CASE NOTE

ONE STEP FORWARD, TWO STEPS BACK? *GEORGIA V RUSSIA (II)*, EUROPEAN COURT OF HUMAN RIGHTS, APPL NO 38263/08

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CONTENTS

I INTRODUCTION

The European Court of Human Rights' ('Court') Grand Chamber judgment in the interstate case *Georgia v Russia (II)*[1] was keenly awaited by many. Against the background of the brief armed conflict between Georgia and Russia in 2008, it was expected that the Court would provide clarity with respect to a number of highly contested issues in legal practice and scholarship. Such issues pertain to the applicability of human rights — the *European Convention on Human Rights* ('*ECHR*') in particular, during international armed conflict ('IAC') — the extraterritorial application of the Convention during such conflicts and how the right to life must be interpreted in the context of the conduct of hostilities and in relation to international humanitarian law ('IHL'). These issues are hotly debated in international law and in the context of other human rights regimes, which further raised the question of whether the Court would follow in the footsteps of the UN Human Rights Committee and the Inter-American Court of Human Rights or whether it would take a different approach. From a more practical perspective, the numerous individual victims of the conflict who

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1 *Georgia v Russia (II)* (European Court of Human Rights, Grand Chamber, Application No 38263/08, 21 January 2021).

brought their case to the Strasbourg Court may now finally expect their cases to be decided — now that the Grand Chamber has handed down its judgment in the interstate case.

The judgment indeed presents a new landmark in the Court's case law with respect to the extraterritorial applicability of the Convention and with respect to the interplay of the Convention with IHL. It is of further importance to states' procedural obligation to investigate violations of the Convention, which, as is explored below, takes on a particularly prominent role. Yet, the judgment is controversial in many respects, and whether it succeeds in bringing clarity, and whether it does so in a convincing manner, remains to be seen.

Below, the judgment is explored, starting with a summary of the factual and legal findings of the Court (Part II). This contribution then analyses and contextualises the judgment in respect of the issue of jurisdiction (Part III), the interplay between the *ECHR* and IHL (Part IV) and the procedural duty to investigate (Part V). The contribution concludes with a number of final remarks.

II BACKGROUND AND SUMMARY OF THE CASE

This section provides some background to and a brief summary of the judgment, from which the rest of the article will draw.

The case arose from the armed conflict in August 2008 between Georgia on the one hand and South Ossetian and Abkhaz separatists supported by Russia on the other hand.[2] South Ossetia and Abkhazia were (and are) regions in Georgia which are under de facto control of separatists with ties to Russia. The conflict started with a sustained Georgian artillery attack on the night of 7–8 August which struck the town of Tskhinvali. This was followed by other movements of the Georgian armed forces targeting Tskhinvali and the surrounding areas. Russian, South Ossetian and Abkhaz military units and armed elements quickly became involved. The advance of the Georgian armed forces soon came to a halt. In a counter-movement, Russian armed forces, covered by air strikes and by elements of its Black Sea fleet, penetrated deep into Georgia, cutting across the country's main east–west road, reaching the port of Poti and stopping short of Georgia's capital city, Tbilisi. On 12 August 2008, a ceasefire agreement was negotiated between Russian President Dmitry Medvedev, Georgian President Mikheil Saakashvili and French President Nicolas Sarkozy, the latter acting on behalf of the European Union.[3]

Georgia submitted an interstate application under the *ECHR* to the Court on 11 August 2008, together with a request for interim measures. The Court imposed interim measures on both parties the following day.[4] In 2011, a Chamber of the Court declared the application admissible.[5] The case was subsequently

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[2] The following description of the conflict is based on the report of the Independent International Fact-Finding Mission on the Conflict in Georgia. This fact-finding mission was established by the Council of the European Union in December 2008 and presented its report in September 2009: Independent International Fact-Finding Mission on the Conflict in Georgia, *Report* (Report, September 2009) vol I ('*Fact-Finding Mission Report*').

[3] Ibid 10–11.

[4] Amnesty International, *Civilians in the Line of Fire: The Georgia-Russia Conflict* (Report, November 2008) 58.

[5] *Georgia v Russia* (European Court of Human Rights, Fifth Section, Application No 38263/08, 13 December 2011).

relinquished to the Grand Chamber of the Court. The Grand Chamber issued its judgment on 21 January 2021, more than twelve years after Georgia submitted its application.

For the purpose of determining whether the different aspects of the case fell within the jurisdiction of Russia for the purposes of art 1 of the *ECHR*, the Court distinguished between two phases of the conflict. The first phase was an 'active phase of hostilities' which the Court considered to run from 8 to 12 August 2008.[6] The second phase was the phase following the ceasefire that concluded on 12 August.

With respect to the first phase, in which Georgia submitted that Russia violated art 2 of the *ECHR*, the Court considered that, in the event of military operations carried out during an international armed conflict, it was not possible to 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 meant that there was no control over that area. This was also true in the present case, as the majority of the fighting had taken place in areas previously under Georgian control. The Court therefore attached decisive weight to the fact that the very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos not only meant that there was no 'effective control' over that area but also excluded any form of 'State agent authority and control' over individuals.[7] It thus considered that the conditions it had applied in its case law to determine the exercise of extraterritorial jurisdiction by a state had not been met in respect of the military operations it was required to examine in the present case concerning the active phase of hostilities in the context of an international armed conflict. The Court concluded that the events occurring during the active phase of hostilities (8–12 August 2008) did not fall within the jurisdiction of the Russian Federation for the purposes of art 1 of the Convention and declared this part of the application inadmissible.[8]

With respect to the second phase, which the Court referred to as the 'Occupation phase', the Court found that the Russian Federation had exercised 'effective control' within the meaning of its case law over South Ossetia, Abkhazia and the 'buffer zone' during the period from 12 August – 10 October 2008, the date of the official withdrawal of the Russian troops. After that period, the strong Russian presence and the South Ossetian and Abkhazian authorities' dependency on the Russian Federation indicated that there had been continued 'effective control' over South Ossetia and Abkhazia. The Court concluded that the events occurring after the cessation of hostilities (following the ceasefire of 12 August 2008) did fall within the jurisdiction of the Russian Federation for the purposes of art 1 of the Convention.[9]

Another preliminary question concerned the relationship between the *ECHR* and IHL. Russia argued that in the international armed conflict during which the alleged violations of the *ECHR* took place, Russia's obligations were defined and governed exclusively by IHL, and the Court had no jurisdiction over the relevant

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6 *Georgia v Russia (II)* (n 1) 39.
7 Ibid 46–8.
8 Ibid 49.
9 Ibid 68.

questions of Russia's compliance with IHL. It suggested that the *ECHR* is not applicable during armed conflict. Because the Court does not have jurisdiction *ratione materiae* over IHL, it should not pronounce itself on that field of law. The Court did not follow this reasoning but took as its starting point the co-application of IHL and the *ECHR*. On the basis of the rules of treaty interpretation, specifically the rule contained in art 31(3)(c) of the *Vienna Convention on the Law of Treaties*, it considered that the *ECHR* must be interpreted in harmony with other rules of international law of which it forms a part. These other rules of international law include IHL. Against this background, 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. For each aspect, it inquired whether there was a conflict between the provisions of the Convention and the rules of IHL. It found that there were no such conflicts in this case.[10]

With respect to the question of whether domestic remedies had been exhausted, the Court reiterated that exhaustion of domestic remedies is not necessary in cases where there is an 'administrative practice' of violations of the Convention. It found that such a practice had existed with regard to each of the substantive articles that Georgia alleged were violated in the occupation phase. The only exception was art 2 of Protocol 1 (right to education), in respect of which it concluded that there was insufficient evidence of an administrative practice.[11]

Specifically, the Court found that there were administrative practices consisting of (i) the killing of civilians and the torching and looting of houses in Georgian villages in violation of arts 2, 3 and 8 of the *ECHR* and art 1 of Protocol I to the *ECHR*;[12] (ii) inhuman and degrading treatment and conditions of detention of Georgian civilians and humiliating acts to which they were exposed that amounted to violation of arts 3 and 5 of the *ECHR*;[13] (iii) acts of torture of Georgian Prisoners of War in violation of art 3 of the *ECHR*;[14] and (iv) the inability of Georgian nationals to return to their homes in violation of art 2 of Protocol 4 to the *ECHR*.[15] In addition, the Court held that Russia has a procedural obligation under art 2 of the *ECHR* to carry out an effective investigation into events both during and after the active phase of hostilities. It found that the investigations carried out by the Russian authorities had not satisfied the requirements of art 2 of the Convention.[16]

Finally, the Court held that Russia, by refusing to submit certain documents to the Court, had 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 art 38 of the Convention. The Court held that the question of the application of art 41 was not ready for decision and consequently reserved it in full. The Court was divided by 11 votes to six in finding that Russia had not exercised jurisdiction

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10 Ibid 104–5, 117, 123, 128, 134–5.
11 Ibid 128.
12 Ibid 94.
13 Ibid 108–9.
14 Ibid 119–20.
15 Ibid 124–5.
16 Ibid 136–8.

during the active phase of hostilities and was unanimous or had a 16 to one majority on all other issues.[17] One concurring separate opinion, one partly concurring opinion and seven (partly) dissenting opinions are appended to the judgment.

III JURISDICTION

A *Introduction*

Article 1 of the *ECHR* provides that the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms set out in the Convention. Previous case law of the Court has made clear that a state's jurisdiction under art 1 is 'primarily territorial'.[18] The Court has however recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a contracting state outside of its own territorial boundaries. In other words, extraterritorial jurisdiction for the purposes of art 1 exists, but it is exceptional.[19]

The case law of the Court makes clear, and the Court confirms as much in *Georgia v Russia (II)*, that the main bases for finding that a state has exercised extraterritorial jurisdiction over persons are that i) those persons are in an area over which the state exercises effective control (effective control of an area) ('ECA') and ii) that the state exercises authority and control over an individual through its agents (state agent authority and control) ('SAA').[20]

The case law of the Court does not necessarily provide a very clear or consistent picture of the precise scope of the exceptional circumstances in which there is extraterritorial jurisdiction.[21] A highly influential — and controversial — case in this respect is *Banković v Belgium* ('*Banković*'). In its decision on admissibility in this case, the Court held that art 1 of the *ECHR* does not countenance a '"cause-and-effect" notion of jurisdiction'; ie mere use of kinetic force is not enough to establish jurisdiction.[22] One of the reasons the judgment in *Georgia v Russia (II)* was highly anticipated was because it was seen as a test for the approach taken in *Banković*. Indeed, the Court itself noted that this case marks the first time since the decision in *Banković* that the Court has been required to examine the question of jurisdiction in relation to military operations

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17 Ibid 141–4.

18 *Banković v Belgium* [2001] XII Eur Court HR 333, 351–2 [59] ('*Banković*'); *MN v Belgium* (European Court of Human Rights, Grand Chamber, Application No 3599/18, 5 May 2020) 23 [98].

19 See generally Marko Milanovic, 'Models of Extraterritorial Application' in Marko Milanovic (ed), *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press, 2011); Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, 2009) 150–203.

20 *Georgia v Russia (II)* (n 1) 42 [115]; *Al-Skeini v United Kingdom* [2011] IV Eur Court HR 99, 166–70 [130]–[140] ('*Al-Skeini*').

21 See, eg, *Al-Skeini* (n 20) 189–97 (Judge Bonello). See also Steering Committee on Human Rights (CDDH), *CDDH Report on the Place of the European Convention on Human Rights in the European and International Legal Order* (Report No CDDH(2019)R92 Addendum1, 29 November 2019) 42–4.

22 *Banković* (n 18) 356–7 [75].

(armed attacks, bombing, shelling) in the context of an international armed conflict the existence of which is not disputed by the parties.[23]

As noted above, to answer the question of whether Russia exercised extraterritorial jurisdiction for the purposes of art 1 of the *ECHR*, the Court made a distinction between two phases of the conflict. The first phase was an 'active phase of hostilities'. According to the Court, this phase encompassed the first five days of the conflict, lasting from 8 until 12 August 2008. Georgia claimed that in this phase Russia violated the right to life (art 2 of the *ECHR*). The second phase was the 'occupation' phase after the active phase of hostilities had ceased.

B *Active Phase of Hostilities*

The Court first focuses on the issue of jurisdiction in the 'active phase of hostilities'.

It will be recalled that the Court has recognised two main bases for extraterritorial jurisdiction: ECA and SAA.[24] With respect to ECA, the Court holds that

> it can be considered from the outset that 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.[25]

The Court considers that this was also true in the present case. It thereby dismisses the possibility for states to exercise control over territory during an 'active phase of hostilities' in a 'context of chaos', meaning that under such circumstances there *cannot* be any exercise of extraterritorial jurisdiction on the basis of ECA.[26]

With respect to SAA, the Court in a rather anodyne manner states that, since *Banković*, the Court's case law on the concept of extraterritorial jurisdiction has evolved.[27] This is its rather euphemistic way of distancing itself from the quite narrow conception of extraterritorial jurisdiction put forward in that decision. This is nevertheless important, because the Court has not previously expressly distanced itself from *Banković* even if it has expanded the notion of jurisdiction as set out in that decision.[28] The Court describes a number of cases in which it had already seemed to take a different approach.[29] In those cases, it was accepted that

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23 *Georgia v Russia (II)* (n 1) 42 [113].

24 See, eg, 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* (Oxford University Press, 2018) 112, 114; Lea Raible, 'The Extraterritoriality of the ECHR: Why *Jaloud* and *Pisari* Should Be Read as Game Changers' [2016] (2) *European Human Rights Law Review* 161, 163.

25 *Georgia v Russia (II)* (n 1) 46 [126].

26 Ibid.

27 Ibid 42 [114].

28 Marko Milanovic, '*Al-Skeini* and *Al-Jedda* in Strasbourg' (2012) 23(1) *European Journal of International Law* 121, 129.

29 *Georgia v Russia (II)* (n 1) 43–6 [117]–[124].

states had exercised jurisdiction over individuals when Turkey engaged in cross-border use of force against victims in Northern Cyprus, when UK armed forces used force during patrols in Iraq, when armed forces used force while manning checkpoints abroad and so forth.[30] According to the Court, the approach in those cases 'refines and broadens the concept of extraterritorial jurisdiction'.[31] This is in contrast in particular to its judgment in *Al-Skeini v UK* ('*Al-Skeini*'), in which it suggested that its earlier case law was fully coherent.[32]

The Court thus acknowledges that the room for extraterritorial application of the Convention has been broadened. It does this in particular by acknowledging that in a number of cases it has applied the concept of 'state agent authority and control' over individuals to scenarios going beyond physical power and control exercised in the context of arrest or detention. The Court then immediately restricts that room by holding that those cases concerned 'isolated and specific acts involving an element of proximity'.[33]

This finding is questionable for two principal reasons. The first is that the qualification of the factual situation in some of the cases concerned as 'isolated and specific and involving an element of proximity' is hardly supported by the facts. For example, in *Issa v Turkey*, the Court described the situation in which the alleged violation of the Convention took place as a military operation 'carried out with the participation of seventy to eighty thousand troops accompanied by tanks, armoured vehicles, aircraft and helicopters, last[ing] almost six weeks between 19 March and 2 May 1995'.[34] In *Pad v Turkey*, the key to finding jurisdiction was fire discharged from helicopters while they were circling overhead.[35] A helicopter circling overhead is not necessarily closer to the ground than an artillery piece firing or an aircraft on a bomb run. The second ground for criticism is that it would be odd if jurisdiction were to exist in cases of isolated and specific acts but not when similar acts occur on a large scale. If anything, it would seem that in case of widespread violence, the protection that is provided by human rights is more urgent. As Judges Yudkivska, Wojtyczek and Chanturia state,

> 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*).[36]

Applying its case law to the facts of this case, the Court more importantly introduces a second restriction to SAA as a ground for extraterritorial jurisdiction. This restriction corresponds to the reason it held that there was no

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30 *Isaak v Turkey* (European Court of Human Rights, Third Section, Application No 44587/98, 28 September 2006) 21; *Al-Skeini* (n 20) 62–3 [149]–[150]; *Jaloud v Netherlands* [2014] VI Eur Court HR 229, 302 [152] ('*Jaloud*'). See also *Issa v Turkey* (European Court of Human Rights, Second Section, Application No 31821/96, 16 November 2004) 19 [55], 23 [68], [71], 24 [72], 26 [82] ('*Issa*'); *Andreou v Turkey* (European Court of Human Rights, Fourth Section, Application No 45653/99, 27 October 2009) 7 [25]–[26]; *Pad v Turkey* (European Court of Human Rights, Third Section, Application No 60167/00, 28 June 2007) 10 [53]–[55] ('*Pad*').

31 *Georgia v Russia (II)* (n 1) 46 [124].

32 *Al-Skeini* (n 20) 166–70 [130]–[142].

33 *Georgia v Russia (II)* (n 1) 47 [132].

34 *Issa* (n 30) 15 [45].

35 *Pad* (n 30) 10 [54].

36 *Georgia v Russia (II)* (n 1) 192 [9] (Judges Yudkivska, Wojtyczek and Chanturia).

ECA by Russia in Georgia, namely that an 'active phase of hostilities' excludes exercise of control. The Court states that

> the very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos not only means that there is no 'effective control' over an area as indicated above (see paragraph 126 above), but also excludes any form of 'State agent authority and control' over individuals.[37]

The Court thus suggests that there can be no extraterritorial jurisdiction for the purposes of art 1 of the *ECHR* during an 'active phase of hostilities'. A number of observations can be made concerning the use of this term by the Court.

First, this is not the first time the Court has used the term. It was previously used in *Hassan v UK* ('*Hassan*').[38] In that case, the respondent government acknowledged that where state agents operating extraterritorially take an individual into custody, this is a ground of extraterritorial jurisdiction which has been recognised by the Court. It submitted however that

> this basis of jurisdiction should not apply in the active-hostilities phase of an international armed conflict, where the agents of the Contracting State are operating in territory of which they are not the occupying power, and where the conduct of the State will instead be subject to the requirements of international humanitarian law.[39]

The Court rejected that argument, finding that to do otherwise would be at odds with the International Court of Justice's ('ICJ') case law on this issue.[40] Although the Court did this in the specific context of persons taken into custody, the rejection was broadly understood to apply more generally.[41] The Court now takes a different route.

Secondly, the Court does not clearly define what is and what is not an 'active phase of hostilities'. As a consequence, the exact scope of this exception to extraterritorial jurisdiction remains unclear. What is the exact threshold of violence that needs to be crossed before one can speak of an 'active phase of hostilities'? And how to determine when such a phase ends? In the case of Georgia, a ceasefire was concluded between the parties, which the Court uses as a means of separating the two phases. But what about conflicts in which there is no ceasefire or in which large-scale fighting continues after a ceasefire?[42]

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37 Ibid 48 [137].

38 *Hassan v United Kingdom* [2014] VI Eur Court HR 1 ('*Hassan*').

39 Ibid 49 [76].

40 Ibid 50 [77].

41 See, eg, Andreas von Arnauld, 'An Exercise in Defragmentation: The Grand Chamber Judgment in *Hassan v UK*' in Robin Geiß and Heike Krieger (eds), *The 'Legal Pluriverse' Surrounding Multinational Military Operations* (Oxford University Press, 2020) 179, 188.

42 An example is provided by the conflict between Armenia and Azerbaijan in Nagorno-Karabakh in 2020. On 10 October, Russia announced that both Armenia and Azerbaijan had agreed on a humanitarian ceasefire after 10 hours of talks in Moscow. This ceasefire quickly broke down, however. A ceasefire that did hold was agreed on 9 November 2020. See Associated Press in Moscow, 'Nagorno-Karabakh: Armenia and Azerbaijan Agree to Ceasefire', *The Guardian* (Web Page, 11 October 2020) <https://www.theguardian.com/world/2020/oct/10/nagorno-karabakh-armenia-and-azerbaijan-agree-to-ceasefire>, archived at <https://perma.cc/2LS9-ELKQ>. Both Armenia and Azerbaijan have lodged interstate applications before the European Court of Human Rights concerning the events in Nagorno-Karabakh.

The formulations used by the Court also raise a number of questions. One example is the element of 'context of chaos', which the Court uses in conjunction with the term 'active phase of hostilities'. Does the Court consider that an active phase of hostilities automatically creates a context of chaos, or are they two separate elements, both of which need to be present? Another question is whether the exception only applies in international armed conflicts ('IACs'), or also in non-international armed conflicts ('NIACs'). The explicit references made by the Court to IACs when it talks about the active phase of hostilities could suggest that it wants to limit the exception to jurisdiction to situations of IAC, but it does not say so explicitly. This is a question that is relevant for European states participating in extraterritorial armed conflicts against organised armed groups such as ISIS.

Thirdly, it must be wondered whether the Court means for the active hostilities doctrine to apply to all rights protected by the Convention or to a limited selection only. The Court develops its new active phase of hostilities doctrine in the context of its discussion of art 2 of the *ECHR*. Although the doctrine is phrased categorically by the Court, it appears it does not extend to arts 3 and 5 of the *ECHR*. The Court notably does accept that Russia exercised jurisdiction over detained persons, including persons captured during the active phase of hostilities, whose rights under arts 3 and 5 were alleged to have been violated by Russia. The Court justifies this by stating that the persons concerned were 'mostly' detained after the hostilities had ceased (civilian detainees) and that they were detained, 'inter alia', after the cessation of hostilities (prisoners of war).[43] Because the Court does not apply the 'active phase of hostilities' exception to jurisdiction over detainees, the judgment in *Georgia v Russia (II)* may, strictly speaking, not be incompatible with *Hassan*. This element in the judgment does raise the question of whether there are other exceptions to the 'active phase of hostilities' exception to jurisdiction. There is at least one, which will be discussed in more detail below. This is jurisdiction in the context of the procedural limb of art 2 of the *ECHR*.

What is particularly interesting is the Court's concluding paragraphs on the issue of jurisdiction in the active phase of hostilities.[44] In these paragraphs, the Court essentially puts forward practical and legal policy considerations to justify its approach. It refers 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, IHL or the law of armed conflict).[45]

None of these considerations are very convincing as a reason to exclude a whole category of situations from the scope of application of the Convention. For example, it may be true that in situations of armed conflict it is difficult to establish facts (the so-called fog of war), but this does not mean it is

43 *Georgia v Russia (II)* (n 1) 105 [239], 118 [269].
44 Ibid 48–9 [140]–[144].
45 Ibid 48 [140].

impossible.[46] The Court has various options at its disposal to deal with this issue, including the use of reports by intergovernmental and non-governmental organisations, using interim measures to obtain evidence, and fact-finding hearings.[47] Another example is the large number of victims. It is difficult to see why cases in which there are large numbers of victims are less deserving of application of the *ECHR* than cases in which there is only one or a few victims. If anything, the reverse makes more sense. With respect to the argument that armed conflict is primarily regulated by IHL, this is not an obstacle to the application of the Convention in and of itself. In this context, it is important to note that mechanisms to ensure compliance in IHL are much weaker than under the *ECHR*.[48] To disapply the Convention thus means significantly weakening protection for individual victims.

The real reason, or at least one of the real reasons, for the approach taken by the Court appears to be its desire to avoid dealing with cases in which there is a large danger of political fallout.[49] Such fallout could have consequences for the entire Convention system, for example, if it came in the form of states withdrawing from the *ECHR*.[50]

It appears from the dictum of the judgment and the dissenting opinions that the Court was strongly divided on the issue of excluding jurisdiction during an 'active phase of hostilities'. Six out of 17 judges disagreed with the Court's holding that events which occurred during the active phase of the hostilities (8–12 August 2008) did not fall within the jurisdiction of the Russian Federation for the purposes of art 1 of the Convention. The language in the dissenting opinions written by these judges is sometimes strongly worded, which testifies to the level of disagreement.

C *Occupation Phase*

With respect to the occupation phase, that is, the phase after the active phase of hostilities, the Court does not have much difficulty in finding that Russia exercised jurisdiction for the purposes of art 1 of the *ECHR*. It does so on the basis of ECA, in line with the criteria it has developed in its earlier case law for

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46 See, eg, Rick Lawson, 'Si Vis Pacem, Para Bellum: Application of the European Convention on Human Rights in Situations of Armed Conflict' in Lawrence Early et al (eds), *The Right to Life under Article 2 of the European Convention on Human Rights: Twenty Years of Legal Developments since McCann v the United Kingdom* (Wolf Legal Publishers, 2016) 213, 218–19.

47 Philip Leach, 'Fact-Finding: European Court of Human Rights (ECtHR)' in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (Oxford University Press, online at June 2018) [12], [17], [30]–[35].

48 See Jann K Kleffner, 'A Bird's-Eye View on Compliance with the Law of Armed Conflict 70 Years after the Adoption of the Geneva Conventions' in Terry D Gill et al (eds), *Yearbook of International Humanitarian Law 2019* (TMC Asser Press, 2021) 107.

49 Marko Milanovic, 'Georgia v Russia No 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos', *EJIL:Talk!* (Blog Post, 25 January 2021) <https://www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/>, archived at <https://perma.cc/X4SW-LR4J>.

50 For a report that Russia has seriously considered this in the past, see, eg, Andrew Griffin, 'Russia Could Withdraw from European Convention on Human Rights, State News Agency RIA Reports', *Independent* (online, 1 March 2018) <https://www.independent.co.uk/news/world/europe/russia-echr-human-rights-european-convention-putin-kremlin-eu-a8234086.html>, archived at <https://perma.cc/2ZHQ-KBJ7>.

such jurisdiction. The main criteria are the strength of the state's military presence in the area and the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region. It is noteworthy that the Court makes extensive use of information provided by Russia, either as evidence in the case or through public statements.[51]

It is also interesting that the Court, after having concluded that there was a situation of ECA, states that '[i]f 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'.[52] The Court appears to say that if there is a situation of occupation in the sense of IHL, there is automatically ECA for the purposes of art 1 of the Convention. This is noteworthy, because it seems difficult to reconcile with the Court's statement in *Jaloud v Netherlands* that 'the status of "Occupying Power" within the meaning of Article 42 of the *Hague Regulations*, or lack of it, is not per se determinative' of the question of whether there is jurisdiction for the purposes of art 1 of the *ECHR*.[53] That statement has been interpreted as meaning that art 1 jurisdiction is 'an autonomous concept not dependent on the status of occupying power'.[54] But if occupation in the sense of IHL ipso facto means there was ECA, as the Court states in *Georgia v Russia (II)*, then the status of Occupying Power is determinative in the sense that there is automatically jurisdiction if a state has that status. This is not to say that the reverse is also true: the absence of the status of Occupying Power does not preclude the existence of jurisdiction for the purposes of art 1 of the *ECHR*.

If occupation in the sense of IHL automatically entails jurisdiction, this also raises the question why the Court in *Al-Skeini* chose to base jurisdiction on SAA and not on ECA. In that case, there was no doubt that the United Kingdom was an Occupying Power in the sense of IHL in a part of Iraq. One can only speculate why the Court adopted a different approach in *Georgia v Russia (II)*. It may be that the prominent role given to IHL in *Al-Skeini* also had an impact on this aspect of the judgment. It could be that the Court was more willing to attach further-reaching consequences to the existence of an occupation than in *Al-Skeini*, in which the Court ultimately largely ignored IHL. Whether this constituted an inconsistency or if it is a new approach by the Court remains to be seen.

IV THE *ECHR* AND INTERNATIONAL HUMANITARIAN LAW

IHL played a pivotal role in the Court's judgment in *Georgia v Russia (II)*. This was not the first time the Court addressed the interrelationship between human rights and IHL.[55] Other international courts and treaty bodies have also dealt with this issue.

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51 *Georgia v Russia (II)* (n 1) 66–9 [162]–[175].

52 Ibid 88 [196].

53 *Jaloud* (n 30) 300 [142].

54 Peter Kempees, *'Hard Power' and the European Convention on Human Rights* (Brill Nijhoff, 2020) vol 134, 250.

55 Ibid 38–64.

The ICJ has found that human rights continue to apply during armed conflict: 'the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation'.[56] It has furthermore held that during armed conflict, what constitutes an 'arbitrary' deprivation of life must be determined by reference to the rules regulating the use of force under IHL.[57] The Inter-American Court of Human Rights, the United Nations Human Rights Committee and the African Commission on Human and Peoples' Rights have all confirmed the continued applicability of their respective human rights conventions during armed conflicts — and therefore in co-application with IHL.[58] The Inter-American Court and the Human Rights Committee, although lacking the jurisdiction to apply IHL directly, have moreover taken a relatively open approach towards interpreting human rights in light of IHL. The Inter-American Court has found that IHL can be used '*to provide content and scope* to the provisions of the [American] Convention',[59] and has even determined the lawfulness of deprivations of life by interpreting the right to life in light of the IHL principles of distinction, proportionality and precautions.[60] The Human Rights Committee has similarly found that 'rules of international humanitarian law may be relevant for the purposes of the interpretation of [Covenant rights]' and that therefore '[s]ecurity detention authorized and regulated by and complying with international humanitarian law in principle is not arbitrary',[61] and '[u]se of lethal force consistent with international humanitarian law and other applicable international law norms is, in general, not arbitrary'.[62] This is also the position of the

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56 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 178 [106]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, 243 [216]. In very similar wording, see the earlier *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 240 [25] ('*Nuclear Weapons Advisory Opinion*'). For a detailed analysis, see Lawrence Hill-Cawthorne, 'Just Another Case of Treaty Interpretation? Reconciling Humanitarian Law and Human Rights Law in the ICJ' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press, 2015).

57 *Nuclear Weapons Advisory Opinion* (n 56) 240 [25].

58 Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, 2187th mtg, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004, adopted 29 March 2004) [11]; Human Rights Committee, *General Comment No 36: Article 6: Right to Life*, 124th sess, UN Doc CCPR/C/GC/36 (3 September 2019) [64] ('*General Comment No 36*'); *Santo Domingo Massacre v Colombia (Preliminary Objections, Merits and Reparations)* (Inter-American Court of Human Rights, Series C No 259, 30 November 2012) [21] ('*Santo Domingo Massacre*'). See also *Las Palmeras v Colombia (Preliminary Objections)* (Inter-American Court of Human Rights, Series C No 67, 4 February 2000) [32]; *Serrano Cruz Sisters v El Salvador (Preliminary Objections)* (Inter-American Court of Human Rights, Series C No 118, 23 November 2004) [113] ('*Serrano Cruz Sisters*'); *Article 19 v Eritrea (Merits)* (African Commission on Human and Peoples' Rights, App No 275/2003, 16–30 May 2007) [87].

59 *Serrano Cruz Sisters* (n 58) [119] (emphasis added).

60 *Santo Domingo Massacre* (n 58) [211]; *Cruz Sánchez v Peru (Preliminary Objections, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 292, 17 April 2015) [270], [273].

61 Human Rights Committee, *General Comment No 35: Article 9 (Liberty and Security of Person*), 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) [64].

62 *General Comment No 36*, UN Doc CCPR/C/GC/36 (n 58) [64].

African Commission,[63] meaning that under the globally applicable *International Covenant on Civil and Political Rights*, as well as under the two other binding regional rights systems, human rights are interpreted in light of IHL.

The European Court has thus far walked a different path, traditionally shying away from interpreting the Convention in light of IHL.[64] This may have to do with the Convention's wording, which does not merely prohibit *arbitrary* deprivations of life and liberty but rather forbids such deprivations unless they fall under an exhaustive list of exceptions. This restricts the possibilities for interpreting the Convention in light of IHL — at least so long as states do not derogate from the Convention during armed conflict. In *Hassan*, the Court for the first time ruled that under a number of strict conditions, deprivations of liberty in compliance with IHL could be read as conforming to the right to liberty under the Convention.[65] This approach has not yet been repeated, however, and many have wondered whether the Court would apply this approach in relation to the right to life — which the Court was expected to do in *Georgia v Russia (II)*.[66] As one commentator stated, the question was whether the approach the Court introduced in *Hassan* was 'capable of application to other Convention Articles guaranteeing substantive rights' — most notably art 2.[67]

As stated above in Part II, in *Georgia v Russia (II)*, Russia argued that the conflict was governed by IHL, that the Court does not have jurisdiction with respect to IHL and that the Court thus should not pronounce itself. The Court does not follow this reasoning but takes as its starting point the co-application of IHL and the *ECHR*. As was discussed above, the Court also adopted this view in its judgment in *Hassan*, which *Georgia v Russia (II)* cites in extenso.

In this case, taking the above as its starting point, the methodology adopted by the Court consists of 'examin[ing] the interrelation between the two legal regimes with regard to each aspect of the case and each Convention Article alleged to have been breached'.[68] For each aspect, it inquires whether there is a conflict between the provisions of the Convention and the rules of IHL. This is the first time since its judgment in *Hassan* that the Court has expressly engaged with the question of whether the Convention comes into conflict with rules of IHL. Only a few weeks later, the Grand Chamber moreover applied the same approach in the case of *Hanan v Germany* ('*Hanan*'),[69] which may be taken to mean that this is now an established approach with respect to the interplay of

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63 African Union, African Commission on Human and Peoples' Rights, *General Comment No 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)*, 57th ord sess (4–18 November 2015) [32].

64 Larissa van den Herik and Helen Duffy, 'Human Rights Bodies and International Humanitarian Law: Common but Differentiated Approaches' in Carla M Buckley, Alice Donald and Philip Leach (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Brill Nijhoff, 2017) vol 5, 366, 389.

65 *Hassan* (n 38) [101]–[104], [107].

66 See, eg, Françoise J Hampson, 'Article 2 of the Convention and Military Operations during Armed Conflict' in Lawrence Early et al (eds), *The Right to Life under Article 2 of the European Convention on Human Rights: Twenty Years of Legal Developments since McCann v the United Kingdom* (Wolf Legal Publishers, 2016) 191, 211.

67 Kempees (n 54) 63.

68 *Georgia v Russia (II)* (n 20) 35 [95].

69 *Hanan v Germany* (European Court of Human Rights, Grand Chamber, Application No 4871/16, 16 February 2021) ('*Hanan*').

IHL and the *ECHR*. This methodology is generally sound, but its application by the Court in this case may be criticised on several accounts.

First, it is interesting to note which rules of IHL the Court takes into consideration. As is well known, IHL distinguishes between international armed conflicts on the one hand and non-international armed conflicts on the other. IACs are conflicts between states, whereas NIACs are those conflicts in which at least one of the parties is not a state. The IHL regimes that apply in the two types of armed conflicts are not identical. The regime applicable to NIACs is much more limited, at least in so far as treaty rules are concerned.[70]

The rules of IHL that the Court refers to in its judgment are part of the IHL regime that applies to IACs. This is certainly appropriate with respect to the conduct of Russian troops: there is no doubt that there was an IAC between Georgia and Russia.[71] The question is, however, whether the regime for IACs is also the appropriate regime to apply to the conduct of South Ossetian troops, as the Court seems to presume. Here, the Court touches on a controversial issue in the field of IHL. This issue concerns the level of control that a state must have over a non-state armed group for the fighting between that group and another state, or the occupation of territory of another state by that group, to be governed by the IHL regime of international armed conflict.[72] The majority view is that this requires 'overall control' over the conduct of the non-state actor, although there is no consensus on this issue.[73] If there is no such control, then the conduct of the non-state actor is regulated by the IHL regime applicable to NIACs. The Court does not explicitly conclude that Russia exercised such overall control over South Ossetian forces. In the context of its discussion of jurisdiction, the Court states that it is not necessary to provide proof of 'detailed control' of each of the actions of South Ossetian troops.[74] It remains unclear on what basis the Court considered that the fighting between South Ossetian troops and Georgia was internationalised. Such a clarification would seem necessary, also because the International Independent Fact-Finding Mission on the Conflict in Georgia established by the EU concluded that this was a non-international armed conflict.[75]

A second point of criticism concerns how the Court goes about its inquiry into potential conflicts between norms of IHL and the Convention rights. The Court does not give the impression that it has considered this issue sufficiently

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70 Emily Crawford and Alison Pert, *International Humanitarian Law* (Cambridge University Press, 2015) 50.

71 Noam Zamir, *Classification of Conflicts in International Humanitarian Law: The Legal Impact of Foreign Intervention in Civil Wars* (Edward Elgar Publishing, 2017) 133–4.

72 See, eg, Marten Zwanenburg, 'The Requirement of Effective Control in the Law of Occupation' in Rogier Bartels et al (eds), *Military Operations and the Notion of Control under International Law: Liber Amicorum Terry D Gill* (TMC Asser Press, 2021) 263.

73 See, eg, Crawford and Pert (n 70) 79; Rogier Bartels, 'The Impact of Control over Armed Forces on Conflict Classification in War Crimes Cases' in Rogier Bartels et al (eds), *Military Operations and the Notion of Control under International Law: Liber Amicorum Terry D Gill* (TMC Asser Press, 2021) 235, 239–41; Terry D Gill, 'Classifying the Conflict in Syria' (2016) 92(1) *International Law Studies* 353, 364. For a critical analysis of this position, see Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press, 2012) 32, 58–62.

74 *Georgia v Russia (II)* (n 1) 92–3 [214].

75 *Fact-Finding Mission Report* (n 1) 300.

thoroughly. The most extensive discussion is devoted to a theoretical conflict between art 5 of the *ECHR* and IHL rules on the internment. In this case, there is no need to accommodate these IHL rules through an interpretation of art 5, as was the case in *Hassan*. This is because the Court — correctly — concludes that the ground put forward by Russia for the internment of civilians — the security of the civilians themselves — is equally prohibited under both art 5 of the Convention and IHL. Although the Court notably applies the incorrect provision under IHL, IHL only allows for the internment of civilians for 'imperative reasons of security', meaning that the Court comes to the correct conclusion: both the Convention and IHL prohibit the deprivations of liberty in question. The Court spends only a few sentences on the interrelationship between other Convention articles and IHL, finding that they do not conflict. In doing so, it may have overlooked potential conflicts. One example is the duty to investigate, which is discussed in more detail below.

The Court finally, perhaps understandably, does not indicate how it would deal with a conflict if it were to find one. In *Hassan*, the Court on the basis of 'implicit derogations' determined that the grounds for detention under IHL could be 'accommodated' in art 5 of the *ECHR*. It had been speculated that the Court in this case might do the same with respect to art 2. Because of the Court's holding that Russia did not exercise jurisdiction during the 'active phase of hostilities' and because Georgia only claimed violations of the substantive limb of art 2 during that phase, the Court did not need to pronounce itself on this issue.

V THE PROCEDURAL DUTY TO INVESTIGATE

Finally, it may be worthwhile to examine in more detail how the Court engages with Russia's obligation to investigate potential violations of the right to life. Pursuant to the Court's established case law, such an obligation stems from the obligation to effectively protect the right to life, read in light of the art 1 obligation to 'secure' Convention rights.[76] It requires states to conduct an effective investigation into the lethal use of force by state agents, as well as into other suspicious deaths.[77] Georgia alleged that Russia had failed to execute this obligation by failing to (effectively) investigate potential war crimes committed by both Russia's armed forces and the armed forces of South Ossetia.[78] The Court's approach in this respect provides a valuable insight into both the interplay of the Convention with IHL and its engagement with the question as to extraterritorial jurisdiction.

With respect to the interplay of the *ECHR* and IHL, the Court first determines that IHL equally requires states to conduct an investigation into allegations of war crimes, citing the grave breaches provisions under the *Geneva Conventions* and Additional Protocol I, as well as Rule 158 of the International Committee of the Red Cross's ('ICRC') study on customary IHL.[79] Because IHL therefore requires states to investigate allegations of war crimes when they have personal, territorial or another type of jurisdiction over the crime or the perpetrator, this

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76 *McCann v United Kingdom* (1995) 324 Eur Court HR (ser A) 41 [161].
77 See, eg, *Al-Skeini* (n 20) 178–80 [163]–[167].
78 *Georgia v Russia (II)* (n 1) 129 [316].
79 Ibid 134–5 [323]–[324].

leads the Court to conclude that there is no conflict between IHL and the Convention in this respect. It finds that 'it may be observed that the obligation to carry out an effective investigation under art 2 of the Convention is broader than the corresponding obligation in international humanitarian law', but that '[o]therwise, there is no conflict between the applicable standards in this regard under art 2 of the Convention and the relevant provisions of international humanitarian law'.[80] Whether this very brief assessment does justice to the intricate interplay between investigative obligations under IHL and the Convention may be questioned, however.

With respect to the scope of the application of investigative obligations, the *ECHR* may well require investigations into incidents which IHL does not. The Court appears to treat this as an unproblematic divergence in what both rules require. What it seemingly overlooks, however, is that in so far as the Convention requires an investigation into *any* use of lethal force by state agents, this will include the use of force which is (clearly) lawful under IHL. If, however, states are required to investigate even the use of force against enemy combatants which is clearly lawful under IHL, this may overshoot what is realistic.[81] A further tension arises with respect to 'combatant privilege', which under IHL protects lawful combatants from prosecution for lawful acts of war by any other state than their own.[82] This requirement of IHL may come into direct conflict with the European Court's insistence that the use of lethal force, by both state agents and third parties, requires an 'effective official investigation' and, where appropriate, prosecution and punishment.[83] The *ECHR* may then require what IHL prohibits, leading to a direct conflict between the two. The Court does not engage in depth with this issue in *Georgia v Russia (II)* and perhaps understandably so. Georgia had alleged that Russia had fallen short of its investigative obligations with respect to violations of *IHL*, not the use of force which was in conformity with IHL. This allowed the Court to sidestep this issue.

In *Hanan*, the Court was called upon to engage with such issues more directly. *Hanan* related to an airstrike authorised by a German officer in 2009, during the extraterritorial NIAC in Afghanistan in which several NATO States were involved.[84] The Court was called upon to decide whether the airstrike, which had caused a number of civilian casualties, was subject to investigative obligations under the Convention, and whether the investigation conducted by Germany conformed to Convention standards. What makes this case particularly interesting is that the German criminal investigation had focused not simply on whether the victims of the airstrike had been civilians but primarily on what the German colonel had known when ordering the strike. The investigation had

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80 Ibid 135 [325].

81 See, eg, Kenneth Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict' (2004) 98(1) *American Journal of International Law* 1, 33; Noëlle Quénivet, 'The Obligation to Investigate after a Potential Breach of Article 2 ECHR in an Extra-Territorial Context: Mission Impossible for the Armed Forces?' (2019) 37(2) *Netherlands Quarterly of Human Rights* 119.

82 See, eg, Sandra Krähenmann, 'Protection of Prisoners in Armed Conflict' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford University Press, 3rd ed, 2013) 359, 367.

83 See, eg, *Tahsin Acar v Turkey* [2004] III Eur Court HR 1, 44–5 [220].

84 See Françoise Hampson, 'Afghanistan 2001–2010' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press, 2012) 242.

thereby focused on the lawfulness and criminality of the attack *under IHL*. Under IHL, the proportionality of an attack must be determined *ex ante*, weighing expected civilian losses against the anticipated military advantage of the attack, which means that the lawfulness of the attack and the criminal liability of those involved hinge on their knowledge when ordering the strike.[85] The Court, having to determine whether the investigation was adequate, crucially went along with the main thrust of the investigation, focusing on determining the mens rea and knowledge of those involved — thereby deferring to the IHL standard for lawfulness.[86]

With respect to the standards an investigation must respect, there are also potential conflicts between IHL and the *ECHR*. Under the Convention, a crucial requirement for the effectiveness of an investigation is that it is fully independent. Under IHL, however, it is commanders who are required to 'suppress' and 'repress' breaches by their subordinates[87] and who, according to the ICRC *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, must operate as 'investigating magistrate[s]'.[88] They are moreover criminally liable if they fail to do so.[89] This potentially means that if commanders do conduct an investigation, they thereby violate the *ECHR*, whereas if they do not, they violate IHL and are even criminally liable for such. The only way for commanders to avoid this issue is by reporting a breach to appropriate authorities. While the Court did not address such issues in *Georgia v Russia (II)*, it did so more directly in *Hanan*. In *Hanan*, the Court — without categorising this as a conflict — acknowledged the role commanders play under IHL and considered that they need not be excluded from investigations.[90] This therefore opens up the possibility of investigations within the chain of command, although commanders must be excluded from a role in investigations into their own conduct and liability.[91] This shows that the Court may be moving towards a more overt and express relationship with IHL.

On the matter of jurisdiction, finally, the duty to investigate takes on a very particular role in *Georgia v Russia (II)*. As set out above, the Court decides that during the 'active phase of hostilities', Russia had not exercised jurisdiction extraterritorially — and even *could* not have, under either the ECA or SAA bases for such. Nonetheless, when considering whether Russia had an obligation to investigate alleged violations committed during these active hostilities, the Court finds that Russia indeed was required to do so. In doing so, the Court relies on a line of case law in which it had previously ruled that even if an incident fell outside a state's jurisdiction, that state may nevertheless be required to *cooperate*

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85 See *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) arts 48, 51(1)–(2), 51(4), 57(2) ('*Additional Protocol I*').

86 *Hanan* (n 49) 73–4 [218].

87 *Additional Protocol I* (n 85) arts 86(2), 87(3).

88 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, 1987) 1022–3 [3560]–[3562].

89 *Additional Protocol I* (n 85) art 86(2).

90 *Hanan* (n 69) 74–5 [223]–[224].

91 Ibid 75 [225].

in the investigation by the territorial state — for instance when the suspect or relevant evidence is present on its territory.[92] In *Georgia v Russia (II)*, the Court extends this obligation to an autonomous duty for states to investigate with respect to incidents falling outside their jurisdiction if there are 'special features' in the case which establish a 'jurisdictional link' with that state.[93] The Court does not define what such special features are in the abstract, but on the facts of the present case it finds that because (i) Russia was also required to conduct an investigation under IHL, (ii) Russia had taken certain investigative steps, (iii) Russia had established effective control over the area immediately after the end of the active phase of hostilities and (iv) because all suspects, including Russian armed forces, were present on territory under Russian control, a jurisdictional link existed between it and the alleged war crimes committed during the active phase of hostilities.[94] Despite the Court's finding that Russia did not exercise jurisdiction during the active phase of hostilities, the Court found that Russia *was* under the obligation to investigate incidents occurring during that time.

The Court has already confirmed this approach in *Hanan*. There, the Court ruled similarly with respect to the German investigation into an extraterritorial NIAC in Afghanistan, which crucially concerned an airstrike *during active hostilities*.[95] In this case, the Court considered 'special features' to exist based on the (i) investigation conducted by the German authorities, (ii) its obligation under domestic law and IHL to conduct an investigation and (iii) Germany's exclusive jurisdiction with respect to the criminal prosecution of its service members, pursuant to a Status of Forces Agreement.[96]

Two important conclusions may be drawn from the Court's practice in this respect. First, the Court's application of the duty to investigate is an important mitigation of its categorical finding that there can be no exercise of jurisdiction during the active phase of hostilities of an international armed conflict. Its approach of accepting a 'jurisdictional link' to exist if 'special features' are present appears to bring many instances of the use of force during armed conflict within the purview of the investigative obligations under the Convention. After all, if a state's armed forces violate IHL, this will give rise to investigative obligations under that body of law (as well as under domestic law, if the state has correctly implemented IHL),[97] and members of the armed forces will in almost all situations be within the jurisdiction of their own state for the purposes of prosecution. Territorial states will furthermore often be prevented from effectively investigating, due to alleged perpetrators either having returned to their own state or because a Status of Forces Agreement prevents them from

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92 *Güzelyurtlu v Cyprus* (European Court of Human Rights, Grand Chamber, Application No 36925/07, 29 January 2019) 60–1 [232]. See also Marko Milanović, 'The Murder of Jamal Khashoggi: Immunities, Inviolability and the Human Right to Life' (2020) 20(1) *Human Rights Law Review* 1, 42.

93 *Georgia v Russia (II)* (n 1) 137–8 [330]–[332].

94 Ibid 138 [331].

95 *Hanan* (n 69) 50 [136].

96 Ibid 50–2 [137]–[144].

97 See, eg, Noam Lubell, Jelena Pejic and Claire Simmons, *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice* (Report, September 2019).

exercising criminal jurisdiction. Special features are therefore highly likely to be present. Second, whereas the Court appears to take a step back in terms of providing material protection to victims of war, it takes a step forward in establishing some form of procedural review of conduct of hostilities. This in a way outsources the primary obligation to respect the law governing the conduct of hostilities to states, with the Court taking on a more subsidiary role in reviewing whether states have themselves set up and effectuated proper mechanisms for monitoring, reviewing, investigating and, where appropriate, prosecuting violations.

VI CONCLUSION

While the Court's judgment was highly anticipated, the result is highly controversial. Especially where the issue of the extraterritorial exercise of jurisdiction and therefore the extraterritorial applicability of the Convention is concerned, the Court appears to go against the grain of broader developments in international human rights law. The finding that, during the 'active phase of hostilities' of an IAC, the ensuing 'context of chaos' renders the exercise of control — and therefore jurisdiction — impossible appears to be inconsistent with previous case law and moreover departs from international jurisprudence in this respect. The Court appears to have been moved by motives of legal policy relating to the practical difficulties it must face in deciding cases relating to armed conflict and in doing so denies many victims of war recourse to the Convention and the Court. Because the terms 'active phase of hostilities' and 'context of chaos' are not further defined by the Court, they do little to clarify the applicability of the Convention. The issue of extraterritorial jurisdiction during armed conflict is therefore certain to be a bone of contention in future cases before the Court, such as those pending with respect to the armed conflict in the east of Ukraine and the conflict between Azerbaijan and Armenia. Especially where there is no clear cut-off date for active hostilities or where such hostilities arguably go on for extended periods of time and even years, the Court will be hard-pressed to come up with a convincing solution, which, it is submitted, should ensure that individuals are not deprived of human rights protection for extended periods of time.

While the Court therefore takes a step back in supervising human rights protection during armed conflict, it at the same time extends its procedural oversight in such situations. Its finding that the duty to investigate potential violations can also apply extraterritorially during active hostilities when 'special features' establish a jurisdictional link is likely to bring the use of lethal force by states' armed forces within the purview of the Court's supervision. Such procedural review may relieve the Court's concerns over the vast amounts of evidence involved in cases relating to armed conflict, because it can supervise the extent to which states themselves have sufficiently investigated and brought evidence to light.

Finally, the Court has developed a promising methodology to deal with the interplay between the *ECHR* and IHL. Its determination as to whether conflicts between both regimes exist, on a contextual and article by article basis, must be considered to be the correct approach under international law. Yet, it is hoped that the Court determines the existence of such conflicts based on a detailed

examination. The case of *Hanan* is a step in the right direction in this respect. What remains is for the Court to decide how it will deal with the potential normative conflict between the right to life under the Convention and IHL's permission to use lethal force against legitimate targets. Although many thought this issue would finally be decided in *Georgia v Russia (II)*, it appears that for now, the wait continues.