrested civilians and arbitrary detention (Articles 3 and 5 of the Convention, respectively)[27], and torture and ill-treatment of Georgian prisoners of war (Article 3 of the Convention).[28] By assigning the responsibility to Russia, the ECtHR did not distinguish between the Russian and local (separatist) troops, explaining that:

> […] even if the direct participation of the Russian forces has not been clearly demonstrated, since it has been established that the Georgian civilians fell within the jurisdiction of the Russian Federation, the latter was also responsible for the actions of the South Ossetian authorities, without it being necessary to provide proof of 'detailed control' in respect of each of their actions.[29]

The Court reached similar conclusions regarding the involvement of the Russian authorities in the administrative practice of violating the Freedom of Movement of displaced persons (i.e. the inability of Georgian nationals to return to their respective homes), finding this practice to be contrary to Article 2 of the Protocol No. 4 to the ECHR.[30] Finally, the Court found that Russian authorities failed to produce their military 'combat reports' regarding the armed conflict in Georgia in 2008 and other relevant documents essential to enable the Court to establish the facts of the case. Therefore, the Court considered that the respondent State has fallen short of its obligation to furnish all necessary facilities to the Court in its task of establishing the facts of the case, as required under Article 38 of the Convention.[31]

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[25] Ibid., para. 220.
[26] Ibid., paras. 216, 219.
[27] Ibid., paras. 242-256.
[28] Ibid., paras. 272-281.
[29] Ibid., para. 248. As regards prisoners of war – *cf.* para. 276.
[30] Ibid., paras. 296-301.
[31] Ibid., para. 346.

As mentioned above, the judgement contains nine separate opinions, including seven partly dissenting opinions and, as might be guessed, the issue whether Russia had jurisdiction during the active phase of hostilities became, above all, a bone of contention between the majority and minority of the judiciary. However, the arguments used by the dissenting judges in this matter differ from one another. For example, in his briefly formulated partly dissenting opinion, Judge Lemmens found the Court's invocation of the *Banković* case as unfortunate, since there are many other, more recent cases in which jurisdiction issues have been dealt with on the basis of the principle that when State agents use physical force against individuals, they exercise authority and control over those individuals. Such authority and control bring the individuals concerned within the jurisdiction of the State in question.[32] Besides, in Judge Lemmens opinion, the reference to the reality of an armed conflict cannot be a valid excuse for not accepting extraterritorial jurisdiction during the active stage of hostilities.[33] Judge Pinto de Albuquerque also undertook criticism of the *Banković* case, explaining that the revival of this case in *Georgia v. Russia (II)* is deeply regrettable in the eyes of the victims.[34] In his opinion, the distance between the location of the alleged human rights violation and the national territory is irrelevant for the purposes of determining jurisdiction under Convention law.[35]

Judge Grozev, on the other hand, based his arguments on the concept of a 'vacuum in protection'. In his opinion, people who would be protected by the provisions of the ECHR before and after the "active phase of hostilities" were deprived of this protection only because of their presence in the area covered by military operations, in the period between 8 and 12 August 2008. However, a gap like this in the protection of human rights is unacceptable and should be ruled out.[36] Judge Chanturia spoke in a similar vein, indicating that the majority's ruling as regards the question of extraterritorial jurisdiction during the active phase of hostilities has given birth to a legal vacuum, which would amount to a denial of human-rights protection to victims of armed conflicts.[37] However, in their joint opinion,

[32] *Georgia v. Russia (II) – Partly Dissenting Opinion of Judge Lemmens*, para. 2.
[33] Ibid.
[34] *Georgia v. Russia (II) – Partly Dissenting Opinion of Judge Pinto de Albuquerque*, para. 30.
[35] Ibid., para. 27.
[36] *Georgia v. Russia (II) – Partly Dissenting Opinion of Judge Grozev.*
[37] *Georgia v. Russia (II) – Partly Dissenting Opinion of Judge Chanturia*, paras. 54-55.

Judges Yudkivska, Wojtyczek, and Chanturia postulate greater flexibility in the interpretation of the personal model of jurisdiction within the meaning of Article 1 of the ECHR, in particular concerning the jurisdiction of a State during armed conflict. It is true that the scope of this jurisdiction during the active phase of the struggle is limited, but its existence cannot be denied, and the ECHR States-parties are obliged to provide civilians with rights and freedoms adequate to the scope of this jurisdiction.[38] In other words, the scope of the rights to be guaranteed has to be adequate to the scope of the State power which is exercised.[39]

The judges were generally or almost unanimous on the rest of the issues. One of the more widely discussed issues in the case of some of the dissenting opinions was the relationship of the ECHR to international humanitarian law, in particular the issue of the application of the Convention to cases of the use of force in the course of active hostilities, a dilemma that the Court has not resolved, although it referred to other situations that, during armed conflict, are regulated both by tenets of human rights and by international humanitarian law. It was only in the joint opinion that Judges Yudkivska, Pinto de Albuquerque, and Chanturia discussed and explained the interplay between the Convention (and particularly the substantive obligations of Article 2) and international humanitarian law in the context of an international armed conflict. The judges paid particular attention to the importance of Article 15 of the ECHR (derogation in times of emergency), which makes it possible to take into account humanitarian law in situations where the norms of this law would probably conflict with the provisions of the Convention. According to the dissenting judges,

> […] if States have difficulties in upholding their Article 2 obligations during armed conflicts […], they have only one way out of these difficulties: to derogate from the Convention and to comply with both the Article 15 proportionality clause […] and 'the other obligations under international law', namely with international humanitarian law.[40]

Taking into account the absence of a formal derogation under Article 15 by the Russian Federation in the context of the five-day war, its

[38] *Georgia v. Russia (II) – Joint Partly Dissenting Opinion of Judges Yudkivska, Wojtyczek, and Chanturia*, para. 15.

[39] Ibid.

[40] *Georgia v. Russia (II) – Joint Partly Dissenting Opinion of Judges Yudkivska, Pinto de Albuquerque, and Chanturia*, para. 18.

Convention obligations under Article 2 are fully applicable, independently of the relevant rules of international humanitarian law. Consequently, the acts of war resulting in death constitute in principle a violation of Article 2 of the ECHR.[41] Similarly, Judges Yudkivska, Wojtyczek, and Chanturia in their joint partly dissenting opinion claim that Russia violated Article 2 during the active phase of the hostilities, regardless of whether the Court applied Article 2 alone (in the absence of a derogation under Article 15) or in the light of international humanitarian law, with its less strict standards. In both cases, in the light of the evidence gathered by the Court, the principles of IHL used to assess the legality of taking a life in armed conflict, such as the proportionality principle and the duty to take precautionary measures, were not properly respected.[42]

4. Comments

In order to comment on the judgement under discussion, it is worth summarising the decisions made regarding the key issues examined by the Court, which will also help organise the order of issues presented below. First, the Court found that Russia did not have jurisdiction under either the spatial or the personal model for the purpose of assessing the lawfulness of large-scale, distant use of force in the form of bombing and artillery shelling during the active phase of hostilities. Second, Russia did have jurisdiction under the spatial model during the occupation phase, i.e. from 12 August 2008 until the withdrawal of Russian troops several months later. Third, Russia did have jurisdiction over all persons (both civilians and prisoners of war) who were deprived of their liberty, even during the active phase of the conflict. In view of these above-mentioned considerations, the Court referred to the relationship between international humanitarian law and the ECHR. Fourth, Russia did have jurisdiction during the active phase of hostilities for the purpose of investigating potentially unlawful use of force.

At the outset, however, it should be noted that the division adopted by the Court into the "active phase of hostilities" (during which military operations were carried out) and events that occurred during the occupation

[41] Ibid., para. 25.

[42] *Georgia v. Russia (II) – Joint Partly Dissenting Opinion of Judges Yudkivska, Wojtyczek, and Chanturia*, para. 16.

phase (after the end of the active phase of hostilities), such as the detention and ill-treatment of civilians and prisoners of war, or restrictions on Freedom of Movement of displaced persons[43], is an artificial division and is not reflected either in the applicable international law or in state practice. First of all, in the light of Article 2, common to the four Geneva Conventions for the Protection of War Victims of 1949[44], the scope of the term "international armed conflict" also includes military occupation. In addition, the Court limits the conduct of military operations only to the first phase while, during belligerent occupation, military operations, although less frequent than during the active phase of hostilities, often constitute an effective way to maintain power and control over the occupied territory[45], an example of which is the occupation of Iraq by coalition forces in 2003-2011.[46] It should also be noted that the boundary between the phase of actual armed struggle and the phase of occupation is extremely blurred and it is usually difficult to determine when the fighting ends and the occupation begins. At any rate, within the framework of the belligerent occupation itself, military practice distinguishes a phase of combat or 'combat vigilance', in which administrative functions are limited to the most essential and usually performed directly by combat units, and an occupation phase, with the front moving beyond the occupied area and the military units, that remain on it, prioritise administration over combat.[47]

For the purposes of resolving the present case, the Court 'adopted' its own definition of an 'international armed conflict', which is essentially limited to armed confrontation and fighting between enemy military forces

[43] *Georgia v. Russia (II)*, para. 83.

[44] See, for example, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

[45] It is true that the occupied territory remains under hitherto State sovereignty, but the exercise of power is in fact the responsibility of the occupant, so there is no reason to question the right of the occupant to combat the organisation of an armed resistance movement by military or military-police means – it is not a war crime, as the occupant is in its rights under occupation regulations (Watkin, "Use of force during occupation: law enforcement and conduct of hostilities", 283-285).

[46] An interesting analysis of the legal aspects of the occupation of Iraq was conducted by Eyal Benvenisti in his monograph on the international law of occupation (see Benvenisti, *The International Law of Occupation*, 249-275).

[47] Bierzanek, *Wojna a prawo międzynarodowe* [War and International Law], 232. *Cf.* Benvenisti, *The International*, 55; Dinstein, *The International Law of Belligerent Occupation*, 46.

"in a context of chaos"[48]; it can also be concluded that this definition does not provide for 'hostilities' to be carried out during the occupation phase. It is therefore a *sui generis* definition, closely related to the facts of the case at hand. In fact, in the case of the five-day war, the active phase of hostilities is relatively easy to distinguish. However, many armed conflicts take place intermittently, without a formal settlement, and even a formal ceasefire does not always mean the end of actual hostilities[49], as was the case, for example, in 2014 in eastern Ukraine[50] or in 2020, after the signing of the ceasefire during the conflict over Nagorno-Karabakh.[51]

Moreover, the definition of the "active phase of hostilities" is unclear and unexplained by the Court, in spite of being a key concept for determining the scope of extraterritorial jurisdiction. In the case of the term 'hostilities', it can be assumed that the Court has adopted the understanding that exists under IHL (although this term appears frequently in humanitarian treaty law, e.g. in Additional Protocol I of 1977[52], it has not been defined in any of the conventions within the scope of this law). Following the authors of the ICRC's commentary on Additional Protocol I, it can be assumed that 'hostilities' should be understood as all "acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces."[53] This definition should be supplemented with the position presented by the Supreme Court of Israel in its ruling in *The Public Committee Against Torture in Israel et al. v. The Government of Israel et al.* of 2005, according to which the definition of hostilities should include both acts of violence directed against the army or the State, and against the civilian population of the State that is a party to the conflict.[54] However,

[48] See *Georgia v. Russia (II)*, para. 126.

[49] *Cf.* Dzehtsiarou, "International Decisions", 292.

[50] See "Ukraine ceasefire breached in Donetsk and Mariupol", *The Guardian*, 7 September 2014, accessed 14 June 2021, https://www.theguardian.com/world/2014/sep/06/eastern-ukraine-ceasefire-russia.

[51] See "Nagorno-Karabakh: both sides blame each other over ceasefire violations", *The Guardian*, 12 December 2020, accessed 14 June 2021, https://www.theguardian.com/world/2020/dec/12/armenian-officials-and-azerbaijan-accuse-of-breeching-nagorno-karabakh-peace-deal.

[52] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Protocol I), 8 June 1977, 1125 UNTS 3.

[53] Sandoz, Swinarski, Zimmermann, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, para. 1942.

[54] *The Public Committee Against Torture in Israel et al. v. The Government of Israel et al.*, Supreme Court (sitting as the High Court of Justice), HCJ 769/02, judgement of

what is the meaning of the phrase "active phase"? Does any condition regarding the level or form of armed violence have to be met to begin this phase? And what conditions should be adopted to determine when this phase ends? Admittedly, the Court mentions "military operations" carried out during active hostilities, but apart from rather enigmatic examples of "armed attacks, bombing and shelling"[55], there is no indication that the Court intended to use the term "military operations" to define the framework of the "active phase" of hostilities. So, military operations can take various forms constituted by all forms and types of manoeuvres and activities (both offensive and defensive), related to the conduct of hostilities, undertaken by armed forces, during which violence is used.[56] Thus, military operations may involve the use of various types of force, each of which involving numerous forms of exercising power and control over the territory and population, depending on the actual situation.[57]

The notes and observations presented above seem to indicate that the Court made a distinction between the active phase of hostilities and the post-ceasefire occupation phase, exclusively in order to answer the question of whether Russia exercised extraterritorial jurisdiction for the purposes of Article 1 of the ECHR. Moreover, the aforementioned division was introduced in the context of the analysis of alleged violations of Article 2 of the ECHR. The Court does not use the term "active phase of hostilities" when investigating violations of Articles 3 and 5 of the Convention, accepting that Russia exercised jurisdiction over detained persons, including persons captured during the active phase of hostilities.[58] Therefore, it seems that the "active phase of hostilities", as an exception to jurisdiction, refers only to the assessment of violations of the Right to Life in the context of an international armed conflict. This may be supported by the considerations of the Court on the application of the territorial and personal model of jurisdiction in the case of the five-day war, i.e. the period of active hostilities.

As regards the territorial/spatial model (i.e. effective control over the territory), the Court rejected this jurisdictional basis, suggesting that

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14 December 2006, para. 33. See also Kretzmer, "Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?", 192.

55 *Georgia v. Russia (II)*, para. 126.

56 Sandoz, Swinarski, Zimmermann, *Commentary*, para. 1875.

57 Duffy, "Georgia v. Russia"; Tan and Zwanenburg, "Case Note", 8.

58 See *Georgia v. Russia (II)*, paras. 248, 276. *Cf.* Milanovic, "Georgia v. Russia."

a combat zone creates a chaotic situation, and in such circumstances it is difficult to speak of effective control over this zone.[59] The Court referred to the aforementioned decision on the admissibility of the application in the case of *Banković and Others* of 2001, concerning the NATO bombing of the Radio-Television Serbia headquarters in Belgrade. The Court pointed out certain similarities between this case and *Georgia v. Russia (II)*: in both cases there is a question of jurisdiction in relations to military operations (e.g. bombing and shelling) in the context of an international armed conflict.[60] Furthermore, in both cases the Court highlighted the essentially territorial notion of jurisdiction within the meaning of Article 1 of the ECHR and indicated that the exercise of jurisdiction outside a State's territory is only an exception. There are two examples of that exception: first, jurisdiction is exercised in case of effective overall control over a territory; second, jurisdiction is exercised when a State agent exerts authority or control over individuals by holding a person and thus effectively controls that person. The case against European NATO States for the bombardment of Belgrade during the Kosovo conflict was inadmissible, for lack of control by NATO States of Belgrade.[61] Besides, in the *Banković* case the Court emphasised that the ECHR is a multi-lateral treaty operating in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States, and the then Federal Republic of Yugoslavia clearly did not fall within this legal space.[62] However, in the case of *Georgia v. Russia (II)*, both of the States were parties to the Convention[63], therefore the Court – pointing out that its case-law on the concept of extra-territorial jurisdiction had developed since the *Banković* case – adopted the 'effective control' test as a determinant of exercising jurisdiction. If, on the other hand, the States-parties to the conflict are only struggling to gain control over a given territory, in reality neither party exercises effective control over that territory, *ergo*, the warring States cannot exercise their jurisdiction.[64]

[59] *Georgia v. Russia (II)*, para. 126.

[60] *Georgia v. Russia (II)*, para. 113.

[61] Duffy, "Georgia v. Russia"; Frederik Naert, "Human Rights and (Armed) Conflict", in *Armed Conflicts and the Law*, eds. Jan Wouters, Philip De Man and Nele Verlinden (Cambridge: Intersentia, 2016), 198.

[62] *Banković and Others v. Belgium*, para. 80.

[63] A detailed analysis of this issue – see *Georgia v. Russia (II) – Partly Dissenting Opinion of Judge Grozev*.

[64] *Georgia v. Russia (II)*, para. 138.

However, as Marko Milanovic rightly points out, in the Court's reasoning, the essence of the problem lies in its categorical nature. Indeed, control over the territory involved in hostilities is very fluid, especially when it comes to a very short time and a relatively small area, as in the case in question. In principle, however, it is perfectly possible for an invading army to gradually establish relatively stable control over enemy territory as it moves through it, even though hostilities are still ongoing on the outskirts of that territory.[65] Military operations are characterised by a certain dynamism, and control over a given area may change hands many times in a single day. However, it is always possible to establish at least partial, limited control by one of the parties to the conflict over a given area, although it should be emphasised that it is much easier to establish such control with military units in place (the situation of 'boots on the ground'), and it is difficult to talk about exercising spatial jurisdiction in the case of carrying out extraterritorial air bombings.[66]

This conclusion therefore leads us to analyse the position of the Court regarding the second exception, i.e. jurisdiction based on "State agent authority and control over individuals".[67] The Court recalled its earlier cases in which it applied this model of jurisdiction, *inter alia*, *Al-Skeini and Others* of 2011 and *Hassan v. UK* of 2014, in which the ECtHR stated that:

> [...] in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction. This principle has been applied where an individual is taken into the custody of State agents abroad.[68]

Moreover, the Court also applied the above approach in cases involving the use of kinetic force, namely, death of individuals shot by British soldiers (again, *Al-Skeini and Others*[69]) and the shooting of a person while crossing a

[65] Milanovic, "Georgia v. Russia."

[66] *Cf.* Steiger, "(Not) Investigating Kunduz and (Not) Judging in Strasbourg? Extraterritoriality, Attribution and the Duty to Investigate", accessed 7 June 2021, https://www.ejiltalk.org/not-investigating-kunduz-and-not-judging-in-strasbourg-extraterritoriality-attribution-and-the-duty-to-investigate.

[67] See *Georgia v. Russia (II)*, para. 127.

[68] *Al-Skeini and Others v. the United Kingdom*, para. 136; *Hassan v. the United Kingdom*, No. 29750/09, judgement of 16 September 2014, para. 74.

[69] *Al-Skeini and Others v. the United Kingdom*, para. 149.

checkpoint controlled by Dutch forces (*Jaloud v. the Netherlands* of 2014[70]). Generally, in similar cases brought before the ECtHR, the Court, while deciding on the question of extraterritorial jurisdiction, examined whether the respondent State exercised (a) control over part of a territory, or over individuals, on account of extraterritorial military operations carried out by the armed forces (e.g. in *Issa and Others v. Turkey*[71]), or (b) control over individuals on account of incursions and targeting of specific persons by the armed forces/police (e.g. in *Mansur Pad and Others v. Turkey*[72]). Importantly, this jurisdictional nexus between the individuals affected and the State has been relied upon in many various situations, including armed conflicts. Therefore, it may be somewhat surprising that, in the case of *Georgia v. Russia (II)*, the Court departed from this broad concept of extraterritorial jurisdiction, considering that active military actions in the analysed case did not meet the criteria of "State agent authority and control" over individuals.[73] According to the ECtHR, in previous cases it has applied the concept of "State agent authority and control" to scenarios going beyond physical power and control exercised in the context of arrest or detention, however, those cases concerned "isolated and specific acts involving an element of proximity".[74] It seems that, in the Court's view, the mere use of kinetic force, such as extraterritorial assassinations or drone strikes, is sufficient to create a jurisdictional link and is somehow more deserving of protection than a massive, systematic use of lethal force, like "bombing and artillery shelling".[75]

It is difficult to agree with this view, especially since large-scale military operations, most often with the use of heavy equipment and weapons, prevail in international armed conflicts. In such operations, human rights protection should gain an even greater priority.[76] It is also difficult to accept the 'element of proximity' used by the Court: why is a situation of close combat, e.g. with pistols, rifles, or knives or bayonets, more worthy of protection than, say, mortar fire or aerial bombardment? As

[70] *Jaloud v. the Netherlands*, No. 47708/08, judgement of 20 November 2014, para. 152.

[71] See *Issa and Others v. Turkey*, para. 71 *et seq*.

[72] See *Mansur Pad and Others v. Turkey*, No. 60167/00, admissibility decision of 28 June 2007, para. 54.

[73] *Georgia v. Russia (II)*, paras. 130-133.

[74] *Georgia v. Russia (II)*, para. 132.

[75] Milanovic, "Georgia v. Russia."

[76] *Cf.* Tan and Zwanenburg, "Case Note", 7.

Judges Yudkivska, Wojtyczek, and Chanturia aptly noted in their separate opinion:

> […] [w]e do not see why proximity should be relevant. In any event, we note that the criterion of proximity is fulfilled in the instant case, the military operations having been carried out close to an area under the effective control of the respondent State. More importantly, if jurisdiction has been established in respect of 'isolated and specific acts', it is obvious that the respondent State exercises jurisdiction within the meaning of Article 1 when it undertakes a large-scale operation involving innumerable acts with far-reaching consequences (*argumentum a fortiori*).[77]

In conclusion of its considerations on jurisdictional issues, the Court assumed that "it is not in a position to develop its case-law beyond the understanding of the notion *jurisdiction* as established to date" due to, in particular, "the large number of alleged victims and contested incidents", "the magnitude of the evidence produced" and "the difficulty in establishing the relevant circumstances".[78] Such an explanation seems to correspond to the "context of chaos" which, in the opinion of the ECtHR, is to accompany the conduct of hostilities in international armed conflicts since no one controls the active phase of hostilities, the "number of victims" may be significant, "incidents" unverified, and the "circumstances" difficult to determine.

However, military operations conducted by modern armies are carefully planned and always preceded by the collection of intelligence data, and modern military technology allows to minimise all manifestations of the 'fog of war', unclear combat situations, including amongst others ignorance of the party to the conflict as to the number and distribution of the enemy's forces and resources, as well as its intentions. It is true that the conduct of hostilities is dynamic and belligerents do not have control over all aspects of the battlefield. However, States carrying out military operations must comply with the principles and standards of international humanitarian law relating to the conduct of hostilities, including the principles of distinction and proportionality, and the obligation to exercise precautionary measures in both attack and defence. Humanitarian law therefore obliges armed forces to avoid casualties among

[77] *Georgia v. Russia (II) – Joint Partly Dissenting Opinion of Judges Yudkivska, Wojtyczek, and Chanturia*, para. 9.

[78] *Georgia v. Russia (II)*, para. 141.

the civilian population as early as at the level of preparation of operations, and then to adequately respond to changing circumstances during an engagement. In other words, "[i]nternational humanitarian law requires informed military decisions based upon intelligence and careful planning, including planning in respect of collateral damage and possible civilian casualties."[79] In this type of situation, gathering evidence, for example, concerning alleged attacks in which civilians have suffered, should not be so difficult for the Court that it cannot cope with collecting it, even if gathering evidence is tedious and lengthy and the Court's resources are limited. The Court has already dealt with more complicated cases, giving rise to much greater difficulties of evidence.[80] The case of the five-day war has been relatively well-documented, which the Court confirmed, as it were, by examining the facts of the case.[81] So, if the complexity of a case, including "the large number of alleged victims and contested incidents", "the magnitude of the evidence produced" and "the difficulty in establishing the relevant circumstances", may be an obstacle for the Court in assessing the question of jurisdiction in an armed conflict, what settlements should be expected in cases concerning human rights violations in eastern Ukraine and Nagorno-Karabakh?

In the paragraph summarising jurisdictional issues during the active phase of hostilities, the Court indicated that, in this phase, international humanitarian law (law of armed conflict) is predominantly and particularly applicable.[82] However, this is not an obstacle in terms of the application of the ECHR, although in such a situation it would be necessary to establish the relationship between the Convention and humanitarian law. The Court rejected Russia's position according to which its obligations were defined and governed exclusively by IHL and took as a starting point the co-application of IHL and the ECHR. The Court, citing the case-law of the

[79] *Georgia v. Russia (II) – Joint Partly Dissenting Opinion of Judges Yudkivska, Wojtyczek, and Chanturia*, para. 11. According to the IIFFMCG, 'Russian military operations in Georgia in August 2008 appear to most analysts to have been well-planned and well-executed.' (IIFFMCG, *Report*, vol. II, 217).

[80] Duffy, "Georgia v. Russia"; Dzehtsiarou, "International Decisions", 293; Risini. "Human Rights."

[81] See e.g.: *Georgia v. Russia (II)*, paras. 32-33, 63-74, 180-188. See also *Georgia v. Russia (II) – Partly Dissenting Opinion of Judge Chanturia*, paras. 20-28.

[82] *Georgia v. Russia (II)*, para. 141.

International Court of Justice[83], and also its own judgements[84], highlighted that "the Convention must be interpreted in harmony with other rules of international law of which it forms part" and "[t]his applies no less to international humanitarian law".[85] Taking into account this approach, the Court examined the interrelation between the two legal regimes with regard to each aspect of the case and each Convention article alleged to have been breached. In doing so, the ECtHR inquired each time whether there was a conflict between the provisions of the Convention and the rules of IHL.[86] It found that there were no such conflicts in the case in question.

The Court's approach to the relationship between IHL and the ECHR (or, more broadly, international human rights law, IHRL), seems justified. In order to settle a conflict between humanitarian law and human rights law, a 'relationship rule' applies, i.e. the rule *lex specialis derogat legi generali*. Basically, in the light of this rule, IHL, as a law designed to be applied in an armed conflict, contains norms of a specific nature which should always take precedence over (any) norms of a general nature. However, it is doubtful whether IHRL as a whole is the general law and IHL as a whole is the special law. Rather, it might be argued that both are special legal regimes compared to general international law, in which case the *lex specialis* rule can only be applied on a case-by-case basis in respect of specific norms.[87] Therefore, taking into account the coexistence and complementarity of IHL and IHRL in armed conflicts, one should rather talk about the primacy of a specific norm over other norms in a specific situation. There is no doubt that, if a particular provision or part of it (e.g. paragraph, section) has been specifically designed to regulate a given issue, its application should be

[83] See: *Legality of the Threat or Use of Nuclear Weapons*, ICJ Advisory Opinion of 8 July 1996, ICJ Reports 1996, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion of 9 July 2004, ICJ Reports 2004, para. 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Ruanda)*, Merits, ICJ judgement of 3 February 2006, ICJ Reports 2006, para. 216.

[84] See *Hassan v. UK*, para. 102; *Varnava and Others v. Turkey*, Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, judgement of 18 September 2009, para. 185.

[85] *Georgia v. Russia (II)*, para. 94.

[86] Ibid., para. 95.

[87] Naert, "Human Rights," 207. See also Krieger, "A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study", p. 5-6, accessed 14 June 2021, https://www.jura.fu-berlin.de/fachbereich/einrichtungen/oeffentliches-recht/lehrende/kriegerh/dokumente/berliner_online_beitraege_krieger.pdf

considered and, if necessary, given priority. Humanitarian law is therefore not a 'special law' in the sense that it completely excludes the application of the IHRL; a specific IHL rule can be considered as *lex specialis* against a specific norm in the field of human rights protection.[88] In other words, in the case of conflict between IHL and IHRL, one should apply the one that is most appropriate to the situation or that is specifically designed to apply to the situation and/or that provides the most detailed regulation of what is allowed and what is prohibited.[89] In some cases, the IHL will contain detailed regulations and their interpretation, while in others it will be IHRL. One simply needs to determine which of these areas of law are more detailed and adapted to given circumstances.

It should be noted, however, that the application of the above methodology in the present case concerns only selected activities that would, if proven, clearly constitute violations of both IHL and IHRL, such as torture and ill-treatment of detained civilians and prisoners of war, killing civilians, or destruction and looting of private property. For instance, the Court pays great attention to the conflict between Article 5 of the ECHR and IHL rules on detention. According to its judgement in the *Hassan v. UK*, the Court ruled that, in an international armed conflict, IHL provisions on detention can be invoked to interpret and to displace (at least in part) ECHR provisions, even in the absence of a derogation.[90] However, in the case at hand, there was no need to align IHL standards with Article 5 of the Convention by way of their interpretation.[91] The Court rightly stated that, by justifying the arrest and detention of Georgian citizens with the need to ensure the safety of civilians, and not with its own "imperative reasons of security", Russia violated both Article 5 ECHR and IHL, because both the Convention and IHL prohibit the deprivations of liberty under such circumstances.[92]

In the case of the mutual relations between the other articles of the Convention and the IHL, the Court devoted only a few sentences to them, but, importantly, it did not address one of the most anticipated decisions

[88] *Cf.* Mujezinović Larsen, "A 'principle of humanity' or a 'principle of human-rightism'?", 129.

[89] Gill, "Some Thoughts on the Relationship Between International Humanitarian Law and International Human Rights Law: A Plea for Mutual Respect and a Common-Sense Approach", 256.

[90] See *Hassan v. the United Kingdom*, paras. 103-107.

[91] *Cf.* Tan and Zwanenburg, "Case Note", 15.

[92] *Georgia v. Russia (II)*, para. 237.

at all: namely, the relationship between the Right to Life (Article 2 of the ECHR) and the norms of humanitarian law, governing the conduct of hostilities. The Court simply concluded that "the very detailed rules of international humanitarian law" prevail over Article 2.[93] It is true that in the case of the assessment of the lawfulness of kinetic uses of force during international armed conflict, the IHL's principle of distinction takes precedence over the provisions of the ECHR. Thus, it is lawful to attack individuals who are members of the opposing State armed forces, i.e. they are combatants. However, it is worth referring to the comment of the third-party intervener in *Georgia v. Russia (II)*, namely, the Human Rights Centre of the University of Essex, according to which there will be a violation of the ECHR in the case of deaths and injuries resulting from acts of violence between the armed forces of two States where there has been a violation of the relevant rules of IHL.[94] Therefore, if the discussed case involved alleged death of civilians as a result of hostilities, a violation of Article 2 of the Convention was perpetrated. It should also be noted that IHL not only prohibits attacks against civilians but also requires that, in targeting combatants or military objectives, the State take account of the risk to civilians and civilian property, in accordance with the principle of proportionality. Furthermore, in carrying out an attack, a State is required to take precautions in its attack with a view to minimising civilian casualties.[95]

Interestingly, in some of the previously adjudicated cases, the Court did not hesitate to refer to the existing regulations of IHL. For example, in *Ergi v. Turkey*, the Court judged that a State had to "take all feasible precautions in the choice of means and methods of a security operation […] with a view to avoiding and, in any event, to minimising, incidental loss of civilian life."[96] This is an explicit reference to the precautionary measures laid down in the 1977 Additional Protocol I to the Geneva Conventions on the protection of victims of international armed conflicts.[97] This approach

[93] *Georgia v. Russia (II)*, para. 143.

[94] Francoise Hampson and Noam Lubell, *Amicus Curiae Brief, Georgia v. Russia (II), 38263/08* (University of Essex: Human Rights Centre, 2014), para. 26.

[95] Ibid., para. 27.

[96] *Ergi v. Turkey*, No. 23818/94, judgement of 28 July 1998, para. 79.

[97] According to Article 57(2)(a)(ii) of Additional Protocol I, those who plan or decide upon an attack shall 'take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects'.

was seen by most commentators as a *de facto* application of IHL.[98] It is a pity, therefore, that in the case of *Georgia v. Russia (II)*, the Court declined to adopt a clear and unequivocal position on the relationship between Article 2 of the ECHR and IHL. The Court, accepting that Russia did not exercise jurisdiction during the "active phase of hostilities", concluded that it did not need to comment on this issue. However, this issue is not a jurisdictional aspect, but an issue of responsibility for violations and such considerations can and should be conducted at the merits stage of the case.[99]

The "phase of occupation" caused the Court much fewer controversies than the "active phase of hostilities", because in the Court's opinion Russian authorities exercised "effective control" over South Ossetia, Abkhazia and the 'buffer zone' after the active part of hostilities (i.e. between 12 August and 10 October 2008). The Court reached this conclusion based on an analysis of the IIFFMCG reports, as well as on other reports submitted by NGOs (i.e. Human Rights Watch and Amnesty International), official statements of the Russian authorities and various treaties concluded between the Russian Federation and Abkhazia and South Ossetia. Moreover, referring to its findings in previous rulings, the Court decided that, in the light of Article 1 of the ECHR, Russia exercised "effective control over an area outside its own territory"[100], and in determining this control, the Court took into account the strong Russian military presence in the regions in question and economic, military and political support from the Russian Federation for the local subordinate administration. However, the separation of the "occupation phase" required the Court to indicate the relationship that exists between the abovementioned "effective control over an area" under Article 1 of the ECHR and the "effective occupation" under IHL. In the Court's view:

[…] the concept of "occupation" for the purposes of international humanitarian law includes a requirement of "effective control". If there is "occupation" for the purposes of international humanitarian law there will also be "effective control" within the meaning of the Court's case law, although the term "effective control" is broader and covers situations that do not necessarily amount to a situation of "occupation" for the purposes of international humanitarian law.[101]

98 Naert, "Human Rights", 210.
99 *Cf.* Duffy, "Georgia v. Russia"; Milanovic, "Georgia v. Russia."
100 *Georgia v. Russia (II)*, para. 164.
101 Ibid., para. 196.

As one of the commentators rightly points out, "[i]t's debatable whether this approach is the right one – it is likely overly simplistic, even if it is correct in its essence"[102], because in the light of the factual findings, Russia did in fact control the territory of Abkhazia, South Ossetia and the 'buffer zone'. The above statement of the Court would suggest, however, that if we are dealing with a situation of occupation within the meaning of the IHL, it automatically means "effective control over the area" within the meaning of Article 1 of the Convention. Indeed, occupation by definition entails effective control over territory; it is defined as "territory actually placed under the authority of the hostile army" and extends only to "the territory where such authority has been established and can be exercised".[103] Thus, in the Court's opinion, if a State has the status of an occupying power, it automatically gains territorial jurisdiction under the ECHR, but – importantly – the lack of such status does not exclude the existence of territorial jurisdiction within the meaning of Article 1 of the Convention.[104] This is a rather surprising conclusion, considering that in *Jaloud v. the Netherlands*, the Court clearly stated that for the purposes of establishing jurisdiction under the Convention, "the status of 'occupying power' within the meaning of Article 42 of the Hague Regulations, or lack of it, is not *per se* determinative".[105] Perhaps, then, we are dealing with a new approach by the Court in determining territorial jurisdiction in territories recognised by the Court as occupied?

Having established that Russia had effective control of Abkhazia, South Ossetia and the 'buffer zone', the Court was able to address the human rights violations attributed to the Russian authorities. The Court identified systemic violations of the Convention by Russia, including violations of the Right to Life, the Prohibition of Inhuman and Degrading Treatment, the Prohibition of Arbitrary Detention, the Right to Property, the Right to Family Life and the Freedom of Movement. Indeed, the situation of the occupation creates an obligation on the part of the occupying power to respect human rights. As the Court stated in the case of *Al-Skeini and Others v. UK*, if the territory of one ECHR State-party is occupied by the armed

[102] Milanovic, "Georgia v. Russia."

[103] See Article 42 of the *Hague Regulations Concerning the Laws and Customs of War on Land*, annexed to the *Hague Convention (IV) Respecting the Laws and Customs of War on Land*, 18 October 1907, https://ihl-databases.icrc.org/ihl/INTRO/195, accessed 14 June 2021.

[104] *Cf.* Tan and Zwanenburg, "Case Note", 11.

[105] *Jaloud v. the Netherlands*, para. 142.

forces of another State-party, "the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory".[106] However, it is not clear on what basis the Court ascribes to Russia, for example, acts of violence committed by Ossetian armed groups against ethnic Georgians. The Court only explains that, as it exercises "effective control" over the above-mentioned territories, Russia is responsible for the actions of the armed groups in these territories and it is not necessary to provide proof of "detailed control" of each of those actions.[107] It should be noted, however, that "control over territory" relates to the question of jurisdiction and concerns individuals (i.e., in the case of human rights violations, their victims), while "control over non-State actors" relates to the question of attribution for the purposes of State responsibility.[108] Thus, in order to assign to Russia the responsibility for violations of the Convention by separatist armed groups, the Court could, for example, refer to the responsibility rules contained in the Articles on State Responsibility adopted by the International Law Commission in 2001.[109] The Court's failure to carry out any attribution test may therefore raise some interpretation doubts; it is not entirely clear whether Russia "is being held responsible for violating (by action) a negative duty to respect human rights, or for violating (by omission) a positive duty to prevent third parties from violating human rights within an area under its jurisdiction".[110]

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[106] *Al-Skeini and Others v. the United Kingdom*, para. 142.

[107] See *Georgia v. Russia (II)*, paras. 214, 248 and 276. It should be noticed, however, that "[e]ffective control needed for triggering the law of occupation should not be confused with the effective control test in the context of State Responsibility as developed by the *Nicaragua* case." (Cuyckens, "The Law of Occupation", 419, footnote 7).

[108] As Marko Milanovic rightly observed, "[t]he focus of the control tests under Article 1 [of the ECHR], which superficially resembles the language of control tests for attribution purposes, is on control over the victim of the human rights violation or the place where they are located, *not* on control over the actor that committed the violation. Thus, conduct violating human rights can occur within a State's jurisdiction but not be attributable to it (for example, homicide or torture by private persons within the State's territory), or be clearly attributable to the State while not manifestly being within its jurisdiction (for example, an overseas drone strike by the State's armed forces.' (Milanovic, "Special Rules of Attribution of Conduct in International Law", 345).

[109] See International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, accessed 14 June 2021, https://www.refworld.org/docid/3ddb8f804.html

[110] Milanovic, "Georgia v. Russia."

As regards the procedural obligation under Article 2 of the ECHR to investigate potentially unlawful uses of lethal force, the Court found Russia in violation of this Article for the lack of an effective investigation into the deaths of the many victims during and in the aftermath of the hostilities. In the light of the ECtHR jurisprudence, States are obliged to conduct an appropriate and effective investigation procedure each time an individual is murdered as a result of an operation by State agents, and also when there is a suspicion of a violation of the Right to Life.[111] Importantly, the obligation to investigate allegations of violations of the Right to Life also occurs in a situation of an ongoing armed conflict. When a death to be investigated under Article 2 of the ECHR occurs in circumstances of widespread violence, armed conflict or insurrection, although investigators may encounter obstacles and practical limitations may force them to use less effective measures or cause delays in undertaken activities, the obligation to protect life still requires that, even in such difficult circumstances, all reasonable steps need to be taken in order to ensure an effective and independent investigation.[112] In brief, this investigation must be capable to determine whether the use of force was justified or not in the specific circumstances of the case.[113]

Regarding *Georgia v. Russia (II)*, the Court found that both the ECHR and the IHL obligated Russia to carry out the above-mentioned investigation. In the case of humanitarian law, this results from the treaty and customary provisions of this law concerning the prosecution and punishment of war crimes. Thus, in the Court's opinion, "there is no conflict between the applicable standards in this regard under Article 2 of the Convention and the relevant provisions of international humanitarian law"[114], although the Court noticed that "the obligation to carry out an effective investigation under Article 2 of the Convention is broader than the corresponding obligation in international humanitarian law".[115] However, this is a rather simplified and concise assessment of a more complex interplay that exists between the obligation to investigate under the Convention and under the IHL. First of all, the conditions for the occurrence of this

[111] See e.g.: *McCann and Others v. the United Kingdom*, No. 18984/91, judgement of 27 September 1995, para. 161; *Al-Skeini and Others v. the United Kingdom*, paras. 166-167; *Jaloud v. the Netherlands*, para. 186.

[112] *Al-Skeini and Others v. the United Kingdom*, para. 164.

[113] Steiger, "(Not) Investigating Kunduz."

[114] *Georgia v. Russia (II)*, para. 325.

[115] Ibid.

obligation and the 'degree of diligence' in its implementation are different. This varying degree of diligence depends on the risk that exists in a given situation. There are also differences in the conduct of State organs and the applicable procedures. This concerns the requirement to conduct a formal investigation in cases where use of force has resulted in fatalities. According to ECHR standards, such an investigation is an undisputed obligation, while under the IHL one may feel exempt from this obligation, unless there is a suspicion of having committed war crimes (or other international crimes), or excessive 'collateral damage' among the civilian population.[116]

The IHL standards therefore impose an obligation to conduct an investigation in the event of a serious breach of this law. This means that humanitarian law requires investigation only in certain instances where force was used, for example, if there is a suspicion that civilians have been intentionally targeted by an attack. However, the death of people such as combatants or civilians directly participating in hostilities – i.e. legitimate targets of attack under the IHL – does not trigger an obligation to conduct an investigation. Likewise, it is not required where the accidental loss of life by a civilian in the course of hostilities does not constitute a breach of the IHL – that is, appropriate precautions have been taken and there has been no breach of the principle of proportionality. Humanitarian law therefore takes into account the fact that some actions causing death are unavoidable in the course of hostilities. The so-called combatant privilege that protects combatants of a State-party to a conflict from criminal proceedings for lawful acts of war, also needs to be taken into consideration. Thus, if the Convention requires an official and effective investigation of any use of force by a government official, then, due to the 'combatant privilege', a conflict may arise between the Convention and the IHL norms. In the present case, however, such a conflict did not arise, because Georgia accused Russia of failing to investigate violations of the IHL, not against the use of force in accordance with humanitarian law, and therefore the Court did not consider this issue.[117]

[116] Fleck, "International Humanitarian Law a Decade after September 11: Developments and Perspectives", 355. More on the issues related to investigative obligations under IHL – see *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice* (Geneva: International Committee of the Red Cross/Geneva Academy of International Humanitarian Law and Human Rights, 2019).

[117] *Cf.* Tan and Zwanenburg, "Case Note", 16.

5. Conclusions

Taking into account the arguments and considerations presented in this comment, it is actually difficult to unequivocally assess the analysed ECtHR judgement. On one hand, the Court points to Russia's responsibility for systematic violations of human rights, and on the other, it makes an incomprehensible compromise, dividing the Georgian-Russian armed conflict into two phases and excluding Russia's jurisdiction in one of these phases, avoiding difficult topics related, among other things, to violations of the Right to Life in hostilities and introduces confusion in the interpretation of the concept of extraterritorial jurisdiction. It seems that most of the judges wanted a balanced, truly 'Solomonic' sentence, which was to offer a partial victory to both sides, while relieving the need to assess complex issues related to the active phase of hostilities.[118] Worse, the Court has not even attempted to define what it meant by the "active phase of hostilities". Admittedly, the time limits of this phase are relatively easy to determine in case of the five-day war, but what about more complex conflicts, in which the temporal framework of hostilities is blurred, and armed clashes take place despite concluded ceasefire agreements? What is more, does this notion refer only to armed conflicts of an international nature, or does it also cover more frequent non-international armed conflicts or military confrontations below the threshold of war, in which the use of lethal force takes place?[119] Should the Convention not apply in all those cases, the results of some cases pending before the Court, such as those concerning eastern Ukraine or Nagorno-Karabakh (but also future potential cases related to armed conflicts), would become completely unpredictable.[120]

The commented judgement also appears to be a step back in areas where human rights and their protection have evolved in recent years, in particular as regards jurisdictional issues, including the exercise of extraterritorial jurisdiction.[121] The change of heart by the Court towards the *Banković* case may be surprising in this matter since it has already developed some interpretative guidelines and solutions in more recent judgements, e.g. in the case of *Al-Skeini*. The assertion that the "context

[118] Dzehtsiarou, "International Decisions", 291.

[119] *Cf.* Dzehtsiarou, "The Judgement of Solomon"; Milanovic, "Georgia v. Russia"; Tan and Zwanenburg, "Case Note", 9.

[120] Dzehtsiarou, "The Judgement of Solomon"; Tan and Zwanenburg, "Case Note", 19.

[121] Duffy, "Georgia v. Russia."

of chaos" during the "active phase of hostilities" in an international armed conflict makes it impossible to exercise "effective control" – and therefore jurisdiction – seems inconsistent with previous jurisprudence of the ECtHR and – moreover – deviates from international jurisprudence in this respect.[122] Even the exercise of limited jurisdiction triggers the applicability of those human rights affected by it, including potentially in combat situations and other cases of the exercise of limited authority.[123] The Court's approach presented in the commented case may limit the application of the ECHR and the Court's ability to exercise its powers in relation to armed conflict, where the protection of individuals and access to justice are often almost unattainable. This restrictive approach by the Court to jurisdiction in armed conflict can hinder victims of violations on their only path to justice.[124] This approach is certainly not improved by the fact that the Court is not prepared to investigate massive human rights violations because they are too complex and difficult to investigate. As a result, as noted by one of the commentators, the ruling under discussion "creates a very questionable incentive for states to engage in open massive wars rather than conduct isolated and specific military acts.[125]"

Fortunately, the verdict of the ECtHR in the case of *Georgia v. Russia (II)* also brought about some progressive solutions. These include the methodology used to assess the interplay between the ECHR and the IHL. From the perspective of international law, it should be considered right that in the event of a conflict between these legal regimes priority should be given to a specific norm over other norms, taking into account the situational context and the circumstances that have arisen. It is a pity that the Court did not propose how to resolve the normative conflict between the Right to Life in the light of the ECHR and the use of lethal force against the legitimate targets within the meaning of the IHL.[126] It is also appropriate to confirm the obligation to conduct an investigation if there is a suspicion of a violation of the Right to Life, also during the "active phase of hostilities". Such an obligation arises even in the case of incidents outside the jurisdiction of a given State, provided there are "special features" in a given case allowing the establishment of a "jurisdictional

[122] Tan and Zwanenburg, "Case Note", 19.
[123] Naert, "Human Rights", 203.
[124] Duffy, "Georgia v. Russia."
[125] Dzehtsiarou, "The Judgement of Solomon."
[126] *Cf.* Tan and Zwanenburg, "Case Note", 19-20.

link" with that State.[127] Ultimately, however, this ruling creates more confusion than order, leaving many issues unclear or inconsistent with previous judgements. Fortunately, separate opinions shed more light on some of the issues analysed by the Court. It is currently difficult to assess whether the controversial solutions adopted in the discussed case are just a temporary departure from general international trends in the protection of human rights, or whether they constitute the beginning of a new line of jurisprudence. The Court is awaiting further cases concerning violations of human rights in situations of an armed conflict, and decisions in these cases may result in an answer.

Bibliography

1. Asmus, Ronald D. *A Little War That Shook the World: Georgia, Russia, and the Future of the West*. New York: St. Martin's Press, 2010.
2. Benvenisti, Eyal. *The International Law of Occupation* (2nd edition). Oxford: Oxford University Press, 2012.
3. Bierzanek, Remigiusz. *Wojna a prawo międzynarodowe* [War and International Law]. Warsaw: Wydawnictwo MON, 1982.
4. Cuyckens, Hanne. "The Law of Occupation." In *Armed Conflicts and the Law*, edited by Jan Wouters, Philip De Man and Nele Verlinden, 417-44. Cambridge: Intersentia, 2016.
5. Dinstein, Yoram. *The International Law of Belligerent Occupation* (2nd edition). Cambridge: Cambridge University Press, 2019.
6. Duffy, Helen. "Georgia v. Russia: Jurisdiction, Chaos and Conflict at the European Court of Human Rights". *Just Security*, 2 February 2021. Accessed June 7, 2021. https://www.justsecurity.org/74465/georgia-v-russia-jurisdiction-chaos-and-conflict-at-the-european-court-of-human-rights/.
7. Dzehtsiarou, Kanstantsin. "International Decisions: Georgia v. Russia (II), Merits. App. No. 38263/08. European Court of Human Rights (Grand Chamber), January 21, 2021." *American Journal of International Law* 115, No. 2 (2021): 288-94.
8. Dzehtsiarou, Kanstantsin. "The Judgement of Solomon that went wrong: Georgia v. Russia (II) by the European Court of Human Rights." *Völkerrechtsblog*, 26 January 2021. Accessed June 7, 2021. https://voelkerrechtsblog.org/the-judgement-of-solomon-that-went-wrong-georgia-v-russia-ii-by-the-european-court-of-human-rights/.

[127] Ibid., 18.

9. Fleck, Dieter. "International Humanitarian Law a Decade after September 11: Developments and Perspectives." *Yearbook of International Humanitarian Law* 14 (2011): 34-60.
10. Gill, Terry D. "Some Thoughts on the Relationship Between International Humanitarian Law and International Human Rights Law: A Plea for Mutual Respect and a Common-Sense Approach." *Yearbook of International Humanitarian Law* 16 (2013): 251-66.
11. Hampson, Francoise, and Lubell, Noam. *Amicus Curiae Brief, Georgia v. Russia (II), 38263/08*. University of Essex: Human Rights Centre, 2014.
12. Kretzmer, David. "Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?" *European Journal of International Law* 16, No. 2 (2005): 171-212.
13. Krieger, Heike. "A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study." *Berliner Online-Beiträge zum Völker- und Verfassungsrecht*, No. 3, 13 November 2007. Accessed June 14, 2021. https://www.jura.fu-berlin.de/fachbereich/einrichtungen/oeffentliches-recht/lehrende/kriegerh/dokumente/berliner_online_beitraege_krieger.pdf.
14. Mallory, Conall. "A Second Coming of Extraterritorial Jurisdiction at the European Court of Human Rights?" *Questions of International Law: Zoom-in* 82 (2021): 31-51.
15. Milanovic, Marko. "Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos." *EJIL: Talk!*, 25 January 2021. Accessed June 7, 2021. https://www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/.
16. Milanovic, Marko. "Special Rules of Attribution of Conduct in International Law." *International Law Studies* 96 (2020): 295-393.
17. Mujezinović Larsen, Kjetil. "A 'Principle of Humanity' or a 'Principle of Human-Rightism'?" In *Searching for a "Principle of Humanity" in International Humanitarian Law*, edited by Kjetil Mujezinović Larsen, Camilla Guldahl Cooper and Gro Nystuen, 124-48. Cambridge: Cambridge University Press, 2013.
18. Naert, Frederik. "Human Rights and (Armed) Conflict." In *Armed Conflicts and the Law*, edited by Jan Wouters, Philip De Man and Nele Verlinden, 187-218. Cambridge: Intersentia, 2016.
19. Risini, Isabella. "Human Rights in the Line of Fire: Georgia v Russia (II) before the European Court of Human Rights." *Verfassungsblog*, 28 January 2021. Accessed June 7, 2021. https://verfassungsblog.de/human-rights-in-the-line-of-fire/.
20. Sandoz, Yves, Swinarski, Christophe, and Zimmermann, Bruno, eds. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva*

Conventions of 12 August 1949. Geneva: International Committee of the Red Cross, 1987.

21. Steiger, Dominik. "(Not) Investigating Kunduz and (Not) Judging in Strasbourg? Extraterritoriality, Attribution and the Duty to Investigate." *EJIL: Talk!*, 25 February 2020. Accessed June 7, 2021. https://www.ejiltalk.org/not-investigating-kunduz-and-not-judging-in-strasbourg-extraterritoriality-attribution-and-the-duty-to-investigate/.
22. Tan, Floris, and Zwanenburg, Marten. "Case Note: One Step Forward, Two Steps Back? Georgia v Russia (II), European Court of Human Rights, Appl No 38263/08." *Melbourne Journal of International Law* 22, No. 1 (2021): 1-20 (forthcoming).
23. Watkin, Kenneth. "Use of Force during Occupation: Law Enforcement and Conduct of Hostilities." *International Review of the Red Cross* 94, No. 885 (2012): 267-315.