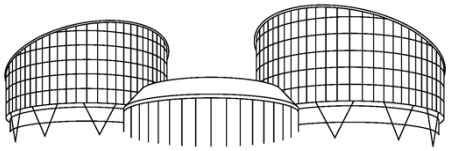

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF GEORGIA v. RUSSIA (II)

(Application no. 38263/08)

JUDGMENT
(Merits)

Art 1 • Jurisdiction of Russia over Abkhazia and South Ossetia • Jurisdiction not established during the active phase of hostilities • Jurisdiction established after their cessation • "Effective control"
Art 2 • Art 3 • Art 8 • Art 1 P1 • Administrative practice as regards the killing of civilians and the torching and looting of houses in Georgian villages in South Ossetia and in the "buffer zone"
Art 3 • Inhuman and degrading treatment • Art 5 • Administrative practice as regards the conditions of detention of Georgian civilians and the humiliating acts to which they were exposed • Administrative practice as regards their arbitrary detention
Art 3 • Administrative practice as regards the acts of torture of which the Georgian prisoners of war were victims
Art 2 P4 • Administrative practice as regards the inability of Georgian nationals to return to their respective homes in Abkhazia and South Ossetia
Art 2 P1 • Alleged looting and destruction of public schools and libraries and intimidation of ethnic Georgian pupils and teachers • Insufficient evidence
Art 2 (procedural) • Procedural obligation to carry out an adequate and effective investigation not only into the events that occurred after the cessation of hostilities but also into the events that occurred during the active phase of the hostilities • Investigations carried out by the Russian authorities neither prompt nor effective nor independent
Art 38 • Russian Government's failure to comply with obligation to furnish all necessary facilities to the Court

STRASBOURG

21 January 2021

This judgment is final but it may be subject to editorial revision.

INDEX

In the case of Georgia v. Russia (II),

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Robert Spano, *President*,
Linos-Alexandre Sicilianos,
Jon Fridrik Kjølbro,
Paul Lemmens,
Yonko Grozev,
Helena Jäderblom,
Vincent A. De Gaetano,
Ganna Yudkivska,
Paulo Pinto de Albuquerque,
Helen Keller,
Krzysztof Wojtyczek,
Dmitry Dedov,
Armen Harutyunyan,
Gabriele Kucsko-Stadlmayer,
Georgios A. Serghides,
Tim Eicke,
Lado Chanturia, *judges*,

and Johan Callewaert, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 23 and 24 May 2018, 23 October 2019 and 2 July 2020,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

I. INTRODUCTION

1. The case originated in an application (no. 38263/08) against the Russian Federation lodged with the Court under Article 33 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Georgia on 11 August 2008. It was accompanied by a request for the application of Rule 39 of the Rules of Court (interim measures) against the Russian Federation.

2. The Georgian Government ("the applicant Government") were represented before the Court by their Agent, Mr Beka Dzamashvili. They had previously been represented successively by their former Agents: Mr David Tomadze and Mr Levan Meskhoradze.

3. The Russian Government ("the respondent Government") were represented by their Representative, Mr Mikhail Galperin. They had previously been represented by their former Representative, Mr Georgy Matyushkin.

4. The application was allocated to the Fifth Section of the Court (Rule 51 § 1).

5. On 12 August 2008 the President of the Court, acting as President of Chamber, decided to apply Rule 39, calling upon both the High Contracting Parties concerned to honour their commitments under the Convention, particularly in respect of Articles 2 and 3 of the Convention.

6. The application of Rule 39 was extended several times.

7. On 6 February 2009 the Agent of the applicant Government lodged the formal application and annexes with the Registrar of the Court.

8. The applicant Government alleged that – through indiscriminate and disproportionate attacks against civilians and their property on the territory of Georgia by the Russian army and/or the separatist forces placed under their control – the Russian Federation had permitted or caused to exist an administrative practice, resulting in a violation of Articles 2, 3, 5, 8 and 13 of the Convention, Articles 1 and 2 of Protocol No. 1, and Article 2 of Protocol No. 4. They alleged, further, that despite the indication of interim measures the Russian Federation continued to violate its obligations under the Convention and, in particular, was in continuous breach of Articles 2 and 3 of the Convention.

II. ADMISSIBILITY PROCEDURE BEFORE THE CHAMBER

9. On 27 March 2009 the President of the Chamber decided to give notice of the application to the respondent Government, inviting them to submit observations on the admissibility of the complaints. After an extension of the time-limit for doing so, the respondent Government filed their observations on 7 October 2009.

10. On 9 October 2009 the applicant Government were invited to submit their observations in reply. After the time-limit for doing so had been extended, they filed their observations on 10 March 2010. The annexes were received on 22 March 2010.

11. On 6 September 2010 the President of the Chamber invited the respondent Government to indicate to the Court whether they wished to submit observations in reply. On 12 November 2010 the respondent Government replied that they wished to reserve the possibility of submitting observations at a later date if this were to become necessary in the interests of international justice.

12. The Court considered the state of the procedure on 25 January 2011 and decided to obtain the oral observations of the parties on the admissibility of the application. It set the date of the hearing for 16 June 2011 and also invited the parties to reply in writing to a list of questions before the date of the hearing.

13. At the request of the applicant Government, the Court decided on 3 May 2011 to adjourn the date of the hearing on admissibility and that of

the submission by the parties of their written observations regarding the questions put by the Court.

14. On 13 and 15 June 2011 the parties filed their observations.

15. On 13 December 2011, following a hearing on admissibility questions (Rule 51 § 5) held on 22 September 2011, a Chamber of that Section composed of the following judges: Peer Lorenzen, President, Karel Jungwiert, Anatoly Kovler, Isabelle Berro-Lefèvre, Mirjana Lazarova Trajkovska, Nona Tsotsoria, Zdravka Kalaydjieva, and also of Claudia Westerdiek, Section Registrar, declared the application admissible. The Chamber also joined to the merits the objections of incompatibility *ratione loci* and *ratione materiae* of the application with the provisions of the Convention and the objection of failure to exhaust domestic remedies.

III. PROCEDURE ON THE MERITS BEFORE THE GRAND CHAMBER

16. On 3 April 2012 the Chamber relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

17. The composition of the Grand Chamber was determined in accordance with the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

18. On 10 October 2013 the President of the Grand Chamber invited the parties to file their observations on the merits of the case in reply to the written questions of the Court. After a number of extensions of the time-limits fixed for that purpose, the parties submitted their observations, together with annexes, on 30 December 2014 and 5 March 2015 respectively.

19. In addition, third-party comments were received from the Human Rights Centre, University of Essex, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

20. On 29 June 2015 the Court decided to hear further evidence orally, in accordance with Article 38 of the Convention and Rule A1 of the Annex to the Rules of Court. It appointed a delegation of seven judges of the Grand Chamber, composed of Mirjana Lazarova Trajkovska, Nona Tsotsoria, Vincent A. De Gaetano, Helen Keller, Dmitry Dedov, Jon Fridrik Kjølbro and Yonko Grozev.

21. On 8 October 2015 the President invited each party to submit a list of witnesses (a maximum of twenty) whom they wished the delegation of judges to hear. He also invited additional witnesses chosen by the Court. After several extensions of the time-limit fixed for that purpose, the applicant Government submitted their list of witnesses on 19 February 2016 and the respondent Government submitted theirs on 19 February and 15 March 2016.

22. On 8 October 2015 the President also invited the parties to submit their observations in reply to the additional written questions of the Court. The questions related in particular to the alleged Russian military operations in the villages of Eredvi, Karbi and Tortiza and the town of Gori in August 2008, which the Court had identified at an earlier stage with a view to examining them as "representative incidents" in relation to the alleged violations. After an extension of the time-limit fixed for that purpose, the parties submitted their observations, together with annexes, on 19 February and 31 March 2016 respectively.

23. Between 6 and 17 June 2016 the delegation of judges of the Grand Chamber heard witnesses and experts in camera in the presence of the parties' representatives at the Human Rights Building in Strasbourg.

24. The delegation heard thirty-three witnesses in total: fifteen had been called by the Government of Georgia, twelve by the Government of the Russian Federation and six directly by the Court.

25. A list of the witnesses and experts who appeared before the delegation and a summary of their statements are annexed to this judgment. A confidential verbatim record of the statements they gave to the delegation has also been drawn up by the Court Registry and included in the case file.

26. On 30 September 2016 the President invited the parties to file additional observations on the evidence produced at the witness hearing and the verbatim record of the witnesses' oral evidence that had been sent to them beforehand (Rule 58 § 1 and Rule A8 § 3 of the Annex to the Rules of Court). After an extension of the time-limit fixed for that purpose, the parties' observations, together with annexes, reached the Court on 31 January, and on 3, 6 and 8 February 2017. Supplementary observations of the parties, in reply to their respective prior observations, together with annexes, were received on 24 November 2017.

27. On 3 March 2017 the President decided to obtain the parties' oral submissions on the merits of the case. He scheduled the date of the hearing for 27 September 2017. On 17 May 2017 he decided to adjourn the hearing to 23 May 2018.

28. On 27 April 2018, notwithstanding a request from the applicant Government to that effect, the President decided that it was not appropriate to adjourn further the date of the hearing.

29. A hearing on the merits of the case took place in public in the Human Rights Building, Strasbourg, on 23 May 2018 (Rule 58 § 2).

There appeared before the Court:

(a) *for the applicant Government*
Mr G. LORDKIPANIDZE, Deputy Minister of Justice,
Mr B. DZAMASHVILI, *Agent*,
Mr B. EMMERSON, QC,
Mr R. DIXON, QC, *Counsel*;
Ms T. ROSTIASHVILI,
Ms M. BILIKHODZE,
Ms N. TCHANTURIDZE,
Mr G. NAKASHIDZE, *Advisers.*

(b) *for the respondent Government*
Mr M. GALPERIN, Deputy Minister of Justice, *Representative,*
Mr M. SWAINSTON, QC,
Mr P. WRIGHT,
Mr R. BLAKELEY,
Mr E. HARRISON,
Mr K. IVANYAN,
Mr V. TORKANOVSKIY,
Ms V. PODYUKOVA, *Counsel;*
Ms Y. BORISOVA,
Mr P. SMIRNOV,
Mr A. GORSHKOV,
Mr S. SHKODENKO, *Advisers.*

The Court heard addresses by Mr Emmerson, Mr Galperin and Mr Swainston.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

30. The present application was lodged in the context of the armed conflict that occurred between Georgia and the Russian Federation in August 2008 following an extended period of ever-mounting tensions, provocations and incidents between the two countries.

31. The facts of the case may be summarised as follows[1].

1 A detailed description of the facts appears under each aspect of the application that the Court is being required to examine.

A. Overview

32. In its report of September 2009 the Independent International Fact-Finding Mission on the Conflict in Georgia[2] (IIFFMCG – hereafter "the EU Fact-Finding Mission"), established by a decision of 2 December 2008 of the Council of the European Union, described the armed conflict in the following terms (p. 5):

> "On the night of 7 to 8 August 2008, after an extended period of ever-mounting tensions and incidents, heavy fighting erupted in and around the town of Tskhinvali in South Ossetia. The fighting, which soon extended to other parts of Georgia, lasted for five days. In many places throughout the country it caused serious destruction, reaching levels of utter devastation in a number of towns and villages. Human losses were substantial. At the end, the Georgian side claimed losses of 170 servicemen, 14 policemen and 228 civilians killed and 1 747 persons wounded. The Russian side claimed losses of 67 servicemen killed and 283 wounded. The South Ossetians spoke of 365 persons killed, which probably included both servicemen and civilians. Altogether about 850 persons lost their lives, not to mention those who were wounded, who went missing, or the far more than 100 000 civilians who fled their homes. Around 35,000 still have not been able to return to their homes. The fighting did not end the political conflict nor were any of the issues that lay beneath it resolved. Tensions still continue. The political situation after the end of fighting turned out to be no easier and in some respects even more difficult than before."

33. The EU Fact-Finding Mission also summarised the course of the events in question as follows (pp. 10-11):

> "On the night of 7 to 8 August 2008, a sustained Georgian artillery attack struck the town of Tskhinvali. Other movements of the Georgian armed forces targeting Tskhinvali and the surrounding areas were under way, and soon the fighting involved Russian, South Ossetian and Abkhaz military units and armed elements. It did not take long, however, before the Georgian advance into South Ossetia was stopped. 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. 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. Such a combination of conflicts going on at different levels is particularly prone to violations of International Humanitarian Law and Human Rights Law. This is indeed what happened, and many of these instances were due to the action of irregular armed groups on the South Ossetian side that would not or could not be adequately controlled by regular Russian armed forces. Then another theatre of hostility opened on the western flank, where Abkhaz forces supported by Russian forces took the upper Kodori Valley, meeting with little Georgian resistance. After five days of fighting, a ceasefire agreement was negotiated on 12 August 2008 between Russian President Dmitry Medvedev, Georgian President Mikheil Saakashvili and French President Nicolas Sarkozy, the latter acting on behalf of the European Union. An

2 Volume I and extracts from volume II of the report of the EU Fact-Finding Mission are annexed to the admissibility decision. The full report is available only in English and can be consulted on the Internet.

implementation agreement followed on 8 September 2008, again largely due to the persistent efforts of the French President."

B. Chronology of the conflict

34. In the light of all the material in the Court's possession, the chronology of the conflict may be summarised as follows.

35. In the night of 7 to 8 August 2008, after an extended period of ever-mounting tensions and incidents, Georgian artillery attacked Tskhinvali (administrative capital of South Ossetia[3]).

36. From 8 August 2008 Russian ground forces penetrated into Georgia by crossing through Abkhazia and South Ossetia before penetrating into the neighbouring regions in undisputed Georgian territory. They were assisted by the Russian air force and the Black Sea fleet.

37. Armed fighting essentially took place in the area of Tskhinvali in South Ossetia, and in the area of Gori, situated in the "buffer zone" in undisputed Georgian territory, to the south of South Ossetia.

38. From 10 August 2008, the Georgian armed forces withdrew from the Tskhinvali region and then from the Gori district.

39. The Russian armed forces progressively invaded the following Georgian territories:

(i) all of Abkhazia, including Upper Abkhazia (upper Kodori Valley), formerly under Georgian control;

(ii) all of South Ossetia, including the Akhalgori district, formerly under Georgian control; that district was occupied from 16 August 2008;

(iii) the village of Perevi (Sachkhere district), situated in undisputed Georgian territory, to the west of South Ossetia;

(iv) the "buffer zone", including the zones bordering South Ossetia and Abkhazia, situated in undisputed Georgian territory, after the Russian armed forces had withdrawn from the town of Gori on 22 August 2008.

40. A ceasefire agreement was concluded on 12 August 2008 between the Russian Federation and Georgia under the auspices of the European Union, providing, *inter alia*, 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.

41. By a decree of 26 August 2008 the Russian President, Dmitry Medvedev, recognised South Ossetia and Abkhazia as independent States following a unanimous vote of the Russian Federal Assembly to that end. That recognition was not followed by the international community.

42. Owing to the delay by the Russian Federation in applying that agreement, a new agreement implementing the ceasefire agreement

3 The terms "Abkhazia" and "South Ossetia" refer to the regions of Georgia which are currently outside the *de facto* control of the Georgian Government.

(Sarkozy-Medvedev agreement) was signed on 8 September 2008. It provided, *inter alia*, that the Russian Federation would withdraw its troops from the zones bordering Abkhazia and South Ossetia within 10 days of deployment of the EU observation mission on 1 October 2008.

43. On 17 September 2008 Russia signed "friendship and cooperation" agreements with South Ossetia and Abkhazia in respect of a number of areas. Those agreements provided for the establishment of military bases and the stationing of up to 3,800 Russian soldiers in each of those two regions. The two agreements were unanimously ratified by the State Duma on 29 October 2008 and by the Federation Council on 11 November 2008.

44. On 10 October 2008 Russia completed the withdrawal of its troops stationed in the "buffer zone", except for the village of Perevi (Sachkhere district), situated in undisputed Georgian territory, from which the Russian troops did not withdraw until 18 October 2010.

II. RELEVANT INTERNATIONAL HUMANITARIAN LAW[4]

A. The Hague Regulations of 1907

45. The Hague Regulations concerning the Laws and Customs of War on Land of 18 October 1907[5] contain, *inter alia*, relevant provisions in situations of occupation.

B. Geneva Conventions of 1949 and Additional Protocol

46. The Conventions and Additional Protocol relevant to the present case are the following:

(i) the First Geneva Convention – Convention (I) – for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted in 1864 and revised in 1906, 1929 and 1949)[6];

(ii) the Third Geneva Convention – Convention (III) – relative to the Treatment of Prisoners of War (adopted in 1929 and revised in 1949)[7];

4 The wording of the relevant provisions of each of these instruments or a reference thereto appear below in respect of each aspect of the application which the Court is required to examine.

5 Russia ratified the Regulations on 27 November 1909. Georgia is not a party to this treaty, but its provisions are considered to embody rules of customary international law (see International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, ICJ Reports* 2004, p. 172, § 89). As such, they are also binding on Georgia.

6 This Convention came into force on 14 September 1993 with regard to Georgia and on 10 May 1954 with regard to the Russian Federation.

7 This Convention came into force on 14 September 1993 with regard to Georgia and on 10 May 1954 with regard to the Russian Federation.

(iii) the Fourth Geneva Convention – Convention (IV) – relative to the Protection of Civilian Persons in Time of War of 12 August 1949[8]; and

(iv) the Additional Protocol to the Geneva Conventions – Protocol (I) – relating to the Protection of Victims of International Armed Conflicts, adopted on 8 June 1977[9].

47. Article 1 of each of these Conventions requires the Contracting Parties to "undertake to respect and to ensure respect for the present Convention in all circumstances".

III. REQUESTS OF THE PARTIES

A. The applicant Government

48. The applicant Government submitted that on the basis of the available evidence:

> "a. The violations of the Convention fall within the jurisdiction of the Russian Federation under Article 1 of the Convention because it exercised effective authority and control over the relevant areas where the violations took place and/or exercised jurisdiction through state agent authority and control.
>
> b. The violations form part of a repetitive pattern of acts and omissions that amount to an administrative practice incompatible with the Convention, which have been perpetrated by Russian authorities or the subject of official tolerance by Russian authorities and that in any event, no effective remedies exist having regard to the approach adopted by the Russian authorities to investigation of the violations at issue.
>
> c. Russia has violated Articles 2, 3, 5, 8 and 13 of the Convention, Articles 1 and 2 of Protocol 1 to the Convention and Article 2 of Protocol 4 to the Convention and has failed to carry out investigations into the incidents forming the basis of these violations."

Having regard to the evidence relied upon, the applicant Government asked the Court to acknowledge that Russia had infringed the above-mentioned provisions and had failed to carry out an investigation into the incidents giving rise to those infringements. The applicant Government also sought "just satisfaction for these violations, including Convention compliant investigations, remedial measures and compensation to the injured parties".

8 This Convention came into force on 14 September 1993 with regard to Georgia and on 10 May 1954 with regard to the Russian Federation.

9 The Additional Protocol came into force on 14 September 1993 with regard to Georgia and on 29 September 1989 with regard to the Russian Federation.

B. The respondent Government

49. The respondent Government challenged Georgia's application for the following reasons:

> "1. Georgia's allegations relate to alleged events that took place outside the jurisdiction of the Russian Federation and outside Russia's effective control. Accordingly, Georgia's complaints, aside from being specious and contrived, relate to matters outside the jurisdiction of the Court.
>
> 2. Georgia's case relates substantially to alleged conduct of Russian armed forces in an armed conflict and the immediate aftermath of an armed conflict which Georgia started by its attack upon South Ossetia and Russian peacekeepers and nationals in South Ossetia.
>
> 3. Russia's military response was legitimate under public international law and IHL [international humanitarian law]. In the international armed conflict that resulted, Russia's obligations were defined and governed exclusively by IHL, and the Court has no jurisdiction over the relevant questions of Russia's compliance with IHL. Without prejudice to that position, Russia complied fully with IHL.
>
> 4. Georgia's allegations of human rights abuses and Russian responsibility for them are false on the facts and lack evidential support. The limited evidence that has been put before the Court by Georgia is not a proper basis for the serious charges levelled against Russian forces. ...
>
> 5. To the extent that Georgians were injured or their property damaged outside areas of active conflict (and Georgia vastly exaggerates the instances), the perpetrators appear to have been South Ossetians including rogue militia members, disaffected South Ossetian civilians and criminals. ...
>
> 6. As regards Georgia's complaints of inconvenience to Georgian nationals from the maintenance of border controls, those controls are the exclusive responsibility of the South Ossetian and Abkhazian governments. ...
>
> 7. Georgian nationals have remedies in South Ossetia and Abkhazia. They also have capacity to bring cases in Russia. However, Georgia has failed consistently to engage with or provide assistance to criminal investigations in South Ossetia, Abkhazia and Russia."

The primary submission of the respondent Government was that the Court should reject Georgia's application because

> "(1) It is premised on Russia having effective control over areas of conflict and subsequent civil disorder, where it should be apparent even at this stage that Russia did not have effective control;
>
> (2) It is premised upon alleged breaches of Convention law where IHL, exclusively, applied.
>
> If the Court is minded to go yet further, the Russian Federation respectfully submits that it will be necessary for the Court to make arrangements to receive evidence and for the evidence to be appropriately tested, including by cross-examination. It will also be necessary to take into account evidence from individual applications which bears on the facts in dispute."

In view of the foregoing, while reconfirming its objections on jurisdiction and admissibility in the present case, the respondent Government alternatively respectfully requested that the application be "dismissed on the merits in full".

THE LAW

I. MAIN ASPECTS OF THE APPLICATION

50. The Court notes that the present application contains the following main aspects:

A. Active phase of hostilities during the five-day war after the intervention by the Russian armed forces[10] (from 8 to 12 August 2008)

51. Alleged attacks (bombing, shelling, artillery fire) by the Russian armed forces and/or South Ossetian forces, starting on 8 August 2008 and ending on 12 August 2008 – complaints under Article 2 of the Convention.

B. Occupation phase after the cessation of hostilities (ceasefire agreement of 12 August 2008)

52. Allegations of killings, ill-treatment, looting and burning of homes by the Russian armed forces and South Ossetian forces in South Ossetia and in the adjacent "buffer zone", occurring in particular in the period after 12 August 2008 – complaints under Articles 2, 3 and 8 of the Convention, and under Article 1 of Protocol No. 1.

C. Treatment of civilian detainees and lawfulness of their detention

53. Alleged illegal detention in dire conditions of some 160 civilians (mostly women and elderly people) for approximately fifteen days (they were all released on 27 August 2008) by South Ossetian forces; some of them were also allegedly ill-treated – complaints under Articles 3 and 5 of the Convention.

10 In its admissibility decision the Court found as follows: "the present application concerns the impugned events that started in South Ossetia and in Abkhazia on 7 August 2008". As this is an application against the Russian Federation and not against Georgia, it should be noted that the intervention by the Russian armed forces began on 8 August 2008.

D. Treatment of prisoners of war

54. Alleged ill-treatment and torture of more than thirty prisoners of war by Russian and South Ossetian forces in August 2008 – complaints under Article 3 of the Convention.

E. Freedom of movement of displaced persons

55. Alleged prevention by the Russian Federation and the *de facto* authorities of Abkhazia and South Ossetia of the return to those regions of about 23,000 forcibly displaced Georgians[11]– complaints under Article 2 of Protocol No. 4.

F. Right to education

56. Alleged looting and destruction of public schools and libraries by Russian troops and separatist authorities and intimidation of Georgian pupils and teachers – complaints under Article 2 of Protocol No. 1.

G. Obligation to investigate

57. Alleged lack of investigations into the circumstances surrounding the events giving rise to the alleged violations regarding Article 2 – complaints under the procedural limb of Article 2 of the Convention.

H. Effective remedies

58. Alleged lack of effective remedies in respect of the violations alleged – complaints under Article 13 of the Convention taken in conjunction with Articles 3, 5 and 8 of the Convention and with Articles 1 and 2 of Protocol No. 1 and Article 2 of Protocol No. 4.

II. PRINCIPLES OF ASSESSMENT OF THE EVIDENCE AND ESTABLISHMENT OF THE FACTS

A. Principles of assessment of the evidence

59. The Court refers in this connection to the general principles which were recently summarised as follows in *Georgia v. Russia (I)* ([GC], no. 13255/07, ECHR 2014):

> "93. In assessing evidence the Court has adopted the standard of proof 'beyond reasonable doubt' laid down by it in two inter-State cases (see *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25, and *Cyprus v. Turkey* [GC],

11 20,000 from South Ossetia and 3,000 from Abkhazia.

no. 25781/94, § 113, ECHR 2001-IV) and which has since become part of its established case-law (see, *inter alia*, *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 26, ECHR 2004-VII, and *Davydov and Others v. Ukraine*, nos. 17674/02 and 39081/02, § 158, 1 July 2010).

94. However, it has never been its purpose to borrow the approach of the national legal systems that use that standard in criminal cases. The Court's role is to rule not on guilt under criminal law or on civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the High Contracting Parties of their engagements to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof. In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or predetermined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights (see, *inter alia*, *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 147, ECHR 2005-VII, and *Mathew v. the Netherlands*, no. 24919/03, § 156, ECHR 2005-IX).

95. In establishing the existence of an administrative practice, the Court will not rely on the concept that the burden of proof is borne by one or other of the two Governments concerned, but will rather study all the material before it, from whatever source it originates (see *Ireland v. the United Kingdom* and *Cyprus v. Turkey*, both cited above). In addition, the conduct of the parties in relation to the Court's efforts to obtain evidence may constitute an element to be taken into account (see *Ireland v. the United Kingdom*; *Ilaşcu and Others*; and *Davydov and Others*, all cited above).

...

138. [Furthermore], the Court would reiterate that, as 'master of its own procedure and its own rules ..., [it] has complete freedom in assessing not only the admissibility and relevance but also the probative value of each item of evidence before it' (see *Ireland v. the United Kingdom*, cited above, § 210 *in fine*). It has often attached importance to the information contained in recent reports from independent international human rights protection associations or governmental sources (see, *mutatis mutandis*, *Saadi v. Italy* [GC], no. 37201/06, § 131, ECHR 2008; *NA. v. the United Kingdom*, no. 25904/07, § 119, 17 July 2008; *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, §§ 227 and 255, ECHR 2011; and *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 118, ECHR 2012). In order to assess the reliability of these reports, the relevant criteria are the authority and reputation of their authors, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and whether they are corroborated by other sources (see*, mutatis mutandis*, *Saadi*, cited above, § 143; *NA. v. the United Kingdom*, cited above, § 120; and *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, § 230, 28 June 2011)."

60. Having adopted the above approach in a recent inter-State case involving the same two High Contracting Parties, the Court considers that it would not be appropriate to alter this approach in the present case.

B. Establishment of the facts

61. The Court observes at the outset that it is particularly difficult to establish the facts in the context of an inter-State case such as the present one, which concerns an armed conflict and its consequences, involving thousands of people and taking place over a significant period of time across a vast geographical area.

62. In the present case, the Court has relied on, *inter alia*, the observations of the parties and the many documents submitted by them.

1. Written evidence

63. It has also had regard to the following reports by international governmental and non-governmental organisations[12]:

(i) Report of the EU Fact-Finding Mission (see paragraph 32 above), published in September 2009;

(ii) "Human Rights in the war-affected areas following the conflict in Georgia" (report by the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE) of 27 November 2008);

(iii) "Human Rights in Areas affected by the South Ossetia Conflict" and "Human Rights Issues following the August 2008 Armed Conflict" (reports by the Commissioner for Human Rights of the Council of Europe of 8 September 2008 and 15 May 2009);

(iv) "Civilians in the line of fire: the Georgia-Russia conflict" (Amnesty International report of November 2008);

(v) "Up in Flames: Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia" and "A Dying Practice: Use of Cluster Munitions by Russia and Georgia in August 2008" (Human Rights Watch reports of January 2009 and April 2009);

(vi) "South Ossetia: The Burden of Recognition" and "Abkhazia: the Long Road to Reconciliation" (International Crisis Group reports of 7 June 2010 and 10 April 2013);

(vii) "August Ruins" (report published by a number of Georgian non-governmental organisations – Georgian Young Lawyers' Association, "Article 42 of the Constitution", Human Rights Centre, "21st Century" and Centre for the Protection of Constitutional Rights in 2009).

64. The Court has attached importance to the report by the EU Fact-Finding Mission, whose mandate was specifically to establish the facts

12 Some of these reports appear in the annex to the admissibility decision in this case.

concerning the conflict in Georgia (particularly from 7 August to 7 September 2008)[13].

65. That mission was composed of about twenty legal and military experts, historians and political analysts. It worked intensively for nine months, consulted all the parties to the conflict and the most representative international organisations, and carried out numerous field visits.

66. The Court has also referred to the report "High-Resolution Satellite Imagery and the Conflict in South Ossetia" published by the American Association for the Advancement of Science (AAAS) on 9 October 2008, finding that the satellite imagery analysis in the report constitutes objective evidence. The report was produced by the Geospatial Technologies Project as part of the Scientific Responsibility, Human Rights and Law Program of the AAAS, an American international non-profit organisation with the aim of promoting the advancement of science throughout the world. The AAAS is also one of the oldest federations of scientific organisations and perhaps the largest, with more than 275 affiliate bodies in more than ninety-one countries.

67. It should also be pointed out that on 13 October 2015 the Prosecutor at the International Criminal Court submitted to that court a "Request for authorization of an investigation into the Situation in Georgia covering the period from 1 July to 10 October 2008, for war crimes and crimes against humanity allegedly committed in and around South Ossetia". In a decision of 27 January 2016 Pre-Trial Chamber I of the International Criminal Court "authorise[d] the Prosecutor to proceed with an investigation of crimes within the jurisdiction of the Court, committed in and around South Ossetia, Georgia, between 1 July and 10 October 2008". Both the Prosecutor's Request and the Pre-Trial Chamber's decision contain relevant elements concerning the events in question and the investigations carried out by the national authorities. It should be noted, however, that the standard of proof is lower than the standard of "beyond reasonable doubt" applied by the Court. The Pre-Trial Chamber phrased it as follows:

> "24. At this point, the Chamber provides its conclusions on the question of whether, in light of the facts alleged by the Prosecutor as supported by the material presented together with the Request, there is a reasonable basis to believe that a crime within jurisdiction of the Court has been committed.
>
> 25. It has been observed previously by other Chambers acting under article 15 of the Statute that in order to satisfy the requirements, the material provided by the Prosecutor 'certainly need not point towards only one conclusion', nor does it have to be conclusive. All that is required is that there 'exists a sensible or reasonable

13 See, however, the disclaimer in this report (Volume I, p. 8):
"In summary, it should be noted that the factual basis thus established may be considered as adequate for the purpose of fact-finding, but not for any other purpose. This includes judicial proceedings such as the cases already pending before International Courts as well as any others."

justification for a belief that a crime falling within the jurisdiction of the Court "has been or is being committed"'."

2. Additional documentary evidence

68. In a letter of 8 October 2015 the Court asked the parties to produce their respective "combat reports" on the armed conflict of 2008 in Georgia.

69. In letters of 3 and 15 December 2015 and 4 February 2016 it drew the respondent Government's attention to Rule 33 § 2 of the Rules of Court, which provides that public access to a document or to any part of it may be restricted and to the fact that sensitive passages may also be removed and/or a summary of the relevant passages submitted.

70. By a letter of 19 February 2016, the applicant Government submitted extracts of their "combat reports". The respondent Government, for their part, sent letters of 15 December 2015 and 1 February 2016 refusing to submit their "combat reports" on the grounds that they were classified and highly sensitive documents and that the Court's procedures for preserving their confidentiality were inadequate.

71. In a letter of 8 April 2016 the Court also asked the applicant Government to produce their observations in the proceedings under way between them and Elbit Systems Limited before the Commercial Court of England in London. In a letter of 3 May 2016 it also drew the applicant Government's attention to Rule 33 § 2 (see paragraph 69 above).

72. The applicant Government initially refused to submit these observations, on the grounds that they were classified "top secret" by the Georgian authorities and that, in the agreement signed between the parties, the latter had undertaken not to reveal the information in those documents.

In a letter of 30 November 2017 the applicant Government finally submitted a redacted version (without the sensitive passages) of these observations, requesting the Court to treat them as confidential in accordance with Rule 33 §§ 2 and 3.

73. The applicant Government also submitted several demining reports in 2017 and 2018, in particular from the HALO Trust, a British demining company.

3. Hearing of witnesses

74. The Court also had regard to the statements of witnesses and experts during the witness hearing held in Strasbourg from 6 to 17 June 2016. As well as the establishment of the facts, the purpose of the hearing was to test the veracity of the evidence submitted by the parties and the evidence set out in the reports by international organisations concerning some of the aspects of the application outlined above (see paragraphs 51-55 above). The Court heard a total of thirty-three witnesses: fifteen had been called by the applicant Government, twelve by the respondent Government and six

directly by the Court (see paragraph 24 above, and also the list of witnesses and experts and the summary of their statements in the annex to the judgment).

III. PRELIMINARY QUESTIONS

75. In its admissibility decision (*Georgia v. Russia* (II) (dec.), 38263/08, 13 December 2011), the Court dismissed the respondent Government's objections regarding the six-month time-limit and the similarity between the present application and the one lodged with the ICJ, and joined to the merits the objections of incompatibility *ratione loci* and *ratione materiae* of the application with the provisions of the Convention and the objection of failure to exhaust domestic remedies.

76. In order to facilitate the handling of the present application, the Court will start with a general overview of the preliminary questions, such as those relating to jurisdiction and the relationship between the Convention and international humanitarian law, and to those regarding exhaustion of domestic remedies and the concept of administrative practice. It will then continue with an examination of these preliminary questions in relation to each of the above-described aspects of the application (see paragraphs 50-58 above).

A. Jurisdiction

77. The first question which the Court must address is whether the victims of the alleged violations fell within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention.

1. The parties' submissions

(a) The applicant Government

78. The applicant Government submitted that the violations of the Convention of which they complained fell within the jurisdiction of the Russian Federation within the meaning of Article 1 of the Convention.

They alleged, firstly, that during all the periods in question the regions of Tskhinvali/South Ossetia and Abkhazia had been under the effective authority and control of the Russian Federation. Prior to the conflict, the Russian Federation had already controlled the majority of those regions, both directly, through its armed forces, and indirectly, by controlling and supporting the *de facto* South Ossetian and Abkhazian authorities, including the separatist troops. During the period between 7-8 August and 22 August 2008 the Russian forces had invaded the rest of South Ossetia and Abkhazia, arriving from the north via the Roki tunnel, and from the west via Abkhazia. They had taken effective control of the last parts of South Ossetia

and Abkhazia that had still been under Georgian control, and which remained under Russian control today.

They alleged, secondly, that during the conflict Russia had taken effective control of other regions, including the "buffer" zone, namely, (a) the majority of the Gori district, including the town of Gori; (b) part of the Kareli district; and (c) part of the Sachkhere district. The Russian forces had crossed the Abkhazian administrative border to take control of the towns of Zugdidi, Senaki and Poti. On 22 August, Russia had withdrawn from the town of Gori but had kept control of the territory to the south of the administrative border (the "buffer zone"), not withdrawing its forces until 8 October. During that period the Russian Federation had also exercised effective control over those other territories, both directly by means of its armed forces, and indirectly through the agents placed under its control, which had been comprised of separatist forces and irregular troops.

Cumulatively with or alternatively to the exercise of effective control of the above-mentioned territories, the criterion of State agent authority and control supported the claim that the Russian Federation's responsibility was engaged on account of the acts and omissions of its armed forces and of all the agents over whom it exercised authority and control, including the militia and separatist forces. In particular, Russia was responsible for the bombing of Georgian territory between 8 and 12 August 2008 and for the attacks on civilian convoys and vehicles attempting to flee the bombs.

The applicant Government's position was confirmed by the Court's well-established case-law regarding the extraterritorial application of the Convention (they referred to *Loizidou v. Turkey* (merits), 18 December 1996, §§ 52 and 56, *Reports of Judgments and Decisions* 1996-VI; *Cyprus v. Turkey* [GC], no. 25781/94, § 77, ECHR 2001-IV; *Issa and Others v. Turkey*, no. 31821/96, § 74, 16 November 2004; *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, §§ 383-85, ECHR 2004-VII; *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 138, ECHR 2011; and *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, § 122-23, ECHR 2012 (extracts)).

(b) The respondent Government

79. The respondent Government submitted that Russia's military intervention had been an urgent response to Georgia's aggression, which had brought Russia into armed conflict with an aggressor equipped with substantial military resources.

The overall conflict had been hard fought, and Georgia had repeatedly attempted to regroup its forces and to counter-attack. Russia's forces had rushed to Tskhinvali and engaged Georgian forces there, and had fought hard to expel them from surrounding Georgian villages which Georgian forces had used as artillery positions, muster points for counterattacks and defensive positions to resist the Russian advance. For a long time there had

been a confused and oscillating front line, and even after the ceasefire brokered by President Sarkozy, concern about a potential renewal of hostilities and a counter-attack had kept Russian forces at the front line and guarding their supply routes. In Abkhazia, Russian forces had not been involved in the conflict, but had been stationed there by way of deterrence, against the background of Georgia's plans to invade Abkhazia too.

The result was that there had never been a time when the Russian Federation had consolidated "effective control" over South Ossetia or Abkhazia through its armed forces. On the contrary, the situation had been very different from that in *Loizidou* ((merits), cited above, §§ 52 and 56) where Turkey had been found to have effective control over more than 3,400 sq. km of territory with 30,000 Turkish troops with no active conflict or ethnic violence. The Russian contingent in South Ossetia and Abkhazia had never risen above 12,000 personnel at the height of the conflict, covering an area of 12,500 sq. km. In South Ossetia, Russian forces had been faced with a well-equipped Georgian army, the threat of reinforcements flown in by the USA, and massive inter-ethnic hostility unleashed by Georgia's aggression. Moreover, as was clear from the case file, Russia had not had any State agent authority over the individuals concerned, who were not its agents.

Furthermore, the Russian Federation had not had any effective control through the South Ossetian and Abkhazian governments or through support for those governments, which had legitimate status as independent decision-makers which were not "subordinate" in any way. In reality the Russian Federation had not occupied or administered South Ossetia or Abkhazia, but carried out a military operation that had been entirely justified under public international law and limited in time (from 8 to 20 August 2008), in order to protect Russian peacekeeping forces and the civilian population.

The respondent Government also reiterated the distinction between the concepts of jurisdiction and attribution (State responsibility) in public international law, referring to the Court's case-law (*Loizidou v. Turkey* (preliminary objections), 23 March 1995, §§ 61 and 64, Series A no. 310, and *Jaloud v. the Netherlands* [GC], no. 47708/08, §§ 154-55, ECHR 2014), and to the judgments of the International Court of Justice in the cases of *Nicaragua v. United States of America*[14] and *Bosnia and Herzegovina v. Serbia and Montenegro*[15].

14 *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), *Judgment, ICJ Reports* 1986, pp. 62-63, §§ 109-10.

15 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), *Judgment, ICJ Reports* 2007, p. 205, §§ 392-93.

2. Third-party comments

80. In its third-party comments, the Human Rights Centre, University of Essex, observed that it was important to distinguish between the fact of the exercise of jurisdiction outside national territory and the scope of the jurisdiction exercised. Whether or not a State had lawful grounds to act in a foreign territory was virtually immaterial to the applicability of human rights obligations regarding its actions. The deciding matter for the applicability of obligations was the factual exercise of jurisdiction, whether lawful or not.

The third party pointed out that under the Court's case-law the key concept in determining whether an act or omission outside the national territory was within the jurisdiction of the respondent State was the question of control. It described the various different situations in which control was exercised, be this physical control over an individual, the State's control over its agents, or the State's control over territory through the presence of its security forces or through a subordinate administration. While there were situations in which the State had an obligation to protect an individual from acts perpetrated by an agent of the State, in some circumstances the State could have an obligation to protect an individual from the acts of third parties. The third party added: "In certain circumstances, the State may be directly responsible for the acts of non-State agents. If the State exercises 'effective control' over the acts of an organised armed group, those acts will be attributable to the State, under general principles of state responsibility[16]. This is independent of the question of control exercised through a subordinate administration."

In the present case, in order to determine whether the alleged violations were within the jurisdiction of the Russian Federation, the third party submitted that the Court needed to ask itself the following questions:

"1. What was the nature of the control, if any, exercised by Russia in South Ossetia and Abkhazia prior to the armed conflict? In particular, was it in occupation or did it exercise a decisive influence over the local authorities? 2. Did the nature of the control exercised by Russia in South Ossetia and Abkhazia change upon the outbreak of hostilities? Did it exercise 'effective control' over the local militia? 3. In undisputed Georgian territory, was the nature of the control exercised during the armed conflict confined to the first three types of control discussed above? 4. After the end of the active hostilities, what was the nature of the control exercised by Russia in areas outside South Ossetia and Abkhazia (i.e. the 'buffer zones')? 5. After the end of the active hostilities, what was the nature of the control exercised by Russia within South Ossetia and

16 *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), *Judgment, ICJ Reports* 1986, pp. 64-65, §§ 115-16.

Abkhazia? In particular, what was the nature of its relationship with the local authorities in control of those areas?"

3. The Court's assessment

(a) General principles relating to the concept of jurisdiction under Article 1 of the Convention

81. The general principles have been laid down in, among other cases, *Al-Skeini and Others* (cited above):

"130. Article 1 of the Convention reads as follows:

'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention.'

As provided by this Article, the engagement undertaken by a Contracting State is confined to 'securing' ('*reconnaître*' in the French text) the listed rights and freedoms to persons within its own 'jurisdiction' (see *Soering v. the United Kingdom*, 7 July 1989, § 86, Series A no. 161, and *Banković and Others*, cited above, § 66). 'Jurisdiction' under Article 1 is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention (see *Ilaşcu and Others*, cited above, § 311).

(α) The territorial principle

131. A State's jurisdictional competence under Article 1 is primarily territorial (see *Soering*, cited above, § 86; *Banković and Others*, cited above, §§ 61 and 67; and *Ilaşcu and Others*, cited above, § 312). Jurisdiction is presumed to be exercised normally throughout the State's territory (see *Ilaşcu and Others*, cited above, § 312, and *Assanidze v. Georgia* [GC], no. 71503/01, § 139, ECHR 2004-II). Conversely, acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases (see *Banković and Others*, cited above, § 67).

132. To date, the Court in its case-law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extraterritorially must be determined with reference to the particular facts.

(β) State agent authority and control

133. The Court has recognised in its case-law that, as an exception to the principle of territoriality, a Contracting State's jurisdiction under Article 1 may extend to acts of its authorities which produce effects outside its own territory (see *Drozd and Janousek*, cited above, § 91; *Loizidou* (preliminary objections), cited above, § 62; *Loizidou v. Turkey* (merits), 18 December 1996, § 52, *Reports of Judgments and Decisions* 1996-VI; and *Banković and Others*, cited above, § 69). The statement of principle, as it appears in *Drozd and Janousek* and the other cases just cited, is very broad: the Court states merely that the Contracting Party's responsibility 'can be involved' in these circumstances. It is necessary to examine the Court's case-law to identify the defining principles.

134. Firstly, it is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others (see *Banković and Others*, cited above, § 73; see also *X. v. Germany*, no. 1611/62, Commission decision of 25 September 1965, Yearbook 8, p. 158; *X. v. the United Kingdom*, no. 7547/76, Commission decision of 15 December 1977, DR 12, p. 73; and *M. v. Denmark*, no. 17392/90, Commission decision of 14 October 1992, DR 73, p. 193).

135. Secondly, the Court has recognised the exercise of extraterritorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government (see *Banković and Others*, cited above, § 71). Thus, where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State (see *Drozd and Janousek*, cited above; *Gentilhomme and Others v. France*, nos. 48205/99, 48207/99 and 48209/99, 14 May 2002; and *X. and Y. v. Switzerland*, nos. 7289/75 and 7349/76, Commission decision of 14 July 1977, DR 9, p. 57).

136. In addition, the Court's case-law demonstrates 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. For example, in *Öcalan* (cited above, § 91), the Court held that 'directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the "jurisdiction" of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory'. In *Issa and Others* (cited above), the Court indicated that, had it been established that Turkish soldiers had taken the applicants' relatives into custody in northern Iraq, taken them to a nearby cave and executed them, the deceased would have been within Turkish jurisdiction by virtue of the soldiers' authority and control over them. In *Al-Saadoon and Mufdhi v. the United Kingdom* ((dec.), no. 61498/08, §§ 86-89, 30 June 2009), the Court held that two Iraqi nationals detained in British-controlled military prisons in Iraq fell within the jurisdiction of the United Kingdom, since the United Kingdom exercised total and exclusive control over the prisons and the individuals detained in them. Lastly, in *Medvedyev and Others v. France* ([GC], no. 3394/03, § 67, ECHR 2010), the Court held that the applicants were within French jurisdiction for the purposes of Article 1 of the Convention by virtue of the exercise by French agents of full and exclusive control over a ship and its crew from the time of its interception in international waters. The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.

137. It is clear that, whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual. In this sense,

therefore, the Convention rights can be 'divided and tailored' (compare the decision in *Banković and Others*, cited above, § 75).

(γ) Effective control over an area

138. Another exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration (see *Loizidou* (preliminary objections), cited above, § 62; *Cyprus v. Turkey*, cited above, § 76; *Banković and Others*, cited above, § 70; *Ilaşcu and Others*, cited above, §§ 314-16; and *Loizidou* (merits), cited above, § 52). Where the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and actions. The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights (see *Cyprus v. Turkey*, cited above, §§ 76-77).

139. It is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area (see *Loizidou* (merits), cited above, §§ 16 and 56, and *Ilaşcu and Others*, cited above, § 387). Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region (see *Ilaşcu and Others*, cited above, §§ 388-94).

140. The 'effective control' principle of jurisdiction set out above does not replace the system of declarations under Article 56 of the Convention (formerly Article 63) which the States decided, when drafting the Convention, to apply to territories overseas for whose international relations they were responsible. Article 56 § 1 provides a mechanism whereby any State may decide to extend the application of the Convention, 'with due regard ... to local requirements', to all or any of the territories for whose international relations it is responsible. The existence of this mechanism, which was included in the Convention for historical reasons, cannot be interpreted in present conditions as limiting the scope of the term 'jurisdiction' in Article 1. The situations covered by the 'effective control' principle are clearly separate and distinct from circumstances where a Contracting State has not, through a declaration under Article 56, extended the Convention or any of its Protocols to an overseas territory for whose international relations it is responsible (see *Loizidou* (preliminary objections), cited above, §§ 86-89, and *Quark Fishing Ltd*, cited above).

(δ) The legal space ('*espace juridique*') of the Convention

141. The Convention is a constitutional instrument of European public order (see *Loizidou* (preliminary objections), cited above, § 75). It does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States (see *Soering*, cited above, § 86).

142. The Court has emphasised that, where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a 'vacuum' of protection within the 'legal space of the Convention' (see *Cyprus v. Turkey*, cited above, § 78, and *Banković and Others*, cited above, § 80). However, the importance of establishing the occupying State's jurisdiction in such cases does not imply, *a contrario*, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe member States. The Court has not in its case-law applied any such restriction (see, among other examples, *Öcalan*; *Issa and Others*; *Al-Saadoon and Mufdhi*; and *Medvedyev and Others*, all cited above)."

(b) Methodology followed in the present case

82. As indicated in the same judgment, "the Court in its case-law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extraterritorially must be determined with reference to the particular facts" (ibid., § 132).

83. In the present case the Court considers that a distinction needs to be made between the military operations carried out during the active phase of hostilities and the other events which it is required to examine in the context of the present international armed conflict, including those which occurred during the "occupation" phase after the active phase of hostilities had ceased, and the detention and treatment of civilians and prisoners of war, freedom of movement of displaced persons, the right to education and the obligation to investigate.

84. It will therefore examine in respect of each of these aspects of the application whether they fell within the jurisdiction of the Russian Federation, before examining them on the merits (see paragraphs 106-144, 146-175, 238-239, 268-269, 292-295, 312 and 328-332 below).

B. Relationship between the provisions of the Convention and the rules of international humanitarian law

1. The parties' submissions

(a) The applicant Government

85. The applicant Government submitted that in *Hassan v. the United Kingdom* ([GC], no. 29750/09, ECHR 2014) the Court had made it clear that, in accordance with international law, the Convention continued to apply during international and non-international armed conflict. In that judgment the Court had also found that it could take into account the

provisions of international humanitarian law when interpreting Article 5 even in the absence of a derogation under Article 15. That conclusion was subject to the Court being able to interpret Article 5 § 1 in line with international humanitarian law in a way that was "in keeping with the fundamental purpose of Article 5 § 1, which was to protect the individual from arbitrariness" (ibid., § 105).

According to the applicant Government, there was no conflict in this case between the requirements of international humanitarian law and human rights law. As such, it did not raise any difficulty for the Court in relation to it "seeking to ensure that the Convention so far as possible be interpreted in harmony with other rules of international law of which it formed part, including international humanitarian law" (ibid., §§ 77 and 102).

(b) The respondent Government

86. The respondent Government submitted, as their principal argument, that "Russia's military response was legitimate under public international law and IHL [international humanitarian law]. In the international armed conflict that resulted, Russia's obligations were defined and governed exclusively by IHL, and the Court has no jurisdiction over the relevant questions of Russia's compliance with IHL. Without prejudice to that position, Russia complied fully with IHL." In support of that position, they argued as follows:

> "In the respectful submission of the Russian Federation, it would be wrong for an approach in favour of dual application of IHL and HRL [international human rights law] to gain momentum from cases [such as *Hassan* and *Jaloud*] which on their facts, in the issues addressed and upon the Court's analysis, do not begin to grapple with the issues of jurisdiction, law and justiciability presented by this case.
>
> Russia respectfully submits that the Court adopted a wrong approach when, in effect, it assumed that it was possible to use IHL to interpret Convention law in both cases. It may be that it was invited down this inappropriate path by the concession of one State – the United Kingdom – that it could do so in *Hassan*.
>
> On any view, however, it is one thing to say that the Convention applies, and that IHL can be used to modify Convention rights in a situation of detention, or in relation to soldiers performing a policing role in an area where they have effective control. It is quite another to suggest that the Convention applies in armed conflict and the chaos that follows, or to say that the Court can mould the Convention to match IHL on a general basis and so assume jurisdiction over alleged breaches of IHL in a conflict situation. That would not be permissible, practical, or desirable for the reasons developed below.
>
> **(A) The Ultra Vires Issue**
>
> ...
>
> States have not agreed that the Court should adjudicate on matters of IHL. The European Court of Human Rights is only empowered by Article 32 to address '... all matters concerning the interpretation and application of the Convention and the

Protocols thereto'. Those do not include matters of interpretation and application of the Geneva Conventions.

On the contrary, the States Parties to the Convention are also States Parties to the Geneva Convention, and in that context, they specifically rejected a suggestion that the International Court of Justice should have jurisdiction over IHL.

On the contrary none of the core instruments of IHL give any jurisdiction to any court in respect of contraventions of IHL.

...

Moreover, this is not an area where a living instrument can grow. On the contrary, if a living instrument grows too far from its roots, it may die, or be pruned. The confinement of the Convention away from armed conflict could not be clearer from the overt conduct of the States who subscribe to it.

Finally on this point, and *pace* the obligations of the Court in *Hassan* [at 101] which perhaps again flow from the United Kingdom's concession, States do not derogate from the application of HRL in zones of conflict because of recognition that, even without derogation, HRL will be read in the light of IHL. They do not derogate because they do not anticipate that HRL will apply in such cases at all.

(B) The Inconsistency Issue

The Convention is not designed for conflict. It only mentions war once, and that is to recognise that it may be necessary to abrogate Convention protections domestically, in time of war. Nothing in the Convention purports to regulate war.

Moreover, Convention rights do not sit well with IHL rules. Many of them are completely irreconcilable to a degree that demonstrates that Convention law and IHL were never intended to operate together."

2. Third-party comments

87. In its comments the Human Rights Centre of the University of Essex reiterated first of all that the rules on the resort to armed force (*jus ad bellum*) were irrelevant to the analysis of the law of armed conflict ("LOAC"). Whether the State was acting in self-defence or not, it was required to obey the same rules in the conduct of the hostilities and the protection of victims.

It added that where the acts of an organised armed group were, in fact, attributable to a State, the conflict was international. The test which was to be applied to determine whether the relationship between an organised armed group and a State was such as to make the conflict international was unclear. The difference in approach of the International Court of Justice and of the International Criminal Tribunal for the former Yugoslavia regarding the issue of a State's international responsibility for non-State actors gave rise to a potential major difficulty. If a conflict was international because an organised armed group was under the "overall control" of a State, this meant that the rules applicable to international armed conflicts applied to the acts of the group (the ICTY approach). If, however, the group was not under the "effective control" of the State, its acts were not attributable to

that State (the ICJ). It would, therefore, be prudent to apply the same control test for classification and attribution. Whether this should be the "overall" or the "effective" test remained a subject of debate.

In the present case, whatever the general relationship between Russia and the militia throughout the conflict, it was possible that the latter had been under the control of Russian forces in a particular incident. This meant that, in order to determine the LOAC rules potentially relevant, the Court had to examine each incident, to see which forces had been involved.

The third party referred to its observations submitted in *Hassan* (cited above), in which it had argued that the applicability of LOAC was not a reason for a human rights court not to exercise jurisdiction. Rather, LOAC might need to be taken into account by the body when determining if there was a violation (ibid., §§ 91-95). It submitted that situations formed a spectrum. At one end, there would only be a violation of human rights law (HRL) if there was a violation of LOAC. At the other end, the only law applicable would be HRL, but the situation of conflict might be relevant as part of the background. In the middle, the two bodies of rules might both be relevant. In summary, it was more likely that incidents involving the rules on the conduct of hostilities between the belligerents, including rules on weapon use, would be at one end of the spectrum, at least in the case of incidents of high intensity. Situations involving the rules on the protection of victims, particularly where they arose away from the immediate scene of hostilities, were more likely to involve a mixture of LOAC and HRL. This approach meant that there could be no general rule mandating the same balance of LOAC and HRL in each case. Rather, each type of situation had to be examined in turn. In practice, there was less likely to be a conflict between LOAC and HRL at the lower end of the spectrum. The LOAC rules on the protection of victims tended to prohibit similar behaviour to that prohibited under HRL. Where most difficulty was likely to arise was where LOAC permitted behaviour prohibited under HRL.

3. The Vienna Convention of 1969 on the Law of Treaties

88. Article 31 of the Vienna Convention of 1969 on the Law of Treaties (hereafter "the Vienna Convention") provides:

Article 31 – General Rule of Interpretation

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of

the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

4. Case-law of the International Court of Justice

89. In its advisory opinion of 8 July 1996 on *Legality of the Threat or Use of Nuclear Weapons* (*Advisory Opinion, ICJ Reports* 1996, p. 226), the International Court of Justice stated as follows:

"25. The Court observes that the protection of the International Covenant for the Protection of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life, however, is not such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."

90. In its advisory opinion of 9 July 2004 on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (*Advisory Opinion, ICJ Reports* 2004, p. 136), the International Court of Justice rejected Israel's argument that the human rights instruments to which it was a party were not applicable to occupied territory, and held:

"106. ... the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law."

91. In its judgment of 19 December 2005 in *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)* (*Judgment, ICJ Reports* 2005, p. 168), the International Court of Justice held as follows:

> "215. The Court, having established that the conduct of the UPDF and of the officers and soldiers of the UPDF [Uganda People's Defence Force] is attributable to Uganda, must now examine whether this conduct constitutes a breach of Uganda's international obligations. In this regard, the Court needs to determine the rules and principles of international human rights law and international humanitarian law which are relevant for this purpose.
>
> 216. The Court first recalls that it had occasion to address the issues of the relationship between international humanitarian law and international human rights law and of the applicability of international human rights law instruments outside national territory in its Advisory Opinion of 9 July 2004 on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. In this Advisory Opinion the Court found that 'the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. ' (I.C.J. Reports 2004, p. 178, para. 106).
>
> It thus concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration. The Court further concluded that international human rights instruments are applicable 'in respect of acts done by a State in the exercise of its jurisdiction outside its own territory', particularly in occupied territories (*ibid*., pp. 178-181, paras. 107-113)."

5. The Court's assessment

(a) General principles

92. The Court observes that it has examined the complex question of the relationship between Convention law and international humanitarian law in a certain number of cases brought before it.

93. Reference should be made to, among others, the *Hassan* judgment (cited above), which is inspired by the case-law of the International Court of Justice in this regard. The relevant passages read as follows:

> "100. The starting-point for the Court's examination must be its constant practice of interpreting the Convention in the light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969 (see *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, § 29, and many subsequent cases). Article 31 of the Vienna Convention, which contains the 'general rule of interpretation' (see paragraph 34 above), provides in paragraph 3 that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties

regarding its interpretation; and (c) any relevant rules of international law applicable in the relations between the parties.

101. There has been no subsequent agreement between the High Contracting Parties as to the interpretation of Article 5 in situations of international armed conflict. However, in respect of the criterion set out in Article 31 § 3 (b) of the Vienna Convention (see paragraph 34 above), the Court has previously stated that a consistent practice on the part of the High Contracting Parties, subsequent to their ratification of the Convention, could be taken as establishing their agreement not only as regards interpretation but even to modify the text of the Convention (see, *mutatis mutandis*, *Soering*, cited above, §§ 102-03, and *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, § 120, ECHR 2010). The practice of the High Contracting Parties is not to derogate from their obligations under Article 5 in order to detain persons on the basis of the Third and Fourth Geneva Conventions during international armed conflicts. As the Court noted in *Banković and Others* (cited above, § 62), although there have been a number of military missions involving Contracting States acting extraterritorially since their ratification of the Convention, no State has ever made a derogation pursuant to Article 15 of the Convention in respect of these activities. The derogations that have been lodged in respect of Article 5 have concerned additional powers of detention claimed by States to have been rendered necessary as a result of internal conflicts or terrorist threats to the Contracting State (see, for example, *Brannigan and McBride v. the United Kingdom*, 26 May 1993, Series A no. 258-B; *Aksoy v. Turkey*, 18 December 1996, *Reports of Judgments and Decisions* 1996-VI; and *A. and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009; see also paragraphs 40-41 above). Moreover, it would appear that the practice of not lodging derogations under Article 15 of the Convention in respect of detention under the Third and Fourth Geneva Conventions during international armed conflicts is mirrored by State practice in relation to the International Covenant for the Protection of Civil and Political Rights. Similarly, although many States have interned persons pursuant to powers under the Third and Fourth Geneva Conventions in the context of international armed conflicts subsequent to ratifying the Covenant, no State has explicitly derogated under Article 4 of the Covenant in respect of such detention (see paragraph 42 above), even subsequent to the advisory opinions and judgment referred to above, where the International Court of Justice made it clear that States' obligations under the international human rights instruments to which they were parties continued to apply in situations of international armed conflict (see paragraphs 35-37 above).

102. Turning to the criterion contained in Article 31 § 3(c) of the Vienna Convention (see paragraph 34 above), the Court has made it clear on many occasions that the Convention must be interpreted in harmony with other rules of international law of which it forms part (see paragraph 77 above). This applies no less to international humanitarian law. The four Geneva Conventions of 1949, intended to mitigate the horrors of war, were drafted in parallel to the European Convention on Human Rights and enjoy universal ratification. The provisions in the Third and Fourth Geneva Conventions relating to internment, at issue in the present application, were designed to protect captured combatants and civilians who pose a security threat. The Court has already held that Article 2 of the Convention should 'be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict' (see *Varnava and Others*, cited above, § 185), and it considers that these observations apply equally in relation to Article 5. Moreover, the International Court of Justice has held that the protection offered by human rights conventions and that offered by international humanitarian law co-exist in situations of armed conflict (see paragraphs 35-37

above). In its judgment *Armed Activities on the Territory of the Congo*, the International Court of Justice observed, with reference to its advisory opinion concerning *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, that '[a]s regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law' (see paragraphs 36 and 37 above). The Court must endeavour to interpret and apply the Convention in a manner which is consistent with the framework under international law delineated by the International Court of Justice.

103. In the light of the above considerations, the Court accepts the Government's argument that the lack of a formal derogation under Article 15 does not prevent the Court from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5 in this case.

104. Nonetheless, and consistently with the case-law of the International Court of Justice, the Court considers that, even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law. ...

...

107. Finally, although, for the reasons explained above, the Court does not consider it necessary for a formal derogation to be lodged, the provisions of Article 5 will be interpreted and applied in the light of the relevant provisions of international humanitarian law only where this is specifically pleaded by the respondent State. It is not for the Court to assume that a State intends to modify the commitments which it has undertaken by ratifying the Convention in the absence of a clear indication to that effect."

(b) Methodology followed in the present case

94. As indicated in *Hassan* (cited above, § 102), "the Court has made it clear on many occasions that the Convention must be interpreted in harmony with other rules of international law of which it forms part ... This applies no less to international humanitarian law."

95. In the present case the Court will thus examine 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, it will ascertain each time whether there is a conflict between the provisions of the Convention and the rules of international humanitarian law.

C. Exhaustion of domestic remedies

1. The parties' submissions

(a) The applicant Government

96. The applicant Government's principal submission was that the rule on exhaustion of domestic remedies did not apply to inter-State applications whose object, as in the present case, was to determine the compatibility with the Convention of an administrative practice. Moreover, there was sufficient

evidence of widespread and systematic violations, and of official tolerance as evidenced by the failure to carry out any prompt, independent and impartial investigations.

In the alternative, they submitted that the obvious and intentional failure of the Russian Federation to investigate allegations against Russian and South Ossetian military personnel demonstrated an official policy of impunity amounting to a barrier to effective redress. The mechanisms for seeking a remedy summarised in the Court's admissibility decision at paragraphs 48 to 53 showed that there was no means by which an individual victim could submit a civil claim for compensation unless a criminal investigation had been instituted. Whilst individual victims could, in principle, file a criminal complaint, there was no realistic prospect of such complaints being promptly and impartially investigated. As the Investigative Committee of the General Prosecutor's Office of the Russian Federation had reacted with indifference to evidence of widespread and systematic crimes committed by the Russian and South Ossetian forces – despite these crimes having been brought to their attention – there could be no realistic prospect of the Russian authorities mounting effective criminal investigations into individual complaints. And without a criminal investigation there was no realistic prospect of an effective domestic remedy.

(b) The respondent Government

97. The respondent Government drew the Court's attention to the existence in the applicable law of the Russian Federation of effective remedies for violations of the provisions of the Convention complained of by the applicant Government in their application (paragraphs 48 to 53 of the admissibility decision). There was no evidence of any attempt by the alleged Georgian victims to avail themselves of these domestic remedies by lodging an application with the competent authorities or reporting an offence. With regard to the complaints received from various human rights organisations, the Investigative Committee of the General Prosecutor's Office of the Russian Federation ("the Investigative Committee") had carried out the requisite investigations. To that end the Investigative Committee had identified and interviewed more than 1,000 Russian military servicemen who had been involved in military operations in South Ossetia, together with a large number of residents of the villages in South Ossetia affected by the hostilities. The investigations had not disclosed any credible evidence showing illegal behaviour (including violations of IHL) by Russian military personnel in the course of the conflict. On the contrary, the evidence suggested that the allegations were unfounded. The Investigative Committee had even written to the Office of the Chief Prosecutor of Georgia to seek its help in investigating the allegations made by Georgia against Russian

servicemen and had come up against a blanket refusal to provide any help whatsoever.

2. The Court's assessment

98. The general principles have been set out in *Georgia v. Russia (I)* (cited above):

> "125. With regard to the rule on exhaustion of domestic remedies, the Court reiterates that, according to its case-law in inter-State cases, the rule does not in principle apply where the applicant Government 'complain of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask ... the Court to give a decision on each of the cases put forward as proof or illustrations of that practice' (see *Ireland v. the United Kingdom*, cited above, § 159). In any event, it does not apply 'where an administrative practice, namely, a repetition of acts incompatible with the Convention, and official tolerance by the State, has been shown to exist and is of such a nature as to make proceedings futile or ineffective' (see *Ireland v. the United Kingdom*, cited above, ibid.; *Akdivar and Others v. Turkey*, 16 September 1996, § 67, *Reports of Judgments and Decisions* 1996-IV; and *Cyprus v. Turkey*, cited above, § 99).
>
> 126. However, the question of effectiveness and accessibility of domestic remedies may be regarded as additional evidence of whether or not such a practice exists (see, in particular, *Cyprus v. Turkey*, cited above, § 87)."

99. In the present case the Court also considers that the question of exhaustion of domestic remedies is closely linked to that of the existence of administrative practices as alleged by the applicant Government. It will therefore examine these questions jointly.

D. Concept of "administrative practice"

100. In their written submissions before the Grand Chamber the applicant Government asked the Court "to determine the compatibility of the administrative practices outlined in §§ 87-258 of this Memorial with the provisions of the Convention. The individual violations are advanced by Georgia as illustrations of the administrative practices alleged. For the avoidance of doubt, Georgia is not inviting the Court to make findings in respect of each alleged violation. The object of the claim is to prevent the repetition of such practices by Russia, and (in the case of the violations of Article 5, Article 1 of Protocol 1, Article 2 of Protocol 1 and Article 2 of Protocol 4) to prevent the continuation of violations that are ongoing."

101. In the present case the Court is therefore called upon to examine whether or not there existed "administrative practices" incompatible with the Articles of the Convention allegedly breached, in accordance with the criteria established by it in its case-law and with the request made to this end by the applicant Government.

102. It refers in this connection to the definition of the concept of "administrative practice" outlined in *Georgia v. Russia (I)* (cited above):

> "122. The Court reiterates that an administrative practice comprises two elements: the 'repetition of acts' and 'official tolerance' (see *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 9940-9944/82, Commission decision of 6 December 1983, Decisions and Reports 35, p. 163, § 19, and *Cyprus v. Turkey*, cited above, § 99).
>
> 123. As to the 'repetition of acts', the Court describes these as 'an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system' (see *Ireland v. the United Kingdom*, cited above, § 159, and *Cyprus v. Turkey*, cited above, § 115).
>
> 124. By 'official tolerance' is meant that illegal acts 'are tolerated in the sense that the superiors of those immediately responsible, though cognisant of such acts, take no action to punish them or to prevent their repetition; or that a higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings a fair hearing of such complaints is denied'. To this latter element, the Commission added that 'any action taken by the higher authority must be on a scale which is sufficient to put an end to the repetition of acts or to interrupt the pattern or system' (see *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, cited above, pp. 163-64, § 19). In that connection, the Court has observed that 'it is inconceivable that the higher authorities of a State should be, or at least should be entitled to be, unaware of the existence of such a practice. Furthermore, under the Convention those authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected' (see *Ireland v. the United Kingdom*, cited above, § 159)."

103. However, it should be noted that while these criteria do define a general framework, they do not indicate the number of incidents required in order to be able to conclude that an administrative practice existed, which is a question left to the Court to assess having regard to the particular circumstances of each case.

104. In the case of *Ireland v. the United Kingdom* (no. 5310/71, Commission's report of 25 January 1976, Series B no. 23-I, pp. 395-96) the Commission gave the following explanations:

> "On the *merits* of an application the concept of a practice in breach of the Convention is not procedural but a relevant feature in the description of the breach involved. Although one single act contrary to the Convention is sufficient to establish a violation, it is [evident] that the violation can be regarded as being more serious if it is not simply one outstanding event but forms part of a number of similar events which might even form a pattern.
>
> Again the level of tolerance is significant in this context insofar as it affects the seriousness of the violation involved: the higher the organ tolerating the acts the more serious is the violation involved. Finally, where repetition and official tolerance is combined, this would constitute an even more serious situation.
>
> Consequently, the Commission's primary concern in any case admitted under Art. 3 - and whether it is arising under Art. 24 [individual application] or Art. 25 [State

application] does not matter - is whether or not the facts established disclose a violation of the Convention in respect of any individual. Where breaches of the Convention have been established in a number of individual cases this might amount to a practice in breach of the Convention with the consequence of rendering the fact that it has been violated more serious."

IV. ACTIVE PHASE OF HOSTILITIES DURING THE FIVE-DAY WAR (FROM 8 TO 12 AUGUST 2008)

105. The applicant Government submitted that the military operations (bombing, shelling, artillery fire) by the Russian armed forces and/or South Ossetian forces during the conflict had breached Article 2 of the Convention.

Jurisdiction

1. The parties' submissions[17]

106. The applicant Government submitted that at the latest on the evening of 7 August 2008 Russian ground forces had entered Georgia through Abkhazia and the Tskhinvali Region/South Ossetia, and then moved into the adjacent areas situated in undisputed Georgian territory. They had been assisted by the Russian air force and the Black Sea fleet. Further, elements of the Russian army as well as hundreds of "volunteers" from the Russian North Caucasus had entered the Tskhinvali Region/South Ossetia from Russia through the Roki Tunnel. Lastly, between 8 and 12 August 2008 there had been more than 75 aerial attacks on Georgian territory by the Russian Federation. The bulk of the bombardments had occurred in the area around Eredvi in South Ossetia and around Tkviavi and Variani in the Gori District. During that time the town of Gori had been hit in a number of separate attacks.

107. The respondent Government replied that this part of Georgia's application had to fail for want of effective control or jurisdiction on the part of the Russian Federation. Plainly, in their submission, Russian forces would not have been shelling or bombarding areas that they already controlled with their own men. As in *Banković and Others v. Belgium and Others* ((dec.) [GC], no. 52207/99, ECHR 2001-XII), the act of bombarding or shelling did not constitute effective control over the area where the bombs or projectiles landed. On the contrary, armed conflict (in the specific aspect of military operations over contested ground) was the antithesis of effective control.

17 See also the arguments set out above (paragraphs 78-79).

2. Summary of the relevant evidence

108. In its report (Volume II, pp. 215-17), the EU Fact-Finding Mission summarised the events in question as follows:

> "The official Russian material submitted to the IIFFMCG in July 2009 holds that 'On 8 August at 14.30 units of the 693rd and 135th Motorised Rifle Regiments of the 19th Motorised Rifle Division charged with the task of carrying out the peacekeeping mission entrusted to the Russian Federation and protecting Russian citizens were deployed from the territory of the Russian Federation to the territory of South Ossetia through the Roki tunnel and began to move into South Ossetia. The air force and artillery units launched strikes against Georgian military facilities to restrict movements of the enemy reserves, disrupt its communications, incapacitate base airfields, destroy warehouses and bases containing fuel and lubricants and to seal off the areas of hostilities.'
>
> In addition to the two regiments of the 19th Motorised Rifle Division of the 58th Army referred to in the Russian information mentioned above, previous information provided to the IIFFMCG by the Russian authorities in mid-May 2009 stated that a number of other military units participated in the Russian operation on the eastern front (South Ossetia) including elements from the 42nd Motorised Rifle Division (from Chechnya), the 76th Assault Division (Pskov), the 98th Airborne Division (Ivanovo), the 20th Motorised Rifle Division (Volgograd), the 234th Assault Division, the 205th Separate Motorised Rifle Brigade, the 429th and 71st Motorised Rifle Regiments, the 104th Assault Regiment, the 331st Parachute Regiment and the 45th Special Purpose Regiment (Moscow district).
>
> According to the Georgian official material submitted to the IIFFMCG the 33rd Motor Rifle Mountain Brigade (Dagestan), the 114th Rocket Brigade (Astrakhan district), the Separate Anti-Aircraft Rocket Brigade (Volgograd) and the 10th Special Forces Brigade (Krasnodar district) also participated in the Russian operation on the eastern front.
>
> Some experts assess that over 12 000 Russian troops were deployed on the eastern front, i.e. in South Ossetia and beyond, in the course of the August crisis.
>
> Separately, elements from the 7th Assault (Mountain) Division (Novorossiysk), the 34th Rifle Mountain Brigade (Karachai-Cherkessia), the 31st Separate Assault Brigade (Ulianovsk), the 526th, 131st and 15th Separate Motorised Rifle Brigades as well as the 2nd, 108th and 247th Assault Regiments deployed in Abkhazia and beyond its administrative boundaries (Zugdidi, Senaki, Poti) and some of these troops may have taken part in the Russian operations on the western (second) front in Georgia.
>
> According to some sources, Russia deployed up to 15 000 troops in Abkhazia in total. The overall number of Russian troops moved into Georgia in August 2008 amounted to 25 000 - 30 000 supported by more than 1 200 pieces of armour and heavy artillery. Also involved in the action were up to 200 aircraft and 40 helicopters. Several thousand armed Ossetians and volunteer militias from the North Caucasus supported the Russian forces on the eastern front as well as up to 10 000 Abkhaz troops and militia forces with armour and guns on the western front.
>
> Russian air operations reportedly opened in the morning of 8 August with the first attacks targeting the Georgian air defence installations in the Gori district. Units employed during the armed conflict in August 2008 seemed to have come mainly from the 4th Air Forces and Air Defence Army (Rostov district) and included Su-24, Su-25, Su-27 and Su-29 aircraft as well as Mi-8 and Mi-24 helicopters.

The target set was focused on Georgian operational ground and air assets. Air defence radar sites and airbases were attacked, with regular repeat attacks against Marneuli, Vaziani and Bolnisi. These targets were well away from the main conflict zone. Hence, rather than to provide close air support to ground forces in contact, the Russian air raids seemed to be strategically intended to support a broader military objective, including to deprive the Georgian brigades engaged in South Ossetia of any support from second echelon forces, particularly air support. Given this primary objective, the targets also included port installations along the Black Sea coast, air traffic radar sites, aircraft manufacturing and maintenance plants. As the Georgian withdrawal continued, Russian efforts diverted to supporting Russian ground troops in order to accelerate Georgian withdrawal. In the course of the August hostilities, the Russian air force reportedly lost several aircraft, including one strategic bomber and reconnaissance aircraft Tu-22M3.

The Russian Black Sea Fleet, deployed in Georgian territorial waters and/or in its vicinity reportedly consisted of around 13 vessels, including its flagship - guided missile cruiser 'Moskva' - as well as landing, antisubmarine and patrol ships, and minesweepers.

Russian military operations in Georgia in August 2008 appear to most analysts to have been well-planned and well-executed. The operational planning had been validated in practice during the 'Kavkaz-2008' military exercise (and previous similar exercises since 2005), which ended on 2 August 2008. After the exercise, some units returned to their garrisons, but others seem to have remained and deployed in a precautionary move near the Georgian border. Therefore, they could quickly move to South Ossetia through the Roki tunnel when ordered to do so."

3. The Court's assessment

109. The Court observes at the outset that in the context of the international armed conflict between Georgia and the Russian Federation in August 2008, the Russian armed forces undeniably carried out military operations, including in South Ossetia and in undisputed Georgian territory.

110. It must first of all determine whether the events which occurred during the active phase of the hostilities fell within the jurisdiction of the Russian Federation and, accordingly, the nature of the control exercised by the latter during the above-mentioned military operations carried out by the Russian armed forces during the five-day war. As only two complaints, concerning the return of Georgian nationals and the right to education, concern Abkhazia as well and all the other complaints concern only South Ossetia and the "buffer zone", the Court can confine itself during that period to examining whether the Russian Federation exercised its jurisdiction in the latter two territories.

111. It should be pointed out that in its admissibility decision the Chamber indicated that "the present application concerns the impugned events that started in South Ossetia and in Abkhazia on 7 August 2008" (see *Georgia v. Russia* (II) (dec.), cited above, § 98). Furthermore, the question of the nature of the control exercised by the Russian Federation in South Ossetia before the start of the active phase of the hostilities is immaterial in the present case, given that the majority of the fighting took place in areas

which were previously under Georgian control: ethnic Georgian villages around Tskhinvali in South Ossetia and the area of Gori, situated in the "buffer zone" in undisputed Georgian territory. The applicant Government themselves acknowledged in their observations that the Russian forces had taken effective control of the last parts of South Ossetia and the "buffer zone" during or immediately after the five-day war (see paragraph 78 above).

112. The four "representative incidents" which the Court identified in the present case concerned the alleged air attacks on the village of Eredvi, situated precisely in the area of South Ossetia formerly under Georgian control, and on the town of Gori and the villages of Karbi and Tortiza, situated in undisputed Georgian territory (see paragraph 22 above).

(a) General principles established in the Court's case-law concerning the concept of extraterritorial jurisdiction

113. The present case marks the first time since the decision in *Banković and Others* (cited above, concerning the NATO bombing of the Radio-Television Serbia headquarters in Belgrade) that the Court has been required to examine the question of jurisdiction in relation to military operations (armed attacks, bombing, shelling) in the context of an international armed conflict, the existence of which is not disputed by the parties.

114. However, the Court's case-law on the concept of extraterritorial jurisdiction has evolved since that decision, in that the Court has indicated, *inter alia*, that the rights under the Convention could be "divided and tailored" and has introduced a nuance into the concept of the Contracting States' "legal space" (see *Al-Skeini and Others*, cited above, §§ 137 and 142). In addition, it has established a number of criteria for the exercise of extraterritorial jurisdiction by a State, which must remain exceptional (see *Al-Skeini and Others*, cited above, §§ 130-42; *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, §§ 178-90, 29 January 2019; and *M.N. and Others v. Belgium* (dec.) [GC], no. 3599/18, §§ 96-109, 5 March 2020).

115. The two main criteria established by the Court in this regard are that of "effective control" by the State over an area (spatial concept of jurisdiction) and that of "State agent authority and control" over individuals (personal concept of jurisdiction) (see *Al-Skeini and Others*, cited above, §§ 133-40).

(i) "Effective control" by the State over an area

116. The Court has reiterated the principles governing the application of this first criterion, for example in *Catan and Others* (cited above, §§ 106-07), and also in *Chiragov and Others v. Armenia* ([GC],

no. 13216/05, § 168, ECHR 2015) and *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, § 98, ECHR 2016):

> "One exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration (see *Loizidou v. Turkey* (preliminary objections), 23 March 1995, § 62, Series A no. 310; *Cyprus v. Turkey* [GC], no. 25781/94, § 76, ECHR 2001-IV, *Banković and Others*, cited above, § 70; *Ilaşcu and Others*, cited above, §§ 314-16; *Loizidou* (merits), cited above, § 52; and *Al-Skeini and Others*, cited above, § 138). ...
>
> It is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area (see *Loizidou* (merits), cited above, §§ 16 and 56, and *Ilaşcu and Others*, cited above, § 387). Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region (see *Ilaşcu and Others*, cited above, §§ 388-94, and *Al-Skeini and Others*, cited above, § 139)."

(ii) "State agent authority and control"

117. The Court has reiterated the principles governing the application of this second criterion, for example in *Hassan* (cited above, § 74) and *Jaloud* (cited above, § 139):

> "In addition, the Court's case-law demonstrates 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. For example, in *Öcalan* (cited above, § 91), the Court held that 'directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the "jurisdiction" of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory'. In *Issa and Others* (cited above), the Court indicated that, had it been established that Turkish soldiers had taken the applicants' relatives into custody in Northern Iraq, taken them to a nearby cave and executed them, the deceased would have been within Turkish jurisdiction by virtue of the soldiers' authority and control over them. In *Al-Saadoon and Mufdhi v. the United Kingdom* ((dec.), no. 61498/08, §§ 86-89, 30 June 2009), the Court held that two Iraqi nationals detained in British-controlled military prisons in Iraq fell within the jurisdiction of the United Kingdom, since the United Kingdom exercised total and exclusive control over the prisons and the individuals detained in them. Finally, in *Medvedyev and Others v. France* ([GC], no. 3394/03, § 67, ECHR 2010), the Court held that the applicants were within French jurisdiction by virtue of the exercise by French agents of full and exclusive control over a ship and its crew from the time of its interception in international waters. The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question."

118. In *Al-Skeini and Others* (cited above), a case concerning the death of individuals who had been fired upon by United Kingdom soldiers, the Court applied the same criterion, accompanied by the observation that the United Kingdom was exercising some of the public powers of a sovereign government:

> "149. It can be seen, therefore, that following the removal from power of the Ba'ath regime and until the accession of the interim Iraqi government, the United Kingdom (together with the United States of America) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in south-east Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basra during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention."

119. It made a similar finding in the *Jaloud* judgment (cited above), concerning the death of a person who had been fired upon while passing through a checkpoint under Netherlands command:

> "152. The Court now turns to the circumstances surrounding the death of Mr Azhar Sabah Jaloud. It notes that Mr Azhar Sabah Jaloud met his death when a vehicle in which he was a passenger was fired upon while passing through a checkpoint manned by personnel under the command and direct supervision of a Netherlands Royal Army officer. The checkpoint had been set up in the execution of SFIR [Stabilization Force in Iraq]'s mission, under United Nations Security Council Resolution 1483 (see paragraph 93 above), to restore conditions of stability and security conducive to the creation of an effective administration in the country. The Court is satisfied that the respondent Party exercised its 'jurisdiction' within the limits of its SFIR mission and for the purpose of asserting authority and control over persons passing through the checkpoint. That being the case, the Court finds that the death of Mr Azhar Sabah Jaloud occurred within the 'jurisdiction' of the Netherlands, as that expression is to be construed within the meaning of Article 1 of the Convention."

120. In other cases brought before it, the Court has 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 (see, among other authorities, *Issa and Others*, cited above, §§ 72-81, where the Court concluded that there had been no control over the entire northern part of Iraq by the Turkish armed forces and no evidence regarding the conduct of military operations in the area where the lethal shots were fired), or

(b) control over individuals on account of incursions and targeting of specific persons by the armed forces/police (see, *inter alia*, *Isaak v. Turkey* (dec.), no. 44587/98, p. 21, 28 September 2006, in which the Court concluded that a person beaten to death by members of the Turkish and "Turkish Republic of Northern Cyprus" ("TRNC") armed forces/police in

the United Nations buffer zone in Cyprus had been under the authority and control of Turkey):

> "In the present case, the Court must therefore ascertain whether Anastassios Isaak came under the authority and/or effective control, and therefore within the jurisdiction, of the respondent State as a result of the acts of the Turkish and 'TRNC' soldiers and/or officials. ...
>
> In view of the above, even if the acts complained of took place in the neutral UN buffer zone, the Court considers that the deceased was under the authority and/or effective control of the respondent State through its agents (see *Issa and Others*, cited above). It concludes, accordingly, that the matters complained of in the present application fall within the 'jurisdiction' of Turkey within the meaning of Article 1 of the Convention and therefore entail the respondent State's responsibility under the Convention."

121. In the case of *Pad and Others v. Turkey* ((dec.), no. 60167/00, 28 June 2007), the Court found that the applicant's relatives fell within Turkey's jurisdiction as they had been killed by fire from helicopters of the Turkish army. It was unclear whether at the relevant time the deceased had been in Turkey or in Iran – and therefore outside the territorial jurisdiction of Turkey. Nonetheless, the Court held (ibid., § 54):

> "However, in the instant case, it was not disputed by the parties that the victims of the alleged events came within the jurisdiction of Turkey. While the applicants attached great importance to the prior establishment of the exercise by Turkey of extraterritorial jurisdiction with a view to proving their allegations on the merits, the Court considers that it is not required to determine the exact location of the impugned events, given that the Government had already admitted that the fire discharged from the helicopters had caused the killing of the applicants' relatives ..."

122. In two further cases (*Andreou v. Turkey* (dec.), no. 45653/99, 3 June 2008, and *Solomou and Others v. Turkey*, no. 36832/97, §§ 48-51, 24 June 2008), concerning deaths in the UN buffer zone in Cyprus, the Court also accepted that the victims fell within Turkey's jurisdiction, since the individuals had been shot by members of the Turkish or "TRNC" armed forces/police. In *Andreou* (cited above, p. 11) it held:

> "Unlike the applicants in the *Banković and Others* case (cited above) she [the applicant in this particular case] was accordingly within territory covered by the Convention.
>
> In these circumstances, even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as 'within [the] jurisdiction' of Turkey within the meaning of Article 1 and that the responsibility of the respondent State under the Convention is in consequence engaged."

123. In *Issa and Others* (cited above) the Court had noted, *inter alia*:

> "71. Moreover, a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating

> – whether lawfully or unlawfully – in the latter State (see, *mutatis mutandis*, *M. v. Denmark,* application no. 17392/90, Commission decision of 14 October 1992, DR 73, p. 193; *Illich Sanchez Ramirez v. France*, application no. 28780/95, Commission decision of 24 June 1996, DR 86, p. 155; *Coard et al. v. the United States*, the Inter-American Commission of Human Rights decision of 29 September 1999, Report No. 109/99, case No. 10.951, §§ 37, 39, 41 and 43; and the views adopted by the Human Rights Committee on 29 July 1981 in the cases of *Lopez Burgos v. Uruguay* and *Celiberti de Casariego v. Uruguay*, nos. 52/1979 and 56/1979, at §§ 12.3 and 10.3 respectively). Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory (ibid.)."

124. This approach, which was also followed in *Isaak and Others* (cited above), *Pad and Others* (cited above, § 53), *Andreou* (cited above) and *Solomou and Others* (cited above, § 45), refines and broadens the concept of extraterritorial jurisdiction. Subsequently, in *Medvedyev and Others* (cited above, § 64) the Court explicitly reiterated, with reference to the *Banković and Others* decision (cited above), that a State's responsibility could not be engaged in respect of "an instantaneous extraterritorial act, as the provisions of Article 1 did not admit of a 'cause and effect' notion of 'jurisdiction'". More recently, it adopted a similar approach in *M.N. and Others* (cited above, § 112), finding that "the mere fact that decisions taken at national level had an impact on the situation of persons resident abroad is also not such as to establish the jurisdiction of the State concerned over those persons outside its territory".

(b) Application of the above principles to the facts of the case

125. In the present case the Court is required to examine whether the conditions applied by the Court in its case-law to determine the exercise of extraterritorial jurisdiction by a State may be regarded as fulfilled in respect of military operations carried out during an international armed conflict.

126. In that connection 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. 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 (see paragraph 111 above).

127. It must therefore be determined in the present case whether there was "State agent authority and control" over individuals (the direct victims of the alleged violations) in accordance with the Court's case-law, and what the precise scope of those terms is.

128. In this connection, the Court reiterates first of all that acts of the Contracting States performed, or producing effects, outside their territory can only in exceptional circumstances amount to the exercise by them of their jurisdiction within the meaning of Article 1 (see *Banković and Others*, cited above, § 67; *Al-Skeini and Others*, cited above, § 132; *Güzelyurtlu and Others*, cited above, § 178 *in fine*; and *M.N. and Others*, cited above, § 102).

129. "Jurisdiction" under Article 1 is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions attributable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention (see *Catan and Others*, cited above, § 103, and the case-law cited therein; *Güzelyurtlu and Others*, cited above, § 178; and *M.N. and Others*, cited above, § 97).

130. In most of the cases that it has examined since its decision in *Banković and Others* (cited above), the Court has found 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 (see *Al-Skeini and Others*, cited above, § 136 *in fine*, and *M.N. and Others*, cited above, § 105).

131. Admittedly, in other cases concerning fire aimed by the armed forces/police of the States concerned, the Court 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 (see, for example, *Issa and Others*; *Isaak and Others*; *Pad and Others*; *Andreou*; and *Solomou and Others*, all cited above – see paragraphs 120-123 above).

132. However, those cases concerned isolated and specific acts involving an element of proximity.

133. By contrast, the active phase of hostilities which the Court is required to examine in the present case in the context of an international armed conflict is very different, 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.

134. The Court observes that in *Banković and Others* (cited above) it found that the wording of Article 1 of the Convention did not accommodate the theory that "anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby 'brought within' the 'jurisdiction' of that State for the purpose of Article 1 of the Convention" (ibid., § 75). It added that interpreting the concept of jurisdiction in that way was tantamount "to equat[ing] the determination of whether an individual falls within the jurisdiction of a Contracting State with the question of whether that person can be considered to be a victim of a violation of rights guaranteed by the

Convention. These are separate and distinct admissibility conditions, each of which has to be satisfied in the aforementioned order, before an individual can invoke the Convention provisions against a Contracting State" (ibid., § 75 *in fine*).

135. As indicated above (see paragraph 124 above), the Court adopted a similar approach in *Medvedyev and Others* (cited above, § 64) and *M.N. and Others* (cited above, § 112).

136. The Court sees no reason to decide otherwise in the present case. The obligation which Article 1 imposes on the Contracting States to secure to everyone within their jurisdiction the rights and freedoms guaranteed by the Convention is, as indicated above, closely linked to the notion of "control", whether it be "State agent authority and control" over individuals or "effective control" by a State over a territory.

137. In this connection, the Court attaches 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 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.

138. The Court therefore considers that the conditions it has applied in its case-law to determine whether there was an exercise of extraterritorial jurisdiction by a State have not been met in respect of the military operations that it is required to examine in the instant case during the active phase of hostilities in the context of an international armed conflict.

139. This conclusion is confirmed by the practice of the High Contracting Parties in not derogating under Article 15 of the Convention in situations where they have engaged in an international armed conflict outside their own territory. In the Court's view, this may be interpreted as the High Contracting Parties considering that in such situations, they do not exercise jurisdiction within the meaning of Article 1 of the Convention, a position also defended by the respondent Government in the present case.

140. That said, the Court is sensitive to the fact that such an interpretation of the notion of "jurisdiction" in Article 1 of the Convention may seem unsatisfactory to the alleged victims of acts and omissions by a respondent State during the active phase of hostilities in the context of an international armed conflict outside its territory but in the territory of another Contracting State, as well as to the State in whose territory the active hostilities take place.

141. However, 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.

142. If, as in the present case, the Court is to be entrusted with the task of assessing acts of war and active hostilities in the context of an international armed conflict outside the territory of a respondent State, it must be for the Contracting Parties to provide the necessary legal basis for such a task.

143. The Court reiterates in this connection that this does not mean that States can act outside any legal framework; as indicated above, they are obliged to comply with the very detailed rules of international humanitarian law in such a context.

144. Having regard to all those factors, the Court concludes that the events which occurred during the active phase of the hostilities (8 to 12 August 2008) did not fall within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention. Accordingly, this part of the application must be declared inadmissible, in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

V. OCCUPATION PHASE AFTER THE CESSATION OF HOSTILITIES (CEASEFIRE AGREEMENT OF 12 AUGUST 2008)

145. The applicant Government submitted that killings, ill-treatment, looting and burning of homes had been carried out by the Russian armed forces and South Ossetian forces in South Ossetia and the adjacent "buffer zone". Such acts had amounted to a violation of Articles 2, 3 and 8 of the Convention and Article 1 of Protocol No. 1.

A. Jurisdiction

146. The Court observes that although these complaints relate only to the events occurring in South Ossetia and the "buffer zone", it will also examine whether the Russian Federation exercised "effective control" over Abkhazia after the cessation of hostilities, since this is a preliminary question in relation to the complaints under Article 2 of Protocol No. 4 and Article 2 of Protocol No. 1 (see paragraphs 292-295 and 312 below).

1. The parties' submissions

(a) The applicant Government

147. The applicant Government observed that after the hostilities had ceased the Russian Federation had exercised, and still exercised, effective control over South Ossetia by having recourse to the following means: military presence, appointment of Russian civil servants to key posts in government and administrations, which were undisputed by the respondent Government, provision of funding, issuing Russian passports to South

Ossetians and granting them free entry into Russia since 2000 whilst continuing to require visas from Georgians. In addition, the law of the Russian Federation had been applied to South Ossetia under bilateral agreements.

Furthermore, from the date of submission of their observations onwards the Russian Federation was still exercising effective control over the majority of South Ossetian territory. On 20 December 2014 the *de facto* authorities of South Ossetia had made public the draft of an "agreement" on alliance and integration with the Russian Federation[18], which provided for combining armed forces and security agencies and the unification of legislation in economic, social and cultural spheres.

Lastly, Russian civil servants continued to be appointed to key posts in the *de facto* administration after the conflict, including the posts of Prime Minister and Minister of Defence and other important posts in the government of South Ossetia.

148. The applicant Government also submitted that, as in the case of South Ossetia, effective control by the Russian Federation in Abkhazia had been implemented and was still being implemented by its direct involvement in the *de facto* administration, particularly as key posts were held by Russian civil servants, the exercise of direct control over the armed forces through the appointment of commanders, the importance of military numbers, the presence of military bases, the provision of essential financial support, investments in infrastructure, granting Russian citizenship and the opening of borders with the Russian Federation, the control of administrative borders and the application of Russian law in Abkhazian territory. On 24 November 2014 a military agreement on alliance and strategic partnership had been signed between Russia and the *de facto* regime of Abkhazia.

149. Lastly, the applicant Government indicated that even after the end of the conflict the Russian Federation had continued deploying its troops in territories situated outside South Ossetia and Abkhazia ("buffer zone") and exercising effective authority and control there. The Russian forces had not fully withdrawn from Georgian territory; they had continued, *inter alia*, to occupy the village of Perevi until October 2010.

(b) The respondent Government

150. The respondent Government replied that the Russian Federation had not exercised any effective control over South Ossetia since the active phase of the conflict, despite having maintained a significant military force there. After 12 August 2008 Russian troops had been mainly concerned with preventing further Georgian attacks. The situation in the conflict zone had not settled down until 20 August. On that day the Russian troops had

18 Agreement signed on 18 March 2015.

unblocked the roads leading to Gori and withdrawn towards what became the "buffer zone". By 22 August eighteen checkpoints had been created along the perimeter of this zone, eight of which in the territory of Georgia, and ten along the "border" between Georgia and South Ossetia.

By 22 August the total number of Russian military personnel had reached 14,901. Equipment had amounted to 119 tanks, 597 armoured fighting vehicles, 180 artillery systems and 94 air-defence systems. Of the military personnel deployed, only around 600 servicemen had been positioned in the "buffer zone". The majority of Russian troops had been concentrated in South Ossetia as it had been difficult to determine from which direction Georgia might launch a further attack.

In their initial observations the respondent Government indicated that "Russian forces had gradually withdrawn from the "buffer zone" from 23 August, except for the 693rd motor rifle regiment which had continued to be stationed there for security reasons up until the creation of a joint military base with South Ossetia as explained below. That regiment had comprised 4,307 servicemen, 33 tanks, 220 fighting infantry vehicles, 30 artillery systems and 14 air-defence systems". Its main function had been to stand in a high state of readiness to meet and detain any attack by Georgian forces.

Following a request by the Court of 7 July 2017 in that regard, the respondent Government submitted their reply on 29 September 2017 rectifying their previous observations. They indicated, among other things, that "Russian forces had gradually withdrawn towards the Russian Federation from 23 August, except for the 693rd motor rifle regiment which had continued to be stationed in South Ossetia for security reasons up until the creation of a joint military base with South Ossetia, as explained below. That regiment had comprised 4,307 servicemen, 33 tanks, 220 fighting infantry vehicles, 30 artillery systems and 14 air-defence systems".

Furthermore, on 8 October 2008 the Russian checkpoints had also been withdrawn from the "buffer zone" (except for the village of Perevi) in accordance with the agreements reached between the French and Russian Presidents. By 10 October the Russian Federation had completed the withdrawal of its troops from South Ossetia, leaving there only the 693rd motor rifle regiment referred to above.

After the Agreement on the joint Russian military base in South Ossetia had been signed between the Russian Federation and the Republic of South Ossetia on 7 April 2010, military base No. 4 had been formed in South Ossetia. It had held 3,285 servicemen and had 305 items of military equipment. In accordance with the agreement referred to above, the personnel of the military base and its contractors were required to obey South Ossetian laws and to abstain from any interference in the internal affairs of South Ossetia.

The respondent Government added that the general support of the Russian Federation was used in accordance with the agreements with South Ossetia to ensure basic welfare standards of the South Ossetian population. It was incumbent upon Georgia to show a real link between the alleged violations and any Russian support measures, but it was submitted that no such link could possibly exist, because all support was provided for humanitarian reasons and to ensure security of the local population. As mentioned above, such support could only help to promote law and order and hopefully assist the secure return of all refugees once a proper political solution was found between Georgia and South Ossetia. In 2008, pursuant to the decisions of the President and the Government of the Russian Federation, the Emergency Situations Ministry (EMERCOM) had put in place a raft of measures to rebuild South Ossetia which had been severely affected by the Georgian aggression.

Lastly, the Russian Federation had not exercised "physical power and control" over any of the alleged victims of breaches of the Convention in South Ossetia since 12 August 2008.

151. The respondent Government also submitted that the Russian Federation had not exercised any effective control over Abkhazia since the end of the armed conflict. On the contrary, Abkhazia had a vigorous and independent government which decided its own affairs. On 17 February 2010 the Russian Federation and Abkhazia had signed a treaty allowing the Russian Federation to position a military base in Abkhazia. Military base No. 7 had been established in Abkhazia under this treaty with 3,923 servicemen and 873 items of military equipment. The Agreement related to the establishment of this military base specifically provided that all personnel of the military base and its contractors must comply with Abkhazian laws and abstain from any interference with the internal affairs of Abkhazia.

The Russian Federation did not exercise control over the "borders" of Abkhazia. In accordance with the cooperation agreement on "border" controls between the Republic of Abkhazia and the Russian Federation (in force since 21 June 2010), Russia had assisted the Abkhazian government by providing certain infrastructure and personnel to support its "border" checks conducted on the basis of Abkhazian law. The Russian servicemen in Abkhazia obeyed local laws and did not exercise Russian sovereign jurisdiction there.

As to financial and other support for Abkhazia, this was similar to that provided to South Ossetia except that there were no gas supplies to Abkhazia.

The Russian Federation had also provided non-monetary support through its Emergency Situations Ministry. Lastly, the Russian Federation had not exercised "physical power and control" over any of the alleged victims of breaches of the Convention in Abkhazia since 12 August 2008.

152. The respondent Government added that the Russian Federation had not exercised effective control over the town of Gori between 12 and 22 August 2008. More particularly, 12 August 2008 had been a time of transition between Georgian and Russian military control. Russian forces had been predominantly stationed outside the town of Gori and, as explained above, in the period between 12 and 22 August, Russian troops had only blocked the main roads leading to the city to enable safe operations at several military bases in the vicinity of the city. Around 300 personnel and about 30 items of military equipment had been deployed around Gori. In parallel Russian forces had sought to consolidate their military position by forming checkpoints along the front line. However, those measures had not given them effective control over the "buffer zone" in the sense of being able to prevent alleged human rights abuses by South Ossetians against Georgians throughout the security zone. Rather, the Russian forces at the checkpoints had had the function of warning about and detaining any advance by the Georgian forces pending a decisive response by Russian forces kept in readiness further back.

Moreover, after 2 September 2008 the Russian Federation had not exercised effective control over any part of the "buffer zone" in the sense of being able to prevent alleged human rights abuses by South Ossetians against Georgians for the reasons explained above (only a small number of troops had been deployed at observation posts along the perimeter of the zone).

The function of Russian military posts in the security zone had been to prevent further aggression by Georgia, to prevent the Georgian forces from regaining control over their military bases and arms storage facilities in the security zone as well as to protect Russian military infrastructure. When the "buffer zone" had been established on 22 August the Russian servicemen had been deployed there (mostly along the perimeter) to provide security by preventing the return of Georgian military forces or destabilising elements into the "buffer zone". They had also been engaged in mine-clearing operations.

The numbers of Russian military personnel in the "buffer zone" had been in the region of 600 (see above). All military personnel and equipment had been withdrawn from the regions of Georgia bordering South Ossetia and Abkhazia by 9 October 2008 (except for the village of Perevi).

Lastly, the Russian Federation had not exercised "physical power and control" over any victim of the alleged breaches of the Convention in the "buffer zone" after 12 August 2008.

2. Summary of the relevant evidence

(a) Russian military presence

153. Report of the EU Fact-Finding Mission[19] (Volume I, pp. 21-22):

"17. ... Finally, by the night of 10 to 11 August, most of the Georgian forces had withdrawn from the territory of South Ossetia. They were followed by Russian troops who entered deeper into Georgian territory by crossing the administrative boundaries of both South Ossetia and Abkhazia and set up military positions in a number of Georgian towns, including Gori, Zugdidi, Senaki and Poti. During the final phase of military hostilities, Abkhaz units supported by Russian forces attacked the Georgian positions in the upper Kodori Valley and seized this territory, which had been vacated by the Georgian forces and most of the local Georgian population by 12 August 2008.

18. ... On 12 August, French President Nicolas Sarkozy, in his capacity as Chairman of the European Council, went to Moscow and Tbilisi in a move to stop the military hostilities. A six-point ceasefire plan was agreed upon, providing, *inter alia*, for the immediate cessation of hostilities and withdrawal of forces to the positions occupied prior to the armed conflict. However, the Russian and South Ossetian forces reportedly continued their advances for some days after the August ceasefire was declared and occupied additional territories, including the Akhalgori district which had been under Georgian administration until the August 2008 conflict, even if it is located within the administrative boundaries of South Ossetia as they had been drawn during the Soviet period. Most of the Russian troops withdrew from their positions beyond the administrative boundaries of South Ossetia and Abkhazia after 22 August, some of them only after an implementation agreement was reached on 8 September 2008 in Moscow or even as late as early October 2008. ..."

154. Human Rights Watch report, "Up in Flames: Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia", 22 January 2009:

"3.7 Russia's Responsibility as Occupying Power (pp. 123 et seq.)

When Russian forces entered Georgia, including South Ossetia and Abkhazia, which are *de jure* parts of Georgia, they did so without the consent or agreement of Georgia. International humanitarian law on occupation therefore applied to Russia as an occupying power as it gained effective control over areas of Georgian territory (see above, Chapter 1.2). Tskhinvali and the rest of South Ossetia must be considered under Russian control from August 10, when Georgian forces officially retreated, through the present. Villages in Gori district fell under Russian control as Russian forces moved through them on August 12. Gori city must be considered under effective Russian control at least from August 12 or 13 until August 22, when Russian troops pulled back further north toward South Ossetia. Russia's occupation of the area adjacent to South Ossetia ended when its forces withdrew to the South Ossetia administrative border on October 10."

155. Amnesty International report, "Civilians in the line of fire: the Georgia-Russia conflict", November 2008: in its report (p. 10) Amnesty International observed that even after the ceasefire had been brokered the Russian Federation continued deploying troops on territories situated outside South Ossetia and Abkhazia. The relevant passage of the report

19 See also paragraphs 32-33 and 108 above.

reads as follows: "Russian armed forces continued to retain control over so-called 'buffer' or 'security zones' extending beyond the 1990 boundaries of South Ossetia and Abkhazia until the second week of October" (p. 29).

(b) Russian Federation's relationship with South Ossetia and Abkhazia

156. The report by the EU Fact-Finding Mission describes the Russian Federation's relationship with South Ossetia and with Abkhazia – and in particular with the South Ossetian and Abkhazian security forces – as follows:

> 1. Prior to the armed conflict (Volume II, pp. 18-19 and 127-35):
>
> "'Creeping annexation'
>
> Georgia's objection to the dominant Russian role in the peacekeeping operation in its conflict zones was motivated mainly by the perception that Russia's contribution to conflict management in the South Caucasus was not 'peacekeeping, but keeping in pieces'. Russia was seen as the protagonist responsible for keeping the conflicts in the region frozen, in order to maintain a 'controllable instability' for the purposes of its own power projection in the South Caucasus. Moreover, Russia was promoting progressive annexation of Abkhazia and South Ossetia by integrating these territories into its economic, legal and security space. The open annexation of these territories was blocked by several obstacles, ranging from Russia's military conflict in Chechnya to its interest in avoiding a massive confrontation with the West.
>
> The clearest demonstration of this Russian policy of integrating separatist entities of neighbouring states into its own legal jurisdiction was 'passportisation', the awarding of Russian passports and citizenship of the Russian Federation to residents of Abkhazia and South Ossetia.
>
> In this context, in 2007 Russia paid residents of Abkhazia a total of 590 million rubles in the form of pensions and allocated 100 million rubles to South Ossetia, where the overwhelming majority of the non-Georgian population were already holders of Russian passports.
>
> According to commentaries by Russian political analysts, Moscow was using economic means 'to try to caution Georgia against attempts to take back the unrecognised republics by force'.
>
> Another aspect of 'creeping annexation' was the fact that the separatist governments and security forces were manned by Russian officials. Russia appointed its former civilian and military leaders to serve in key posts in Abkhazia and especially in South Ossetia, including the *de facto* Defence Ministers of Abkhazia (Sultan Sosnaliev) and South Ossetia (Anatoly Barankevich) and the *de facto* Chief of the Abkhaz General Staff (LtGen Gennadi Zaytsev). Russian journalist Julia Latynina once described the power elite in South Ossetia as a joint business venture between KGB generals and Ossetian entrepreneurs using money allocated by Moscow for the fight against Georgia.
>
> ...

3. Effective government

...

a) South Ossetia

South Ossetia had already established a new constitutional order in 1993, and in a revised form in 2001 with executive, legislative and judicial branches. Nevertheless, there are many doubts as to the effectiveness and independence of the system.

First, as the majority of people living in South Ossetia have acquired Russian citizenship, Russia can claim personal jurisdiction over them... From the point of view of Russian constitutional law, the legal position of Russian citizens living in South Ossetia is basically the same as the legal position of Russian citizens living in Russia.

Second – and still more importantly – Russian officials already had *de facto* control over South Ossetia's institutions before the outbreak of the armed conflict, and especially over the security institutions and security forces. The *de facto* Government and the 'Ministries of Defence', 'Internal Affairs' and 'Civil Defence and Emergency Situations', the 'State Security Committee', the 'State Border Protection Services', the 'Presidential Administration' – among others – have been largely staffed by Russian representatives or South Ossetians with Russian citizenship that have worked previously in equivalent positions in Central Russia or in North Ossetia. According to the South Ossetian Constitution, these officials are directly responsible to the *de facto* President of South Ossetia as 'head of state' and of the executive branch (Art. 47 para. 1 of the Constitution). Still, despite this constitutional accountability, the fact that the decisive positions within the security structures of South Ossetia were occupied by Russian representatives, or by South Ossetians who had built their careers in Russia, meant that South Ossetia would hardly have implemented policies contrary to Russia's interests.

De facto control of South Ossetia was gradually built up by Moscow. Russian representatives were not as present within the South Ossetian leadership before summer 2004. Thus the process of state-building was not gradually stabilised after South Ossetia's declaration of independence in 1992, but suffered setbacks after 2004. Even if South Ossetia was not formally dependent on any other state, Russian foreign influence on decision-making in the sensitive area of security issues was so decisive that South Ossetia's claim to independence could be called into question.

To sum up, Russia's influence on and control of the decision-making process in South Ossetia concerned a wide range of matters with regard to the internal and external relations of the entity. The influence was systematic, and exercised on a permanent basis. Therefore the *de facto* Government of South Ossetia was not 'effective' on its own.

b) Abkhazia

The effective control of the Abkhaz authorities over the relevant territory and its residents is problematic, because many inhabitants had acquired Russian citizenship and were – from the Russian perspective – under the personal jurisdiction of the Russian Federation. According to the information given by the Abkhaz authorities 'practically all the inhabitants of Abkhazia are at the same time citizens of the Russian Federation.' Russian passport-holders participated massively in presidential and parliamentary elections in Russia.

Russia's control over Abkhazia's security institutions seems to be less extensive than in South Ossetia. Contrary to the situation in South Ossetia, the will to remain independent from Russia has traditionally remained strong among the elites and

Abkhaz public opinion. In the 'presidential elections' of 2004/05, for instance, Moscow had to acknowledge the defeat of the candidate whom it had openly supported (Raul Khadjimba) and had to accept the victory of Sergei Bagapsh. This means that the Abkhaz institutions were – at least at that particular moment – not completely under control of the Russian Government.

II. Conclusion

From the perspective of international law, South Ossetia was, at the time of the military conflict in 2008, an entity that had a territory, a population and a government acting on a newly established constitutional basis. But all usual criteria for statehood (in legal and in political terms) are gradual ones. Especially the third criterion, effectiveness was not sufficiently present in the case of South Ossetia, as domestic policy was largely influenced by Russian representatives from 'within'.

Thus, South Ossetia came close to statehood without quite reaching the threshold of effectiveness. It was – from the perspective of international law – thus not a state-like entity, but only an entity short of statehood.

The status of Abkhazia is slightly different. Contrary to South Ossetia, the Abkhaz 'government' has expressed its clear will to remain independent from Russia, even if its policies and structures, particularly its security and defence institutions, remain to a large extent under control of Moscow. Abkhazia is more advanced than South Ossetia in the process of state-building and might be seen to have reached the threshold of effectiveness. It may therefore be qualified as a state-like entity. However, it needs to be stressed that the Abkhaz and South Ossetian claims to legitimacy are undermined by the fact that a major ethnic group (i.e. the Georgians) were expelled from these territories and are still not allowed to return, in accordance with international standards."

2. During the armed conflict (Volume II, pp. 303-04):

"The statements made by the Russian Federation and the *de facto* Abkhaz authorities reject any allegation of overall control. The Russian Federation has declared that 'prior to the conflict in August one could only speak of cooperation between the Russian peacekeeping contingent and South Ossetian and Abkhaz military units wherever peacekeeping forces may be present within parameters commonly accepted in similar situations in other countries. These relations were governed by the mandate of the peacekeeping force. While strong economic, cultural and social ties exist between the Russian Federation and the authorities of Abkhazia, those authorities have stated that, in the course of the operation in the Kodori Valley, 'the Abkhaz army, while remaining in contact with Russian forces acting from Abkhaz territory, operated independently.' Further aspects of the assistance and the military structure and command linking the Russian Federation and those entities would need to be substantiated in order to establish such control. According to Georgia, 'the Abkhaz and South Ossetian military formations did not independently control, direct or implement the military operations during either the armed conflict or the occupation periods. Rather, these military formations acted as agents or *de facto* organs of the Respondent State and as such constituted a simple continuation of the Russian Federation's armed forces.

In factual terms, one may have to draw a distinction with regard to the nature of the relationship between Russia and South Ossetia on the one hand, and between Russia and Abkhazia on the other. In the former, ties seem to be stronger. During the meeting between the IIFFMCG experts and the representatives of the Ministry of Internal Affairs of Georgia, the representatives stressed the political and economic links

between Russia and South Ossetia. They also claimed that Russia exercises control over South Ossetia through various channels ranging from financial help to the presence of Russian officials in key military positions in the South Ossetian forces."

3. After cessation of the active conduct of hostilities (Volume II, pp. 311 et seq.):

"c) IHL of military occupation

... However, the extent of the control and authority exercised by Russian forces may differ from one geographical area to another. It was possibly looser in the territories of South Ossetia and Abkhazia administered by the *de facto* authorities. In the Kodori Valley, and in districts and villages in South Ossetia such as Akhalgori, where before the conflict the Georgian forces and administration had exercised control, the substitution is more evident. In those cases, such as the buffer zones, the argument of an existing administrative authority different from the Georgian one cannot be admissible, nor can the argument according to which 'Russia has frequently dissociated itself from, and even condemned, the Ossetian and Abkhaz authorities.' Regarding the insufficient number of troops invoked by the Russian Federation, this must be linked to the fact that the determination is not about ascertaining the occupation of the whole territory of Georgia. Moreover, in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* case, the arguments used by Uganda of a 'small number of its troops in the territory' and their confinement to 'designated strategic locations' were not used by the Court to reject the qualification of occupation. Finally, given the fact that a state of occupation may exist without armed resistance, the question of the number of troops cannot in itself be legally relevant.

...

h) Maintenance of law and order

Under the IHL on military occupation the occupying power, once it has authority over a territory, has an obligation to take all the measures in its power to restore, and ensure, as far as possible, public order and safety. Ensuring safety includes protecting individuals from reprisals and revenge. There is also an obligation to respect private property.

Even where the law on occupation is not applicable, under HRL states have an obligation to protect persons under their jurisdiction and prevent violations against them.

In the context of the conflict in Georgia the issue of the maintenance of law and order, and consequently that of the authorities responsible for such maintenance, is critical for several reasons. First, control over certain areas changed during the period of the conflict and its aftermath: in South Ossetia, in villages or districts that had previously been administered by the Georgian authorities, and also in the buffer zones and in Abkhazia, in the Kodori Valley. But it is also relevant for those parts of South Ossetia and Abkhazia where the *de facto* authorities had been exercising control before the outbreak of the conflict. Secondly, the presence of Russian forces on those territories raises the issue of their responsibilities, whether under the law of occupation or under human rights law. Thirdly, numerous, if not most, violations occurred after the conflict, at a time when the main question was actually one of policing and maintaining order to prevent or stop such violations. Apart from the question of identifying who had responsibility for maintaining public order and ensuring security, there has clearly been, with some exceptions, a vacuum in this regard.

One of the most worrying areas was the buffer zone. The Representative of the Secretary-General on the human rights of internally displaced persons reported that 'during his visit to the so-called buffer zone, he witnessed evidence of widespread looting of property and listened to villagers reporting incidents of harassment and violent threats committed by armed elements, in tandem with a failure by Russian forces to respond and carry out their duty to protect, particularly in the northernmost area adjacent to the *de facto* border with the Tskhinvali region/South Ossetia. Villagers explained their permanent fear of attack by what they described as armed bandits coming from the Tskhinvali region/South Ossetia, and their repeated but unsuccessful requests to the Russian forces for protection. Villagers insisted that there were no problems between neighbours within the same villages, irrespective of their ethnic origins, but that the perpetrators were coming from outside the villages, i.e. the Tskhinvali region/South Ossetia.' In September 2008 the Council of Europe Commissioner for Human Rights also noted that 'in the northern part – i.e. the area adjacent to the administrative border of South Ossetia – there are still reports of looting, torching and threats, and far fewer people have been able to return.' Following his special mission to Georgia and the Russian Federation on 22-29 August 2008, the Council of Europe Commissioner for Human Rights stressed the 'right to protection against lawlessness and inter-community violence.' He noted that he had 'received a great number of reports of physical assault, robbery, kidnapping for ransom, looting and torching of houses as well as personal harassment by South Ossetian militia or other armed men in the Georgian villages in South Ossetia and in the 'buffer zone'.' He further stated that he 'was alarmed over the rampant criminality in the 'buffer zone'.'

While denying the status of occupying power, the Russian Federation acknowledged that it had tried to exercise police powers on the ground. With regard to 'measures taken outside the scope of hostilities to protect the civilian population from looting, pillaging, abuse etc.,' it describes the situation as follows. In terms of 'a police function':

'South Ossetia had and still has its own government and local authorities which exercise effective control in this country, maintain the rule of law and protect human rights. At the same time, the Russian military contingent called upon to carry out purely military tasks in the territory of South Ossetia, to the best of their abilities tried to maintain law and order and prevent any offences in the areas of their deployment, including Georgia proper, where owing to the flight of Georgian government authorities an apparent vacuum of police presence ensued. The Russian military force could not substitute for the government of South Ossetia. The Russian military have never been granted the jurisdiction to maintain the rule of law, not to mention that their sheer numbers are insufficient for that task. Nevertheless, the Russian troops apprehended more than 250 persons on suspicion of looting and other crimes. All of them have been handed over to the authorities of South Ossetia for further investigation and criminal prosecution.'

This argument of relying on the South Ossetian *de facto* authorities to maintain public order and prevent violations of human rights is flawed, however. In the first place, these authorities failed to ensure the protection or safety of persons living on the territory they controlled, as demonstrated above. This is additionally proven by the fact that even Ossetians did not enjoy protection. One of the two remaining residents of Zonkar, a tiny Tskhinvali-administered hamlet in the Patara Liakhvi valley surrounded by ethnic Georgian villages, told Human Rights Watch how men dressed in Ossetian peacekeeper uniforms looted her house and tried to set fire to it. She said that although she reported the incident to the police, no officials from the South

Ossetia prosecutor's office came to her house to investigate. Even more worrying, however, is the fact that Ossetian forces were themselves among the main perpetrators of violations of human rights.

Furthermore, the position adopted by the Russian Federation is not admissible in the buffer zone, where the South Ossetian *de facto* authorities were not exercising control.

Another aspect of the Russian argumentation calls for further analysis. Russia claims that although it was not an occupying power, 'the Russian military contingent called upon to carry out purely military tasks in the territory of South Ossetia, to the best of their abilities tried to maintain law and order and prevent any offences in the areas of their deployment including Georgia proper, where owing to the flight of Georgian government authorities an apparent vacuum of police presence ensued.' First, it recognises the absence of policing by Georgian authorities. Second and most importantly it clearly states that effectively the Russian forces, to a certain extent, were trying to maintain order and safety. Russia elaborated further on the actions it carried out in this regard:

'From day one of the operation, the Russian military command undertook exhaustive measures to prevent pillaging, looting and acts of lawlessness with respect to the local Georgian population. All personnel serving in units that took part in the operation was familiarised with the Directive issued by the General Staff of the Russian Armed Forces and the order given by the Army Commander-in-Chief 'to maintain public safety and ensure the security and protection of citizens residing in the territory of the South Ossetian Republic'.

Russian troops, jointly with South Ossetian law-enforcement and military units, provided round-the-clock protection of the homes and land allotments that remained undamaged in Georgian villages, at the same time ensuring the safety and security of South Ossetian residents regardless of their ethnic background.'

First of all, this contradicts the information according to which 'in October an official from the Council of Europe who requested anonymity told Human Rights Watch that a senior member of the Russian military in the region said that the military was given no mandate for the protection of civilians.'

In general, these elements demonstrate that to a certain degree, Russian forces were in a position to ensure public order and safety in the territories they were stationed in, and claim to have undertaken measures in this regard. This contrasts strikingly with what happened on the ground, where there was a serious lack of action by the Russian troops to prevent violations and protect ethnic Georgians.

One of the main measures taken by Russian troops was to set up roadblocks and checkpoints. Regarding South Ossetia, Human Rights Watch noted that 'roadblocks set up by Russian forces on August 13 effectively stopped the looting and torching campaign by Ossetian forces, but the roadblocks were inexplicably removed after just a week.

As reported by HRW, two residents of Tkviavi, a village 12 kilometres south of Tskhinvali that was particularly hard hit by looters from South Ossetia, said that the looting had decreased when the Russian forces maintained a checkpoint in the village, although the marauders kept coming during the night. Furthermore, several Tkviavi villagers told Human Rights Watch that they believed that more frequent patrolling by the Russian forces or Georgian police would have improved security in the area. A witness told Human Rights Watch that looters 'seemed to be afraid to encounter the Russians, and were hiding from them, suggesting, according to HRW, that had

Russian forces taken more preventive measures to stop violence against civilians these measures would have been effective.

In this regard, other measures by the Russian troops consisted of patrolling and informing the inhabitants and giving the villagers phone numbers so they could contact the Russian military authorities if they witnessed any kind of violation. Regarding these measures, a habitant of Tkviavi, the former mayor of the village, told the IIFFMCG expert on 3 June that while having offered to help, the Russian military authorities did not do much concretely to stop the looting.

At this stage it is critical to note that the measures such as checkpoints introduced by the Russian forces were meant to prevent violations by South Ossetian militias, and consequently ensure respect of IHL. Oddly, one result of the checkpoints was actually to prevent the Georgian police from maintaining law and order in those areas, and in some cases to stop villagers attempting to return home from Gori to villages in the 'buffer zone', while Russia continued to invoke the lawlessness.

On the other hand, testimonies gathered by the IIFFMCG and by HRW also report Russian ground forces trying to protect the civilian population from Ossetian forces, militia members, or criminal elements.

Nevertheless, from all the testimonies collected, it appears that the Russian authorities did not take the necessary measures to prevent or stop the widespread campaign of looting, burning and other serious violations committed after the ceasefire.

Referring to the situation at the end of August, the Council of Europe Commissioner for Human Rights also stressed that 'the Russian forces have the duty under international humanitarian law to maintain law and order in the zone they control,' and he 'raised his serious concerns about the security of the civilians with all sides.' He noted that the Russian head of the peacekeeping presence in the buffer zone and other high-level Russian officials 'acknowledged that policing and maintaining law and order were major challenges. According to them, the area had been infiltrated by marauders, criminal gangs and militia, who were committing serious crimes.'

In September 2008, as a way to address this failure to maintain law and order properly, Human Rights Watch called for the EU to provide the monitoring mission scheduled to move into areas near South Ossetia with a policing mandate to protect the civilians."

157. At a press conference held on 26 August 2009, that is, a year after recognition by the Russian Federation of South Ossetia's and Abkhazia's independence, the Russian Prime Minister Vladimir Putin made the following statement (extracts):

"Exactly a year ago, on August 26, Russia recognized the independence of South Ossetia and Abkhazia. In this difficult time, immediately after the aggression staged by the current Georgian leaders, the decision of our country served as a firm guarantee for peace in the region, and the survival of the two nations.

It goes without saying that there will be no return to the past situation. The sooner all parties involved in this process realize this, the easier it will be for them to build a joint future.

Much has been done since then for developing full-scale relations between Russia and South Ossetia and for consolidating their legal foundation. In September 2008, we signed a Treaty on Friendship, Cooperation, and Mutual Assistance, and last April, the

Agreement on Cooperation in the Protection of South Ossetia's State Frontier. The Russian border guards have assumed responsibility for securing peace and tranquillity in the region.

More than 30 agreements and treaties – all in all, 36 agreements – are being discussed today. They are designed to consolidate the legal foundation of our cooperation in all areas - security, the economy, and the social sphere.

...

We have also signed an agreement on assistance to South Ossetia in its social and economic development, and an agreement on countering crime. Russia is going to continue rendering all-round political and economic support both to South Ossetia and Abkhazia.

..."

158. With regard to the situation in South Ossetia, the relevant passages of the report by the International Crisis Group, "South Ossetia: The Burden of Recognition", 7 June 2010, read as follows:

"South Ossetia is no closer to genuine independence now than in August 2008, when Russia went to war with Georgia and extended recognition. The small, rural territory lacks even true political, economic or military autonomy. Moscow staffs over half the government, donates 99 per cent of the budget and provides security.

...

The war dealt a heavy physical, economic, demographic and political blow to South Ossetia. The permanent population had been shrinking since the early 1990s and now is unlikely to be much more than 30,000. The $840 million Russia has contributed in rehabilitation assistance and budgetary support has not significantly improved local conditions. With its traditional trading routes to the rest of Georgia closed, the small Ossetian economy has been reduced to little more than a service provider for the Russian military and construction personnel. Other than the International Committee of the Red Cross (ICRC), no international humanitarian, development or monitoring organisation operates in the region; dependent on a single unreliable road to Russia, the inhabitants are isolated.

...

While Russia controls decision-making in several key spheres, such as the border, public order and external relations, it has allowed South Ossetian elites a degree of manoeuvre on such internal matters as rehabilitation, reconstruction, education and local justice.

...

Military-security decisions are delegated to Russia through bilateral agreements. A day after President Medvedev signed the September 2008 ceasefire with President Sarkozy of France (then the EU presidency) to withdraw from Georgia, the Russian defence minister made it clear that Moscow intended to deploy 3,800 troops in the breakaway entities. A year later, as noted, military cooperation agreements provided authority to station troops and maintain military bases in South Ossetia for 49 years, as well as jointly protect the borders, for renewable five-year periods.

...

Moscow has deployed an estimated 900 border troops along South Ossetia's administrative boundary with the rest of Georgia, replacing Ossetian security forces. On request from the *de facto* authorities, Russian experts are currently helping to demarcate the 'state borders', despite strong Georgian protests. Twenty frontier posts that are being built, not least to monitor Georgian military communications and movements, are expected to be completed by 2011.

...

In September 2008, when its troops still occupied the Georgian 'buffer zone', adjacent to South Ossetia and Abkhazia, Russia signed agreements of 'Friendship and Cooperation' with both breakaway regions, pledging to help protect their borders. The signatories granted each other the right to military bases in their respective territories, recognised dual citizenship and established common transportation, energy and communications infrastructure. The agreements are valid for ten years and can be renewed every five. Thus, Russia has consolidated its military presence in both regions, instead of withdrawing forces to pre-conflict positions as stipulated by the Medvedev-Sarkozy agreement. It says recognition has brought a 'new reality', so 'bilateral' cooperation accords take precedence over the ceasefire accord.

...

However, Russia has played a crucial role in providing support for state and institution building in South Ossetia. Most of the ruling elite, including the prime minister, vice prime minister and ministers of defence, economic development and finance, have been transferred from Russia and are under its control. Security and military structures have been controlled by senior officers of the Federal Security Forces (FSB) for many years. A Russian journalist described even pre-war South Ossetia as a joint business venture between FSB generals and Ossetian entrepreneurs using money allocated by Moscow for the competition with Georgia. This has not changed; the current defence minister, Major-General Yuri Tanaev, was previously head of an intelligence department of the Urals military district. Russia's influence over external relations and security is so decisive it arguably undermines the claim to independence.

Nevertheless, Eduard Kokoity, the *de facto* president, does appear to maintain limited control in certain spheres of internal politics. Russian analysts compare this to Chechnya, where President Kadyrov has been given a virtually free hand in internal affairs as long as he maintains stability and remains loyal to Moscow. Kokoity has been able to concentrate internal power and control over the entity's limited print and electronic media. Criticism of local officials, and particularly Russia's policy, is portrayed by the authorities as pro-Georgian 'treason'."

159. With regard to the situation in Abkhazia, the relevant passages from the report by the International Crisis Group, "Abkhazia: The Long Road to Reconciliation", 10 April 2013, read as follows:

"...

The 2008 war with Georgia allowed Russia to greatly enhance its already considerable military presence. Russian officials say there are roughly 5,000 Russian personnel in Abkhazia: 3,500 military and 1,500 Federal Security Service (FSB) officers and 'border guards'.

...

At the same time, given its control over Abkhazia's 'borders', roads and sea, Russia need not maintain a heavy permanent presence, as it can move military equipment and troops into and out of the entity at will.

...

In a further show that Moscow is in control, Russian border guards in September 2012 began manning the lone open checkpoint over the Inguri River, which until then was controlled by Abkhaz guards. This was a symbolic blow to the Abkhaz, whose former leader, Bagapsh, had insisted that Sukhumi would be in formal command of 'frontier forces', with the Russians assisting. Now in booths with darkened windows, Russian guards seated behind computer screens check passports and question visitors. During a recent entry by Crisis Group, one Russian and one Abkhaz official manned the booth, with the Russian clearly in charge – though the Russians at the border wear uniforms identical to the Abkhaz, without visible Russian insignia.

Russia has clearly solidified its security presence in Abkhazia over the past five years, flouting the commitments it made in 2008 to pull back its troops to their pre-war locations, claiming that the agreements are no longer valid because of the 'new realities' created by diplomatic recognition. But Moscow is apparently not utilising its renovated infrastructure to full capacity. This may be due to a desire to not be seen as an occupying force, but may also be linked to Russian armed forces' heavy commitment to combating a Salafi-inspired insurgency in the North Caucasus that limits resources available for use in the entity. It is less likely that Russia is doing this to keep the door open to a compromise with Georgia.

Abkhazia's government is overwhelmingly dependent on Russia for budget and development funds. Since 2009 Moscow has provided about 1.9 billion roubles per year in direct budgetary support ($61-$67 million, depending on exchange fluctuations). In 2012, this amounted to 22 per cent of the official 8.6 billion rouble ($287 million) budget. But taking into account that Moscow allocated another 4.9 billion roubles ($163 million) that year as part of a 'comprehensive aid plan' for infrastructure development, the actual subsidy for Abkhazia's budget is at least 70 per cent. In addition, Moscow also hands out an estimated two billion roubles ($70 million) in pension payments for Abkhaz residents, most with Russian passports.

...

A big reduction in Russian support would have profound political and social consequences. Abkhaz leaders have never made any secret that their level of real independence is circumscribed by their reliance on Moscow, sometimes using terms like 'limited sovereignty', or 'asymmetrical independence'.

...

As long as Abkhazia remains largely dependent on Russia financially and thus politically, it is only able to make independent decisions on local matters. With no prospect of widespread recognition anytime soon and its development fully tied to Moscow, Abkhazia's 'independence project' faces an uphill battle; the entity risks becoming increasingly similar to Russian regions in the North Caucasus."

160. In its decision of 27 January 2016, Pre-Trial Chamber I of the International Criminal Court also made the following observations:

"27. With respect to the war crimes, the Chamber considers first that the information reasonably indicates that an international armed conflict existed between Georgia and the Russian Federation between 1 July 2008 and 10 October 2008. The existence of

such international armed conflict is rather uncontroversial as concerns the period of armed hostilities between Georgian and Russian armed forces between 8 and 12 August 2008 and the period of Russian occupation of parts of Georgian territory, in particular the 'buffer zone', until at least 10 October [2008]. In addition, the Chamber considers, at this stage, that there is sufficient indication that the Russian Federation exercised overall control over the South Ossetian forces, meaning that also the period before the direct intervention of Russian forces may be seen as an international armed conflict (see above paras 9-11)."

3. The Court's assessment

(a) General principles

161. The general principles regarding the "effective control" of a Contracting State over a foreign territory, already set out in *Al-Skeini and Others* (cited above, §§ 138-39 and 142), have been reiterated and developed in, *inter alia*, *Catan and Others* (cited above, §§ 106-07), and then in *Chiragov and Others* (cited above, § 168) and *Mozer* (cited above, § 98) (see paragraph 116 above).

(b) Application of the above principles to the facts of the case

162. The Court observes at the outset that the question whether the facts complained of by the applicant Government fall within the jurisdiction of the respondent State and whether they are attributable to that State and engage its responsibility are separate matters, the latter two having to be determined on an examination on the merits (see *Loizidou* (preliminary objections), cited above, §§ 61 and 64, and *Jaloud*, cited above, §§ 154-55).

163. The Court has also laid down that principle in *Catan and Others* (cited above, § 115) and reiterated it in *Mozer* (cited above, § 102):

> "The Russian Government submitted an argument based on the ICJ *Bosnian Genocide* case, as they had done in *Catan and Others* (cited above, § 96), and the case of *Nicaragua v. the United States of America* (see paragraph 93 above), which was part of the case-law taken into account by the Court in *Catan and Others* (cited above, § 76). In these cases the ICJ was concerned with determining when the conduct of a group of persons could be attributed to a State, with the result that the State could be held responsible under international law for that conduct. In the instant case, however, the Court reiterates that it is concerned with a different issue, namely whether the facts complained of by the applicant fall within the jurisdiction of a respondent State within the meaning of Article 1 of the Convention. As the Court has already found, the test for establishing the existence of 'jurisdiction' under Article 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under international law (see paragraph 98 above, and *Catan and Others*, cited above, § 115)."

164. In the present case, in order to determine whether the facts complained of fall within the jurisdiction of the Russian Federation, in accordance with the Court's case-law, it has to be established whether it exercised "effective control" in South Ossetia and in Abkhazia, and in the "buffer zone". As the Court has said in its case-law, "the question whether

or not a Contracting State exercises effective control over an area outside its own territory is a question of fact. In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area (see *Loizidou* (merits), cited above, §§ 16 and 56, and *Ilaşcu and Others*, cited above, § 387). Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region (see *Ilaşcu and Others*, cited above, §§ 388-94)" (see, among other authorities, *Al-Skeini and Others*, cited above, § 139, and *Catan and Others*, cited above, § 107; *Chiragov and Others*, cited above, § 168; and *Mozer*, cited above, § 98).

(i) Russian military presence

165. In their observations the respondent Government acknowledged a substantial Russian military presence after hostilities had ceased, mainly in South Ossetia (14,901 Russian servicemen in total on 22 August for a total population of 30,000 inhabitants, and 119 tanks, 597 armoured fighting vehicles, 180 artillery systems and 94 air-defence systems), and then, after rectification at the Court's request (see paragraph 150 above), also after 23 August 2008 (presence of the 693rd motor rifle regiment comprising 4,307 servicemen, 33 tanks, 220 fighting infantry vehicles, 30 artillery systems and 14 air-defence systems), and the establishment of 18 observation posts between Georgia and South Ossetia and in the "buffer zone". Only 600 Russian servicemen had been stationed in the "buffer zone" itself after the cessation of hostilities. The respondent Government also referred to the creation of military bases after signing bilateral agreements between the Russian Federation and South Ossetia and Abkhazia respectively in April and February 2010.

(ii) Economic, military and political support from the Russian Federation

166. Furthermore, the respondent Government provided numerous indications showing the extent of the economic and financial support that the Russian Federation had provided and continued to provide to South Ossetia and to Abkhazia. They referred to the raft of measures put in place by the Emergency Situations Ministry (EMERCOM), in accordance with the decisions of the President of the Russian Federation and the Government of the Russian Federation, to rebuild South Ossetia. They maintained that the financial and non-financial support provided to Abkhazia had been similar to that provided to South Ossetia except that there had been no gas supplies to Abkhazia. With regard to the Russian Federation's support for its nationals abroad (in particular, pension payments), the respondent Government pointed out that Russian nationals represented a sizeable proportion of the South Ossetian and Abkhazian populations.

167. Added to that is the information appearing in the report of, *inter alia*, the EU's Fact-Finding Mission, which itself cites other sources such as the Human Rights Watch report, or the statements of the Commissioner for Human Rights of the Council of Europe, regarding the relationship of dependency not only in economic and financial, but also in military and political terms between the Russian Federation and South Ossetia and Abkhazia.

168. Even if in the present case the Court is not required to examine the situation prior to the beginning of hostilities, the information provided by the EU Fact-Finding Mission is also revealing as to the pre-existing relationship of subordination between the separatist entities and the Russian Federation, which lasted throughout the active phase of the hostilities and after the cessation of hostilities.

169. In its report, the EU Fact-Finding Mission refers to "creeping annexation" of South Ossetia and Abkhazia by the Russian Federation (see paragraph 156 above):

> "The clearest demonstration of this Russian policy of integrating separatist entities of neighbouring states into its own legal jurisdiction was 'passportisation', the awarding of Russian passports and citizenship of the Russian Federation to residents of Abkhazia and South Ossetia. ...
>
> Another aspect of 'creeping annexation' was the fact that the separatist governments and security forces were manned by Russian officials. Russia appointed its former civilian and military leaders to serve in key posts in Abkhazia and especially in South Ossetia, including the *de facto* Defence Ministers of Abkhazia (Sultan Sosnaliev) and South Ossetia (Anatoly Barankevich) and the *de facto* Chief of the Abkhaz General Staff (LtGen Gennadi Zaytsev)."

170. This is particularly true of South Ossetia, where the EU Fact-Finding Mission specified in particular that "Russian officials already had *de facto* control over South Ossetia's institutions before the outbreak of the armed conflict, and especially over the security institutions and security forces. The *de facto* Government and the "Ministries of Defence", "Internal Affairs" and "Civil Defence and Emergency Situations", the "State Security Committee", the "State Border Protection Services", the "Presidential Administration" – among others – have been largely staffed by Russian representatives or South Ossetians with Russian citizenship that have worked previously in equivalent positions in Central Russia or in North Ossetia", adding that "*[d]e facto* control of South Ossetia was gradually built up by Moscow". With regard to Abkhazia, the EU Fact-Finding Mission specified that "the effective control of the Abkhaz authorities over the relevant territory and its residents [was] problematic, because many inhabitants had acquired Russian citizenship", adding that "Russia's control over Abkhazia's security institutions seem[ed] to be less extensive than in South Ossetia" (see paragraph 156 above).

171. Furthermore, at a press conference on 26 August 2009, that is, one year after recognition by the Russian Federation of South Ossetia's and Abkhazia's independence, the Russian Prime Minister Vladimir Putin observed, among other things: "In September 2008, we signed a Treaty on Friendship, Cooperation, and Mutual Assistance, and last April, the Agreement on Cooperation in the Protection of South Ossetia's State Frontier. The Russian border guards have assumed responsibility for securing peace and tranquillity in the region". He added: "Russia is going to continue rendering all-round political and economic support both to South Ossetia and Abkhazia" (see paragraph 157 above).

172. Lastly, in its reports of 7 June 2010 on South Ossetia and of 10 April 2013 on Abkhazia, the International Crisis Group confirmed that both regions were totally dependent on the Russian Federation not only in economic and financial terms, but also in political and military terms, including in relation to border protection (see paragraphs 158-159 above):

> "In September 2008, when its troops still occupied the Georgian 'buffer zone', adjacent to South Ossetia and Abkhazia, Russia signed agreements of 'Friendship and Cooperation' with both breakaway regions, pledging to help protect their borders. The signatories granted each other the right to military bases in their respective territories, recognised dual citizenship and established common transportation, energy and communications infrastructure. The agreements are valid for ten years and can be renewed every five."

173. With regard to the "buffer zone", it appears undeniable that it was also occupied by Russian armed forces during the period in question, according to the converging information in this regard contained in the reports of the EU Fact-Finding Mission, Human Rights Watch and Amnesty International, and in the decision of Pre-Trial Chamber I of the International Criminal Court (see paragraphs 153-156 and 160 above).

(iii) Conclusion

174. Having regard to all those factors, the Court considers that the Russian Federation exercised "effective control", within the meaning of the Court's case-law, over South Ossetia, Abkhazia and the "buffer zone" from 12 August to 10 October 2008, the date of the official withdrawal of the Russian troops. Even after that period, the strong Russian presence and the South Ossetian and Abkhazian authorities' dependency on the Russian Federation, on whom their survival depends, as is shown particularly by the cooperation and assistance agreements signed with the latter, indicate that there was continued "effective control" over South Ossetia and Abkhazia.

175. It therefore concludes that the events which occurred after the cessation of hostilities (from the date of the ceasefire agreement of 12 August 2008) fell within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention, and dismisses the preliminary objection raised by the respondent Government in this regard.

It next needs to be determined, on an examination on the merits, whether there has been a violation of the rights protected by the Convention capable of engaging the responsibility of the Russian Federation.

B. Alleged violation of Articles 2, 3 and 8 of the Convention and of Article 1 of Protocol No. 1

176. The applicant Government submitted that killings, ill-treatment, looting and burning of homes had been carried out by the Russian armed forces and the South Ossetian forces in South Ossetia and the adjacent "buffer zone". They alleged that such acts amounted to a violation of Articles 2, 3 and 8 of the Convention and Article 1 of Protocol No. 1, which are respectively worded as follows:

Article 2 of the Convention

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

Article 3 of the Convention

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 8 of the Convention

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 1 of Protocol No. 1

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

1. The parties' submissions

(a) The applicant Government

177. The applicant Government alleged that after the cessation of active hostilities, a campaign of ethnic cleansing had started and lasted months, ending only after nearly the entire ethnic Georgian population of South Ossetia had been expelled from their homes and their villages looted and destroyed. A significant number of the Convention violations alleged in this application had been committed behind Russian lines after hostilities had ended and Georgian military forces had withdrawn.

Before and after the cessation of hostilities, Russian ground troops together with Ossetian forces and other irregular troops operating under the effective control of the Russian Federation had entered ethnic Georgian villages. Most of the inhabitants of these villages had by this time fled or been evacuated and those who remained were predominantly elderly or infirm, either unable or too frightened to uproot themselves. Russian ground troops had sealed the villages off using entry and exit checkpoints and allowed ethnic Georgian homes and entire villages to be burnt. Individuals had been threatened with death if they refused to leave and summary executions had been carried out on Georgians on grounds of their ethnicity.

A number of the crimes committed during this campaign of ethnic cleansing had been perpetrated by Russian forces directly. Others had been committed in the presence of Russian forces, which had made no attempt to prevent them.

Based on the evidence submitted in support of these observations, the applicant Government invited the Court to conclude that the Russian Federation had adopted an administrative practice of causing or permitting the destruction of ethnic Georgian homes and villages with a view to making them uninhabitable, in violation of Articles 3 and 8 of the Convention and of Article 1 of Protocol No. 1 to the Convention, and the applicable rules of international humanitarian law. The applicant Government also invited the Court to find that the Russian Federation had adopted an administrative practice of causing or permitting the summary execution of civilians in violation of Article 2 of the Convention and the applicable rules of international humanitarian law.

(b) The respondent Government

178. The respondent Government replied that the immediate result of Georgia's attack had been very serious civil unrest with attacks by Ossetians on Georgian villages and homes. Given the terrain, and the fact that

Georgian and Ossetian villages were often next to one another, and that people from both groups occupied some mixed villages, such attacks, which could come at any time, had been impossible to prevent.

Russian forces had attempted to intervene when they had witnessed such attacks and where they had been in a position to do so, consistently with the military purposes behind their presence. The declassified orders had made clear Russia's intent to prevent unrest as far as it could.

However, Russian forces had been predominantly at the front line, or in transit to and from the front line, or securing supply lines. They had also been hampered by language, being unable to understand either Georgian or Ossetian. It had been extremely difficult to distinguish people returning from the conflict on either side from criminals bent on looting and destruction. Russian forces had not had the training or resources to assume a policing or peacekeeping role, and miscreants who had been apprehended had been handed to South Ossetian authorities, which had practical responsibility for trying to maintain order, albeit with depleted resources, against the background of Georgia's repudiation of its own responsibility.

The remaining members of Russia's peacekeeping battalion, under the direction of General Kulakhmetov, had been deployed in roving patrols to try to prevent unrest, looting and the destruction of property. He had described his efforts in a statement for these proceedings, but they had had limited success. The task had been hugely difficult, however, and it seemed that the South Ossetian authorities had frequently released people whom the Russian forces had arrested, very possibly for want of resources and of places to put them, and only for them to be arrested again.

Georgia's own evidence purportedly in support of its application contained many references to protective steps taken by Russian soldiers to assist Georgian people, as would be explained in greater detail below.

Importantly, the Russian army had not occupied the territories through which it had moved whether in South Ossetia, Abkhazia or in undisputed Georgian territory. Its task had been only to deal with the Georgian armed forces and the continuing threat they posed.

Lastly, many Georgian villages had suffered substantial damage during fighting around Tskhinvali, including as a result of Georgian cluster munitions that had failed to hit their target, either because they had failed to function or because they had been fired from too great a distance. The respondent Government referred in this regard to the proceedings brought by the Israeli supplier against Georgia in the Commercial Court of England in London for defaulting on payment and to the settlement that had been agreed between the parties.

2. Third-party comments

179. The Human Rights Centre of the University of Essex submitted that, generally, the law of armed conflict ceased to apply at the end of active

hostilities but there were provisions designed to secure the protection of individuals even after this time[20]. Whilst, in the period immediately after the close of active hostilities, it could be necessary to recognise LOAC grounds of detention, that period would not last long.

Where the close of hostilities represented the start of occupation, a specific LOAC regime applied. Given the control over the territory which an occupier had to be able to exercise, it was appropriate for the occupying power to have the full range of HRL obligations[21].

3. Summary of the relevant evidence

(a) Written evidence

180. The relevant part of the OSCE report cited above, concerning the post-war killings in South Ossetia (pp. 35-36), reads as follows:

> "According to individuals interviewed, a disturbing pattern of killings of unarmed civilians continued in a large number of villages after the bombardment ended. Witnesses reported that the perpetrators were often Ossetians – some of whom were described as soldiers and others as civilians – who followed the Russian forces into the villages that were under Georgian administration prior to the August conflict. In Charebi village, for example, two separate witnesses reported that a group of 'Ossetians' murdered two village residents in their house. Citizens of Disevi village reported a murder by an 'Ossetian' from a nearby village, in addition to deaths from bombing. In Vanati, a displaced couple reported to the HRAM that one of their friends was killed by soldiers. They wanted to bury him but they were not allowed to since it was too late in the day and the Russian army had imposed a curfew. Also in Vanati, a schoolteacher was reportedly killed and his wife, a nurse, was wounded; her house was then set on fire leaving her to die inside. In Ksuisi village, a witness described how when he went outside after the bombing ended he came under sniper fire from an Ossetian village. In Satskheneti a woman witnessed a man shot and killed by an 'Ossetian' when he refused to hand over his cows and another man shot dead in a quarrel over a car. In Avnevi, a man was killed when he refused to let marauders into his house.
>
> In contrast to the reports of Russian troops participating in misdeeds, several villagers told how some Russian troops intervened to assist the local population or to protect them from Ossetians. A woman from Tamarasheni, for example, recounted how Russian soldiers asked if she needed food and brought her three day's supply of bread, butter, and canned meat. When a woman in Eredvi was harassed by an Ossetian, a Russian soldier nearby intervened, hit the Ossetian man with the butt of his gun and made him go away. In Charebi, Russian soldiers came and removed an unexploded bomb from a villager's garden. In Nuli, Russian troops handed out white armbands to the population to protect them from 'Ossetians'. Villagers from Kekhvi, Satskheneti and Ikoti reported that Russian troops did no harm in their villages."

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20 First Geneva Convention 1949, Article 5; Second Geneva Convention, Article 6; Third Geneva Convention, Article 5; Fourth Geneva Convention, Article 6; Additional Protocol (I) of 1977, Article 3 (amending Article 6 of the Fourth Geneva Convention).

21 *Loizidou v. Turkey* (merits), 18 December 1996; *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001-IV. The question of the scope of each of these obligations raises a different issue (see *Al-Skeini and Others*, cited above, § 168).

181. The relevant part of the OSCE report cited above, concerning the post-war killings in the "buffer zone" adjacent to South Ossetia (p. 23), reads as follows:

> "A new phase of the hostilities began with the advance of ground forces into the 'buffer zone', following which there were numerous reported attacks on civilians. The advancing military forces were variously described by displaced persons as 'Ossetians' and 'Russians'; in many cases civilians were not able to distinguish clearly between the two. Displaced persons witnessed killings of unarmed civilians by incoming military forces in Gori and in the villages of Megvrekisi, Tirdznisi, Ergneti, and Karaleti. In Ergneti, for example, a villager described to the HRAM how he saw a group of ten 'Ossetians' in Russian uniforms hit an 80-year old man in the back and then shoot him. The victim, according to the villager, crawled into a building, said 'I've been shot', and then fell down and died. In Karaleti, a villager reported, a car with four 'Ossetians' dressed in military uniforms entered the village and shot and killed one of his neighbours with an automatic weapon."

182. The relevant passages of the report by the EU fact-finding mission (Volume II, pp. 351-53, and pp. 362-70) read as follows:

> "During the conflict and after the cease-fire, there was a campaign of deliberate violence against civilians: houses were torched and villages looted and pillaged. Most of these acts were carried out in South Ossetia and in the undisputed territory of Georgia, mainly in the areas adjacent to the administrative border with South Ossetia.
>
> These acts occurred even weeks after the cease-fire and the end of the hostilities. Such violations raise the critical question of the general lack of protection in areas under changing control, such as Georgian-administered villages in South Ossetia or the so-called 'buffer zone'. As highlighted by interviews conducted by Human Rights Watch, most of the acts of violence against civilians, pillage and looting were committed by Ossetian forces. Information gathered from eyewitnesses also indicates the presence of Russian forces while these violations were taking place, and sometimes the participation of Russian forces in these acts. While most of the violations were committed against ethnic Georgians, ethnic Ossetians were also not immune from looters.
>
> According to Human Rights Watch:
>
> 'South Ossetian forces include South Ossetian Ministry of Defence and Emergencies servicemen, riot police (known by the Russian acronym OMON), and several police companies, working under the South Ossetian Ministry of Internal Affairs, and servicemen of the South Ossetian State Committee for Security (KGB). Many interviewees told Human Rights Watch that most able-bodied men in South Ossetia took up arms to protect their homes. As South Ossetia has no regular army its residents tend to refer to the members of South Ossetian forces as militias (*opolchentsy*) unless they can be distinctly identified as policemen or servicemen of the Ministry of Defence and Emergencies. Credible sources also spoke about numerous men from North Ossetia and several other parts of Russia who fought in the conflict in support of South Ossetia and who were involved in the crimes against civilians that followed.'
>
> 'In some cases, it is difficult to establish the exact identity and status of the Ossetian perpetrators because witnesses' common description of their clothing (camouflage uniform, often with a white armband) could apply to the South Ossetian Ministry of Defence and Emergencies, South Ossetian Ministry of Internal Affairs, volunteer

fighters, or even common criminal looters. Several factors, however, indicate that in many cases the perpetrators belonged to South Ossetian forces operating in close cooperation with Russian forces. The perpetrators often arrived in villages together with or shortly after Russian forces had passed through them; the perpetrators sometimes arrived on military vehicles; and the perpetrators seem to have freely passed through checkpoints manned by Russian or South Ossetian forces.'

'Witnesses sometimes also referred to the perpetrators as Chechens and Cossacks; whether this was an accurate identification is not clear, although there were media reports of Chechens and Cossacks participating in the conflict.'

Two closely linked questions arise at this point: that of identifying the perpetrators of these violations and that of the exact role played by the Russian forces in the violations. Answering these questions will have key legal implications, as it requires us to distinguish between those who committed these acts of violence and those who did not act to prevent them or stop them.

While it appears difficult to conclude that Russian forces systematically participated in or tolerated the conduct of South Ossetian forces, there do seem to be credible and converging reports establishing that in many cases Russian forces did not act to prevent or stop South Ossetian forces. Human Rights Watch refers to three types of situation: passive bystanders, active participation and the transport of militias. Some testimonies also mention the positive involvement of Russian troops in stopping militias from looting or preventing them from looting and burning houses. HRW refers also to checkpoints and roadblocks set up on 13 August which effectively stopped the looting and torching campaign but which were inexplicably removed after just a week. Interviews conducted in March 2009 by the IIFFMCG's expert also produced different accounts ranging from active intervention to stop violations, to passive observation, and even involvement.

Lastly, it is important to stress from the outset that patterns of violence differed depending on the area concerned. The most extensive destruction and brutal violence seem to have taken place in South Ossetia, with certain characteristics that appear to be different from what happened in the buffer zone. This difference in pattern was explicitly recognised by representatives from the Georgian Ministry of Internal Affairs when meeting with IIFFMCG experts on 4 June 2009. There is, finally, no comparison possible between the situations in these two former areas and the effects of the hostilities in Abkhazia, which were very limited.

...

The conflict in Georgia and its aftermath have been characterised by a campaign of large-scale pillage and looting against ethnic Georgian villages in South Ossetia and in the so-called buffer zones. While this was mainly committed by Ossetian military and militias, including Ossetian civilians, there are many eyewitness reports of looting by Russian forces. Most importantly, numerous testimonies refer to Russian soldiers being present while armed Ossetians were looting. Some pillage started immediately after the withdrawal of the Georgian forces.

HRW documented – and sometimes directly witnessed – systematic looting in Tamarasheni, Zemo Achabeti, Kvemo Achabeti, Kurta, Tkviavi, Tirdznisi, Dvani, Koshka, Megrekisi, Nikozi, Karaleti, Knolevi, Avlevi, Tseronisi, and Kekhvi. The HRAM of the OSCE also reported a number of cases of looting and pillage. By way of example, the HRAM told of a woman in Kekhvi who saw her house being looted by a group of 'Ossetians' wearing military uniforms with white arm bands. The men also stole her car and loaded it with furniture from a neighbour's house before driving

away. As she fled the village, she saw 'Ossetian' soldiers who were being protected by Russian forces and were pillaging shops and other houses.

It is critical to stress that in the aftermath of the conflict the looting and pillage intensified both in South Ossetia and in the buffer zone in Dvani, Megvrekisi and Tkviavi.

Moreover, Ossetian villagers also participated in looting in September, demonstrating a lack of protection and policing by the Ossetian and Russian forces. Many testimonies refer to Russian forces being present whilst Ossetian militias were looting.

Far from being a few isolated cases, in certain villages the pillage seems to have been organised, with looters first using trucks to take the furniture and then coming to steal the windows and doors of houses.

Human Rights Watch also pointed out that 'in some communities where Ossetians lived side-by-side with Georgians, or in mixed marriages, the Ossetians were also targeted for looting, harassment, and accusations of collaboration', such as in Zonkar, a tiny Tskhinvali-administered hamlet in the Patara Liakhvi valley surrounded by ethnic Georgian villages.

Amnesty International expressed particular concern at the 'many reports of Russian forces looking on while South Ossetian forces, militia groups and armed individuals looted and destroyed Georgian villages and threatened and abused the residents remaining there'. It described the following situation:

'In the village of Eredvi on 26 August Amnesty International representatives witnessed ongoing looting and pillaging, including by armed men. As the looting was going on, Russian military equipment continued to pass through Eredvi ([east] of Tskhinvali) and Russian checkpoints controlled the entry and exit to the village; Amnesty International observed that only ordinary cars, rather than trucks or other large vehicles, were searched, and not in all cases.'

There is consequently extensive evidence of a widespread campaign of looting and pillage by Ossetian forces, as well as unidentified armed Ossetians and sometimes civilians, during the conflict but mostly after the cease-fire. While the Russian forces do not seem to have played an important part in this campaign, they did little to stop it.

...

When considering the destruction of civilian property in the context of the conflict in South Ossetia and its aftermath, a key distinction must be made between on the one hand destruction as a result of shelling, artillery strikes, aerial bombardment or tanks firing, which might constitute a violation of IHL but does not systematically do so, and destruction as a result of deliberate acts of torching and burning. As noted by the HRAM, some destruction resulted from the hostilities proper, whether during the offensive by Georgian forces against Tskhinvali and other villages in South Ossetia, or during Russian aerial bombardments and artillery shelling. Here it is necessary to refer to the section on indiscriminate attacks, above.

This type of destruction is in no way less serious. But it must be stressed from the outset that the extensive damage caused through burning, with some villages almost completely burned down, raises grave concern as to the motives behind such acts. The practice of burning reached such a level and scale that it is possible to state that it characterised the violence of the conflict in South Ossetia. This large-scale campaign

of burning targeted ethnic Georgian villages in South Ossetia and, to a lesser extent, the areas adjacent to the administrative border.

In this regard it is also paramount to stress that a number of testimonies seem to suggest a pattern of deliberate destruction and torching in the ethnic Georgian villages in South Ossetia that was different in scale and motives from what happened in the buffer zone.

Regarding the burning and torching of entire villages in South Ossetia, the explanation given by Russia and the *de facto* South Ossetian authorities failed to convince the IIFFMCG.

According to the Russian Federation, 'one of the reasons accounting for the fires and destruction in Georgian villages was the deliberate policy of arson perpetrated by the retreating Georgian Armed Forces. As a result a number of ordnances detonated including armour-piercing rocket-launcher rounds that had been placed and stored in advance in residential homes in a number of Georgian villages (Kekhvi, Tamarasheni, Kheita, Kurta, Eredvi, Avnevi, etc.) to arm Georgian paramilitary self-defence units'. Explanations given by South Ossetia also point the finger at Georgians: the representative of one of the two South Ossetian organisations accompanying the IIFFMCG during its visit to South Ossetia in March claimed that the houses were burned by Georgians. These claims, however, are not supported by any information available through interviews of IDPs [internally displaced persons] or of villagers who remained during the hostilities and after. Moreover, according to HRW, the majority of the witnesses it interviewed did not complain about violations against them by the Georgian forces, in the context of the ground offensive.

The South Ossetia *de facto* Prosecutor-General told the HRAM that the Georgian forces had been using these villages as military positions. This latter explanation could in no way account for the extensive and systematic torching of entire villages witnessed by the IIFFMCG. All the information gathered from a variety of sources points to South Ossetian forces and militias as being the perpetrators, with dozens of testimonies in this regard. Interviews of inhabitants from ethnic Georgian villages as direct eyewitnesses, by Georgian NGOs, Human Rights Watch and Amnesty International, as well as information collected by the IIFFMCG itself, substantiate this pattern.

After the cease-fire this campaign did not stop, but actually intensified. Regarding the extent of the damage caused, it is clear from both eyewitness reports and satellite images that many houses were burned in the last two weeks of August and in September.

This was also confirmed by IDPs interviewed by the IIFFMCG expert and other organisations. Furthermore, although to date unverifiable, one person interviewed by the Mission's expert claimed that some burned houses were later destroyed to conceal the fact that they had been torched. This may be related to confirmed reports of burned houses having been 'bulldozed' in September.

The IIFFMCG also wishes to note that this campaign of burning houses in South Ossetia was accompanied by violent practices such as preventing people from extinguishing fires under threat of being killed or forcing people to watch their own house burning.

The IIFFMCG concludes that – as also stated by the HRAM and by HRW – after the bombing, South Ossetians in uniform as well as Ossetian civilians who followed the Russian forces' advance undertook a systematic campaign of arson against homes and other civilian buildings in villages populated predominantly by ethnic Georgians.

Interviews by the IIFFMCG expert confirmed that with few exceptions Russian forces did not participate directly in the destruction of villages, aside from a brief period in mid-August, but nor did they intervene to stop it.

With regard to the destruction of property in the buffer zone, it is first necessary to state that both types of destruction (as a result of hostilities, and from deliberate torching) were documented in this area. The IIFFMCG expert, travelling in June 2009 on the road from Karaleti to Koshka, saw several houses that had been destroyed by Russian aerial bombardment and artillery shelling. While these forms of destruction do not in themselves amount to a violation of IHL, some instances, discussed earlier, do constitute indiscriminate attacks. As for the burning of houses, the members of the OSCE HRAM counted approximately 140 recently burned homes during their travels in the 'buffer zone', none of which showed traces of combat activity.

Without questioning the reality of the destruction by torching of houses in the buffer zone, the IIFFMCG wishes to observe that, at least for the villages its expert visited in June 2009 and in the light of the interviews it conducted, the patterns of destruction through arson appear to be slightly different than in South Ossetia. First, the scale of the destruction is less vast. In Karaleti, inhabitants indicated that 25 houses had been burned. The motive for torching deserves particular attention. While it is true that revenge and private motives are also relevant in explaining the torching of ethnic Georgian villages in South Ossetia, the destruction of only selected houses in the village indicates a more targeted form of violence in the places the IIFFMCG visited. Information gathered by the IIFFMCG expert appears to suggest that lists of houses to be burned down were pre-established. Some inhabitants felt that the destruction was prompted by the fact that the owner had a relative in the police who had allegedly been involved in acts committed against ethnic Ossetians. An elderly woman living with her family on the outskirts of Karaleti explained that the house in front of hers had been burned down by a group of Ossetians because the owner had bought cattle that had previously been stolen from ethnic Ossetians. Similar accounts of the selective torching of houses were collected by the IIFFMCG expert in Tkviavi.

Another explanation for this more selective violence could be that many mixed families with Ossetian relatives live in the buffer zone. When acknowledging the different pattern of violence in the buffer zone, the representatives of the Ministry of Internal Affairs the IIFFMCG met with offered this as a justification for it.

While these considerations cannot be generalised, they need to be taken into account when reflecting on the patterns of violence during the conflict, especially with regard to property rights. This aspect of individualised revenge is critical and should not be overshadowed by more general patterns. For a comprehensive post-conflict solution to be meaningful, this aspect should be addressed in order to defuse tension and deal with the different types of violence effectively."

183. The Commissioner for Human Rights of the Council of Europe reported in this regard as follows (see *Human Rights in Areas Affected by the South Ossetia Conflict*, CommDH(2008)22, 8 September 2008, p. 16):

"87. The Commissioner received a great number of reports of physical assault, robbery, kidnapping for ransom, looting and torching of houses as well as personal harassment by South Ossetian militia or other armed men both in the Georgian villages in South Ossetia and in the 'buffer zone'.

88. The Commissioner was alarmed over the ramping criminality in the 'buffer zone', as some civilians have remained there or are attempting to go back, if only for short visits. The Commissioner observed for an hour a number [of] civilians passing

through the checkpoint in Karaleti on their way to their homes to look after their gardens and property."

184. The relevant part of the Amnesty International report, mentioned above, reads (pp. 31-32 and 34-39):

"...

According to eye-witness testimony collected by Amnesty International, the advancing Russian army was accompanied by both regular South Ossetian forces and an array of paramilitary groups. The latter groups have been widely referred to as 'militias' (*opolchentsy* in Russian, *dajgupebebi* in Georgian), and their exact composition is unclear. Just prior to the conflict there were reports of the arrival of 300 Ossetian volunteers who had been serving in the police in North Ossetia. *De facto* South Ossetian President Eduard Kokoity reportedly ordered the integration of these volunteers into the *de facto* South Ossetian Ministry of the Interior forces. There were also reports of representatives of other ethnic groups from the North Caucasus moving into South Ossetia following the onset of hostilities, in order to fight on the South Ossetian side. Amnesty International was also informed in North Ossetia that significant numbers of men who initially fled to North Ossetia from South Ossetia in the first days of the conflict returned to South Ossetia in order to fight. Several South Ossetians interviewed by Amnesty International representatives in both South and North Ossetia stated that they had taken up arms and participated in the hostilities.

The composition of armed groups identified by eye-witnesses as 'South Ossetian militias' is therefore extremely difficult to establish. Several accounts collected by Amnesty International indicated that these militias were composed of representatives from different ethnic groups and used Russian as a common language. These groups are widely described as having followed in the wake of Russian ground forces or aerial attacks; they were also widely reported by eye-witnesses and humanitarian organizations as moving through the 'buffer zones' established and maintained by Russian armed forces following the cessation of hostilities and throughout the following weeks. It would appear that the majority of these groups answered, if only loosely, to a South Ossetian chain of command and that the South Ossetian forces in turn operated in co-operation with Russian military forces.

Amnesty International is concerned by the serious abuses against ethnic Georgians in South Ossetia and adjacent 'buffer zones' under effective Russian control. Amnesty International documented unlawful killings, beatings, threats, arson and looting perpetrated by armed groups associated with the South Ossetian side and acting with the apparent acquiescence of Russian armed forces. Whilst the looting and pillaging of ethnic Georgian villages was initially focused on South Ossetia, and limited, in the immediate aftermath of the conflict, to largely opportunistic raids on Georgian property and villages along the main roads beyond the region's borders, it progressively extended to the adjacent 'buffer zone' under effective Russian control in the weeks that followed. However, Georgian-populated settlements in South Ossetia under *de facto* South Ossetian administrative control are not reported as having suffered extensive damage.

As the occupying power Russian armed forces had overall responsibility for maintaining security, for law and order and for ensuring the welfare of the populations living in areas under their control. The Russian authorities therefore share, with the *de facto* South Ossetian authority controlling them, accountability for human rights abuses committed by South Ossetian militias engaged in looting, arson and other attacks, whether within the 1990 boundaries of South Ossetia or in Georgia proper.

Amnesty International is seriously concerned by reports of assaults on civilians by groups aligned with South Ossetia, during and in the wake of the conflict. In many cases South Ossetian armed groups or irregulars arrived in villages that were largely depopulated, with only the elderly and infirm remaining. According to eye-witness reports militias ordered local inhabitants to leave; Amnesty International received reports that those who resisted these orders were, in some cases, beaten and/or killed. Others were attacked in the course of uncontrolled looting."

185. The relevant parts of the above-mentioned Human Rights Watch report "Up in Flames" read as follows (pp. 123-24, 127-29, 154 and 163-64):

"Russia's Responsibility as Occupying Power

When Russian forces entered Georgia, including South Ossetia and Abkhazia, which are *de jure* parts of Georgia, they did so without the consent or agreement of Georgia. International humanitarian law on occupation therefore applied to Russia as an occupying power as it gained effective control over areas of Georgian territory (see above, Chapter 1.2). Tskhinvali and the rest of South Ossetia must be considered under Russian control from August 10, when Georgian forces officially retreated, through the present. Villages in Gori district fell under Russian control as Russian forces moved through them on August 12. Gori city must be considered under effective Russian control at least from August 12 or 13 until August 22, when Russian troops pulled back further north toward South Ossetia. Russia's occupation of the area adjacent to South Ossetia ended when its forces withdrew to the South Ossetia administrative border on October 10.

Human Rights Watch documented one occasion when Russian forces intervened to help a civilian who was the victim of a crime in progress, and two distinct occasions when Russian forces temporarily set up roadblocks to prevent looting. Yet overall, Russian authorities did not take measures to stop the widespread campaign of destruction and violence against civilians in villages in South Ossetia (see below, Chapters 4.2 and 4.3) and in the buffer zone in undisputed Georgian territory. They allowed these areas to become a virtual no-man's land where individuals were able to commit war crimes – to kill, loot, and burn homes – with impunity. This deliberate violence against civilians started in the immediate aftermath of Georgian forces' withdrawal from South Ossetia and continued in waves in the weeks that followed; concomitantly, Russian forces' failure to ensure protection of civilians in territories under their control was persistent. Russian forces therefore violated their obligation as an occupying power to 'ensure public order and safety' and to provide security to the civilian population in the territory under its control. This is a serious violation of international humanitarian law.

Russia bore responsibility but took no discernable measures on behalf of protected individuals, including prisoners of war, at least several of whom were executed or tortured, ill-treated, or subjected to degrading treatment by South Ossetian forces, at times with the participation of Russian forces.

...

Violations by South Ossetian Forces

Overview

Human Rights Watch found that South Ossetian forces and militias committed serious violations of international humanitarian law, including war crimes, in South Ossetia and undisputed Georgian territory controlled by Russian forces.

South Ossetian forces and militias embarked on a campaign of deliberate and systematic destruction of the Tbilisi-backed villages in South Ossetia, which involved the widespread and systematic pillage and torching of houses, and beatings and threats against civilians. In undisputed parts of Georgian territory they conducted a campaign of deliberate violence against civilians, burning and looting their homes, and committing execution-style killings, rape, abductions, and countless beatings. They rounded up at least 159 ethnic Georgians, killing at least one and subjecting nearly all of them to inhuman and degrading treatment and inhuman conditions of detention. They also tortured at least four Georgian prisoners of war and executed at least three.

In engaging in the violence summarized above, South Ossetian forces and militias egregiously violated multiple obligations under humanitarian law with respect to treatment of protected persons, including civilians and others *hors de combat*. Murder, rape, acts of torture, inhuman or degrading treatment, and wanton destruction of homes and property are all strictly prohibited under both humanitarian law and human rights law, and the perpetrators of such acts should be held criminally responsible for them. To the extent that any of these prohibited acts was committed as part of a widespread or systematic attack directed against any civilian population, they may be prosecuted as a crime against humanity. Where any of these acts, as well as acts such as imprisonment, unlawful detention of civilians, pillaging, and comprehensive destruction of homes and property, were carried out with discriminatory intent against a particular group, in this case ethnic Georgians, they also constitute the crime of persecution, a crime against humanity, prosecutable under the statute of the International Criminal Court.

South Ossetian forces include South Ossetian Ministry of Defense and Emergencies servicemen, riot police (known by the Russian acronym OMON), and several police companies, working under the South Ossetian Ministry of Internal Affairs, and servicemen of the South Ossetian State Committee for Security (KGB). Many interviewees told Human Rights Watch that most able-bodied men in South Ossetia took up arms to protect their homes. As South Ossetia has no regular army its residents tend to refer to the members of South Ossetian forces as militias (*opolchentsy*) unless they can be distinctly identified as policemen or servicemen of the Ministry of Defense and Emergencies. Credible sources also spoke about numerous men from North Ossetia and several other parts of Russia who fought in the conflict in support of South Ossetia and who were involved in the crimes against civilians that followed.

In some cases, it is difficult to establish the exact identity and status of the Ossetian perpetrators because witnesses' common description of their clothing (camouflage uniform, often with a white armband) could apply to South Ossetian Ministry of Defense and Emergencies, South Ossetian Ministry of Internal affairs, volunteer fighters, or even common criminal looters. Several factors, however, indicate that in many cases the perpetrators belonged to South Ossetian forces operating in close cooperation with Russian forces. The perpetrators often arrived in villages together with or shortly after Russian forces passed through them; the perpetrators sometimes arrived on military vehicles; and the perpetrators seem to have freely passed through checkpoints manned by Russian or South Ossetian forces.

Witnesses sometimes also referred to the perpetrators as Chechens and Cossacks; whether this was an accurate identification is not clear, although there were media reports of Chechens and Cossacks participating in the conflict. In some cases, witnesses claimed that the groups of perpetrators consisted of both Ossetians and Russians. These incidents also demonstrate Russia's failure to protect civilians in areas under its effective control (as discussed in Chapter 3.7).

...

South Ossetian Abuses in Undisputed Georgian Territory

Summary Executions

During and in the immediate aftermath of the war, at least 14 people were deliberately killed by Ossetian militias in territory controlled by Russian forces. Human Rights Watch documented six deliberate killings in undisputed Georgian territory controlled by Russian forces, and received credible allegations of another six cases. As described above, Human Rights Watch also heard allegations of two such killings in South Ossetia. In addition, Human Rights Watch documented the execution of one Georgian detainee and three Georgian prisoners of war by Ossetian forces, as described in Chapters 4.4 and 4.5. Extrajudicial killings constitute murder as prohibited under article 3 common to the Geneva Conventions, and 'willful killings' of protected persons as prohibited under the four Geneva Conventions. Willful killings of protected persons constitute grave breaches of the Geneva Conventions and war crimes.

...

Pillage and Destruction of Civilian Property

Ossetian militias looted, destroyed, and burned homes on a wide scale in undisputed Georgian territory south of the South Ossetian administrative border. As noted above (Chapter 3, Violations by Russian Forces), Russian forces were in many instances involved in these actions, either as active participants, passive bystanders, or by providing transportation to militias into villages. The Geneva Conventions prohibit pillage and destruction of civilian property, and the deliberate nature of this violation against protected persons makes it a war crime.

Pillage is prohibited, and the destruction of any real or personal property is only permitted where it is rendered absolutely necessary by military operations.

Villages close to the South Ossetian administrative border such as Koshka, Ergneti, Nikozi, Megvrekisi, Tirdznisi, and Tkviavi in Gori district, and Dvani, Knolevi, Avlevi, and Tseronisi in the Kareli district were particularly hard hit by destruction and pillage. Though the looting and torching was ongoing, two waves are discernible: the first just after Russian troops began the occupation of Gori and Kareli districts, and the second in the last week of August.

As noted above, in some incidents looters killed residents during the pillaging."

186. As to the use of cluster munitions by Georgia during the 2008 conflict, the relevant part of the above-mentioned Human Rights Watch report "A Dying Practice: Use of Cluster Munitions by Russia and Georgia in August 2008" reads as follows (see pp. 63-66):

"Georgian statements about cluster munitions evolved dramatically from August 2008 to March 2009. Georgia moved from completely condemning the weapon to acknowledging limited Georgian use to recognising the possibility of a deadly failure of Georgian clusters yet defending their military advantage.

In August 2008 Georgia repeatedly blamed Russia for using cluster munitions but failed to acknowledge its own use. For example, the Ministry of Foreign Affairs issued a statement on August 15 that said, 'It must be especially stressed, that the use of cluster munitions against civilian population is especially cynical next to the background of the efforts applied by the international community to restrict and even

ban such types of weaponry.' The same day, Georgian President Mikheil Saakashvili, in a press conference with US Secretary of State Condoleezza Rice, described cluster munitions as 'an inhuman weapon' and the Russians as '21st century barbarians' and 'cold-blooded killers' for using them against civilians.

In early September, however, Georgia acknowledged its own use of cluster munitions. In a letter to Human Rights Watch made public on September 1, the Georgian Ministry of Defence stated that it had used cluster munitions 'against Russian military equipment and armament marching from Rocki [*sic*] tunnel to Dzara road.' The ministry also insisted that cluster munitions 'were never used against civilians, civilian targets and civilian populated or nearby areas.

The letter, later made public, identified the type of cluster munitions used as Mk.-4 LAR160 rockets carrying M85 submunitions. It said the rockets were launched from the GRADLAR 160 multiple launch rocket system and had a range of 45 kilometres. It also claimed Georgia only had M85s with self-destruct mechanisms. The ministry denied launching rockets toward Shindisi, despite Human Rights Watch's discovery of M85s there. It also said the Russians had not destroyed any GRADLAR launchers during the war.

The ministry concluded:

The discovery of M85 bomblets in Shindisi raises a lot of suspicion ... This fact demands proper investigation and Georgian side is ready to participate in and provide all necessary assistance for the conduc[t] of such investigation. If needed, for the investigation purposes, we can provide the name of the supplier company.

In a meeting with Human Rights Watch on October 21, 2008, then-First Deputy Minister of Defence Batu Kutelia presented a more nuanced position on Georgia's use of cluster munitions. He said Georgia has limited M85 stocks and used them only against Russian troops in the area north of Tskhinvali. He did not deny, however, that the M85s Human Rights Watch found in Georgia could be Georgian weapons.

Kutelia said he could not explain the presence of M85 submunitions in areas south of the South Ossetian administrative border. He said:

We received reports of M85s in a number of Georgian villages. How they ended up there is unclear. Our system would not fire there itself.... Perhaps an accident happened. That might be the explanation.... It's a real mystery how they ended up there. It is physically impossible someone fired there.

He said Georgia had opened an investigation into the situation and had requested assistance from the company from which they bought the weapons. He did not disclose the name of the company, but it is presumably Israel Military Industries.

A massive failure is one possible explanation for the many M85 duds Human Rights Watch documented south of the South Ossetian border. In villages other than Tirdznisi and Shindisi, Human Rights Watch found no evidence of M85 submunitions that exploded on impact and much evidence of M85s that had failed to function. According to witnesses, there were also no Russian troops in the areas hit at the time of the strikes. The Mk.-4 rocket has a minimum range of 12 kilometers. According to Kutelia, Georgia fired its rockets from about eight to ten kilometres north of Gori (although the Georgian Ministry of Defence, in a February 2009 response to a Human Rights Watch inquiry, refused to release more detailed information about the launch sites, saying that the information 'is not public'). If Kutelia's information about the launch sites is correct, the rockets that landed in the Gori District fell short of their

minimum range, which would explain why there were high dud rates[22] and why so many submunitions were unarmed.

Georgian officials claimed that their military directed cluster munition strikes only against military targets in fairly unpopulated areas just south of the Roki Tunnel. If a massive failure of the weapons system caused the civilian casualties and contamination of a large populated area in the Gori District, however, the consequences of the failure highlight the danger of these weapons. The large number of submunitions dramatically increases the harm caused by any failure.

Kutelia also expressed surprise at the large number of M85 duds found not only by Human Rights Watch researchers but also by Georgian military deminers. Like the former, the latter found no evidence of self-destruct mechanisms, but according to Kutelia, 'our contract was for self-destruct'. He said the Ministry of Defense, with the company's help, would also investigate that issue."

187. The relevant passage from the decision of 27 January 2016 of Pre-Trial Chamber I of the International Criminal Court reads as follows:

"19. During the same period, the civilian population, in particular ethnic Georgian civilians, was attacked by South Ossetian forces, including an array of irregular militias, in Georgian-administered villages in South Ossetia and Georgian villages in the 'buffer zone'. The attack commenced subsequent to the intervention and in the course of the advancement of the Russian forces, and continued in the weeks that followed the cessation of active hostilities on 12 August 2008.

20. The attack targeted mainly ethnic Georgians following a consistent pattern of deliberate killing, beating and threatening civilians, detention, looting properties and burning houses. The level of organization of the attack is apparent from the systematic destruction of Georgian houses, the use of trucks to remove looted goods, and the use of local guides to identify specific targets. Valuable items were removed from houses or farms before they were set on fire.

21. These acts were reportedly committed with a view to forcibly expelling ethnic Georgians from the territory of South Ossetia in furtherance of the overall objective to change the ethnic composition of the territory, sever any remaining links with Georgia and secure independence. The *de facto* leadership of South Ossetia reportedly acknowledged some aspects of the policy of expulsion, in particular the deliberate destruction of civilian homes in order to prevent the return of the ethnic Georgian population. The supporting material further suggests that the policy to expel was passed from the highest echelons of the South Ossetian leadership to the South Ossetian forces. It has been reported that irregular armed groups answered, if only loosely, to the South Ossetian chain of command.

22. The attack against the civilian population resulted in between 51 and 113 cases of deliberate killings of ethnic Georgians and the displacement of between 13,400 and 18,500 ethnic Georgian inhabitants from villages and cities in South Ossetia and the 'buffer zone'. Coercive acts used by South Ossetian forces to create an atmosphere of fear and terror thus forcing ethnic Georgians to leave their place of residence reportedly included killings, severe beatings, insults, threats and intimidation, detention, looting and destruction of property.

23. Accounts vary as regards the conduct of Russian armed forces or the Russian Federation in relation to the acts allegedly committed either by members of the

22 A dud rate is the percentage of submunitions that do not explode.

> Russian forces or in relation to the acts allegedly committed by South Ossetian forces. The information indicates that some members of the Russian forces actively participated while others remained passive. For example, when asked why the Russian forces do not intervene to extinguish the fires, one Russian army officer is quoted to have said that this is the policy. The Chamber, however, also notes a series of instances where members of the Russian forces purportedly intervened to protect and assist civilian victims."

188. The satellite images from the "High-Resolution Satellite Imagery and the Conflict in Georgia" AAAS summary report of October 2008 show that the majority of the damage to houses in Georgian villages after 10 August 2008 had been caused by burning (see page 28 of the report and the witness statement below by W32[23], an employee of the AAAS, on this subject).

189. The relevant extract from a combat order[24] of 12 August 2008 sent by the Russian commander of the forces of the North-Caucasian military circuit to the commander of the 58th army and other combat divisions is worded as follows:

> "1. On 12 August 2008, pursuant to the instructions of the President of the Russian Federation the Armed Forces in cooperation with other security forces of the Russian Federation and the executive authorities of the Republic of South Ossetia (hereinafter referred to as the RSO) completed the military operations and commenced the peacekeeping activities, as well as the activities to maintain law and order, ensure public security and protection of the individuals within the RSO and the Georgian territory controlled by the Russian Armed Forces.
>
> Notwithstanding the execution of the ceasefire agreement the acts aimed on destabilisation of the situation in the area controlled by the Russian Armed Forces by the nationalistic militias are expected.
>
> Furthermore, looting and robbery attempts by the local population and the soldiers of the RSO are possible.
>
> 2. In pursuance of the instructions of the President of the Russian Federation, for the purposes of peacekeeping and ceasefire I hereby ORDER THE FOLLOWING:
>
> ...
>
> to prevent looting by the local population and the soldiers;
>
> ...
>
> 3. To arrange for the cooperation with the units of the Armed Forces of the RSO and executive authorities in order to accomplish the tasks set and to protect the lives of the soldiers and the local inhabitants
>
> ...
>
> 5. To carry out the commandment of the forces (troops) in the course of accomplishment of the peacekeeping and law enforcement tasks within the RSO and the Georgian territory controlled by the Russian Army in accordance with the shared

23 See the summary of witness statements in the Annex (W is the abbreviation of "witness").

24 Annex 78 submitted by the respondent Government in their observations on the merits.

system with the use of the command points of the military circuit, their direct subordinate units in cooperation with the authorities of the RSO."

(b) Hearing of witnesses

190. W13 and W14, two Georgian citizens living in Tirdznisi, stated that bombardment by the Russians had begun on 8 August 2008. Subsequently, Russian forces had taken control of the village and South Ossetians and/or Russians had looted and burnt people's houses. On 14 August 2008 South Ossetians and/or Russians had chased W13 and Ivane Lalashvili and the latter had subsequently been killed. W14 had returned to his village in mid-August 2008 and had seen a group of Russian soldiers and South Ossetian militias beating to death Natela Kaidarashvili, who was 67 years old and deaf. When asked about victims of cluster munitions, W14 replied that Mikheil Kaidarashvili had stepped on unexploded ordnance and died as a result. He did not know if Mikheil Kaidarashvili was a relative of Natela Kaidarashvili, but they had lived in the same house.

W15, a Georgian citizen living in Vanati, stated that his village had been bombed on or around 7 August 2008. On 9 or 10 August 2008 Russian forces had taken control of the village and there had subsequently been widespread looting and burning of houses by South Ossetian militias. All the houses, except those with white markings, had been torched, and sometimes even houses where ethnic South Ossetians lived. He added that South Ossetians could be identified because they wore one white armband on their sleeves whereas North Caucasians wore two.

191. W30 and W31, former members of the Parliamentary Assembly of the Council of Europe and co-rapporteurs of the Monitoring Committee for Georgia and the Russian Federation respectively, participated in fact-finding visits in South Ossetia and in the "buffer zone" in the immediate aftermath of the hostilities. Both stated that the "ethnic cleansing" of Georgian villages had been committed by South Ossetian militias and gangs. Whilst Russian forces had not taken part in those crimes, being the occupying power they had had a duty to prevent them and had failed in their duty.

192. W23 stated that after hostilities had ceased his troops had been deployed in the "buffer zone" and ordered to search for remaining Georgian troops and equipment. He said that he had visited several villages and had never seen or heard of any cases of looting and burning. Whilst they had found some burnt houses in Tirdznisi, these had burnt down before, possibly during the period of active fighting, and had no longer been on fire. Lastly, he underlined that orders to prevent looting, burning and other crimes against the local population in the "buffer zone" had been issued to him every day in writing during the period of 12 to 15 August 2008 and that a copy of those orders could still be obtained.

W21 stated that after the cessation of hostilities peacekeeping forces had been deployed along the "border" between South Ossetia and Georgia in the

"buffer zone". Their task had been to ensure that there was no movement of troops across the "buffer zone", as neither South Ossetian nor Georgian forces had been allowed into that zone, and to ensure the safety of the remaining local population whom they had assisted as much as they could. Russian peacekeeping forces could be distinguished from regular Russian forces because they wore the inscription "MC" on their uniforms and helmets.

W22 stated that his regiment of 800 soldiers had been posted in Gori during the period of 13 to 17 August 2008. Its key task had been to prevent looting and burning. He added that he had not had enough men to protect the many villages in the "buffer zone". He said that there had been no looting or burning in the area under his responsibility (that is, Gori) and that Russian forces, in general, had done everything possible in order to prevent crimes against the local population.

W20, Commander of Joint Peacekeeping Forces in South Ossetia from September 2004 to October 2008, stated that after the cessation of hostilities the Russian peacekeeping forces had no longer been responsible for South Ossetia, but had all been transferred to the "buffer zone". Law and order in South Ossetia had been the responsibility of regular Russian forces after 12 August 2008. There had been, all in all, about 460-480 peacekeepers in the "buffer zone". As the area under the responsibility of the peacekeeping forces had been large and contained 200 or so settlements, it had been impossible to prevent all acts of looting and burning. However, the peacekeeping forces had done all they could to protect the local population. With regard to the allegations by Human Rights Watch and the OSCE that there had been ample evidence of systematic looting and burning of ethnic Georgian villages by South Ossetian forces in the presence of Russian armed forces, W20 replied that those NGOs had visited South Ossetia and the "buffer zone" only after the withdrawal of the Russian forces, and denied that there had been a systematic campaign of looting and burning.

W24, "Minister of Foreign Affairs" of South Ossetia from 1998 to 2012, explained that during the 2008 conflict the following forces had taken part: armed forces under the "Ministry of Defence of South Ossetia"; police forces under the "Ministry of Internal Affairs of South Ossetia"; and "defenders" or militias formed from the general population in time of war.

193. W32, an employee of the AAAS, which produced the report "High-Resolution Satellite Imagery and the Conflict in Georgia" in October 2008, said that satellite images of 10 and 19 August 2008 had been available. She said that the most helpful graphic was probably the one on page 28 of the report which clearly showed that the town of Tskhinvali had sustained the most damage up to the morning of 10 August 2008, whereas the nearby villages, inhabited by ethnic Georgians, had sustained the most damage between the morning of 10 August and the morning of 19 August 2008. The report also showed that most of the pre-10 August 2008 damage

had been caused by shelling and bombing, whereas most of the post-10 August 2008 damage had been caused by burning. The witness explained that a burnt house looked very different to a bombed house on satellite images: while fire would usually not knock down its exterior and interior walls, a shell or a bomb would.

4. Relevant provisions of international humanitarian law

194. The relevant provisions of the Hague Regulations concerning the Laws and Customs of War on Land read as follows:

Article 42

"Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised."

Article 43

"The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

195. In *Chiragov and Others* (cited above) the Court defined the concept of "occupation" in international humanitarian law as follows:

"96. ...

Accordingly, occupation within the meaning of the 1907 Hague Regulations exists when a State exercises actual authority over the territory, or part of the territory, of an enemy State.[25] The requirement of actual authority is widely considered to be synonymous to that of effective control.

Military occupation is considered to exist in a territory, or part of a territory, if the following elements can be demonstrated: the presence of foreign troops, which are in a position to exercise effective control without the consent of the sovereign. According to widespread expert opinion, physical presence of foreign troops is a *sine qua non* requirement of occupation[26], that is, occupation is not conceivable without

25 See, for example, E. Benvenisti, *The International Law of Occupation* (Oxford: Oxford University Press, 2012), p. 43; Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Leiden, Martinus Nijhoff Publishers, 2009), pp. 5-8; Y. Dinstein, *The International Law of Belligerent Occupation* (Cambridge, Cambridge University Press, 2009), at pp. 42-45, §§ 96-102; and A. Roberts, "Transformative Military Occupation: Applying the Laws of War and Human Rights", *American Journal of International Law*, vol. 100:580 (2006), pp. 585-86.

26 Most experts consulted by the International Committee of the Red Cross in the context of the project on occupation and other forms of administration of foreign territory agreed that "boots on the ground" are needed for the establishment of occupation – see T. Ferraro, "Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory"

> 'boots on the ground', therefore forces exercising naval or air control through a naval or air blockade do not suffice[27]."

196. Generally speaking, international humanitarian law applies in a situation of "occupation". 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 (see also the report of the EU Fact-Finding Mission, Volume II, pp. 304-12).

197. In its report the EU Fact-Finding Mission indicated that it was not easy to determine when international humanitarian law ceased to apply:

> "The question remains whether, when the cease-fire occurred on 12 August 2008, IHL ceased to apply in relation to the August 2008 conflict. While it could be said that it is fairly easy to determine when IHL starts to apply, it seems more difficult to identify the moment when its application ends, mainly owing to the different formulas used in conventional law. Geneva Convention IV, for example, speaks about the 'general close of military operations' (Article 6(2)), whereas Additional Protocol II uses the expression 'end of the armed conflict' (Article 2(2)). The International Criminal Tribunal for the former Yugoslavia (ICTY), in its decision of 2 October 1995 in the *Tadic* case, tried to clarify this point by indicating that: 'International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.' The ICTY thus rejected the factual criteria that signify the cessation of hostilities. This implies that a cease-fire – whether temporary or definitive – or even an armistice cannot be enough to suspend or to limit the application of IHL. Relevant conventional instruments stipulate that a number of provisions continue to apply until the emergence of a factual situation completely independent of the concluding of a peace treaty. Thus, to quote only some examples, the protection provided for people interned as a result of the conflict (in particular, prisoners of war and civilian prisoners) applies until their final release and repatriation or their establishment in the country of their choice."

198. Other relevant provisions in this connection are Articles 27, 29, 32, 33, 49 and 53 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War.

199. Having regard to the complaints raised in the present case, there is no conflict between Articles 2, 3 and 8 of the Convention and Article 1 of Protocol No. 1 and the rules of international humanitarian law applicable in a situation of occupation.

(Geneva: ICRC, 2012), pp. 10, 17 and 33; see also E. Benvenisti, cited above, pp. 43 et seq., and V. Koutroulis, *Le début et la fin de l'application du droit de l'occupation* (Paris: Éditions Pedone, 2010), pp. 35-41.

27 T. Ferraro, cited above, at pp. 17 and 137, and Y. Dinstein, cited above, p. 44, § 100.

5. The Court's assessment

(a) General principles

200. With regard to the obligations incumbent on a State exercising "effective control" over an area, the relevant passages from the *Al-Skeini and Others* judgment (cited above) are worded as follows:

> "138. Another exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration (see *Loizidou* (preliminary objections), cited above, § 62; *Cyprus v. Turkey*, cited above, § 76; *Banković and Others*, cited above, § 70; *Ilaşcu and Others*, cited above, §§ 314-16; and *Loizidou* (merits), cited above, § 52). Where the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and actions. The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights (see *Cyprus v. Turkey*, cited above, §§ 76-77).
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> ...
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> 142. The Court has emphasised that, where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a 'vacuum' of protection within the 'legal space of the Convention' (see *Cyprus v. Turkey*, cited above, § 78, and *Banković and Others*, cited above, § 80)."

201. The principles set forth in *Al-Skeini and Others* (cited above, § 138) have subsequently been reiterated in, *inter alia*, *Catan and Others* (cited above, § 106); *Chiragov and Others* (cited above, § 168); *Mozer* (cited above, § 98); and *Güzelyurtlu and Others* (cited above, § 179).

202. On the merits the Court has dealt with applications where it was undisputed that the applicants' relatives had died in circumstances falling outside the exceptions set out in the second paragraph of Article 2. In these cases, if the Court established that the applicants' relatives were killed by State agents or with their connivance or acquiescence, it found the respondent State liable for their death (see, among many other authorities, *Avşar v. Turkey*, no. 25657/94, §§ 413-16, ECHR 2001-VII (extracts); *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, § 147, 24 February 2005; *Estamirov and Others v. Russia*, no. 60272/00, § 114, 12 October 2006; *Musayeva and Others v. Russia*, no. 74239/01, §§ 79-82, 26 July 2007; and *Amuyeva and Others v. Russia*, no. 17321/06, §§ 83-84,

25 November 2010). And even in circumstances where the Court could not establish beyond reasonable doubt that any State agent was involved in the killing, the Court nonetheless found the respondent State responsible, if it considered that the authorities failed to take reasonable measures available to them to protect the right to life of the applicant in question (see *Mahmut Kaya v. Turkey*, no. 22535/93, §§ 87 and 101, ECHR 2000-III; *Kılıç v. Turkey*, no. 22492/93, §§ 64 and 77, ECHR 2000-III; and *Gongadze v. Ukraine*, no. 34056/02, §§ 170-71, ECHR 2005-XI).

203. Reference may also be made in this connection to the International Court of Justice's judgment of 19 December 2005 in *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)* (*Judgment, ICJ Reports* 2005, p. 231, §§ 179-80).

204. The Court has also dealt with cases concerning allegations of deliberate destruction of homes by security forces, even where this has not been in the context of an international armed conflict (see, *inter alia*, *Akdivar and Others v. Turkey*, 16 September 1996, § 88, *Reports* 1996-IV). It has subsequently dealt with similar allegations in the context of a state of emergency proclaimed in certain regions of Turkey (see, among many other authorities, *Menteş and Others v. Turkey*, 28 November 1997, *Reports* 1997-VIII; *Selçuk and Asker v. Turkey*, 24 April 1998, *Reports* 1998-II; *Bilgin v. Turkey*, no. 23819/94, 16 November 2000; *Dulaş v. Turkey*, no. 25801/94, 30 January 2001; *Yöyler v. Turkey*, no. 26973/95, 24 July 2003; and *İpek v. Turkey*, no. 25760/94, ECHR 2004-II (extracts)).

(b) Application of the above principles to the facts of the case

205. The Court observes that the information appearing in the various reports by international organisations and the EU Fact-Finding Mission, and in the decision of the International Criminal Court is consistent as regards the existence, after the cessation of active hostilities, of a systematic campaign of burning and looting of homes in Georgian villages in South Ossetia and in the "buffer zone". Such information also corresponds to the satellite images appearing in the AAAS report, which show that the houses in question were burnt. That campaign was accompanied by abuses perpetrated against civilians and in particular summary executions. The three Georgian witnesses heard by the Court also mentioned burning and looting of houses by South Ossetian militias while their villages had been under Russian control, and abuses perpetrated against Georgian civilians (see paragraph 190 above). W30 and W31, co-rapporteurs of the Monitoring Committee for Georgia and the Russian Federation respectively, stated that "ethnic cleansing" of Georgian villages had been committed by South Ossetian militias and gangs.

206. Following a detailed description of the events in question and referring in particular to the Human Rights Watch and Amnesty

International reports, the EU Fact-Finding Mission reached the following conclusion (see paragraph 182 above):

> "as also stated by the HRAM and by HRW – after the bombing, South Ossetians in uniform as well as Ossetian civilians who followed the Russian forces' advance undertook a systematic campaign of arson against homes and other civilian buildings in villages populated predominantly by ethnic Georgians. Interviews by the IIFFMCG expert confirmed that with few exceptions Russian forces did not participate directly in the destruction of villages, aside from a brief period in mid-August, but nor did they intervene to stop it."

207. The OSCE, for its part, referred to the murder of civilians in South Ossetia and in the buffer zone (see paragraphs 180-181 above):

> "According to individuals interviewed, a disturbing pattern of killings of unarmed civilians continued in a large number of villages after the bombardment ended. Witnesses reported that the perpetrators were often Ossetians – some of whom were described as soldiers and others as civilians – who followed the Russian forces into the villages that were under Georgian administration prior to the August conflict."
>
> ...
>
> "A new phase of the hostilities began with the advance of ground forces into the 'buffer zone', following which there were numerous reported attacks on civilians. The advancing military forces were variously described by displaced persons as 'Ossetians' and 'Russians'; in many cases civilians were not able to distinguish clearly between the two."

208. Pre-Trial Chamber I of the International Criminal Court stated as follows (see paragraph 187 above):

> "19. During the same period, the civilian population, in particular ethnic Georgian civilians, was attacked by South Ossetian forces, including an array of irregular militias, in Georgian-administered villages in South Ossetia and Georgian villages in the 'buffer zone'. The attack commenced subsequent to the intervention and in the course of the advancement of the Russian forces, and continued in the weeks that followed the cessation of active hostilities on 12 August 2008.
>
> 20. The attack targeted mainly ethnic Georgians following a consistent pattern of deliberate killing, beating and threatening civilians, detention, looting properties and burning houses. The level of organization of the attack is apparent from the systematic destruction of Georgian houses, the use of trucks to remove looted goods, and the use of local guides to identify specific targets. Valuable items were removed from houses or farms before they were set on fire."

209. According to the statement by W24, "Minister of Foreign Affairs" of South Ossetia from 1998 to 2012, the following forces took part in the 2008 conflict: armed forces under the "Ministry of Defence of South Ossetia"; police forces under the "Ministry of Internal Affairs of South Ossetia"; and "defenders" or militias formed from the population in time of war (see paragraph 192 above).

210. In addition, the report by Human Rights Watch defines the composition of the South Ossetian forces as follows (see paragraph 185 above):

> "South Ossetian forces include South Ossetian Ministry of Defence and Emergencies servicemen, riot police (known by the Russian acronym OMON), and several police companies, working under the South Ossetian Ministry of Internal Affairs, and servicemen of the South Ossetian State Committee for Security (KGB). Many interviewees told Human Rights Watch that most able-bodied men in South Ossetia took up arms to protect their homes. As South Ossetia has no regular army its residents tend to refer to the members of South Ossetian forces as militias (*opolchentsy*) unless they can be distinctly identified as policemen or servicemen of the Ministry of Defence and Emergencies. Credible sources also spoke about numerous men from North Ossetia and several other parts of Russia who fought in the conflict in support of South Ossetia and who were involved in the crimes against civilians that followed."

211. The report also indicates that it was sometimes difficult to establish who the perpetrators were (see paragraph 185 above):

> "In some cases, it is difficult to establish the exact identity and status of the Ossetian perpetrators because witnesses' common description of their clothing (camouflage uniform, often with a white armband) could apply to the South Ossetian Ministry of Defence and Emergencies, South Ossetian Ministry of Internal Affairs, volunteer fighters, or even common criminal looters. Several factors, however, indicate that in many cases the perpetrators belonged to South Ossetian forces operating in close cooperation with Russian forces. The perpetrators often arrived in villages together with or shortly after Russian forces had passed through them; the perpetrators sometimes arrived on military vehicles; and the perpetrators seem to have freely passed through checkpoints manned by Russian or South Ossetian forces."

212. Accordingly, even if there were also civilians among them who directly participated in the hostilities on a merely spontaneous, sporadic or unorganised basis, the Court considers that the evidence available to it indicates that in many cases the perpetrators were members of the South Ossetian forces, including an array of irregular militias.

213. The respondent Government, for their part, did not dispute as such the reality of those events, but submitted that bombings by Georgian armed forces, of Tskhinvali, among other places, had created inter-ethnic tensions and had subsequently caused South Ossetians to take revenge on the Georgian civilian population by attacking Georgian villages. The Russian forces, who had allegedly often attempted to interpose themselves and protect the Georgian villages, had not been in a position to prevent every incident and in any case had not controlled the South Ossetians, who had often been criminals. The commanders of the Russian armed forces and Russian peacekeeping forces who had testified at the witness hearing had also stated that their troops had done everything in their power to protect the civilian population, but had often not had sufficient men to prevent every incident.

214. However, in accordance with the Court's case-law (see *Al-Skeini and Others*, cited above, §§ 138 and 142, and the case-law cited therein, as well as subsequent judgments – see paragraphs 200-201 above), from the time when the Russian Federation exercised "effective control" over the

territories of South Ossetia and the "buffer zone" after the active conduct of hostilities had ceased, it was also responsible for the actions of the South Ossetian forces in those territories, without it being necessary to provide proof of "detailed control" of each of those actions.

215. The Court has applied these principles in, *inter alia*, the *Cyprus v. Turkey* judgment (cited above):

> "77. ... Having effective overall control over northern Cyprus, [Turkey's] responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. ..."

and in *Ilaşcu and Others* (cited above):

> "382. In the light of all these circumstances, the Court considers that the Russian Federation's responsibility is engaged in respect of the unlawful acts committed by the Transdniestrian separatists, regard being had to the military and political support it gave them to help them set up the separatist regime and the participation of its military personnel in the fighting ..."

and subsequently in *Mozer* (cited above):

> "157. Nevertheless, the Court has established that Russia exercised effective control over the 'MRT' during the period in question (see paragraph 110 above). In the light of this conclusion, and in accordance with the Court's case-law, it is not necessary to determine whether or not Russia exercises detailed control over the policies and actions of the subordinate local administration (see *Catan and Others*, cited above, §§ 106 and 150). By virtue of its continued military, economic and political support for the 'MRT', which could not otherwise survive, Russia's responsibility under the Convention is engaged as regards the violation of the applicant's rights."

216. The Court also observes that an administrative practice is defined not only by a "repetition of acts", but also "official tolerance", that is to say, "illegal acts are tolerated in that the superiors of those immediately responsible, though cognisant of such acts, take no action to punish them or to prevent their repetition; or that a higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings a fair hearing of such complaints is denied" (see, among other authorities, *Georgia v. Russia (I)*, cited above, § 124).

217. In the present case, even if some witness statements indicate that at times Russian troops had intervened to stop abuses being committed against civilians, in many cases Russian troops were passively present during scenes of looting. Accordingly, the EU Fact-Finding Mission indicated as follows (see paragraph 156 above):

> "In general, these elements demonstrate that to a certain degree, Russian forces were in a position to ensure public order and safety in the territories they were stationed in, and claim to have undertaken measures in this regard. This contrasts strikingly with what happened on the ground, where there was a serious lack of action by the Russian troops to prevent violations and protect ethnic Georgians.

...

Nevertheless, from all the testimonies collected, it appears that the Russian authorities did not take the necessary measures to prevent or stop the widespread campaign of looting, burning and other serious violations committed after the ceasefire."

218. This shows that despite the order given to the Russian armed forces to protect the population and carry out peacekeeping and law-enforcement operations "in South Ossetia and in the Georgian territory controlled by the Russian armed forces" (see paragraph 189 above), on the ground the measures taken by the Russian authorities proved to be insufficient to prevent the alleged violations.

219. In that respect this can be deemed to be "official tolerance" by the Russian authorities, as is also shown by the fact that the latter did not carry out effective investigations into the alleged violations (see paragraph 336 below).

220. Having regard to the foregoing, the Court considers that it has sufficient evidence in its possession to enable it 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, who, furthermore, were targeted as an ethnic group (see, *mutatis mutandis*, *Cyprus v. Turkey*, cited above, §§ 305-11), the Court considers that this administrative practice was also contrary to Article 3 of the Convention.

221. Furthermore, in accordance with the Court's case-law (see paragraph 98 above), the rule of exhaustion of domestic remedies does not apply where the existence of an administrative practice is established. The preliminary objection of non-exhaustion of domestic remedies raised by the respondent Government in this regard must therefore be dismissed.

222. There has therefore been a violation of Articles 2, 3 and 8 of the Convention and Article 1 of Protocol No. 1, and the Russian Federation is responsible for that violation.

VI. TREATMENT OF CIVILIAN DETAINEES AND LAWFULNESS OF THEIR DETENTION

223. The applicant Government submitted that the South Ossetian forces had illegally detained 160 civilians (mostly women and elderly people) for approximately fifteen days (they had all been released on 27 August 2008) in indecent conditions, and that some of the detainees had also been

ill-treated. They alleged that this amounted to a violation of Articles 3 and 5 of the Convention, which provide:

Article 3 of the Convention

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 5 of the Convention

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

A. The parties' submissions

224. The applicant Government submitted that the Russian and South Ossetian forces had illegally detained at least 160 Georgian civilians (mostly women and elderly people) in degrading conditions for

approximately fifteen days (they were all released on 27 August 2008), some of whom had been subjected to ill-treatment.

They submitted in particular that the Russian and South Ossetian forces had arrested at least 160 Georgian civilians who had remained in South Ossetia or in the villages along the administrative border. They had mostly been elderly and the overwhelming majority had been detained after the cessation of hostilities. Most had been held for approximately two weeks in the basement of the *de facto* "Ministry of Internal Affairs" building in Tskhinvali in conditions described by Human Rights Watch as "inhuman and degrading". They had been frequently subjected to ill-treatment, including beatings and mock executions. All detainees had been held in overcrowded conditions, with little food and no clean water, no electricity, nowhere to sleep other than the floor and with insufficient toilet facilities. Many had been subjected to verbal and physical abuse, and some had been forced to work in the streets of Tskhinvali collecting corpses and burying them in mass graves.

There was clear and direct eyewitness testimony establishing the involvement of Russian forces and authorities in the arrest and detention of these civilians and in their ill-treatment both during August 2008 and afterwards.

Based on the evidence submitted with these observations, the applicant Government invited the Court to conclude that the Russian Federation had implemented and continued to implement an administrative practice of causing or permitting arbitrary detention, and of serious and sustained ill-treatment, of civilian detainees, in violation of Articles 3 and 5 of the Convention and the applicable rules of international humanitarian law.

225. The respondent Government replied that the Russian Federation had not been involved and had exercised no control over the premises or buildings concerned. As Russian soldiers had not been involved in the running of the detention centre there was no proper basis for attributing liability to the Russian Federation for the detention of Georgian civilians.

In any event the actions of the South Ossetian authorities, when viewed against the background of the conflict, could not fairly be criticised: Georgia's attack on Tskhinvali and the atrocities committed by its armed forces had unleashed a wave of anger among the Ossetian population and a desire amongst some individuals to exact revenge on Georgians. The South Ossetian authorities had therefore detained many Georgians to protect them from acts of revenge. It was grotesque for the applicant Government to complain about the conditions of the detainees in the detention centre. The truth was that because of the massive destruction caused by Georgia's attack on Tskhinvali, and the resultant breakdown in local civil institutions, there had been nowhere better safely and securely to house the detainees. That situation appeared to have been recognised by Mr Hammarberg, the Commissioner for Human Rights of the Council of Europe, who in his visits

to the detention centre had never raised any concerns about the conditions of the detainees. Given the massive destruction of Tskhinvali and the breakdown in civil institutions, it was not unreasonable to expect able-bodied young detainees to clean the streets, and thereby to join in the collective civil effort to get Tskhinvali back on its feet, get supplies in and improve public health.

B. Third-party comments

226. The Human Rights Centre of the University of Essex submitted that where detention was effected during the course of an international armed conflict, the grounds of detention were determined by the law of armed conflict, together with the general system (not necessarily the detail) of review of detention and the circumstances in which detention must end. On that basis, members of the opposing armed forces could be detained as prisoners of war[28]. Civilians could only be detained on imperative grounds of security, whether in occupied territory or not[29]. Their detention had to be reviewed by a board at six monthly intervals[30]. The details of their treatment and their rights in the review process were regulated by a mixture of the law of armed conflict and human rights law.

C. Summary of the relevant evidence

1. Written evidence

(a) Treatment of civilian detainees

227. The relevant part of the Human Rights Watch report "Up in Flames" (pp. 170-82) reads:

> "As Russian forces began to occupy South Ossetia on August 8 and 9, South Ossetian forces travelled with them or followed them into ethnic Georgian villages in South Ossetia and then into Gori and Kareli districts. Most of the able bodied and younger residents had fled just before the start of hostilities or in the initial days of fighting. Most of the residents who remained in the villages had chosen to stay behind to look after their homes and property or were unable to flee. Ossetian forces, at times together with Russian forces, detained some of the residents they found remaining in these villages, particularly in the ethnic Georgian villages of South Ossetia; in most cases, detentions took place in the context of the campaign of looting and destruction described above. Detainees told Human Rights Watch that they were not given reasons for their detention and did not have access to lawyers or any opportunity to challenge their detention.
>
> As Russian and Ossetian forces entered Georgian villages in South Ossetia and the Gori district, they detained at least 159 people, primarily ethnic Georgians as well as at least one Ossetian and one ethnic Russian married to an ethnic Georgian. Forty-five

28 Third Geneva Convention of 1949, Article 21.
29 Fourth Geneva Convention of 1949, Articles 41, 42 and 78.
30 Fourth Geneva Convention of 1949, Article 78.

of the detained were women. At least 76 were age 60 or older, and at least 17 were age 80 or older. There was one child, a boy, about eight years old. Human Rights Watch interviewed 29 of the detained, all post-release. Many detainees described ill-treatment during detention, during transfer to custody, and in custody. Most detainees were held in the basement of the South Ossetian Ministry of Interior building in Tskhinvali for approximately two weeks in conditions that amounted to degrading treatment. Some of these detainees were forced to work clearing the Tskhinvali streets of decomposing bodies of Georgian soldiers, and debris. At least one man was executed while in Ossetian custody during his transfer to the Ministry of Interior. All of these actions are grave breaches of the Geneva Conventions and amount to war crimes. To the extent that Russia exercised effective control in the territory where these detentions took place, the Russian government is liable for these acts, which also amount to violations of its human rights obligations under the ICCPR and the ECHR.

In some instances, Russian forces directly participated in the detention of ethnic Georgians, and detainees held in the Ministry of Interior reported being interrogated by people who introduced themselves as members of Russian forces. ...

...

All of the detainees interviewed by Human Rights Watch described appalling conditions of detention in small, overcrowded basement cells of the South Ossetian Ministry of Interior building in Tskhinvali. Many detainees described degrading treatment, particularly upon arrival at the facility. Material conditions in Tskhinvali at the time of these detentions were dire: the city had no electricity, very little food, and very little water. Irrespective of these conditions, Russian and Ossetian authorities had an obligation to provide humane conditions of detention in accordance with international standards. Ill-treatment and willfully causing great suffering or serious injury to body or health constitute war crimes. Several detainees told Human Rights Watch that Russian Federation officials were present at certain times at the Ministry of Interior during their detention.

Ill-treatment in detention

Tamaz Chalauri described treatment by Ossetian forces upon his arrival at the Ministry of Interior building in Tskhinvali on August 10: ‘They lined us up facing the wall. They wrote down our names, searched us, took everything we had with us. They were hitting us, kicking us, cursing us the whole time, and calling us, ‘You Georgian pigs, you motherfuckers.’ Others also described searches, which sometimes involved beatings or stripping of clothes, as well as confiscation of money, cell phones, jewellery, and identity documents. Nothing was returned to the detainees upon their release, except identity documents in some cases.

Some detainees reported that Ossetian forces forced them to walk across or spit on a Georgian flag placed on the ground near the Ministry of Interior building. When Ilo Khabareli refused to step or spit on the flag and said, ‘Kill me here because I won’t do that,’ an Ossetian fighter hit him on the head, forcing him into a wall, where he hit his head again. Vazha Lagazashivili told Human Rights Watch that when he tried to walk around the flag, Ossetians hit him with the butt of a gun on the back and neck.

Human Rights Watch did not interview anyone who was beaten at the detention facility, except in those cases when the interviewee was beaten upon arrival as described above. However, former detainees told Human Rights Watch that many of the men, particularly the young men, were beaten, and that some were beaten frequently. They described consistently how men would be taken out of their cells and

out of the basement, and how, when they were returned, they showed clear signs of beatings. Manana Gogidze, 48, from Tamarasheni, told Human Rights Watch that she witnessed young men regularly being beaten:

We saw them being taken upstairs and we could hear their screams. When they were brought back, they would bear clear signs of beating.... I saw the bruises myself as I was trying to help them. There was a young man from Tirdznisi who was beaten several times. I saw large dark bruises mostly on his back ... There was one [elderly] detainee ... who spoke no Ossetian despite having an Ossetian name. He was hit once by the guards for not speaking Ossetian.

Salimat Bagaeva told Human Rights Watch, '[Y]oung men would be taken out and then badly beaten. I saw them. Their bodies would be covered in bruises. There was one who had a broken nose.'

Several, although not all, detainees reported that they were interrogated during their detention. One reported being insulted by an Ossetian police officer, but none of those interviewed by Human Rights Watch reported ill-treatment during interrogation.

Degrading conditions of detention

Detainees stated that the basement contained five dark, dirty, poorly ventilated cells without windows, designed for short-term detentions. Women and men were held in separate cells. The cells quickly became overcrowded and the guards eventually opened the doors of the cells and detainees could move into the hall or the small, fenced-in, outdoor exercise yard accessible from the basement. These areas quickly also became full as more detainees were brought to the basement. According to one detainee, 'There wasn't even space to walk around in the corridor or in the exercise yard' due to the large number of people.

With many more detainees in the cells than there were bunk beds for them, most were forced to sleep sitting up or lying on the floors of the cells, halls, or exercise yard. One detainee, 76-year-old Rusudan Chrelidze, remarked that in her cell, 'the women were sleeping like herrings in a tin.' A 47-year-old detainee from Karaleti reported that in his cell people slept in shifts because there was not enough space for people to lie down.

Detainees described being given small quantities of water that contained sand and was frequently undrinkable, and insufficient food. During the initial days of detention, detainees received only bread. Guards would throw four to five loaves of bread into the cells, saying 'Eat, you pigs!' Detainees stated that later they were given slightly more and better food, including buckwheat cereal, more servings of bread, and tea. Detainees reported losing significant weight during their two weeks of detention.

There was one toilet for all detainees covered with a plastic sheet that the detainees put up themselves. The toilet smelled terribly and frequently overflowed because it did not have water. When asked what had been the most difficult part of her experience in detention, Rusudan Chrelidze said, 'The toilet was a big problem. There was only one and there was always a long line for it.'

Forced labour

Ossetian forces forced many of the male detainees to work, which included recovering decomposing bodies from the streets of Tskhinvali, digging graves, and burying bodies, as well as clearing the streets of building debris from the hostilities. Two detainees interviewed by Human Rights Watch stated that they volunteered to work on some days in order to be out of the overcrowded cells for a few hours. None of the workers received any compensation for this work. Under the Fourth Geneva

Convention, adults (individuals age 18 or older) may be required to work as is necessary to maintain public utilities, and to meet needs of the army and humanitarian needs, such as activities related to feeding, sheltering, clothing, and health care of the civilian population. People must be appropriately compensated for their work, and there can be no obligation to work based on any form of discrimination. Unpaid or abusive forced labour, or work that amounts to partaking in military operations, is strictly prohibited.

Vazha Lagazashivili, age 58, told Human Rights Watch that he was forced to work every day of his 20-day detention:

They would take us out at 9 a.m. until late evening. We were cleaning the streets. They told me that I must go. We had to clear dead bodies from the street. We had to pick them up and put them into body bags. Some had limbs missing. [We also] collected the body parts.

I was taken out sometimes to do other work, like unload trucks full of humanitarian aid from Russia... They would give us one tin of food per person and some bread after we unloaded the trucks. We could only rest when we were given some food, for about half an hour. Of course I was not paid.

Revaz R., 36, from Zemo Achabeti, confirmed that he was among 30 men who were forced to work from early morning until 7 or 8 p.m. 'We cleaned the street, threw out garbage, and removed and buried the dead. We buried about 44 people. Most of the corpses were already decaying,' he told Human Rights Watch. He also stated that while they worked they received better food, such as canned meat. After about a week in detention, Ossetian forces also forced 70-year-old Gaioz Babutsidze to work for two days lifting coffins off trucks and placing them in graves. He estimates that they buried 50 bodies.

Those who worked were also subjected to degrading treatment as they were taken from their work locations to the Ministry of Interior building. 'Sometimes they would make us walk back to the police station ... accompanied by four soldiers ... People on the streets would yell at us, insult us. They were cursing, swearing, calling us sons of bitches, pigs, whores,' Vazha Lazagashivili told Human Rights Watch.

ICRC, journalist visits to the facility

Detainees reported that the International Committee of the Red Cross visited the facility in mid-August.

Journalists also visited the facility. David Giunashvili stated that he spoke to a journalist from the Moscow newspaper Nezavisimaya Gazeta. Tamaz Chalauri told Human Rights Watch that he was forced to give an interview to Russian television. Emilia Lapachi, age 51, recalled being pressured to speak positively about her detention experience for Russian journalists:

One day Russian journalists came to interview us. We were told by the guards that ... if we wanted to be released, we should tell them that we had been treated well and that we had no complaints. We were told to say that we had been taken to custody for our own safety and security. We discussed it among ourselves and decided to say anything to be released from there.

...

Release of civilian detainees

Ossetian forces released one group of 61 detainees, including most of the elderly and all of the women, on August 21, in exchange for eight detainees whom the

Georgian Ministry of Defence described as militia fighters. Other civilians were released on subsequent days, including a final group of 81 civilians on August 27, who, according to the Georgian Ministry of Defence, were exchanged for four people detained during active fighting and described as 'militants,' as well as nine Ossetians previously convicted for crimes and serving sentences in Georgian prisons. While prisoner exchanges are a recognised and legitimate process to facilitate repatriation of prisoners who are in the hands of the enemy, it is prohibited to use the mechanism of prisoner exchanges as a means of effecting population transfer. It is also prohibited to use prisoners as hostages – that would be to unlawfully detain persons with the intent of using them to compel the enemy to do or abstain from doing something as a condition of their release."

228. Amnesty International reported, in that regard, as follows (see its report, cited above, pp. 46-47):

"The Georgian authorities report that 159 Georgian civilians were held by the *de facto* South Ossetian authorities. These were held in the main police station in Tskhinvali for periods of between three and 10 days before being transferred to the Georgian authorities between 19 and 27 August. On 21 August, Amnesty International delegates spoke to a number of the first group of Georgian detainees to be released. From their accounts, it would appear that the earliest civilian detainees were taken captive around 10 August whilst the hostilities were still ongoing. These were mostly young men. The majority of civilian detainees, however, would appear to have been taken captive after 13 August, that is, after the formal cessation of hostilities and whilst the looting and destruction of the Georgian villages near Tskhinvali was taking place. Most of these later detainees were elderly residents who had not fled during the conflict. Whilst it is arguable that these detainees were removed from their homes for their own safety, the danger attendant on their remaining arose from the criminal actions of Ossetian forces, militia and private citizens engaged in the burning and pillaging of Georgian villages.

From the accounts of detainees, it would appear that they were provided with basic food and tea during their captivity. They were kept, without bedding or blankets, in four cells opening on to an open exercise yard, which became progressively more overcrowded as new detainees arrived. Whilst the detainees spoken to alleged frequent verbal abuse, they did not suggest that they were physically ill-treated during their captivity beyond the obvious hardship, especially for the many elderly captives, of their cramped, hot and uncomfortable accommodation. It was alleged, however, that the more able-bodied detainees were taken from the police station during the day, beaten and made to work on the removal of debris from streets of Tskhinvali."

229. The relevant part of the OSCE report mentioned above (pp. 38-39) reads as follows:

"A substantial number of civilians were arbitrarily detained in South Ossetia, primarily by armed Ossetian forces. Many were taken to places of detention in Tskhinvali.

The HRAM interviewed several displaced persons who had been arbitrarily detained and were subsequently released, each of whom provided extensive details. A villager from Tamarasheni, for example, was arrested by Ossetian militiamen while he was trying to extinguish a fire in a pigpen. His wife was also detained. They were given no reason or explanation for their detention. They were taken to Tskhinvali and held in a compound composed of a small room and a big yard. They were not handcuffed or physically abused, but they had to sleep on the floor and were given only bread and

water. Two other women from the same village were detained under similar circumstances. One of them recalled sitting for ten days in the detention centre, since there were no beds and just one open toilet for the use of both men and women. There was no access to doctors, but some medicines were distributed. She remembered seeing 'Russians acting as supervisors' of the detention centre.

Two villagers from Java described being taken to a makeshift prison in Tskhinvali, located in a three storey building next to a drugstore. Five or six rooms were crowded with 95 detainees; detainees also had access to a paved courtyard surrounded by a solid metal fence. The detention centre was guarded by men in military uniforms. The detainees were fed small meals of buckwheat and bread once or twice a day, with tea. The two villagers were assigned separately to work details. One spent four days sweeping streets and loading trucks; the other was forced to bury bodies. While on work details, they were guarded by Ossetians. Neither was physically abused. Their release was arranged by the ICRC on 27 August.

The HRAM also interviewed a woman from Kekhvi, who was detained with many other villagers by Ossetian police. Their place of detention was a building in the centre of Tskhinvali, in front of a well-known drugstore, perhaps the same one described by the two men from Java (above). She and the other villagers were detained for nine days. There were 161 people in the detention centre; men and women were held together. 'We lived like dogs, animals. There was a toilet next to us and I was lying on the floor with no mattress, sleeping next to the toilet, choking because of the smell. We only got a small piece of bread to eat, no tea. It was only hot water without sugar. Some of the guys among the prisoners went upstairs and brought the food down but we had no contact with prison staff.' The detainees had no access to a lawyer and did not see a doctor until their fifth day of detention, when an ICRC representative visited the prison. Some of the young male prisoners were forced to bury bodies. Another resident of the same village gave a very similar account.

A detainee described being detained with his neighbours by 'Ossetians' and driven to Tskhinvali, where the group was held in a dirty basement. After entering the building, they were forced to wipe their feet on a Georgian flag and then spit on it. The detainee described how he was then taken into a room where he was strip searched, robbed and beaten with rifles and fists. The conditions in the detention centre were very bad. There was very little food – 'for twenty people, we received three loaves of bread; and per person one small glass of boiled buckwheat and one glass of red tea with no sugar' – and the water was from a barrel in the toilet. The detainees were forced to work in teams burying bodies; the villager said he personally buried 44. After about ten days, the women and about 15 old men were released, but the young men were held for another week. A day or two after the women were released the detainees were visited by Georgian church officials, who brought food, and then by the ICRC, which brought clothes and blankets. The interviewee surmised that his captors deliberately released the women before allowing the Red Cross to visit so that an international organisation would not see women being held in such conditions. The interviewee, together with 84 other detainees, was released in a prisoner exchange on 27 August, after 16 days in detention."

(b) Lawfulness of their detention

230. The report of the EU Fact-Finding Mission reads, in so far as relevant, as follows (Volume II, p. 361):

"During the meeting the [Mission] had on 5 June 2009 with representatives of the *de facto* Ministry of Defence and Ministry of Interior of South Ossetia, these authorities

actually acknowledged that civilians had been present in the Ministry of Interior building, but they indicated that they had been taken there in the context of safety measures to protect them from the effects of the hostilities. Not only is this in complete contradiction with numerous testimonies from persons detained there but, even if it were so, it would be impossible to explain why, if such measures were taken for protection purposes, those persons were not released until 27 of August, two weeks after the hostilities had ended, and why they had to clean the streets and bury dead bodies."

231. The relevant part of the Human Rights Watch report (cited above, pp. 172-73 and 181-82) reads as follows:

"During hostilities and occupation, the Fourth Geneva Convention permits the internment or assigned residence of protected persons such as civilians for 'imperative reasons of security'. However, unlawful confinement of a protected person is a war crime.

Human Rights Watch has not been presented with evidence that there were reasonable security grounds for the detention of the 159 persons detained by Ossetian and Russian forces. Many of those detained were very elderly, and one was a small child. Most were detained in circumstances that strongly suggest that they were not taking up arms, not participating in hostilities, and not otherwise posing a security threat, as described below.

If, among the detained, there were Georgians who participated in hostilities against Ossetian or Russian forces, but who were not members of the Georgian military, under international humanitarian law such persons would be considered non-privileged combatants. Georgians who took up arms to defend their lives or property from advancing Ossetian or Russian forces would be considered armed civilians. In both cases, detention of such persons would be considered reasonable on security grounds. Such persons are entitled to the protections guaranteed to civilians under the Fourth Geneva Convention. Detentions must be carried out in accordance with a regular procedure permissible under international humanitarian law. Those detained have a right to appeal their internment and have their case reviewed every six months. The Fourth Geneva Convention provides detailed regulations for the humane treatment of internees. The International Committee of the Red Cross must be given access to all protected persons, wherever they are, whether or not they are deprived of their liberty.

Given their particular vulnerability, children are afforded special protections under the Geneva Conventions. Protocol I states, 'Children shall be the object of special respect ... Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.'

Ossetian President Eduard Kokoity has stated that 'ethnic Georgians were detained for their personal safety' and that 'the Ministry of Interior [was] protecting them and saving their lives.' While the Geneva Conventions allow for internment in order to provide for the security of civilians, Human Rights Watch has not found evidence that the detentions by Russians and Ossetians had this purpose or were justified on these grounds. The fact that the majority of individuals were detained as Georgian soldiers were retreating and in areas in which Russian and Ossetians exercised effective control suggests that in most cases civilians were not likely to be threatened by armed combat. Furthermore, Russian and Ossetian forces apprehended most individuals in a violent and threatening manner and subjected them to inhuman and degrading

treatment and conditions of detention, and forced labor, reflecting no intent on the part of these forces to provide for the personal safety and well-being of those detained."

2. Hearing of witnesses

232. W10, W11 and W12, three Georgian civilians, all stated that they had been captured by South Ossetian fighters on 10 and 11 August 2008 and put in the basement of the "Ministry of Internal Affairs of South Ossetia" in Tskhinvali. The conditions of detention had been dire, and the cells overcrowded, dark and dirty, and after a time men and women had not been detained separately. The first two witnesses also stated that they had been ill-treated – receiving, in particular, blows and insults – and had been taken to clean the streets of Tskhinvali and clear dead bodies. The third witness stated that she had been forced to clean offices and sleeping quarters on the second floor of the building.

233. W20, Commander of Joint Peacekeeping Forces in South Ossetia from September 2004 to October 2008, W19, "Human Rights Ombudsman of South Ossetia" in August 2008, and W25, head of the "detention centre" at the material time, all said that Georgian civilians had been detained in the basement of the "Ministry of Internal Affairs of South Ossetia" in Tskhinvali for their own safety. Following the Georgian attack, many South Ossetians had sought to take revenge on Georgians. According to W25, the first civilians had arrived on 11 or 12 August and the last ones had left on 26 August 2008. Less than a third of the detainees had been women. As to the conditions of detention, he said that there had been seven cells of different sizes, two toilets and some common premises for more than 160 detainees; and that there had been enough beds for half of the detainees only. He acknowledged that the detention centre had not been designed for so many people. He also confirmed that the "Prosecutor of South Ossetia" had ordered that the streets of Tskhinvali be cleaned by Georgian detainees. However, it had been easy to find volunteers given the conditions of detention. Lastly, he said that the Russian armed forces had supplied water and food. W20 explained that the Russian forces had questioned detainees in another part of the building.

D. Relevant provisions of international humanitarian law

234. The relevant provisions in this connection are Articles 27, 32, 33 § 1, 34, 42 § 1, 43, 78 §§ 1 and 2, 85, 89, 95, 146 and 147 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, and Article 75 of Additional Protocol (I) relating to the Protection of Victims of International Armed Conflicts.

235. Having regard to the complaints raised in the present case, there is no conflict between Article 3 of the Convention and the above-mentioned provisions of international humanitarian law, which provide in a general

way that detainees are to be treated humanely and detained in decent conditions.

236. There may, however, be a conflict between Article 5 of the Convention and the relevant provisions of international humanitarian law, as the Court stated in *Hassan* (cited above):

> "97. ... the Court considers that there are important differences of context and purpose between arrests carried out during peacetime and the arrest of a combatant in the course of an armed conflict. It does not take the view that detention under the powers provided for in the Third and Fourth Geneva Conventions is congruent with any of the categories set out in sub-paragraphs (a) to (f). Although Article 5 § 1(c) might at first glance seem the most relevant provision, there does not need to be any correlation between security internment and suspicion of having committed an offence or risk of the commission of a criminal offence. As regards combatants detained as prisoners of war, since this category of person enjoys combatant privilege, allowing them to participate in hostilities without incurring criminal sanctions, it would not be appropriate for the Court to hold that this form of detention falls within the scope of Article 5 § 1(c).
>
> 98. In addition, Article 5 § 2 requires that every detainee should be informed promptly of the reasons for his arrest and Article 5 § 4 requires that every detainee should be entitled to take proceedings to have the lawfulness of his detention decided speedily by a court."

237. However, the situation is different in the present case, given that the justification for detaining Georgian civilians put forward by the respondent Government (namely, to ensure the security of civilians and not that of the Power in question) is not permitted under Article 5 of the Convention or under the relevant provisions of international humanitarian law. Indeed, according to the latter, the detention of civilians is permitted only if "the security of the Detaining Power makes it absolutely necessary" (Article 42 § 1 of the Fourth Geneva Convention). Accordingly, the reasons set out in this regard in *Hassan* are not applicable in the present case.

E. The Court's assessment

1. Jurisdiction

238. The Court notes at the outset that it is not disputed that a large number of mostly fairly elderly Georgian civilians (around 160, of whom one third were women) were detained by South Ossetian forces in the basement of the "Ministry of Internal Affairs of South Ossetia" in Tskhinvali between around 10 and 27 August 2008.

239. In so far as the Georgian civilians were mostly detained after the hostilities had ceased, the Court concludes that they fell within the jurisdiction of the Russian Federation within the meaning of Article 1 of the Convention (see paragraph 175 above) and dismisses the preliminary objection raised by the respondent Government in that regard. It next needs to be determined whether there has been a violation of the rights protected

by the Convention capable of engaging the responsibility of the Russian Federation.

2. Alleged violation of Articles 3 and 5 of the Convention

(a) General principles regarding Article 3 of the Convention

240. The Court has set out the general principles in, *inter alia*, the *Ananayev and Others v. Russia* and *Idalov v. Russia* judgments, and then in *Georgia v. Russia* (I) (cited above):

> "... Article 3 enshrines one of the most fundamental values of democratic societies. The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct (see, for example, *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV). Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, *Ireland v. the United Kingdom*, 18 January 1978, § 162, Series A no. 25).
>
> Ill-treatment that attains such a minimum level of severity usually involves actual bodily injury or intense physical or mental suffering. However, even in the absence of these, where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3 (see, among other authorities, *Vasyukov v. Russia*, no. 2974/05, § 59, 5 April 2011).
>
> In the context of deprivation of liberty the Court has consistently stressed that, to fall under Article 3, the suffering and humiliation involved must in any event go beyond that inevitable element of suffering and humiliation connected with detention. The State must ensure that a person is detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured (see *Kudła v. Poland* [GC], no. 30210/96, §§ 92-94, ECHR 2000-XI, and *Popov v. Russia*, no. 26853/04, § 208, 13 July 2006).
>
> When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant (see *Dougoz v. Greece*, no. 40907/98, § 46, ECHR 2001-II). The length of the period during which a person is detained in the particular conditions also has to be considered (see, among other authorities, *Alver v. Estonia*, no. 64812/01, § 50, 8 November 2005)."

(see *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, §§ 139-42, 10 January 2012; *Idalov v. Russia* [GC], no. 5826/03, §§ 91-95, 22 May 2012; and *Georgia v. Russia* (I), cited above, § 192)

(b) General principles regarding Article 5 of the Convention

241. The relevant passage from the *El-Masri v. the former Yugoslav Republic of Macedonia* judgment ([GC], no. 39630/09, ECHR 2012) reads as follows:

> "230. The Court notes at the outset the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. It is for that reason that the Court has repeatedly stressed in its case-law that any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrariness (see *Chahal*, cited above, § 118). This insistence on the protection of the individual against any abuse of power is illustrated by the fact that Article 5 § 1 circumscribes the circumstances in which individuals may be lawfully deprived of their liberty, it being stressed that these circumstances must be given a narrow interpretation having regard to the fact that they constitute exceptions to a most basic guarantee of individual freedom (see *Quinn v. France*, 22 March 1995, § 42, Series A no. 311)."

(c) Application of the above-mentioned principles to the facts of the case

(i) Allegations of a violation of Article 3 of the Convention

242. The Court notes that the testimonies of Georgian civilians concerning their difficult conditions of detention are consistent with the information in the Human Rights Watch, Amnesty International and OSCE reports. The statement at the witness hearing by W25, head of the "detention centre" is also revealing in this regard, such as when he explained that there were seven cells of different sizes, two toilets and some common premises for more than 160 detainees, and that there had been enough beds for half of the detainees only. He also acknowledged that the basement of the "Ministry of Internal Affairs of South Ossetia" had not been designed to accommodate so many detainees. The respondent Government's argument that there were no other premises available cannot be accepted.

243. The extreme lack of space in a prison cell weighs heavily as an aspect to be taken into account for the purpose of establishing whether the impugned detention conditions were "degrading" from the point of view of Article 3 of the Convention (see *Ananyev and Others*, cited above, § 143, and *Georgia v. Russia* (I), cited above, § 200). Furthermore, men and women were detained together for a certain period and there were not enough beds, a situation posing particular difficulties for old people. Lastly, the Court cannot but observe that basic health and sanitary conditions were not met.

244. It transpires from those reports, and from the statements by the Georgian civilians at the witness hearing, that some of the detainees were subjected to vexatious and humiliating measures by their South Ossetian guards: they were frequently insulted and had sometimes received blows,

such as on their arrival at the detention centre, and had also been forced to clean the streets and collect corpses.

245. The Russian officials confirmed at the witness hearing that some of the male detainees had been obliged to clean the streets of Tskhinvali, and that they had even "volunteered" to do so in order to escape their poor conditions of detention.

246. The Court reiterates that Article 3 does not refer exclusively to the infliction of physical pain but also of mental suffering, which is caused by creating a state of anguish and stress by means other than bodily assault (see *Iljina and Sarulienė v. Lithuania*, no. 32293/05, § 47, 15 March 2011, and *El-Masri*, cited above, § 202), which was undeniably the case here regarding the treatment suffered by the Georgian detainees.

247. Moreover, it appears from the above-mentioned reports and the statements by the Georgian witnesses that the Russian forces were present in the building, that they delivered food and water supplies and that they questioned some detainees in other parts of the building.

248. 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 (see paragraph 214 above).

249. Lastly, although they were present at the scene, the Russian forces did not intervene to prevent the impugned treatment (see, *mutatis mutandis*, *Z and Others v. the United Kingdom* [GC], no. 29392/95, §§ 73-75, ECHR 2001-V; *M.C. v. Bulgaria*, no. 39272/98, § 149, ECHR 2003-XII; *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, no. 71156/01, §§ 124-25, 3 May 2007; and *El-Masri*, cited above, § 211).

250. Having regard to all those factors, the Court concludes that there was an administrative practice contrary to Article 3 of the Convention as regards the conditions of detention of some 160 Georgian civilians and the humiliating acts to which they were exposed, which caused them undeniable suffering and must be regarded as inhuman and degrading treatment.

251. Furthermore, in accordance with the Court's case-law (see paragraph 98 above), the rule of exhaustion of domestic remedies does not apply where the existence of an administrative practice is established. The preliminary objection of non-exhaustion of domestic remedies raised by the respondent Government in this regard must therefore be dismissed.

252. There has therefore been a violation of Article 3 of the Convention, and the Russian Federation is responsible for that violation.

(ii) Allegations of a violation of Article 5 of the Convention

253. The Court notes that the respondent Government and the Russian officials who gave evidence at the witness hearing stated that Georgian civilians had been detained for their own safety owing to potential attacks from South Ossetians seeking to take revenge on Georgians for the attack on Tskhinvali. That justification, which is moreover factually disputed in the above-mentioned reports, is not accepted as a ground for detention under Article 5 of the Convention. Furthermore, the detainees were not informed of the reasons for their arrest and detention.

254. It thus concludes that there was an administrative practice contrary to Article 5 of the Convention as regards the arbitrary detention of Georgian civilians in August 2008.

255. As explained above (see paragraph 251) the preliminary objection of non-exhaustion of domestic remedies raised by the respondent Government in this regard must also be dismissed.

256. There has therefore been a violation of Article 5 of the Convention, and on the basis of the same reasoning as set out above (see paragraphs 248-249), the Russian Federation is responsible for that violation.

VII. TREATMENT OF PRISONERS OF WAR

257. The applicant Government submitted that more than thirty Georgian prisoners of war had been ill-treated and tortured by Russian and South Ossetian forces in August 2008. They alleged that this amounted to a violation of Article 3 of the Convention, which provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. The parties' submissions

258. The applicant Government submitted that Russian and South Ossetian forces had ill-treated and tortured over thirty Georgian prisoners of war after they had been captured and put *hors de combat* by enemy forces. Two of them had been summarily executed and one beaten to death. Based on the evidence submitted in support of their observations, the applicant Government invited the Court to conclude that the Russian Federation had implemented an administrative practice of causing or permitting the torture of prisoners of war in violation of Article 3 of the Convention and the applicable rules of international humanitarian law.

259. The respondent Government replied that the Russian Federation had not been involved and had exercised no control over the premises or buildings concerned. They categorically denied the allegations of human rights breaches by Russian forces, maintaining that the allegations sought

merely to detract from the abomination of Georgia's attack on Tskhinvali and the surrounding villages.

B. Summary of the relevant evidence

1. Written evidence

260. According to the Georgian NGOs (see the report "August Ruins", cited above, pp. 202-13), and also Amnesty International (see its report, cited above, p. 46) and Human Rights Watch (see its report "Up in Flames", pp. 185-94), thirteen Georgian prisoners of war, captured at the Shanghai settlement on the outskirts of Tskhinvali, were tortured by South Ossetian forces between 8 and 17 August 2008. Before being exchanged on 19 August 2008, they all spent two days in the custody of the Russian forces, where they were treated correctly. The Human Rights Watch report provides a very detailed account of what happened:

> "Russian and Ossetian forces detained at least 13 Georgian military servicemen during active fighting. All these detainees were entitled to prisoner of war (POW) status and should have been treated as such. Human Rights Watch interviewed four, post-release, all of whom had been captured in Tskhinvali by Ossetian militias on August 8. Human Rights Watch also interviewed one of the Ossetian militia fighters responsible for holding the Georgian soldiers for the first three days following their capture. All four Georgian military servicemen were held in informal places of detention, including a dormitory and schools, for several days, and were then transferred to Ossetian police. Ossetian police held several Georgian soldiers for six days, including three of the four interviewed by Human Rights Watch. They transferred one of the Georgian serviceman interviewed by Human Rights Watch to Russian custody, where he was treated for wounds. Georgian soldiers reported that they had been subjected to severe torture and ill-treatment throughout their detention by Ossetian forces. Human Rights Watch documented the execution of three Georgian servicemen while in the custody of Ossetian forces.
>
> Ossetian forces eventually transferred 13 Georgian prisoners of war to Russian forces, and Russian authorities exchanged them for five Russian prisoners of war on August 19.
>
> Russian forces had or ought to have had full knowledge that Ossetians detained Georgian servicemen. They apparently participated in the execution of two Georgian soldiers, as well as in interrogations of Georgian POWs [prisoners of war] in Ossetian custody. Furthermore, the Georgian soldiers were held in Tskhinvali, over which Russia exercised effective control from August 9, and therefore are to be regarded as having fallen into Russia's power. Russia was therefore obligated to afford them POW status and to treat them in conformity with the protections of the Third Geneva Convention, which include absolute prohibitions on ill-treatment and require POWs to be treated humanely and kept in good health. The execution, torture, and ill-treatment of prisoners of war are grave breaches of the Third Geneva Convention and constitute war crimes. The ICCPR and ECHR also provide an absolute prohibition on torture and other degrading or inhuman treatment and an obligation to protect the right to life of those in detention.

Beatings and Humiliation during Initial Days of Detention

Three Georgian servicemen interviewed by Human Rights Watch – Davit Malachini, Imeda Kutashvili, and Kakha Zirakishvili – were detained together by Ossetian forces on the afternoon of August 8.

The three were among a group of seven Georgian soldiers Ossetian forces took to the basement of a four-story building, where Ossetian women and elderly as well as wounded Ossetian militia fighters were hiding. Although some soldiers described the building as an apartment block, an Ossetian militia fighter interviewed by Human Rights Watch and involved in the detentions stated that the building was actually a dormitory of the agricultural technical institute. The Georgian soldiers were given some food, water, and cigarettes on the first day of detention. That evening additional men arrived at the building, including some wearing helmets with plastic masks. According to Davit Malachini, a 26-year-old sergeant, 'They kicked us, cursed us, and beat us with the butts of their guns. They spoke Russian and Ossetian.' Imeda Kutashvili, 21, who had been serving in the military for only nine months, recalled, 'They were beating us and swearing at us, saying, "You pigs, why did you come here [to Tskhinvali]?"'

The fourth Georgian soldier Human Rights Watch interviewed was Zaza Kavtiashvili. On August 9 Kavtiashvili, 32, who had been shot in the knee during street fighting in Tskhinvali that day and had been hiding on the ground floor of the dormitory, crawled down to the basement to seek shelter for the night. He had no idea that Ossetian forces and others, including the group of Georgian POWs, were there. Ossetian forces captured him and held him with the others. Kavtiashvili recalled the moment of his detention:

They were as surprised as I was that I crawled right to them. But there was nothing I could do. I could not walk. My leg was numb. They started beating me as soon as they detained me. They beat me on the head with the butt of a gun. They stood on my wounded leg and demanded to know where I had dropped my flak jacket.

The Ossetian captors held the POWs in the dormitory for two nights. On the morning of August 10 they transferred all eight POWs to a school, possibly School No. 6, on the outskirts of Tskhinvali. The Ossetians forced the POWs to walk approximately two kilometers through Tskhinvali; the others had to carry Kavtiashvili because he could not walk. On the way, Russian troops, Ossetian forces, and civilians beat and humiliated the group. According to Kavtiashvili, 'Anyone who wanted to beat us, beat us. I fainted several times because I had already lost so much blood. I was in a lot of pain. Some people attacked us and grabbed dirt and shoved it into the mouths of the guys carrying me, saying, "You wanted this land, well here it is!"' Their route took them through Tskhinvali central square. Davit Malachini told Human Rights Watch, 'When we got to the square, whoever wanted to beat us, beat us ... They kicked and punched us, and those who were armed hit us with gun butts. We fell to the ground. They threatened us, saying, "Let's kill them. Let's execute them."' Kakha Zirakishvili, age 33, recalled.

They took us to the very center of the city, where many people beat us: Ossetian militia, local residents, Ossetian troops, anyone who wanted to... They beat us with gun butts, iron bars, whatever they had: wooden sticks, chairs, even. Some of us lost consciousness. When we lost consciousness [some of the attackers] would urinate on our faces to wake us up and began beating us again.

From the central square the men were then taken to the school, which was apparently functioning as a makeshift base. According to Zaza Kavtiashvili, as many

as a few hundred Ossetian fighters were at the school, where they would eat and rest before going back outside. Ossetian forces and civilians again beat the POWs upon their arrival at the school. According to Davit Malachini, 'First they beat us outside of the school. Ten or fifteen people would come and beat us, then another group. Someone broke my rib. I couldn't breathe normally. They beat me on the eyes, back, legs, and head.'

Execution of Three Georgian POWs

The Ossetian captors took the Georgian POWs into a small room that led off from a gymnasium, where Russian federal forces were among those present. The Ossetians and Russians inspected each of the Georgian soldiers' hands, apparently in an attempt to determine whether any of them bore the calluses characteristic of artillerists or tank gunners. The captors singled out one of the men as a tank gunner and ordered him into a small shower room next door. The other POWs identified the tank driver as Sopromadze but did not know his first name.

In describing what happened next, Davit Malachini told Human Rights Watch, 'They called the tank gunner out into a small room and then we heard shooting. Quite a lot of machine gun fire.' Malachini, Zirakishvili, Kutashvili and one other Georgian POW were then also called into the room. 'The tank gunner was lying face down. They had shot him in the back of the head. We saw that his head was open and his brain was exposed. It looked like a watermelon cut in half.'

Although the Ossetian captors claimed that they had shot the tank gunner because he was trying to escape, both Zirakishvili and Kutashvili described the scene in the room as one in which some hasty preparation had apparently taken place. 'Some kind of tarp or tent lay on the floor and, from the position of the body lying on the tarp, it seemed that he had been kneeling at the edge of the tarp when they shot him,' said Zirakishvili. An Ossetian militia fighter, who was among the captors, confirmed that the tank gunner was singled out and taken away deliberately. 'One [of the prisoners], a tank gunner, was taken away by some of our own [Ossetians] and Russians. I don't know what happened to him but we had seven prisoners again,' he told Human Rights Watch.

The four POWs were then made to carry the body outside into a courtyard, while the Ossetian captors threatened to kill them. Kutashvili stated that Russian federal troops were also in this yard, and one Russian soldier with a gun, whom, based on his appearance, Kutashvili believed was ethnic Russian, approached him saying, 'I'm going to kill you now.' However, another Russian federal soldier, whom Kutashvili described as 'a large man with a full beard,' and whom he believes was possibly Chechen, intervened to stop the shooting, claiming that Kutashvili reminded him of his own son who also had been wounded in battle. The first soldier pushed the bearded soldier aside and again made as if to shoot Kutashvili. The bearded soldier punched the first soldier, and then protected Kutashvili from further threats or beatings that night.

The other POWs were beaten again after moving the body outside. Two POWs were made to clean up the blood and remains in the shower room. The Georgian soldiers then carried the body of the tank gunner to a location near a railway line where they were ordered to dig a grave. According to Malachini, by the time they finished digging the grave, it was dark, and so they wrapped the body in the tarp with a rope and left it unburied.

The next day, August 11, the POWs witnessed one of their group, whom they identified only as 21-year-old Khubulov, being singled out and led away, apparently

because his surname was Ossetian and he claimed to be ethnic Ossetian. Khubulov was beaten and dragged away from the others, while the captors yelled at him, saying, 'You will die! You are a traitor.' The Georgian POWs we interviewed never saw Khubulov again. When Zaza Kavtiashvili asked some of his Ossetian captors about Khubulov's fate, one of them replied, 'We [killed him] because he was an Ossetian traitor.'

The Ossetian militia fighter who was among the captors and was interviewed by Human Rights Watch apparently corroborated Khubulov's execution. He told us, 'And then a Chechen fighter [possibly from the Russian Ministry of Defense's Vostok battalion], who came to us with some Russians and Chechens realised that one of our prisoners was an ethnic Ossetian. He could not believe it at first, and then got very angry. He said that traitors had to be punished, and took him out in the yard and just shot him.'

Human Rights Watch documented a third extrajudicial killing of a Georgian soldier, which also took place on August 11. A law enforcement officer of the South Ossetian forces described to us how they had executed a Georgian armed man:

The day before yesterday [August 11, 2008], the Georgians killed two of my soldiers in the village of Tamarasheni. We had been conducting a sweep operation there. We detained three of them. Two of them didn't do anything to us so we just let them go – we couldn't take them anywhere as I had to take care of my own men first. The third one seemed to be high on something – a normal person would have surrendered, and this one was shooting at us instead. We questioned him. He was the one who killed our guys. We executed him.

Torture and Ill-Treatment by Ossetian Police

The Ossetian captors transferred the group to what was apparently Ossetian police custody. According to one of the Ossetian militia captors, 'We did not know what to do with all these prisoners and just passed them on to the [Ossetian] Ministry of Interior on August 11.' The POWs described these Ossetian forces as all having identical 'star-shaped badges on their belts,' as being 'physically big and strong,' and possibly being Ossetian special forces.

Although Ossetian forces eventually transferred the injured Zaza Kavtiashvili to Russian forces that day, they first interrogated him and beat and humiliated him. He described the ordeal:

They separated us in the yard. [They] started interrogating us. They would beat me, question me, then beat me, all the while also insulting and humiliating me. They brought a Georgian flag into the yard and ordered me to spit on it. I refused. One of the Ossetians put a Makarov gun into my mouth and threatened to kill me if I would not spit. One of the Ossetians also put his foot on my wounded knee and pressed hard on it. Someone from the second floor of the building ordered them to stop this and then they took us inside the building to a room. There they beat me with chairs, metal sticks, and the butts of guns. They broke my right arm. After all this they handed me over to the Russian forces.

After being transferred to Russian military custody, Kavtiashvili underwent surgery on his leg at a Russian Ministry of Emergency Situations hospital in Tskhinvali, and after several days was taken to Java and from there flown to a military hospital in Vladikavkaz, North Ossetia, for further treatment. Kavtiashvili was exchanged with other Georgian POWs on August 19.

Several Georgian POWs, including three interviewed by Human Rights Watch, were held in Ossetian police custody until August 17, when they were handed over to Russian troops. Ossetian police held the Georgian POWs in degrading conditions and subjected them to torture and severe ill-treatment. The soldiers were held in pairs in small cells and given very little water and almost no food for six days. Ossetian police interrogated the soldiers a number of times. One Georgian POW stated that Russian military forces visited them while in detention several times and also sometimes interrogated them. Although both Imeda Kutashvili and Kakha Zirakishvili had been wounded during the Russian aerial bombardment, they received no medical care during their 12 days in Ossetian detention.

Kakha Zirakishvili told Human Rights Watch about his experience in police detention, saying that the previous days' beatings 'were nothing compared to what we faced at this place':

They put us into cells and gave us only 100 grams of water for two people per day. They beat us regularly. Five or seven guys would come into the cell, beat us, get tired, go out, rest, come back, beat us. They would beat us until we were unconscious. They punched us, kicked us, hit us with hammers and with gun butts. They hit my hands with a hammer. They broke a bone in my right hand, as well as in [my fingers]. They also beat me a lot in my face and head with a hammer and even in the mouth. I lost one tooth on the bottom as a result of the beating. Sometimes, two people would stand on my arm, while another burned my hands with a lighter.... They gave us bread once ... but they gave us so little water for six days that I couldn't eat anything.

Davit Malachini and Imeda Kutashvili were held in the same cell and described similar treatment. Malachini told Human Rights Watch,

Three Ossetians would come regularly, beat us for five, ten, fifteen minutes, leave, come back again. They would beat us from morning until late at night. This went on for six days. They tortured us. They put a bucket on my head and would beat a stick against the bucket. Two guys would stand on my arm and a third guy would burn my finger with a lighter. The skin was totally burned through to the bone. They beat my ankles with iron rods and broke one bone on my foot. They beat me on the head with butts of Makarov pistols. We were only given a small amount of water and some bread and once some buckwheat. But I could not eat because I was in so much pain. My jaw had been beaten. They swore at us and cursed at us saying, 'Did you want our land? Did you want our money? If you wanted our land you can go and dig your own grave here.'

Imeda Kutashvili also stated that the Ossetians gave him very little water and almost no food, and beat him regularly with hammers on his hand as well as by placing a bucket on his head and hitting it. He also described beatings by Ossetian police using 'anything they had on hand.' 'They beat us with chairs, belts, and ropes, and when the shovel broke, they used the handle,' he said. 'They beat me on the arms and on the soles of my feet with an iron rod. While they were beating me I tried to cover my head, and they broke my hand. Sometimes I lost consciousness and they would put water in my face to wake me up.' Davit Malachini stated that while in Ossetian police detention he witnessed police urinating on another soldier's face to wake him up in order to begin beating him again.

The physical and psychological consequences of this treatment are described below.

At some point during the detention of Georgian POWs by Ossetian police, Russian journalists were allowed to film the Georgian soldiers and asked them their names,

ages, and how they were being treated. Some of this video was placed on the internet and included images of Malachini, Kutashvili, and Zirakishvili.

Transfer to Russian custody and release

On August 17, Ossetian police transferred Malachini, Kutashvili, and Zirakishvili to Russian forces, who took them to a base. The Georgian soldiers were in very poor physical condition: Davit Malachini said, 'By that time I couldn't really even move my arms. My feet dragged. My legs and arms were so swollen. I was trembling all over. I couldn't control it.' Kakha Zirakishvili said, 'We couldn't even really stand or walk. We leaned on each other in order to move.'

The Russian forces questioned the three men and then placed them in a basement together with five or six other Georgian soldiers who had been detained separately. The Russian forces did not physically ill-treat the three. They allowed the Georgian soldiers to wash, shave, and rinse their uniforms and gave them food, water, and some basic medical treatment.

Malachini, Zirakishvili, and Kutashvili, together with 10 others, were transferred to Georgian custody on August 19 in exchange for Russian POWs.

Consequences of ill-treatment and torture

All of the former POWs suffered serious medical complications following their detention and ill-treatment. Imeda Kutashvili said, 'I don't sleep at night. I have nightmares. I wake up and think that this will happen to me again. I have problems walking, I am dizzy. My spine is damaged, my ribs are bruised, and my heels are split open.' He spent approximately one week in hospital following his release. When Human Rights Watch interviewed Kutashvili, he walked with a severe limp and had visible scars on his head.

Kakha Zirakishvili and Davit Malachini also had medical complications. Malachini stayed in hospital for approximately one week. He had a broken rib and damage and swelling to one lung. He also complained of pain in his ankles, back, sides, and chest, as well as from his severely burned finger. Kakha Zirakishvili was still in hospital at the time of his interview with Human Rights Watch, more than three weeks following his release. He told Human Rights Watch,

Before this, I weighed 78 kilos. When they weighed me [in hospital after my release] I weighed only 52 kilos. I have a broken rib. I have a broken bone in my right hand and [two broken bones] in my fingers. I have a lot of bruising, internal bruising in my chest and abdomen. I have pain in my joints, where they beat me. My eardrum is broken. I will have surgery to repair it. I also have a lot of problems with my head now. I lose sense of reality, a sense of where I am. The doctors say there may be some serious head trauma.

When Human Rights Watch interviewed Zaza Kavtiashvili on September 11, 2008, he had been in a Georgian hospital since he was exchanged. He could not walk, and doctors had told him that he will eventually need to receive an artificial knee replacement for the kneecap shattered when he was shot during the street fighting in Tskinvali on August 9. His arm, broken as a result of the beatings by Ossetian police, required an additional operation, having been improperly set during initial medical treatment. Kavtiashvili also had many bruises and several head wounds from the beatings."

261. The EU Fact-Finding Mission (see its report, Volume II, pp. 360-61) and the OSCE (see its report, cited above, p. 37) noted the

allegation by the Georgian authorities that at least thirty Georgian prisoners of war had been tortured in South Ossetia during the conflict. However, their reports contain no details on the subject.

2. Hearing of witnesses

262. W7, W8 and W9 were members of the Georgian forces and were detained as prisoners of war in August 2008.

263. W7, born in 1972, stated that in August 2008 he had been a corporal in the Georgian armed forces. On 8 August 2008 he was deployed in the Shanghai settlement, Tskhinvali. The witness said that he had been wounded in the shoulder during a Russian bombardment of the Shanghai settlement on 8 August 2008. Shortly thereafter, he was captured by South Ossetian forces. He described his treatment as follows. He was first held in the basement of one of the residential buildings at the Shanghai settlement. He was beaten there by, among others, Russian peacekeepers (they had the sign "MC"[31] on their uniforms, they spoke Russian and looked Russian). On 10 August he was moved to School No. 6 in Tskhinvali, where he was again beaten by, among others, "Russians" (the witness was not certain as to whether they were Russian soldiers or simply fighters from the Russian Federation). On the way to the school, he was first made to walk and then taken by a vehicle from one location to another and beaten by local people. During his stay in the school, two prisoners of war were killed – Sopromadze, because he had been a tank driver, and Khubuluri, because he was an ethnic Ossetian. The witness did not see the actual killing of Sopromadze, but he heard a shot and was made to remove his body. As to Khubuluri, he was taken out one day and never came back. On 12 August 2008, the witness was taken to Tskhinvali Police Station. There, he was not only beaten as before, but also interrogated and tortured by, among others, the Federal Security Service of the Russian Federation (they tied his hands behind his back with wire for a period of time without giving him water and then untied his hands and poured very cold water into his throat; they also used bayonets and hammers and burnt his hands with lighted cigarettes). On 17 August 2008 he was transferred to a Russian military base. He was finally released on 19 August 2008. He received medical treatment for the first time after his release.

264. W8, born in 1972, stated that in August 2008 he had been a corporal in the Georgian armed forces. On 9 August 2008 he was deployed in the Shanghai settlement, Tskhinvali. The witness said that he had been shot in the knee and captured by South Ossetian forces in the Shanghai settlement on 9 August. He described his treatment as follows. He was first held in the basement of one of the residential buildings in the Shanghai settlement. He was beaten there by South Ossetians. Whilst Russian soldiers

31 *Миротворческие силы* – peacekeeping forces in Russian.

were present at the premises, they did not beat him. On 10 August he was moved to School No. 6 in Tskhinvali. As he could not walk (because of his wounded knee), he was carried by other Georgian prisoners of war. On the way to the school as well as in the school, he was beaten by, among others, Russian soldiers. In the school, he was also beaten by officials of the Federal Security Service of the Russian Federation in order to force him to declare that he had seen many dead civilians in Tskhinvali and that United States soldiers had been fighting on the Georgian side. During his stay in the school, a Georgian prisoner of war called Sopromadze had been taken out of the room and killed because he was a tank driver. The witness did not see the actual killing, but he heard a shot. On 13 August he was moved first to a Russian military hospital in Tskhinvali and then to a hospital in Vladikavkaz, the Russian Federation, for medical treatment. Whilst in the Russian military hospital in Tskhinvali, he was again beaten by officials of the Federal Security Service of the Russian Federation. He was finally released on 19 August 2008.

265. W9, born in 1983, stated that in August 2008 he had been a lieutenant in the Georgian armed forces. He was deployed in the Georgian port of Poti on 18 August 2008. On 18 August he and twenty-one other soldiers were captured by Russian forces in Poti and taken to Senaki. Ten of them were released the next day. After four days in Senaki, he and the remaining eleven soldiers were relocated to a Russian peacekeepers' base in Chuburkhindji, in the Gali region of Abkhazia. Upon their arrival, they were interrogated and subjected to various forms of ill-treatment by Russian soldiers, including punching, kicking, beating of the soles of the feet and electric shocks. All twelve of them were then placed in a small toilet for four days. There was no light, they could not move, they had to take turns to sit down and, for the first two days, they were given neither food nor water. In addition, during the night, drunken Russian soldiers kicked the door of the toilet, threatening to kill them and verbally assaulting them, but their guards did not let those soldiers enter the toilet. During his cross-examination, the witness stated that he did not know why this story did not feature in any of the NGOs' reports on the conflict.

C. Relevant provisions of international humanitarian law

266. The relevant provisions in this connection are Articles 13, 129 and 130 of the Third Geneva Convention on the Treatment of Prisoners of War, and Article 75 of Additional Protocol (I) relating to the Protection of Victims of International Armed Conflicts.

267. Having regard to the complaints raised in the present case, there is no conflict between Article 3 of the Convention and the above-mentioned provisions of international humanitarian law, which provide that prisoners of war must be treated humanely and held in decent conditions.

D. The Court's assessment

1. Jurisdiction

268. The Court observes at the outset that it can be seen from the Human Rights Watch, Amnesty International and "August Ruins" reports, among others, that Georgian prisoners of war were detained in Tskhinvali between 8 and 17 August 2008 by South Ossetian forces.

269. Given that they were detained, *inter alia*, after the cessation of hostilities, the Court concludes that they fell within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention (see paragraph 175 above) and dismisses the preliminary objection raised by the respondent Government in that regard. It must next determine whether there has been a violation of the rights protected by the Convention capable of engaging the responsibility of the Russian Federation.

270. Having regard to the fact that none of the above-mentioned reports refers to the detention of Georgian prisoners of war in Abkhazia, the Court does not consider it necessary to examine the allegation that Georgian prisoners of war were also subjected to ill-treatment in that region.

2. Alleged violation of Article 3 of the Convention

(a) General principles

271. These have been set out in, *inter alia*, *Ananyev and Others* and *Georgia v. Russia* (I) (both cited above; see paragraph 240 above), and in *El-Masri* (cited above), the relevant passage of which reads as follows:

> "197. In order to determine whether any particular form of ill-treatment should be classified as torture, the Court must have regard to the distinction drawn in Article 3 between this notion and that of inhuman or degrading treatment. This distinction would appear to have been embodied in the Convention to allow the special stigma of 'torture' to attach only to deliberate inhuman treatment causing very serious and cruel suffering (see *Aksoy*, cited above, § 62). In addition to the severity of the treatment, there is a purposive element, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating (Article 1 of the United Nations Convention) (see *İlhan v. Turkey* [GC], no. 22277/93, § 85, ECHR 2000-VII).
>
> 198. The obligation on Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals (see *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V). The State's responsibility may therefore be engaged where the authorities fail to take reasonable steps to avoid a risk of ill-treatment about which they knew or ought to have known (see *Mahmut Kaya v. Turkey*, no. 22535/93, § 115, ECHR 2000-III)."

(b) Application of the above-mentioned principles to the facts of the case

272. The Court observes that cases of ill-treatment and torture of prisoners of war by South Ossetian forces were mentioned in, among others, the Human Rights Watch, Amnesty International and "August Ruins" reports.

273. At the witness hearing W7 and W8, who had already been heard by Human Rights Watch, described in detail the treatment that had been inflicted on them by the South Ossetian and also the Russian forces (see paragraphs 263-264 above).

274. In the Court's view, their statements are credible, seeing that they are very precise and are consistent with the information appearing in the above-mentioned reports.

275. Having regard to the foregoing, it considers that it has sufficient evidence in its possession to enable it to conclude beyond reasonable doubt that Georgian prisoners of war were victims of treatment contrary to Article 3 of the Convention inflicted by the South Ossetian forces.

276. Even if the direct participation of the Russian forces has not been clearly demonstrated in all cases, since it has been established that the prisoners of war fell within the jurisdiction of the Russian Federation on account of the "strict control" that it exercised over the South Ossetian forces, it was also responsible for the latter's actions, without it being necessary to provide proof of "detailed control" of each of those actions (see paragraph 214 above).

277. Furthermore, it can be seen from the above-mentioned reports and the statements of the Georgian witnesses that Russian forces were present on site and that they did not intervene to prevent the impugned treatment (see, *mutatis mutandis*, *Z and Others*, cited above, §§ 73-75; *M.C. v. Bulgaria*, cited above, § 149; *Members of the Gldani Congregation of Jehovah's Witnesses and Others*, cited above, §§ 124-25; and *El-Masri*, cited above, § 211).

278. Lastly, the Court considers that the ill-treatment inflicted on the Georgian prisoners of war caused "severe" pain and suffering and must be regarded as acts of torture within the meaning of Article 3 of the Convention. Those acts are particularly serious given that they were perpetrated against prisoners of war, who have a special protected status under international humanitarian law.

279. Having regard to all those factors, the Court concludes that there was an administrative practice contrary to Article 3 of the Convention as regards the acts of torture of which the Georgian prisoners of war were victims.

280. As explained above (see paragraph 251 above), the preliminary objection of non-exhaustion of domestic remedies raised by the respondent Government in this regard must also be dismissed.

281. There has therefore been a violation of Article 3 of the Convention, and the Russian Federation is responsible for that violation.

VIII. FREEDOM OF MOVEMENT OF DISPLACED PERSONS

282. The applicant Government submitted that the Russian Federation and the *de facto* authorities of Abkhazia and South Ossetia had prevented the return of about 23,000 forcibly displaced ethnic Georgians to those regions. They alleged that this amounted to a violation of Article 2 of Protocol No. 4, which provides:

> "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> 2. Everyone shall be free to leave any country, including his own.
>
> 3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
>
> 4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society."

A. The parties' submissions

283. The applicant Government submitted that the Russian Federation and the *de facto* South Ossetian and Abkhazian authorities had deliberately prevented the return of some 23,000 Georgian nationals who had fled the regions in question.

284. They added that as a result of the conflict, and the campaign of ethnic cleansing that followed, many thousands of ethnic Georgians had fled from South Ossetia and adjacent territories. By the end of 2012 the total ethnic Georgian population of South Ossetia had been (permanently) reduced by over 20,000. The Georgian civilians comprising this group of internally displaced persons had been prevented ever since from returning to their homes. The same situation applied in relation to Upper Abkhazia. According to the most recent figures estimated by the Upper Abkhazia municipal authorities, as a result of Russian actions 3,672 people (1,281 families) had been forced to flee the territory of Upper Abkhazia and were also unable to return home.

The applicant Government maintained that refusal of the right of return was a deliberate policy of the South Ossetian and Abkhazian separatist regimes, supported and implemented by the authorities of the Russian Federation.

Based on the evidence submitted with their observations, the applicant Government invited the Court to conclude that the Russian Federation had applied, and continued to apply, an administrative practice of frustrating the right of ethnic Georgian internally displaced people to return to their homes in violation of Article 2 of Protocol No. 4 to the Convention and the applicable rules of international humanitarian law.

285. The respondent Government replied that border controls remained under the authority of the South Ossetian and Abkhazian Governments, despite the cooperation agreements of 30 April 2009 signed with both States providing for joint efforts to ensure border protection. Moreover, such controls were justified in view of the attacks by Georgia and its sponsorship of terrorism in those regions, especially near the borders.

B. Third-party comments

286. The Human Rights Centre of the University of Essex stated that whether a conflict was international or not, the law of armed conflict could regulate the grounds on which civilians were moved. Other aspects of their treatment during such a movement would be based on a mixture of the law of armed conflict and human rights law. On that basis, civilians could only be moved for their own safety or imperative reasons of security[32]. This clearly implied that such forced movement could only be short term, whilst the need for it existed. Civilians could not be deported out of their own territory into that of an occupying power or any other State.

C. Summary of the relevant evidence

1. Written evidence

287. The relevant part of the OSCE report cited above (pp. 47-50 and 62-64) reads:

> "As noted above, the August conflict led to the displacement of tens of thousands of people resident in South Ossetia. The HRAM interviewed a number of displaced persons who reported being forced from their homes as a result of the aerial bombardment of their villages by Russian planes or because they feared harm from advancing forces. In Eredvi, Ksuisi, Kekhvi and Nuli, for example, the population began to flee as the bombs began to fall. Other villagers fled as Russian and Ossetian forces began to arrive in their villages, for example in Vanati and Akhalgori and the town of Tskhinvali. Many villagers fled through the forests, while a few reported that they were assisted to safe refuge by the ICRC.
>
> Many of the villagers interviewed by the HRAM said that they did not leave their homes until they were told to do so, although it was not always clear who told them to

32 See the Fourth Geneva Convention of 1949, Article 49 (occupied territories), for international armed conflicts, and Additional Protocol (II) of 1977, Article 17, for non-international armed conflicts.

leave or why. In Eredvi, according to villagers, groups of Ossetians in military uniforms told the inhabitants they had to leave; in at least one instance these Ossetians told the villagers that 'if you don't leave, you will be killed'. Another villager from Eredvi reported to the HRAM that one old couple was threatened by 'Russians and Ossetians' and forced to leave. Yet another reported that the Georgian police warned residents before the Russian bombing began that they should leave as soon as possible because they would be killed if they stayed. Other villagers were warned by relatives or neighbours that they had to leave.

A large number of ethnic Ossetians were also forced from their homes by the conflict. As noted previously, over 30,000 fled to North Ossetia, the large majority of whom have since returned. The *de facto* authorities told the HRAM that there were about 3,000 forcibly displaced persons in South Ossetia.

On the other hand, many of the ethnic Georgians who fled their villages in South Ossetia during the conflict and its immediate aftermath have not been able to return. Mr Kokoity reportedly made a statement in mid-September that Georgian 'refugees' holding South Ossetian citizenship can freely return to their former places of residence. Displaced Georgians will be allowed to come back if they are ready to renounce Georgian citizenship and acquire South Ossetian citizenship. This is contrary to international standards and obligations, as recognised also by the provisional measures ordered by the ICJ on 15 October 2008, which require the parties to 'do all in their power, whenever and wherever possible, to ensure, without distinction as to national or ethnic origin ... the right of persons to freedom of movement and residence...'

Other *de facto* South Ossetian officials have expressed similar views. The *de facto* Minister of Interior, for example, told the HRAM that he has found records of 4,000 ethnic Georgians living in South Ossetia who had been issued weapons since 2006 and that if these people tried to return they would be prosecuted. Others, he said, would only be allowed to return if they renounce their Georgian citizenship. The Deputy Chairperson of the *de facto* Council of Ministers (the *de facto* Deputy Prime Minister) told the HRAM: 'If a Georgian who decides to remain in South Ossetia does not meet our expectations, they will be expelled .... I don't want Georgians to return to the northern villages of Tamarasheni and others, and they won't be able to.' She then added, however, that 'those not stained with blood are welcome to come back.' The Commandant of the Russian Armed Forces in South Ossetia told the HRAM that it is too early to speak about the return of displaced persons.

...

The August conflict and its aftermath negatively affected freedom of movement and residence in a number of ways with respect to Abkhazia.

...

The HRAM was told by the Chairman of the Human Rights Committee of the *de facto* Parliament that the *de facto* President of Abkhazia made an appeal on television and radio for the civilian population to return; this is an important and positive development. The *de facto* Minister of Foreign Affairs told the HRAM that there are no obstacles to return and that his Government is prepared to support returnees and to provide them with what they need to live. He added, however, that returnees must understand that they will be returning to the 'State of Abkhazia', where they will have the right to become full citizens. That so few displaced persons have returned to the Kodori valley is strong evidence that the *de facto* authorities have not yet done enough

> to meet their obligations to encourage and enable displaced persons to return voluntarily to their homes in dignity and security."

288. Those conclusions are similar to those drawn by the Commissioner for Human Rights of the Council of Europe, the Representative of the United Nations Secretary General for internally displaced persons and the United Nations Secretary General.

2. Hearing of witnesses

289. W24, "Minister of Foreign Affairs" of South Ossetia from 1998 to 2012, and W19 both stated that there had never been a policy of ethnic cleansing of Georgians from South Ossetia. Whilst many of them had fled during the armed conflict, many continued to live there, including in the region of Akhalgori, where Georgian was the teaching language. With regard to the question of returning, about 3,000 ethnic Georgians had indeed returned to their homes, including in the region of Akhalgori, where there had been no conflict. However, on account of the fighting there, it had been impossible to ensure the safe return of 20,000 ethnic Georgians to the villages around Tskhinvali, unless a global solution to the issue of displaced persons, including over 100,000 ethnic Ossetians who had fled their homes in the 1990s, was found. Both witnesses confirmed that the South Ossetian "border" had been guarded with Russian armed forces under the "Agreement on joint efforts in protection of the State border of the Republic of South Ossetia" of 30 April 2009.

D. Relevant provisions of international humanitarian law

290. The relevant provision in this connection is Article 49 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. Moreover, under Rule 132 of the International Committee of the Red Cross's study of customary international humanitarian law, "Displaced persons have a right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist".

291. Having regard to the complaints raised in the present case, there is no conflict between Article 2 of Protocol No. 4 and the relevant provisions of international humanitarian law concerning a situation of occupation.

E. The Court's assessment

1. Jurisdiction

292. The Court observes that it has already established that the Russian Federation exercised "effective control" over South Ossetia and also over Abkhazia, whose situation is not identical but nonetheless similar in this

respect (see paragraph 174 above). Furthermore, it can be seen from the agreements signed on 30 April 2009 between the Russian Federation and South Ossetia and Abkhazia on controls of the administrative borders (see in particular Article 3) that the former also provided logistical support in this regard.

293. Admittedly, a large number of Georgian nationals who fled the conflict no longer reside in South Ossetia, but in undisputed Georgian territory.

294. However, in the Court's view, the fact that their respective homes, to which they were prevented from returning, were situated in areas under the "effective control" of the Russian Federation, and the fact that the Russian Federation exercised "effective control" over the administrative borders, are sufficient to establish a jurisdictional link for the purposes of Article 1 of the Convention between the Russian Federation and the Georgian nationals in question (see, for example, *mutatis mutandis*, *Loizidou* (merits), cited above, § 57, where the Court held that "the continuous denial of the applicant's access to her property in northern Cyprus and the ensuing loss of all control over the property is a matter which falls within Turkey's 'jurisdiction' within the meaning of Article 1 and is thus imputable to Turkey").

295. The Court therefore concludes that the Georgian nationals who were prevented from returning to South Ossetia or Abkhazia by the *de facto* authorities of those regions fell within the jurisdiction of the Russian Federation, and dismisses the preliminary objection raised by the respondent Government in this regard. It must next determine in its examination on the merits whether there has been a violation of the rights protected by the Convention capable of engaging the responsibility of the Russian Federation.

2. Alleged violation of Article 2 of Protocol No. 4

296. The Court has already examined the question of the rights of internally displaced persons under Article 8 of the Convention and Article 1 of Protocol No. 1 (see, *inter alia*, *Cyprus v. Turkey*, cited above, §§ 162-89, and *Chiragov and Others*, cited above, §§ 188-208), but not under Article 2 of Protocol No. 4.

297. In the present case the information in the different reports by international organisations and their representatives as designated above is consistent regarding the refusal of the South Ossetian and Abkhazian authorities to allow the return of many ethnic Georgians to their respective homes, even if some returns, for example in the region of Akhalgori, have been authorised. Moreover, the members of the South Ossetian "Government" who gave evidence at the witness hearing did not deny those facts, but stressed that they had been unable to authorise the return of ethnic

Georgians to the villages around Tskhinvali because their safety could not be guaranteed.

298. The Court takes note of these arguments and of the negotiations under way in Geneva with a view to finding a political solution. Nevertheless, in the meantime the *de facto* South Ossetian and Abkhazian authorities, and the Russian Federation, which has "effective control" over those regions, have a duty to enable inhabitants of Georgian origin to return to their respective homes, pursuant to their obligations under the Convention.

299. Having regard to all those factors, the Court concludes that there was an administrative practice contrary to Article 2 of Protocol No. 4 as regards the inability of Georgian nationals to return to their respective homes. That situation was still ongoing on 23 May 2018, the date of the hearing on the merits in the present case, when the parties submitted their most recent (oral) observations to the Court (see paragraph 29 above).

300. As explained above (see paragraph 251 above), the preliminary objection of non-exhaustion of domestic remedies raised by the respondent Government in this regard must also be dismissed.

301. The Court therefore considers that there has been a violation of Article 2 of Protocol No. 4 at least until 23 May 2018, and that the Russian Federation is responsible for that violation.

IX. RIGHT TO EDUCATION

302. The applicant Government submitted that Russian troops and the separatist authorities had looted and destroyed public schools and libraries and intimidated ethnic Georgian pupils and teachers. They alleged that this amounted to a violation of Article 2 of Protocol No. 1, which provides:

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

A. The parties' submissions

303. The applicant Government submitted that bombing and other acts of violence by Russian troops and separatist forces included the destruction and looting of public schools and libraries and the intimidation of ethnic Georgian teachers and pupils. As a direct result, children of school age in these territories had been prevented from continuing with their education. The applicant Government submitted that this conduct amounted to an administrative practice of violating the right to education under Article 2 of Protocol No. 1.

304. The respondent Government replied that the Russian Federation was not responsible for education policy in South Ossetia or Abkhazia. In South Ossetia any disruption of education was likely to have been caused by Georgia's brutal invasion and bombing. Subsequently, there was no evidence that schools did not provide teaching in Georgian.

B. Third-party comments

305. The Human Rights Centre of the University of Essex stated that in occupied territory the occupying power had specific obligations under the law of armed conflict to ensure the functioning of educational institutions[33].

C. Summary of the relevant evidence

1. Written evidence

306. The Commissioner for Human Rights of the Council of Europe reported as follows ("Report on human rights issues following the August 2008 armed conflict", CommDH(2009)22, 15 May 2009):

> "The issue of education in the Georgian language for the population in Gali was already examined briefly by the Commissioner during his previous visit to the region in 2007. During his latest visit, the Commissioner returned to the primary-education School No. 2 in the town of Gali and discussed the language issue with representatives of civil society.
>
> The overall situation in terms of language education appeared to be similar in February 2009 as during the Commissioner's previous visit. However, following the August 2008 conflict there has been a renewed sense of concern among the Georgian population on the issue of language in schools. The de facto authorities indicated that of the 21 schools in the Gali district, eleven (lower Gali district) had Georgian as [the main] language of instruction, and the remainder taught their courses in Russian. The textbooks used in the Georgian-language schools were the same as those used in the curriculum approved by the Georgian Ministry of Education, except for the contentious subjects of history and geography. Textbooks on those subjects which were approved by the Abkhaz de facto Ministry of Education did not exist in Georgian. In schools where the primary language of instruction was Russian, Georgian was taught as a foreign language three times a week, and there were also courses in the Abkhaz language. There are no higher education institutions in Gali; in Sukhumi University, the language of instruction is Russian.
>
> School No.2 in Gali town, which the commissioner re-visited, provides instruction in Russian. It was evident that the school was struggling because of meagre resources and teaching materials, dilapidated infrastructure, and low teacher salaries. The Georgian government has been supplementing teacher salaries throughout the district; however, this has been disrupted, possibly due to the restrictions on freedom of movement across the administrative boundary (cf. above).
>
> According to statements and information provided by the Georgian authorities, schoolteachers in the Gali district have been forced to teach their pupils in Russian.

33 Fourth Geneva Convention of 1949, Article 50.

> This was strongly denied by the Abkhaz leadership. Nevertheless, there have been many assertions about a deterioration of the situation following the August 2008 conflict. Non-governmental organisations in Gali reported that hours of instruction in Georgian were being reduced and that teachers were teaching in Georgian 'at their own risk'.
>
> The Commissioner notes that a good quality education for children should ensure them equality of access and treatment; it should enable them to develop their capabilities and personalities, and to become full members in the societies in which they reside and to live decent lives. In multiethnic societies with minority communities, language education plays a key role. It is one of the ways for parents to pass on their culture to future generations and preserve their identity. At the same time, authorities have a responsibility to ensure that minorities are given the means, through appropriate language education (in the present case, Russian and/or Abkhaz), which enable them to integrate fully in the wider society.
>
> The aim should be to reconcile the objective of protecting the identity of persons belonging to national minorities with that of making integration possible. The Commissioner recommends that steps be taken to ensure that these precepts are applied in practice. An additional important step towards confidence building would be to develop common textbooks, even on highly disputed and sensitive subjects such as history, so as to eliminate stereotypes and prejudices and foster critical thinking."

307. According to the International Crisis Group ("South Ossetia: The Burden of Recognition", 7 June 2010, p. 6):

> "Instruction is mainly in Russian and follows the Russian school curriculum. However, in some schools in the districts of Znauri, Java and Akhalgori instruction is in Georgian and follows the Georgian curriculum."

308. According to the International Crisis Group ("Abkhazia: The Long Road to Reconciliation", 10 April 2013, p. 20):

> "Another good-will gesture would be to allow schooling in the Georgian language in Gali. Since 1995, Georgian-language education has essentially been prohibited – the official languages of instruction are Russian and Abkhaz. Although instruction in Georgian is still widespread, locals say the Abkhaz authorities have increasingly been enforcing laws on instruction in Russian or Abkhaz. This breeds resentment and decreases the quality of education, due to poor command of Russian, let alone Abkhaz, among teachers and students alike. In addition, Russian border guards have occasionally refused to let schoolchildren under the age of thirteen or fourteen cross at the official checkpoint into Georgian-controlled territory, where they receive instruction in the Georgian language. Legal and practical obstacles to receiving an education in one's mother tongue should be lifted."

2. Hearing of witnesses

309. W24 indicated that in the Akhalgori district, six out of eleven secondary schools (117 pupils in total) had used Georgian as the teaching language at the end of the 2015/16 academic year.

D. Relevant provisions of international humanitarian law

310. Article 50 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War provides that the occupying power must facilitate the proper working of all institutions devoted to the education of children in the occupied territory.

311. Having regard to the complaints raised in the present case, there is no conflict between Article 2 of Protocol No. 1 and the relevant provisions of international humanitarian law concerning a situation of occupation.

E. The Court's assessment

1. Jurisdiction

312. Given that the events in question took place, *inter alia*, after the cessation of hostilities, the Court concludes that the victims fell within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention (see paragraph 175 above) and dismisses the preliminary objection raised by the respondent Government in that regard. It must next determine whether there has been a violation of the rights protected by the Convention capable of engaging the responsibility of the Russian Federation.

2. Alleged violation of Article 2 of Protocol No. 1

313. In *Catan and Others* (cited above) the Court indicated as follows:

> "137. By binding themselves, in the first sentence of Article 2 of Protocol No. 1, not to 'deny the right to education', the Contracting States guarantee to anyone within their jurisdiction a right of access to educational institutions existing at a given time (see *Case* '*relating to certain aspects of the laws on the use of languages in education in Belgium*' (merits), 23 July 1968, pp. 30-32, §§ 3-4, Series A no. 6). ... Moreover, although the text of Article 2 of Protocol No. 1 does not specify the language in which education must be conducted, the right to education would be meaningless if it did not imply in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages, as the case may be (ibid., pp. 30-31, § 3)."

314. In the present case it considers that it does not have sufficient evidence in its possession to conclude beyond reasonable doubt that there were incidents contrary to Article 2 of Protocol No. 1. There has therefore been no violation of that Article.

X. OBLIGATION TO INVESTIGATE

315. The applicant Government submitted that the Russian Federation had not conducted any investigations into the events as regards Article 2 of the Convention. They alleged that this amounted to a violation of Article 2 in its procedural aspect. Article 2 provides:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

A. The parties' submissions

316. The applicant Government submitted that the Russian Federation had wholly failed to discharge its obligation to investigate violations of humanitarian law by its own armed forces or by the Ossetian forces under its effective control, despite the fact that credible reports of such crimes had been brought to its attention by a number of international organisations. In particular, several Georgian NGOs had lodged complaints to no avail with the Investigative Committee of the General Prosecutor's Office of the Russian Federation ("the Investigative Committee").

However, the General Prosecutor's Office of the Russian Federation had waited until 19 May 2010 before writing to the Georgian Ministry of Justice asking for Georgia to investigate some of the allegations submitted by the NGOs and to send it the results by way of mutual legal assistance. On 4 October 2010 the Office of the Chief Prosecutor of Georgia had declined the request for mutual legal assistance, giving the following reasons for its refusal: "It is obvious that the competent agencies of the Russian Federation are implementing only a partial investigation, which therefore falls well short of international standards." The letter pointed out that the United Nations Human Rights Committee, the Council of Europe Monitoring Committee and a number of NGOs had reached a similar conclusion.

Other Georgian NGOs had subsequently contacted the Russian Investigative Committee, again without success. However, the Russian prosecuting authorities had in fact initiated only two criminal investigations. One of them had resulted in a Russian sergeant being fined 35,000 roubles for sexual assault, and in the other case a senior lieutenant had been charged with looting but the charges had been dropped at the complainant's request following a friendly settlement. Given the scale of the abuses that had actually been committed, those two examples merely served to underline the culture of impunity for Russian service personnel.

317. The respondent Government submitted that the prosecuting authorities of the Russian Federation had taken proper steps to investigate and, where appropriate, initiate criminal proceedings in response to duly

substantiated complaints by actual victims, providing two examples: the conviction of a sergeant, who, following a complaint of sexual assault, had been fined 35,000 roubles for the offence of indecent insult under Article 130 § 1 of the Russian Criminal Code, and the opening of a criminal investigation under Article 158 of the Criminal Code in respect of a senior lieutenant for the theft of a television set and twenty bottles of alcohol from a Georgian civilian. The latter case had been closed following a friendly settlement between the parties.

The Investigative Committee had also received a number of applications from various human rights organisations on behalf of Georgian citizens alleged to be the victims of crimes committed by Russian service personnel. Many of the allegations had been insufficiently substantiated, failing to include information such as the identity or a description of the alleged perpetrator and the date and place of the incident. Nevertheless, despite the inherent difficulty of investigating events occurring in another country, the Investigative Committee had sought to investigate the complaints in order to determine whether they had any substance. To that end it had identified and interviewed more than 1,000 Russian service personnel who had been involved in military operations in South Ossetia, together with a large number of residents of the villages in South Ossetia affected by the hostilities. The investigations had not disclosed any credible evidence of illegal behaviour (including violations of international humanitarian law) by Russian military personnel in the course of the conflict. On the contrary, the evidence gathered had suggested that the allegations were unfounded. The investigations had even revealed that a large number of allegations had been made on behalf of alleged victims who had either died or moved from the location of the alleged incident before it had taken place; various examples were given.

On 23 July 2010 the Investigative Committee had written to the Office of the Chief Prosecutor of Georgia to seek its help in investigating the allegations made by Georgia against Russian service personnel. The letter had enquired whether certain identified Georgian citizens had made complaints to the Georgian authorities, and whether documents relating to any subsequent criminal investigations by the Georgian authorities could be provided. It had also asked the Georgian authorities to interview the complainants and to put various questions to them in order to assess the credibility of the accusations brought against Russian servicemen. On 1 October 2010, having received no reply, the Investigative Committee had sent a reminder. On 4 October 2010 the Office of the Chief Prosecutor of Georgia had finally responded to the request. The response had amounted to a blanket refusal to provide any help whatsoever. The letter had sought to justify the refusal on the basis that the Investigative Committee had conducted its investigations in a "biased and subjective manner" and that

there was a real risk that the investigation by the Russian authorities would result in serious crimes going unpunished.

The respondent Government submitted that the Investigative Committee's work in seeking to ascertain whether the various allegations had any substance had therefore been unnecessarily hampered by the unreasonable refusal of assistance by the Office of the Chief Prosecutor of Georgia. Indeed, Georgia's conduct had been so unreasonable that the Court should, as a matter of fairness, refuse to entertain its allegation (which in any event was unfounded) that the Russian authorities had failed to conduct a proper investigation.

The true position was that the Russian prosecuting authorities had made every effort to investigate complaints properly and thoroughly, and there was no basis for concluding that focused and properly particularised complaints by actual victims would not result in proper investigations by independent prosecutors in Russia.

Moreover, the investigations and decisions by the Russian prosecuting authorities were subject to supervision and review by the Russian courts, and there was no suggestion that those courts would not carry out a proper and impartial examination of the cases brought before them.

B. Third-party comments

318. The Human Rights Centre of the University of Essex stated that although the law of armed conflict (LOAC) could require investigations in certain circumstances, there could be perceived differences between LOAC and human rights law (HRL) in this regard. For example, while under LOAC there was a need for investigation if there appeared to have been a violation which amounted to a war crime[34], civilian deaths which appeared to be lawful under LOAC (e.g. circumstances whereby it was indisputably within the proportionality formula) could fall outside this obligation. There was also a question as to the type of investigation (if any) required for violations of LOAC that did not amount to war crimes[35]. HRL, however, could arguably require an investigation for most civilian deaths[36] and thus of incidents which could fall outside those requiring an investigation under LOAC. In practice, cases that came before human rights bodies were likely

34 See the analysis set out in the ICRC study of customary international law: J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, International Committee of the Red Cross, Cambridge, 2005, Rule 158.

35 In that connection the Public Commission to Examine the Maritime Incident of 31 May 2010 (Turkel Commission) considered that war crimes justified an *investigation*, while other violations justified "some form of *examination*" (ibid., p. 99).

36 *Isayeva and Others v. Russia*, nos. 57947/00 and 2 others, § 208, 24 February 2005, and *Al-Skeini and Others*, cited above, §§ 163 and 164: "The Court has held that the procedural obligation under Article 2 continues to apply in difficult security conditions, including in a context of armed conflict."

to be of the type that would have required investigation also under LOAC, due to circumstances pointing to alleged breaches of LOAC and not only HRL. Lastly, the precise shape of investigations conducted in the context of armed conflict could not always reasonably be expected to meet the same standards as peace time domestic police investigations. Many aspects of an investigation, from collection of forensic evidence to using experts at the alleged scene of the crime could be difficult – if not impossible – to fulfil on the battlefield, and the specificities of the obligation must be interpreted in context[37].

C. Summary of the relevant evidence

319. The relevant passage of the January 2009 report by the Parliamentary Assembly Monitoring Committee reads as follows:

> "The Investigative Committee of the General Prosecutor's Office of Russia launched an investigation into genocide committed by Georgian troops against Russian citizens (ethnic Ossetians) in South Ossetia. In addition, it opened an investigation into crimes committed by Georgia against the Russian military. It would seem that there is no intention to investigate possible violations of human rights and humanitarian law committed by Russian forces and forces under the control of the *de facto* South Ossetian authorities. Indeed, the special Investigation Committee reportedly closed its investigations on the ground in South Ossetia in mid-September, at a time when credible reports indicated that looting and pillaging, as well as acts of ethnic cleansing were taking place on a daily basis in the areas under Russian control, including in the so-called 'buffer zone'.[38]"

320. The relevant passage of the United Nations Human Rights Committee's concluding observations of 24 November 2009 on the Russian Federation reads as follows:

> "Notwithstanding the position of the State party that no crimes were committed by Russian military forces or other military groups against the civilian population on the territory of South Ossetia (para. 264, CCPR/C/RUS/Q/6/Add.1), and that the State party does not take responsibility for possible crimes by armed groups (ibid., para. 266), the Committee remains concerned about allegations of large-scale, indiscriminate abuses and killings of civilians in South Ossetia during the military operations by Russian forces in August 2008. The Committee recalls that the territory of South Ossetia was under the *de facto* control of an organized military operation of the State party, which therefore bears responsibility for the actions of such armed groups. The Committee notes with concern that, to date, the Russian authorities have not carried out any independent and exhaustive appraisal of serious violations of

37 See *Al-Skeini and Others*, cited above, § 168.

38 Parliamentary Assembly of the Council of Europe, "The implementation of Resolution 1633 (2008) on the consequences of the war between Georgia and Russia", Doc. 11800, 26 January 2009, § 50.

human rights by members of Russian forces and armed groups in South Ossetia and that the victims have received no reparations[39]."

321. In its *World Report 2011*, Human Rights Watch concluded as follows:

"Over two years since the Russian conflict with Georgia over South Ossetia, Russian authorities have yet to ensure a comprehensive investigation into and accountability for international human rights and humanitarian law violations by their forces.

Russian forces used cluster bombs in areas populated by civilians in Georgia, leading to civilian deaths and injuries. Russia also launched indiscriminate rocket attacks on civilian areas, causing casualties. Russian forces in Georgia failed to protect civilians in areas under their effective control whilst also preventing Georgian forces from policing these areas[40]."

322. In its decision of 27 January 2016, Pre-Trial Chamber I of the International Criminal Court held as follows:

"39. The Chamber considers that, at this stage, the complementarity examination requires an assessment of whether any State is conducting or has conducted national proceedings in relation to the persons or groups of persons as well as the crimes which appear to have been committed on the basis of the information available at this stage, which together would be the subject of investigations and likely to form the potential case(s) before the Court. If (some of) those potential cases are not investigated or prosecuted by national authorities, the criterion provided for in article 53(1)(b) of the Statute, with respect to complementarity, is satisfied.

40. In her Request, the Prosecutor presents the progress of national proceedings in Georgia and the Russian Federation, and informs the Chamber that no other State has undertaken national proceedings with respect to the relevant crimes. The Chamber agrees with the Prosecutor's submission at paragraph 322 of the Request, that any proceedings undertaken by the *de facto* authorities of South Ossetia are not capable of meeting the requirements of article 17 of the Statute, due to South Ossetia not being a recognized State.

41. With respect to Georgia, according to the Prosecutor, the Georgian authorities carried out some investigative activities in relation to the 2008 conflict from August 2008 until November 2014 (Request, paras 279-301). However, no proceedings have been completed and the Georgian authorities informed the Prosecutor in a letter dated 17 March 2015 that 'further progress of relevant national proceedings related to the alleged crimes subject to this Application is prevented by "a fragile security situation in the occupied territories in Georgia and the areas adjacent thereto, where violence against civilians is still widespread"'. In the view of the Chamber, this letter is dispositive of the matter: there is, at present, a situation of inactivity on the part of the Georgian competent authorities and no national proceedings have rendered any potential cases arising out of the situation inadmissible.

42. With respect to national proceedings in the Russian Federation, the Prosecutor presents in the Request the results of her assessment of the potential cases related to: (i) the forcible displacement campaign to expel ethnic Georgians from South Ossetia

39 Concluding Observations of the Human Rights Committee: Russian Federation, 24 November 2009, CCPR/C/RUS/Q/6, § 13.
40 Human Rights Watch, *World Report 2011*, p. 460.

and the 'buffer zone'; and (ii) the attack on Russian peacekeepers (Request, paras 305-320).

43. In relation to the campaign to forcibly expel ethnic Georgians from South Ossetia and the 'buffer zone', the Prosecutor provides information based on bilateral meetings conducted with the Russian authorities on 3 February 2011 and 23-24 January 2014 as well as on written communications. According to the information provided, the Investigative Committee of the Russian Federation, in the course of its investigation between 2010 and 2014, considered 575 allegations made by Georgian victims against Russian servicemen. These allegations referred to murder or attempted murder, destruction of property and pillaging.

44. In a letter addressed to the Prosecutor and dated 18 June 2012, the Russian authorities stated that in an effort to verify these allegations and 'collect additional evidence' they requested several times legal assistance from the Georgian authorities, which was not obtained. Nevertheless, more than 2,000 Russian servicemen were questioned as witnesses and more than 50 Russian military units provided documents as part of the investigation. The letter of 18 June 2012 concludes that the 'investigation has established that the command of the Armed Forces ... had taken exhaustive measures to prevent pillage, violence, indiscriminate use of force against civilians during the entire period of the Russian military contingent's presence in the territory of Georgia and South Ossetia [and that] the investigation has been unable to confirm involvement of the Russian servicemen in the commission of the crimes in the territory of Georgia and South Ossetia'.

45. The Prosecutor notes in this context that 'these findings that the Russian armed forces acted to prevent or punish crimes were partially confirmed by information that has been deemed credible by the Prosecution, while other credible information suggests that Russian soldiers either participated in, or were passive in the face of, crimes committed by South Ossetian forces' (Request, para. 308). Taking into account all the information, the Prosecutor concludes that 'despite a number of reported verification efforts, no concrete and progressive steps have been taken in Russia to ascertain the criminal responsibility of those involved in the alleged crimes related to the potential cases(s) identified in this Application' (Request, para. 312).

46. Having before it the available information, the Chamber finds itself unable to determine that the national proceedings in Russia are inadequate under article 17(1)(b) of the Statute. While the Chamber does not consider significant for the purposes of a determination under article 17(1)(b) of the Statute the Prosecutor's submission to be in possession of evidence contradicting the conclusion of the Russian judicial authorities, reasonable doubts, however, remain as to whether the Russian authorities' inability to access crucial evidence, i.e. to interview Georgian witnesses, constitutes inability within the meaning of article 17 of the Statute. In any case, the Chamber finds it unwarranted to attempt to conclusively resolve this question in the present decision, considering that there exist other potential cases that would be admissible. The national proceedings in question only cover a portion of the potential cases arising out of the situation, i.e. the possible participation of members of the Russian forces in the forcible displacement campaign otherwise conducted by South Ossetian forces (see above, para. 23). It is therefore more appropriate to allow the Prosecutor to conduct her investigation, which will naturally extend to issues of admissibility, and for the question to be authoritatively resolved at a later stage if needed."

D. Relevant provisions of international humanitarian law

323. The relevant provisions in this connection are Articles 1, 49 and 50 of the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Articles 1, 129 and 130 of the Third Geneva Convention on the Treatment of Prisoners of War, Articles 1, 146 and 147 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, and Articles 85, 86, 87 and 88 of Additional Protocol (I) relating to the Protection of Victims of International Armed Conflicts.

324. Moreover, under Rule 158 of the International Committee of the Red Cross's study of customary international humanitarian law, "States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects".

325. In general, it may be observed 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 (see paragraph 318 above). Otherwise, 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[41].

E. The Court's assessment

1. General principles

326. The general principles concerning the obligation to carry out an effective investigation under Article 2 of the Convention in the context of an armed conflict have been laid down in *Al-Skeini and Others* (cited above, §§ 163-67) and subsequently reiterated in *Jaloud* (cited above, § 186):

> "163. The general legal prohibition of arbitrary killing by agents of the State would be ineffective in practice if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State (see *McCann and Others*, cited above, § 161). The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (see *Nachova and Others v. Bulgaria* [GC],

41 See also *Guidelines on investigating violations of international humanitarian law: law, policy and good practice*, published in 2019 by the International Committee of the Red Cross and the Geneva Academy of International Humanitarian Law and Human Rights.

nos. 43577/98 and 43579/98, § 110, ECHR 2005-VII). However, the investigation should also be broad enough to permit the investigating authorities to take into consideration not only the actions of the State agents who directly used lethal force but also all the surrounding circumstances, including such matters as the planning and control of the operations in question, where this is necessary in order to determine whether the State complied with its obligation under Article 2 to protect life (see, by implication, *McCann and Others*, cited above, §§ 150 and 162; *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 128, 4 May 2001; *McKerr*, cited above, §§ 143 and 151; *Shanaghan v. the United Kingdom*, no. 37715/97, §§ 100-25, 4 May 2001; *Finucane v. the United Kingdom*, no. 29178/95, §§ 77-78, ECHR 2003-VIII; *Nachova and Others*, cited above, §§ 114-15; and, *mutatis mutandis*, *Tzekov v. Bulgaria*, no. 45500/99, § 71, 23 February 2006).

164. The Court has held that the procedural obligation under Article 2 continues to apply in difficult security conditions, including in a context of armed conflict (see, among other examples, *Güleç v. Turkey*, 27 July 1998, § 81, *Reports* 1998-IV; *Ergi v. Turkey*, 28 July 1998, §§ 79 and 82, *Reports* 1998-IV; *Ahmet Özkan and Others v. Turkey*, no. 21689/93, §§ 85-90, 309-20 and 326-30, 6 April 2004; *Isayeva v. Russia*, no. 57950/00, §§ 180 and 210, 24 February 2005; and *Kanlibaş v. Turkey*, no. 32444/96, §§ 39-51, 8 December 2005). It is clear that where the death to be investigated under Article 2 occurs in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and, as the United Nations Special Rapporteur has also observed (see paragraph 93 above), concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed (see, for example, *Bazorkina v. Russia*, no. 69481/01, § 121, 27 July 2006). Nonetheless, the obligation under Article 2 to safeguard life entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life (see, among many other examples, *Kaya v. Turkey*, 19 February 1998, §§ 86-92, *Reports* 1998-I; *Ergi*, cited above, §§ 82-85; *Tanrıkulu v. Turkey* [GC], no. 23763/94, §§ 101-10, ECHR 1999-IV; *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, §§ 156-66, 24 February 2005; *Isayeva*, cited above, §§ 215-24; and *Musayev and Others v. Russia*, nos. 57941/00, 58699/00 and 60403/00, §§ 158-65, 26 July 2007).

165. What form of investigation will achieve the purposes of Article 2 may vary depending on the circumstances. However, whatever mode is employed, the authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (see *Ahmet Özkan and Others*, cited above, § 310, and *Isayeva*, cited above, § 210). Civil proceedings, which are undertaken on the initiative of the next of kin, not the authorities, and which do not involve the identification or punishment of any alleged perpetrator, cannot be taken into account in the assessment of the State's compliance with its procedural obligations under Article 2 of the Convention (see, for example, *Hugh Jordan*, cited above, § 141). Moreover, the procedural obligation of the State under Article 2 cannot be satisfied merely by awarding damages (see *McKerr*, cited above, § 121, and *Bazorkina*, cited above, § 117).

166. As stated above, the investigation must be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must take the reasonable steps available to them to secure the evidence concerning the incident,

including, inter alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard (see *Ahmet Özkan and Others*, cited above, § 312, and *Isayeva*, cited above, § 212 and the cases cited therein).

167. For an investigation into alleged unlawful killing by State agents to be effective, it is necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence (see, for example, *Shanaghan*, cited above, § 104). A requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the victim's next of kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see *Ahmet Özkan and Others*, cited above, §§ 311-14, and *Isayeva*, cited above, §§ 211-14 and the cases cited therein)."

327. In *Al-Skeini and Others* (cited above) the Court also added the following clarification:

"168. The Court takes as its starting-point the practical problems caused to the investigating authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war. These practical problems included the breakdown in the civil infrastructure, leading, inter alia, to shortages of local pathologists and facilities for autopsies; the scope for linguistic and cultural misunderstandings between the occupiers and the local population; and the danger inherent in any activity in Iraq at that time. As stated above, the Court considers that in circumstances such as these the procedural duty under Article 2 must be applied realistically, to take account of specific problems faced by investigators."

2. Application of the above principles to the facts of the case

328. The Court reiterates that it has found a violation of Article 2 of the Convention concerning the systematic campaign of killings of civilians after the cessation of hostilities, amounting to an administrative practice contrary to Article 2 (see paragraph 220 above). Accordingly, the Russian Federation had an obligation to carry out an effective investigation under Article 2 of the Convention into those events.

329. Admittedly, the Court has found that the events which occurred during the active phase of the hostilities did not fall within the jurisdiction of the Russian Federation (see paragraph 144 above).

330. However, it points out that in *Güzelyurtlu and Others* (cited above, §§ 188-90) it indicated that a jurisdictional link in relation to the obligation to investigate under Article 2 could be established if the Contracting State had instituted an investigation or proceedings in accordance with its domestic law in respect of a death which had occurred outside its jurisdiction, or if there were "special features" in a given case.

331. In the present case, in view of the allegations that it had committed war crimes during the active phase of the hostilities, the Russian Federation had an obligation to investigate the events in issue, in accordance with the relevant rules of international humanitarian law (see paragraphs 323-324 above) and domestic law (see paragraphs 48-53 of the admissibility decision). Indeed, the prosecuting authorities of the Russian Federation took steps to investigate those allegations (see paragraph 317 above). Furthermore, although the events which occurred during the active phase of the hostilities did not fall within the jurisdiction of the Russian Federation (see paragraph 144 above), it established "effective control" over the territories in question shortly afterwards (see paragraph 175 above). Lastly, given that all the potential suspects among the Russian service personnel were located either in the Russian Federation or in territories under the control of the Russian Federation, Georgia was prevented from carrying out an adequate and effective investigation into the allegations.

332. Accordingly, having regard to the "special features" of the case, the Court considers that the Russian Federation's jurisdiction within the meaning of Article 1 of the Convention is established in respect of this complaint (see, *mutatis mutandis*, *Güzelyurtlu and Others*, cited above, §§ 191-97). It therefore dismisses the preliminary objection raised by the respondent Government in this regard.

333. The Court further notes that various international bodies such as the Monitoring Committee of the Council of Europe and the United Nations Human Rights Committee, as well as the NGO Human Rights Watch, have pointed to the Russian Federation's failure to carry out appropriate investigations into the alleged violations, in particular with regard to Article 2 of the Convention. Thus, in its concluding observations of 24 November 2009 the United Nations Human Rights Committee noted "with concern that, to date, the Russian authorities have not carried out any independent and exhaustive appraisal of serious violations of human rights by members of Russian forces and armed groups in South Ossetia and that the victims have received no reparations".

334. In its decision of 27 January 2016, Pre-Trial Chamber I of the International Criminal Court stated the following regarding the campaign to forcibly expel ethnic Georgians from South Ossetia and the "buffer zone": "the Investigative Committee of the Russian Federation, in the course of its investigation between 2010 and 2014, considered 575 allegations made by Georgian victims against Russian servicemen. These allegations referred to

murder or attempted murder, destruction of property and pillaging." In a letter addressed to the Prosecutor dated 18 June 2012, the Russian authorities had concluded that "the investigation has established that the command of the Armed Forces ... had taken exhaustive measures to prevent pillage, violence, indiscriminate use of force against civilians during the entire period of the Russian military contingent's presence in the territory of Georgia and South Ossetia [and that] the investigation has been unable to confirm involvement of the Russian servicemen in the commission of the crimes in the territory of Georgia and South Ossetia". Taking into account all the information, the Prosecutor concluded that "despite a number of reported verification efforts, no concrete and progressive steps have been taken in Russia to ascertain the criminal responsibility of those involved in the alleged crimes related to the potential cases(s) identified in this Application". Pre-Trial Chamber I found it "unwarranted to attempt to conclusively resolve this question in the present decision, considering that there exist other potential cases that would be admissible. The national proceedings in question only cover a portion of the potential cases arising out of the situation, *i.e.* the possible participation of members of the Russian forces in the forcible displacement campaign otherwise conducted by South Ossetian forces".

335. In the present case, the respondent Government acknowledged that only one Russian serviceman had been convicted in relation to the events which occurred during or immediately after the armed conflict in Georgia in 2008 (see paragraph 317 above).

336. Accordingly, having regard to the seriousness of the crimes allegedly committed during the active phase of the hostilities, and the scale and nature of the violations found during the period of occupation, the Court considers that the investigations carried out by the Russian authorities were neither prompt nor effective nor independent, and accordingly did not satisfy the requirements of Article 2 of the Convention.

337. There has therefore been a violation of Article 2 of the Convention in its procedural aspect.

XI. EFFECTIVE REMEDIES

338. The applicant Government also complained, under Article 13 of the Convention, of a lack of effective remedies in respect of their complaints under Articles 3, 5 and 8 of the Convention, Articles 1 and 2 of Protocol No. 1 and Article 2 of Protocol No. 4.

339. Article 13 provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

340. Having regard to the above conclusions (see paragraphs 220, 250, 254, 279, 299 and 314 above), the Court is of the opinion that there is no need to examine separately the applicant Government's complaint under Article 13 in conjunction with Articles 3, 5 and 8 of the Convention and with Articles 1 and 2 of Protocol No. 1 and Article 2 of Protocol No. 4.

XII. APPLICATION OF ARTICLE 38 OF THE CONVENTION

341. In *Georgia v. Russia* (I) (cited above, § 99) the Court pointed out that the following general principles, which it had established regarding individual applications in particular, should also be applied to inter-State applications:

> "... it is of the utmost importance for the effective operation of the system of individual petition instituted under Article 34 of the Convention that States should furnish all necessary facilities to make possible a proper and effective examination of applications. This obligation requires the Contracting States to furnish all necessary facilities to the Court, whether it is conducting a fact-finding investigation or performing its general duties as regards the examination of applications. A failure on a Government's part to submit such information which is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 of the Convention (see *Tahsin Acar v. Turkey* [GC], no. 26307/95, §§ 253-54, ECHR 2004-III; *Timurtaş v. Turkey*, no. 23531/94, §§ 66 and 70, ECHR 2000-VI; and *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 70, ECHR 1999-IV).
>
> (see *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, § 202, ECHR 2013)."

342. In the present case, the Court asked the parties to produce their military "combat reports" regarding the armed conflict in Georgia in 2008, in order to have replies to questions put to the parties on the compatibility of the alleged bombings with international humanitarian law (see paragraph 68 above). The Court also asked the applicant Government to produce the observations they had submitted before the Commercial Court of England in London, in order to have information about possible Georgian attacks carried out in error on some of the Georgian villages in question (see paragraph 71 above).

These documents were therefore essential to enable the Court to establish the facts of the case.

343. In a letter of 19 February 2016 the applicant Government submitted a redacted version of the extracts from the "combat reports". In a letter of 24 November 2017 they also submitted a redacted version (without the sensitive passages) of their observations before the Commercial Court of England, requesting the Court to treat them as confidential in accordance with Rule 33 §§ 2 and 3 of the Rules of Court.

344. After examining the documents in question, the Court considers that the applicant Government have complied with their obligation to cooperate under Article 38 of the Convention.

345. The respondent Government refused, for their part, to submit the "combat reports", on the grounds that the documents in question constituted a "State secret", despite the practical arrangements proposed by the Court to submit non-confidential extracts. Nor did they submit any practical proposals of their own to the Court that would have allowed them to satisfy their obligation to cooperate while preserving the secret nature of certain items of information.

346. The Court therefore considers that the respondent Government have fallen short of their 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.

XIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

347. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

348. The applicant Government sought "just satisfaction for these violations, including ... compensation to the injured parties" (see paragraph 48 above).

349. The Court considers that the question of the application of Article 41 of the Convention is not ready for decision.

350. In this connection, it reiterates that "Article 41 of the Convention does, as such, apply to inter-State cases" (see *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, § 43, ECHR 2014), and it refers to the three criteria it has set out for establishing whether awarding just satisfaction was justified in an inter-State case: "(i) the type of complaint made by the applicant Government, which had to concern the violation of basic human rights of its nationals (or other victims); (ii) whether the victims could be identified; and (iii) the main purpose of bringing the proceedings" (see *Georgia v. Russia (I)* (just satisfaction) [GC], no. 13255/07, § 20, 29 January 2019).

351. In the same judgment, the Court also reiterated the Contracting States' duty to cooperate, which it outlined as follows:

> "60. This duty to cooperate, which also applies in inter-State cases (see *Georgia v. Russia (I)*, cited above, §§ 99-110), is particularly important for the proper administration of justice where the Court awards just satisfaction under Article 41 of the Convention in this type of case. It applies to both Contracting Parties: the applicant Government, who, in accordance with Rule 60 of the Rules of Court, must substantiate their claims, and also the respondent Government, in respect of whom the

existence of an administrative practice in breach of the Convention has been found in the principal judgment."

FOR THESE REASONS, THE COURT

1. *Holds*, by eleven votes to six, that the events which occurred during the active phase of the hostilities (8 to 12 August 2008) did not fall within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention and *declares* this part of the application inadmissible;

2. *Holds*, by sixteen votes to one, that the events which occurred after the cessation of hostilities (from the date of the ceasefire agreement of 12 August 2008) fell within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention, and *dismisses* the preliminary objection raised by the respondent Government in that regard;

3. *Holds*, by sixteen votes to one, that there was an administrative practice contrary to Articles 2, 3 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", and *dismisses* the preliminary objection of non-exhaustion of domestic remedies raised by the respondent Government in that regard;

4. *Holds*, unanimously, that the Georgian civilians detained by the South Ossetian forces in the basement of the "Ministry of Internal Affairs of South Ossetia" in Tskhinvali between approximately 10 and 27 August 2008 fell within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention, and *dismisses* the preliminary objection raised by the respondent Government in that regard;

5. *Holds*, unanimously, that there was an administrative practice contrary to Article 3 of the Convention as regards the conditions of detention of some 160 Georgian civilians and the humiliating acts to which they were exposed, which caused them undeniable suffering and must be regarded as inhuman and degrading treatment, and *dismisses* the preliminary objection of non-exhaustion of domestic remedies raised by the respondent Government in that regard;

6. *Holds*, unanimously, that there was an administrative practice contrary to Article 5 of the Convention as regards the arbitrary detention of Georgian civilians in August 2008, and *dismisses* the preliminary

objection of non-exhaustion of domestic remedies raised by the respondent Government in that regard;

7. *Holds*, unanimously, that the Georgian prisoners of war who were detained in Tskhinvali between 8 and 17 August 2008 by the South Ossetian forces fell within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention, and *dismisses* the preliminary objection raised by the respondent Government in that regard;

8. *Holds*, by sixteen votes to one, that there was an administrative practice contrary to Article 3 of the Convention as regards the acts of torture of which the Georgian prisoners of war were victims, and *dismisses* the preliminary objection of non-exhaustion of domestic remedies raised by the respondent Government in that regard;

9. *Holds*, by sixteen votes to one, that the Georgian nationals who were prevented from returning to South Ossetia or Abkhazia fell within the jurisdiction of the Russian Federation, and *dismisses* the preliminary objection raised by the respondent Government in that regard;

10. *Holds*, by sixteen votes to one, that there was an administrative practice contrary to Article 2 of Protocol No. 4 as regards the inability of Georgian nationals to return to their respective homes, and *dismisses* the preliminary objection of non-exhaustion of domestic remedies raised by the respondent Government in that regard;

11. *Holds*, unanimously, that there has been no violation of Article 2 of Protocol No. 1;

12. *Holds*, unanimously, that the Russian Federation had a procedural obligation under Article 2 of the Convention to carry out an adequate and effective investigation not only into the events which occurred after the cessation of hostilities (from the date of the ceasefire agreement of 12 August 2008) but also into the events which occurred during the active phase of the hostilities (8 to 12 August 2008), and *dismisses* the preliminary objection raised by the respondent Government in that regard;

13. *Holds*, by sixteen votes to one, that there has been a violation of Article 2 of the Convention in its procedural aspect;

14. *Holds*, unanimously, that there is no need to examine separately the applicant Government's complaint under Article 13 in conjunction with

Articles 3, 5 and 8 of the Convention and with Articles 1 and 2 of Protocol No. 1 and Article 2 of Protocol No. 4;

15. *Holds*, by sixteen votes to one, that the respondent State has failed to comply with its obligations under Article 38 of the Convention;

16. *Holds*, unanimously, that the question of the application of Article 41 of the Convention is not ready for decision;

accordingly,

(a) *reserves* the said question in whole;
(b) *invites* the applicant Government and the respondent Government to submit in writing, within twelve months from the date of notification of this judgment, their observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
(c) *reserves* the further procedure and *delegates* to the President of the Court the power to fix the same if need be.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 21 January 2021.

Johan Callewaert	Robert Spano
Deputy to the Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Keller;
(b) partly concurring opinion of Judge Serghides;
(c) partly dissenting opinion of Judge Lemmens;
(d) partly dissenting opinion of Judge Grozev;

(e) joint partly dissenting opinion of Judges Yudkivska, Pinto de Albuquerque and Chanturia;

(f) joint partly dissenting opinion of Judges Yudkivska, Wojtyczek and Chanturia;

(g) partly dissenting opinion of Judge Pinto de Albuquerque;

(h) partly dissenting opinion of Judge Dedov;

(i) partly dissenting opinion of Judge Chanturia.

R.S.O.
J.C.

CONCURRING OPINION OF JUDGE KELLER

I. INTRODUCTION

1. In the early summer of 1945, members of our parents' generation gathered in San Francisco and sought, in the words of the Preamble to the Charter of the United Nations, "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind".

2. Part of their effort was dedicated "to reaffirm[ing] faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women". To this end, they framed the human rights clauses of the Charter[1] and later turned to writing the Universal Declaration of Human Rights and the rest of the International Bill of Human Rights.[2] Amid delays to that project, attention shifted in Europe to the drawing up of the Convention and its enforcement mechanism.[3]

3. Seventy-five years on, the present judgment demonstrates – not least in the unanimity or near-unanimity with which each of its various aspects has been adopted by the seventeen judges of the Grand Chamber – the significant contribution that the Convention system can make to realising the Charter's dream of peace throughout Europe.

4. It is a contribution that must be understood to have limits. The Court has divided, albeit unevenly, over the question of whether the respondent State exercised jurisdiction over those killed by its forces in the active phase of the hostilities and thus whether the Court may review the circumstances in which those individuals perished so as to determine whether Article 2 of the Convention was violated between 8 and 12 August 2008. For the reasons given in the judgment, there was no such exercise of jurisdiction. To my mind, the contrary conclusion of some of my colleagues is ultimately founded on an overly expansive vision of the Court as an adjudicator of the totality of armed conflict.

5. A principled and yet realistic approach to the notion of "jurisdiction" in Article 1 of the Convention is but one of the ways in which the Court's role in armed-conflict cases is to be demarcated. Another is the Court's commitment to interpreting the Convention in accordance with the international law of treaties (see, for example, *Golder v. the United*

1 See, for example, John Dugard, "The Human Rights Clauses in the United Nations Charter and South African Law" (1980), 13 *De Jure* 297, at pp. 297-98.

2 See, for example, Maya Hertig Randall, "The History of the Covenants: Looking Back Half a Century and Beyond", in Daniel Moeckli, Helen Keller and Corina Heri, *The Human Rights Covenants at 50: Their Past, Present, and Future* (Oxford University Press, 2018), pp. 10-14.

3 See, for example, A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, 2004), pp. 686-87 and 690-705.

Kingdom, 21 February 1975, § 29, Series A no. 18). As codified in Articles 31 to 33 of the Vienna Convention on the Law of Treaties, those customary rules direct the Court to take account of, *inter alia*, the practice of the High Contracting Parties and their other international legal obligations (compare, for example, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections, Judgment, ICJ Reports* 2016, p. 116, § 33). One aim of this opinion is to explain why, had it concluded that the respondent State had exercised jurisdiction during the active phase of the hostilities, the Court would consequently have been obliged to examine the deaths caused by Russian forces under the terms of the Charter and international humanitarian law rather than the terms of Article 2.

6. As set forth below, there could have been no objection to this course of action on the ground that the Article 19 of the Convention charges the Court solely with "ensur[ing] the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto". It would have been entirely in keeping with the ethos of the Convention, the Preamble to which identifies the "common understanding and observance" of human rights safeguarded by the Court as a "foundation of ... peace in the world". The Preamble to the Statute of the Council of Europe similarly stresses that "the pursuit of peace ... is vital". These pronouncements, the relevance of which is reflected in Article 31 § 2 of the Vienna Convention, may be supplemented with an observation by Claude Pilloud, former Head of the Legal Division of the International Committee of the Red Cross,[4] as an illustration of the perspective of "the leading drafters of the 1949 Geneva Conventions" on the relationship of human rights with international humanitarian law.[5] He said that "obvious commonalities" existed between the Universal Declaration and the Geneva Conventions,[6] the drafts of which "he had co-designed for the diplomatic conference".[7]

7. The aspirations of the post-war world are not to be cynically dismissed or raised simply to remind international lawyers of a more hopeful era. I bear them seriously in mind as I approach Article 15 of the Convention, which is especially important today. As many of the High Contracting Parties have recourse to derogation in the face of the current

4 See "Death of Mr. Claude Pilloud" (1984), 24 *International Review of the Red Cross* 341, at p. 342.

5 See Boyd van Dijk, "Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions" (2018), 112 *American Journal of International Law* 553, p. 555.

6 See Claude Pilloud, "La Déclaration universelle des Droits de l'homme et les Conventions internationales protégeant les victimes de la guerre" (1949) 31 *Revue Internationale de la Croix-Rouge et Bulletin Internationale des Sociétés de la Croix-Rouge* 252, at p. 252. This is my own translation from the original French into English.

7 See van Dijk, cited above, p. 555.

pandemic,[8] I wish to make clear my understanding of the relevant legal framework in all its complexity.

II. GENERAL OBSERVATION

8. At the outset, there is a general observation to be made.

9. My colleagues and I have had the privilege of sitting in the fourth inter-State case ever to be resolved on the merits by the Court (see *Ireland v. the United Kingdom*, 18 January 1978, Series A no. 25; *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001-IV; and *Georgia v. Russia (I)* [GC], no. 13255/07, ECHR 2014 (extracts)). Drawing on this experience, I am bound to emphasise that the judicial function entrusted to the Court by the Convention cannot be discharged in precisely the same fashion in inter-State cases (under Article 33) as in cases originating in individual applications (under Article 34). The two paragraphs of Article 29 of the Convention indicate that its drafters were aware of this: they specifically envisaged separate case-processing regimes, with the admissibility of inter-State applications generally decided apart from the merits and by a Chamber, contrary to the manner in which many individual applications are handled (see paragraphs 73-74 of the Explanatory Report to Protocol No. 14).[9]

10. The distinctiveness of the judicial function under Article 33 likely has many consequences.

11. By way of example, my involvement in the panel that heard the oral evidence in the present case has left me convinced that the Court's usual fact-finding methodology is ill-suited, in its flexibility and forbearance, to inter-State cases, in which neither party is subject to the difficulties in gathering evidence that confront individual applicants (see paragraph 59 of the judgment, citing *Georgia v. Russia (I)*, cited above, §§ 93-95 and 138, in which reliance was placed on the Court's reasoning in cases between individuals and States, applying in that different context the standard of proof articulated in *Ireland v. the United Kingdom*, cited above, § 161).

12. Another example: failure to comply with interim measures may call for disparate judicial responses in cases originating in individual applications and those between High Contracting Parties. In the former, "failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's

8 There has been a comparable trend with respect to the International Covenant on Civil and Political Rights, as to which see the United Nations Human Rights Committee's Statement on derogations from the Covenant in connection with the COVID-19 pandemic, 24 April 2020.

9 The spirit of the second sentence of Article 29 § 2 was perhaps somewhat disregarded in the present case (see paragraph 15 of the judgment and compare *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, ICJ Reports* 2019, pp. 46-50, §§ 1-9 (joint separate opinion of Judges Tomka and Crawford)).

complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34" (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 128, ECHR 2005-I). By contrast, it could be argued in an inter-State case that, as Article 33 includes no commitment akin to that contained in the second sentence of Article 34, such conduct should not be regarded by the Court as a violation of the Convention. The short shrift given in the present judgment to the interim measures indicated by the President may be taken as tacit endorsement of this proposition (but maybe wrongly so).[10]

13. Divergent approaches to inter-State cases, on the one hand, and litigation instituted by individuals against States, on the other hand, are wholly appropriate. Such differentiation is compatible with "a tradition that predates the Strasbourg Court and even the Convention itself".[11] Moreover, adjustments are necessary to ensure the equality of arms to which all international adjudicative institutions are committed (compare *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, ICJ Reports* 2012, pp. 27-30, §§ 39-47).

III. THE RIGHT TO LIFE AND INTERNATIONAL ARMED CONFLICT

A. The text of the Convention

14. With respect to the right to life of those killed by Russian forces during the active phase of the hostilities, it is helpful to set out the framework established in the text of the Convention.

15. Article 2 provides:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

10 One could of course also argue that the Court's inherent jurisdiction is in principle as extensive in inter-State cases as it is in others (see paragraph 18 of my partly dissenting opinion in *T.K. and S.R. v. Russia*, nos. 28492/15 and 49975/15, 19 November 2019, pending before the Grand Chamber).

11 See Helen Keller and Sebastian Bates, "Article 18 ECHR in Historical Perspective and Contemporary Application" (2019) 39 *Human Rights Law Journal* 2, 9.

It would therefore appear that deprivation of life by a High Contracting Party is prima facie a violation of the Convention unless it takes place on one of the four grounds identified in the second paragraph of Article 2 and the second sentence of the first paragraph. But the Convention goes on to provide as follows in Article 15:

> "1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
>
> 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
>
> 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

This seems to add a further qualification. A High Contracting Party may exceptionally deprive individuals of life – the right to which is otherwise non-derogable – by "lawful acts of war" if it proceeds in line with the general requirements of consistency "with its other obligations under international law" and notification to the Secretary General.[12]

16. Had the jurisdiction of the respondent State been established, contrary to the Court's conclusion, it might well have been said that Article 2 was violated by each death under the "plain meaning"[13] of the text of the Convention. The Secretary General was not informed of any derogation (see *Georgia v. Russia (II)* (dec.), no. 38263/08, § 73, 13 December 2011). And it is tolerably clear that the grounds in Article 2 are not apposite to the events before the Court.[14]

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12 In addition, the second sentence of Article 2 § 1 is now to be read in conjunction with Protocols Nos. 6 and 13 to the Convention (see *A.L. (X.W.) v. Russia*, no. 44095/14, §§ 63-66, 29 October 2015).

13 On the notion of "plain meaning" and its critique, see Myres S. McDougal and Richard N. Gardner, "The Veto and the Charter: An Interpretation for Survival" (1951), 60 *Yale Law Journal* 258, at pp. 262-66.

14 While it follows from my position on derogation in international armed conflict, expressed at paragraphs 19-21 below, that I need not come to a definite view on this issue, the respondent State's forces were not engaged in a mission of arrest or detention and the hostilities, which did not take place on Russian territory, cannot be described as a "riot" or "insurrection". The respondent Government invoked the applicant State's international responsibility for its allegedly wrongful conduct *vis-à-vis* South Ossetia, but "unlawful violence" of this character can hardly be equated with that which has predominated in the Court's case-law (see, for example, *Finogenov and Others v. Russia*, nos. 18299/03 and 27311/03, §§ 156-61 and 218, ECHR 2011 (extracts)).

B. The practice of the High Contracting Parties

17. According to the law of treaties, however, "a consistent practice on the part of the High Contracting Parties, subsequent to their ratification of the Convention, [can] be taken as establishing their agreement not only as regards interpretation but even to modify the text of the Convention" (see *Hassan v. the United Kingdom* [GC], no. 29750/09, § 101, ECHR 2014).

18. In the field of extraterritorial military operations undertaken in the course of international armed conflict, it has until recently been unquestionably "[t]he practice of the High Contracting Parties ... not to derogate from their obligations under [the Convention]" (ibid.). As Judge Spano, joined by Judges Nicolaou, Bianku and Kalaydjieva, suggested at paragraph 5 of the partly dissenting opinion in *Hassan*, and as the tragic facts of the present case show, the relevance of this practice extends to armed conflicts between the High Contracting Parties themselves. It is true that, after the submission of the application now before the Court, another High Contracting Party gave notice of derogation from the Convention in connection with an alleged international armed conflict. The Court must in any event apply the law as it stood in 2008 rather than as it may be today as a result of subsequent developments (compare *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, ICJ Reports* 2019, p. 130, § 140).

19. In *Hassan* (cited above, § 103), the practice of the High Contracting Parties led the Court to conclude that it could take account of the context and the provisions of international humanitarian law when interpreting and applying Article 5 of the Convention in a situation of international armed conflict even without a formal notification under Article 15. For my own part, I deduce from this practice that in 2008 the High Contracting Parties tacitly agreed that they did not need to give notice under Article 15 § 3 of derogation from the Convention to the extent necessary to carry out military operations outside their own territory as part of an international armed conflict.

20. This tacit agreement among the High Contracting Parties does not justify the Court's dictum that the salience of international humanitarian law in each case turns on what "is specifically pleaded by the respondent State" (ibid., § 107). Indeed, to adjure the High Contracting Parties to plead in a particular manner amounts to demanding that they give *post hoc* notice of derogation, which runs counter to the sense of their agreement.

C. "Lawful acts of war" and "other obligations"

21. There is no indication from their practice to suggest that the High Contracting Parties had agreed by 2008 to depart from the text of Article 15 §§ 1 and 2 stipulating that they should honour their "other obligations under

international law" and that any deprivation of life should result only from "lawful acts of war".

22. I admit to finding these clauses quite ambiguous. The Court has done little to define a "lawful act of war",[15] although I observe that Judge Popescu noted briefly that the lawfulness of an act of war was to be judged in the light of international humanitarian law at paragraph 2 of his concurring opinion in *Şandru and Others v. Romania* (no. 22465/03, 8 December 2009). As for the requirement of consistency with "other obligations under international law", it has rightly been said that "[t]he most interesting fact about the case law [*sic*] on this point is its absence".[16]

23. On account of this obscurity, recourse may be had to the preparatory work of the Convention (see Article 32 of the Vienna Convention). In this connection, it should be recalled that the Committee of Ministers instructed the drafters of the Convention that "attention should be paid to the progress which has been achieved ... by the competent organs of the United Nations" (see *Collected Edition of the* "Travaux Préparatoires" *of the European Convention on Human Rights*, Martinus Nijhoff, vol. V, 1979, p. 176). For this reason, the drafting history of the International Bill of Human Rights as of the date of the Convention's adoption should be accepted as part of the preparatory work.[17]

1. Lawful acts of war

24. Happily, there is a document in the files of the United Nations that apparently clarifies the phrase "lawful acts of war". Document E/CN.4/SR.126, which is a summary record of the 126th meeting of the Commission on Human Rights, held at Lake Success in New York on 14 June 1949, reveals at page 5 that one Ms Bowie, a delegate from the United Kingdom, proposed the words "except in respect of deaths resulting from lawful acts of war" with an apologetic statement:

> "While reference to war might seem inappropriate in a document dealing with human rights, the facts must be faced, and her delegation wished to incorporate that phrase, which had been used in the Hague Convention, in its proposal."

On the strength of this statement and its invocation of what was once known as the "Hague Law", it can be said with some confidence that an "act of war" is "lawful" in terms of Article 15 § 2 if it complies with international

15 See Severin Meier, "Reconciling the Irreconcilable? – The Extraterritorial Application of the ECHR and Its Interaction with IHL" (2019), 9 *Goettingen Journal of International Law* 395, at pp. 405-06.

16 See Bart van der Sloot, "Is All Fair in Love and War? An Analysis of the Case Law on Article 15 ECHR" (2014), 53 *Military Law and the Law of War Review* 319, at p. 334.

17 That more recent material would be of limited utility is underscored by the absence of the term "war" from Article 4 of the International Covenant on Civil and Political Rights, Article 15's counterpart (but see the discussion of armed conflict in the United Nations Human Rights Committee's General Comment No. 29 of 2001).

humanitarian law (compare *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports* 1996, pp. 256-60, §§ 74-87).

25. Therefore, had the Court held otherwise as to the question of jurisdiction during the active phase of hostilities, its duty would have been to assess the conduct of the respondent State in terms of international humanitarian law in order to resolve the applicant Government's complaint under Article 2. It would have been no bar that Article 19 refers only to "the Convention and the Protocols thereto" as opposed to the whole panoply of the High Contracting Parties' international legal obligations, including those arising from international humanitarian law.[18] The Court would have had jurisdiction because the case before it would have concerned a dispute over the application of the Convention; it could not have been deprived of jurisdiction merely because it would have been compelled by the Convention itself to have regard to considerations lying beyond that treaty, such as international humanitarian law (compare *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar)*, ICJ judgment of 14 July 2020, § 49, and *Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates v. Qatar*, ICJ judgment of 14 July 2020, § 49, both citing *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), Judgment, ICJ Reports* 1972, p. 61, § 27).

2. Other obligations

26. Article 15 would have required a like assessment of the respondent State's compliance with its "other obligations under international law". Unfortunately, the preparatory work "provide[s] no guidance as to the interpretation of [these] terms".[19] Another United Nations document, A/2929, the Secretary-General's 1955 annotation of a draft of the human rights covenants, has been studied by the Registry and others.[20] But the Registry's internal working documents should be cited, if at all, with great

18 That the Court's role can be extended further with respect to consenting States is reflected in Article 29 of the Convention on Human Rights and Biomedicine (the "Oviedo Convention").

19 See Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception: with Special Reference to the* Travaux Préparatoires *and Case-Law of the International Monitoring Organs* (Martinus Nijhoff 1998), at p. 630.

20 See Adil Ahmad Haque, "Turkey, Aggression, and the Right to Life Under the ECHR" (*EJIL: Talk!*, 21 October 2019) <https://www.ejiltalk.org/turkey-aggression-and-the-right-to-life-under-the-echr/> (accessed 26 August 2020).

care.[21] In this instance, the documentation on which the Secretary-General relied suggests that the relevant language derives from debates in the early 1950s. Postdating the adoption of the Convention, those exchanges can hardly be germane to its interpretation.

27. It may be that additional information will be brought forward. However, as presently advised, I consider that "other obligations under international law" should be construed broadly, encompassing the Charter. As such, the assessment mentioned in the preceding paragraph would have entailed the Court examining the respondent State's conduct in terms of, *inter alia*, Article 2 § 4 of the Charter.

28. Objections have been levelled against the Court addressing *jus ad bellum*.[22] I do not accept them, for essentially the same reason as given in paragraph 25 above. In seeking to resolve the Convention dispute before it, the Court would not have been acting *ultra vires* or illegitimately setting itself up in the place of the International Court of Justice or the International Criminal Court. The United Nations Human Rights Committee has asserted a similar competence as a result of its General Comment No. 36 of 2018 on the right to life.[23]

IV. CONCLUSION

29. It is a commonplace that war is terrible. Humanity has long been aware that it is in the nature of war to be attended by grave violations of human rights. We have likewise come to appreciate that human rights abuses endanger peace.

30. In response to all these lamentably familiar evils, the international community has developed the international law of human rights, of which the Convention is a preeminent exemplar. Equally, it has agreed on the tenets of international humanitarian law and enshrined *jus ad bellum* in the Charter.

31. The Court might have been called upon to apply the latter norms in these proceedings. Although it ultimately was not, that should not dissuade

21 See, for example, Corina Heri, "Loyalty, Subsidiarity, and Article 18 ECHR: How the ECtHR Deals with *Mala Fide* Limitations of Rights" (2020), 1 *European Convention on Human Rights Law Review* 25, at pp. 45-46.

22 See, for example, Daniel Bethlehem, "When is an Act of War Lawful?", in Lawrence Early, Anna Austin, Clare Ovey and Olga Chernishova, *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: In Honour of Michael O'Boyle* (Wolf Legal Publishers 2016), p. 237.

23 See Ryan Goodman, Christof Heyns and Yuval Shany, "Human Rights, Deprivation of Life and National Security: Q&A with Christof Heyns and Yuval Shany on General Comment 36" (*Just Security*, 4 February 2019) <https://www.justsecurity.org/62467/human-life-national-security-qa-christof-heyns-yuval-shany-general-comment-36/> (accessed 26 August 2020).

it from doing so in a future case in which the "threshold criterion" of "jurisdiction" under Article 1 is satisfied (see *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, § 178, 29 January 2019).

PARTLY CONCURRING OPINION OF JUDGE SERGHIDES

Do States' negative obligations, in terms of jurisdiction, go beyond Article 1 of the Convention, therefore being wider than their positive obligations? – An important question not addressed in the present case

1. This inter-State application, lodged under Article 33 of the Convention by Georgia (the applicant State) against the Russian Federation (the respondent State), concerns complaints "that – through indiscriminate and disproportionate attacks against civilians and property on the territory of Georgia by the Russian army and/or the separatist forces placed under their control – the Russian Federation had permitted or caused to exist an administrative practice, resulting in a violation of Articles 2, 3, 5, 8 and 13 of the Convention, Articles 1 and 2 of Protocol No. 1, and Article 2 of Protocol No. 4" (see paragraph 8 of the judgment under "Introduction").

Further, the applicant State alleged "that despite the indication of interim measures the Russian Federation continued to violate their obligations under the Convention and, in particular, were in continuous breach of Articles 2 and 3 of the Convention" (ibid.).

2. I voted with the majority as regards all points (1-16) of the operative part of the judgment, but I concurred with the majority as regards point 1:

(a) because I was limited to examining the complaint as submitted by the applicant State, namely whether the events which occurred during the active phase of the hostilities (8 to 12 August 2008), or otherwise whether the victims of the alleged violations due to military operations carried out by the Russian Federation (the respondent State) during that phase of the hostilities, fell within the jurisdiction of the Russian Federation *for the purposes of Article 1 of the Convention* (see paragraphs 48-49, 78-79, 106 et seq. and 125-44 of the judgment, and point 1 of the operative part; and paragraphs 2A.a ("Summary") and 137-68 ("V. Submissions as to Article 1 Jurisdiction") of the inter-State application); and

(b) because, in my view, the answer to this complaint is in the negative.

3. However, the purpose of this concurring opinion, which relates only to point 1 of the operative part of the judgment, is mainly twofold:

(a) to clarify that, in my view, the complaint at issue did not fall within the jurisdiction of the respondent State for the purposes of Article 1 of the Convention as interpreted in the existing case-law of the Court, merely because the wording of this provision restricts its application primarily to territorial jurisdiction (with limited exceptions), and not for the other reasons stated in the judgment; and

(b) to clarify that, in my view, the applicant State confined the above complaint to the purposes of Article 1 only, and therefore missed a good opportunity to raise an extremely important issue, namely that of the accountability and jurisdiction of the respondent State regarding its negative

obligations and the corresponding jurisdiction of the Court, not, however, on the basis of Article 1, but on the basis of other provisions of the Convention, such as its substantive provisions (especially Articles 2 and 3), Articles 32, 19, 13, 33, or on the basis of the inherent power of the Court. It is one thing to have to examine the complaint in terms of whether the alleged events which occurred during the active phase of the hostilities (8 to 12 August 2008) fell within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention, as the issue was raised before the Court, and another thing to have to examine the complaint more broadly on the basis of all possible relevant Convention provisions and the inherent power of the Court.

4. If one were to suppose that the member States' negative obligations, in terms of accountability and jurisdiction, went beyond Article 1 of the Convention, in this sense they would be wider than their positive obligations as they would not be limited to the territoriality criterion of this provision. If that were so, consequently it would also make the jurisdiction of the Court in terms of ensuring the observance of the States' negative obligations wider than in relation to their positive obligations.

5. Despite the fact that the issue mentioned in the previous paragraph also concerns the jurisdiction of the Court,[1] a question which it could have raised *ex proprio motu*, that is, of its own motion,[2] since it was not raised by the applicant State on any legal basis other than under Article 1, and therefore was not included in the list of questions put to the parties when the Court gave notice of the application, the Court lacked the opportunity to listen to the positions and arguments of both parties on such an extremely serious matter. Consequently, I was unable to rule on the issue, but I feel at least compelled to address it.

6. In addressing the importance of the issue which has not been raised – an issue which, to the best of my knowledge, has never been decided by the Court – I will use the Socratic or Platonic dialectic method, without, however, providing answers to map out the cognitive process.

7. It would be useful in this endeavour to have in mind, apart from the alleged facts of the present case, a hypothetical example, which, though

1 That the Court's jurisdiction corresponds to the scope of the States' obligations under the Convention may be supported by Article 19 of the Convention, and as William A. Schabas argues (*The European Convention on Human Rights – A commentary*, New York, 2015, at p. 93), "the scope of the obligations under the Convention is identical to the jurisdiction of the Court".

2 See Article 32 of the Convention; *inter alia*, *Blečić v. Croatia* [GC], no. 59532/00, § 67, ECHR 2006-III; *Slivenko and Others v. Latvia* (dec.) [GC], no. 48321/99, §§ 56 et seq., ECHR 2002-II; *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 27, ECHR 2009; and *Mutu and Pechstein v. Switzerland*, nos. 40575/10 and 67474/10, § 63, 2 October 2018. See also, concerning the "notion of complaint" and its determination, *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 110-27, 20 March 2018.

exaggerated, will provide a good basis for a serious and pedagogical reflection on the issue, in a more general context, without, of course, in any way (i) undermining the seriousness of the alleged facts and the issues which should have been raised in the present case, or (ii) implying that it is necessary for more than one member State to be an alleged victim of human rights violations for Article 33 of the Convention to be invoked. Suppose that State X, a member of the Council of Europe, *all of a sudden* decides, for its own reasons, to launch ballistic missiles, targeting each and every one of the other forty-six member States of the Council of Europe. As a result, in each of these forty-six member States, thousands of people die and even more are injured and towns and villages are destroyed. The forty-six member States in question then lodge a joint inter-State application under Article 33 of the Convention against member State X and the case comes before the Court. State X invokes the case of *Banković and Others v. Belgium and Others* ((dec.) [GC], no. 52207/99, § 75, ECHR 2001-XII), and argues that the Court lacks jurisdiction because that State never had any control over the other forty-six States and the missiles were launched from its territory and not from the territory of any of the other States. Could State X argue that it did not breach its negative obligations under the Convention and would the Court in such a case say that it did not have jurisdiction to ensure the observance of the negative obligations of State X?

8. As a general comment, if one were to say that the respondent State and the Court in that hypothetical example and in the present case have no jurisdiction, then at the same time one could wonder whether the scope of the Convention, its very foundation, its *raison d'être* as well the *raison d'être* of the Court, the Court's legitimacy and its role as a guardian of human rights protection and guarantor of peace and stability in Europe, would be negated!

9. So, the question may arise as to whether the Court in the hypothetical example and the present case would become an enclave confined by the wording of Article 1 of the Convention and its decision in the *Banković and Others* case, or, instead, would pursue a different approach wider than that taken in *Banković*? From the *Banković and Others* decision (cited above, § 75), it is clear that the wording "within their jurisdiction" in Article 1 is confined to territoriality:

> "Indeed, the applicants' approach does not explain the application of the words 'within their jurisdiction' in Article 1 and it even goes so far as to render those words superfluous and devoid of any purpose."

Having said the above, was the Court in fact misguided in *Banković* and in the present case in seeking to establish jurisdiction based on Article 1 without looking at other Convention provisions and its own inherent

jurisdiction[3]? In this connection, it is observed in the judgment that if the Court is to be entrusted with jurisdiction for alleged violations occurring outside the territory of the respondent State, "it must be for the Contracting Parties to provide the necessary legal basis for such task" (see paragraph 142), thus probably, in my humble view, leaving the question open to be decided in a future case on another legal basis.

10. If Article 1 of the Convention did not exist, would its omission prevent member States' positive and negative obligations from being observed? To phrase this question in a more general way, would this omission prevent the Convention from being applied? Was the enactment of Article 1 intended to make an *ex abundanti cautela* provision? Is Article 1 intended to serve to make positive obligations clearer but not to make negative obligations less clear by restricting them?

11. Since Article 1 does not distinguish between positive and negative obligations, should it not be understood to cover both? Is Article 1, as a general provision, not intended to deal mainly with the positive obligations of member States to secure human rights? Would it not be logical to argue that the intention of the drafters of Article 1 was not to overburden member States with positive obligations outside their own territory (subject to certain exceptions)? If so, would the territorial limitation in Article 1 not be justified by the member States' lack of control outside their own territory? And if that was so, would negative obligations also be restricted to the territorial limitation in Article 1? Also, if inferring positive obligations outside a State's own territory would be taking the interpretation of the Convention too far, would inferring negative obligations outside the State's territory be taking it not far enough? Does the nature of negative obligations make them wider than positive obligations to the extent that it does not make them dependent on a territorial restriction? Is, for example, the nature of the negative obligation not to kill the same as the nature of the positive obligation to secure life, for example to ensure protection from a dam

3 On inherent or implied powers of international courts and tribunals, see Chester Brown, "The Inherent Powers of International Courts and Tribunals", *The British Yearbook of International Law,* 2005, vol. 76, Oxford, 2006, at pp. 195 et seq.; Paola Gaeta, "Inherent Powers of International Courts and Tribunals", in Lal Chand Vohrah, Fausto Pocar, Yvonne Featherstone, Olivier Fourny, Christine Graham, John Hocking and Nicholas Robson (eds.), *Man's Inhumanity to Man – Essays on International Law in Honour of Antonio Cassese*, The Hague, London, New York, 2013, at pp. 353 et seq.; Krzysztof Skubiszewski, "Implied Powers of International Organizations", in Yoram Dinstein and Mala Tabory (eds.), *International Law at a Time of Perplexity. Essays in Honour of Shabtai Rosenne*, Dordrecht, Boston, London, 1989, at pp. 855 et seq.; Dinah Shelton, "Inherent and Implied Powers of Regional Human Rights Tribunals", in Carla M. Buckley, Alice Donald and Philip Leach (eds.), *Towards Convergence in International Human Rights Law. Approaches of Regional and International Systems*, Leiden, Boston, 2017, at pp. 454 et seq.; Jan Klabbers, *An Introduction to International Institutional Law*, Cambridge, 2002, at pp. 67 et seq. and pp. 75 et seq.; and Nigel D. White, *The law of international organisations*, 2nd ed., Manchester, 2005, at pp. 83 et seq. and 87 et seq.

bursting? If not, should the negative obligations also still be confined to the territorial application of Article 1?

12. Is it the intention of the Convention to bind member States to abide by their negative obligations within their own territory *but to act with impunity outside their boundaries*, with serious consequences, negative for the victim member State and positive for the aggressor member State, allowing the pursuit of strategic and political activities or even expansionist intentions? Is it the intention of the Convention to give member States such an escape valve and render the Convention completely ineffective if a member State were to decide to engage in targeted violations of the human rights of citizens of another member State in the territory of the latter? More precisely, is it the intention of the Convention to encourage a member State to take advantage of its negative obligations under the Convention by violating the human rights of people in another member State without even setting foot on that State, on the pretext that (a) the alleged violations did not take place in its territory, and (b) the respondent State did not have effective control over the applicant State? Does it really matter whether alleged violations of human rights by one member State affecting people in the territory of another member State were committed by air or by sea, without the alleged perpetrators setting foot on the territory of that State? It is true that developments in technology over the last few decades have made it possible to commit the most heinous offences without having to be physically present at the scene. The increased use of drone strikes, resulting in excessive loss of life and damage to property, allows States to carry out mass murder without having any control of the area concerned. Can it not be said then that the outcome is the same, that is, unlawful killing in breach of the Convention, irrespective of how the killing came about? Would it not be overly formalistic and arbitrary to consider that such actions did not amount to a breach of the Convention? Can the purpose and aim of the Convention possibly allow States to bear no responsibility in such cases? Should the Court not always remain vigilant and attentive to the primary aim of the Convention, that is, the effective protection of human rights whenever they are at stake?

13. In the light of the above queries and observations, *are* the negative obligations of a respondent State under the Convention *wider* than its positive obligations, in the sense that the former are not limited to persons within the territory of the respondent State? It is important to emphasise that in *Banković* this point was not raised. Indeed, in that case the applicants focused on the positive obligations arising from Article 1 of the Convention in order to argue that the "effective control" criterion should be adapted to extend those positive obligations to secure the Convention rights. That the decision of the Court in that case was focused on positive obligations only is clear, *inter alia*, from the following passage of *Banković and Others* (cited above, § 75, emphasis added):

> "... the Court is of the view that the wording of Article 1 does not provide any support for the applicant's suggestion that *the positive obligation* in Article 1 to secure 'the rights and freedoms defined in Section I of [the] Convention' can be divided and tailored in accordance with the particular circumstances of the extraterritorial act in question ..."

14. Since the question of jurisdiction as to negative obligations based on Convention provisions other than Article 1 was not specifically raised and examined in *Banković and Others*, can it be said that the Court in that case took a piecemeal rather than a holistic or overall approach? In other words, was *Banković* focused on the wrong issue, namely effective control based on positive obligations, whereas the right issue should have been whether the negative obligations applied irrespective of any territoriality criterion and outside the scope of Article 1?

15. Consequently, should the Court look beyond Article 1 and consider the substantive provisions of the Convention in Section I and the Protocols to the Convention and also other Convention provisions in order to determine the ambit of its jurisdiction over States' non-compliance with their negative obligations? Does the principle of effectiveness as a norm of international law inherent in each Convention provision[4] guaranteeing the effective protection of human rights not also ensure that the negative obligations of member States should be observed irrespective of any territorial limitation? Should this principle as a norm also demarcate, or assist in demarcating, the jurisdiction of the Court?[5] Would human rights protection be effective without being full or complete or global? But would such protection be full or complete or global if jurisdiction over negative obligations and the consequential protection against non-compliance with those obligations were to be excluded by a territoriality restriction?

16. Should Article 1 of the Convention – which is not placed under Section II of the Convention, headed "European Court of Human Rights" – nevertheless exclusively limit the jurisdiction of the Court to the territoriality criterion, despite the fact that Article 32 – which is the only Article of Section II and of the whole Convention expressly dealing with the jurisdiction of the Court – does not make any mention of the territoriality

4 On the capacity of the principle of effectiveness not only as a method of interpretation but also as a norm of international law, see Georgios A. Serghides, "The Principle of Effectiveness in the European Convention on Human Rights, in Particular its Relationship to the Other Convention Principles", in *Hague Yearbook of International Law,* 2017, vol. 30, 1 et seq.; concurring opinion of Judge Serghides, §§ 15 and 22, in *S.M. v. Croatia* [GC], no. 60561/14, 25 June 2020; concurring opinion of Judge Serghides, § 19, in *Obote v. Russia*, no. 58954/09, 19 November 2019; and concurring opinion of Judge Serghides, §§ 15-16, in *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, 15 October 2020.

5 See, for "an appropriate, effective, and fair interpretation of the notion of 'jurisdiction'", in the context of extraterritorial armed attacks with extensive devastating consequences, Daniel Rietiker, *Harmonization of Arms Control – Paving the Way for a World Free of Nuclear Weapons*, London, New York, 2018, at pp. 183-84.

principle or of Article 1, but on the other hand makes reference to Article 33 (inter-State applications), without the latter making any reference, explicit or implicit, to the territoriality criterion? And does that also hold good despite the fact that Article 19 of the Convention, dealing with the establishment of the Court and its role of ensuring the observance of the engagements undertaken by the member States, does not make any reference, explicit or implicit, to Article 1 or to any territorial criterion?

17. Even with or without Article 32 of the Convention, would the Court not have inherent jurisdiction over breaches of member States' negative obligations, not limited to any territoriality criterion provided in Article 1 of the Convention? If the Court had such inherent jurisdiction, would this not be considered as the institutional dimension of the principle of effectiveness as a norm of international law contained in every Convention provision?

18. Each and every one of the Convention provisions dealing with human rights, which the Court interprets and applies under Article 32, starts either with the phrase "everyone" or with the phrase "no one", without any qualification as regards jurisdiction *ratione personae* or *ratione loci* (territoriality). In view of this, why then should the negative obligations be limited to any territoriality criterion?

19. Article 33 of the Convention, dealing with inter-State applications, which is probably the most relevant and important Convention Article in the present case, provides that any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols by another High Contracting Party. This Article does not impose any condition of territoriality, residence, or effective control of one State over the other in an explicit or implicit way. It simply refers to an alleged breach of Convention provisions by one member State against another. Despite this, if one were to insist on reading other requirements or qualifications into Article 33, such as limiting the breaches of negative obligations only to those occurring within the alleged aggressor member State's territory, would that interpretation not infringe Article 33 or render it meaningless? As a result of such an interpretation of Article 33, would the victims, besides the affected member State and its inhabitants, not also include the trust of the people, the member States and the whole world in the Convention, the Court, the Council of Europe and the rule of law? Would the same argument not also apply for individual applications under Article 34, although this issue is not of relevance in the present case? Along the same line of reflection, is it not the *raison d'être* of the Convention to ensure the effective protection of rights through the lodging of an individual or inter-State application under Articles 34 or 33 of the Convention respectively, as the case may be? If that is so, why then should Article 33 be overlooked or set aside, directly or indirectly?

20. From the provisions of Article 15 § 2 of the Convention, which states that no derogation may be made from Article 2 except in respect of

deaths resulting from lawful acts of war, can it not be inferred that the Convention also applies to unlawful acts of war or armed conflicts and that the Court is competent to deal with breaches of the negative obligations of States resulting from such acts, without any limitation as to the territorial criterion? Did the alleged "acts of war" committed in the present case by the respondent State result in deaths and injuries which were "lawful" or "unlawful" for the purposes of Article 15 § 2? Whatever the answer, it is a fact that there was no derogation by the respondent State under Article 15 § 1 of the Convention.

21. It is a well-established principle of the Convention that it should be read as a whole, including its Preamble, and that its provisions should be read in harmony and coherence with each other.[6] On the basis of this principle, is Article 1, which is the first provision of the Convention, not to be considered in isolation? Furthermore, should Article 1 neither limit nor restrict the substantive human rights provisions of Section I of the Convention, or in any way limit or restrict the jurisdiction of the Court under Articles 19 and 32-34 of the Convention?

22. In the light of the above queries and observations, is it not worth reflecting on whether the negative obligations of the member States under the Convention – for example, the obligation not to kill and not to torture anyone – *are wider* than the States' positive obligations, in the sense that the latter are restricted by the territoriality criterion under Article 1? Would it not be contradictory for the Court, on the one hand, to aim to protect human rights and thus not allow any vacuum in such protection, and, on the other hand, to refrain from going a little further and taking into consideration what is obvious and self-evident, namely that the purpose and object of the Convention is not fulfilled, and that its role as a human rights court is therefore not achieved, when it allows gross human rights violations arising from a breach of the States' negative obligations to go unnoticed, or remains passive and closes its eyes completely, citing lack of jurisdiction?

23. Would that not also run counter to the universal nature of human rights, which are not limited by any territoriality criterion? Should the

6 See, for instance, *Johnston and Others v. Ireland*, 18 December 1986, §§ 57-58, Series A no. 112. For more on this principle, see, *inter alia*, John G. Merrills, *The Development of International Law by the European Court of Human Rights*, 2nd ed., Manchester, 1993, at pp. 72 et seq.; Bernadette Rainey, Elizabeth Wicks, and Clare Ovey (eds.), *Jacobs, White, and Ovey: The European Convention on Human Rights*, 7th ed., Oxford, 2017, at pp. 69 et seq.; Daniel Rietiker, "The Principle of 'Effectiveness' in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and its Consistency with Public International Law – No Need for the Concept of Treaty *Sui Generis*", in *Nordic Journal of International Law*, 2010, vol. 79, 245, at pp. 271 et seq.; Céline Braumann and August Reinisch, "*Effet Utile*", in Joseph Klingler, Yuri Parkhomenko and Constantinos Salonidis (eds.), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law*, Alphen aan den Rijn, 2019, at pp. 47 et seq.

universality or universal character of human rights and the consequent effective protection of human rights everywhere and for everyone not be understood without any limitation as to territoriality regarding member States' negative obligations not to infringe human rights? Or should the jurisdiction *ratione loci* of the Court always be necessary even in the case of breaches of negative obligations, even where they have taken place in the territory of a member State other than the member State which is being blamed for the alleged violations? In contrast to a lower domestic court, which is competent only when it has local jurisdiction, should the Court, as a supranational court in Europe, need to have local jurisdiction over breaches of member States' negative obligations? Or should the Court's jurisdiction *ratione loci*, if it is also necessary regarding negative obligations, not be understood as having a wider meaning so as to include any territory of a member State where the alleged violations of human rights take place, or alternatively the aggregate or entire territory of all member States? Or if a member State is accountable or responsible for breaching its negative obligations and the Court also has jurisdiction, would the relevant jurisdictional link be the alleged violation or breach of a negative obligation itself and not any territorial link? In other words, does an alleged breach of a negative obligation establish by itself a jurisdictional link irrespective of a territorial link?

24. Turning now to the hypothetical example (see paragraph 7 above), would the objection of State X lead to manifestly absurd and unreasonable results? If so, would it not also be possible to invoke Article 32 (b) of the Vienna Convention on the Law of Treaties 1969 ("VCLT"), which provides that in a case where the interpretation leads to absurd results, recourse may be had to supplementary means of interpretation, including the preparatory work in respect of the relevant treaty? If one were to look at that preparatory work for the Convention, would it not be clear that the Convention sought to protect future generations from the devastating experience of the Second World War? In this connection, does the Preamble to the Convention – which is an integral part of the Convention reflecting its object and purposes – not also clearly refer to the principle of effective political democracy, the rule of law, the maintenance of justice and peace and human rights? Thus, would any interpretation regarding the jurisdiction of the Court not also take these principles into account and would these principles not also apply irrespective of any territorial restriction as regards negative obligations? In this connection, could it not also be said that Article 33 of the Convention is based on these principles, aimed at maintaining peace, human rights and the rule of law in Europe? Would Article 26 VCLT, which provides that treaties must be performed in good faith (*pacta sunt servanda*), not also apply regarding the provisions of the Convention, the negative obligations of the member States under the Convention and the recognition of the jurisdiction of the Court in such cases?

25. In the hypothetical example (see paragraph 7 above), did State X not grossly violate the provisions of the Convention, and therefore also international law? However, if we were to take Article 1 alone, without looking at the Convention as a whole, would we not come to the absurd and unacceptable conclusion that State X should be exempted from any liability under the Convention on the pretext of the Court's lack of jurisdiction? Should the Court remain inert in response to flagrant violations of human rights by performing a restrictive interpretation as to its jurisdiction, contrary to the scope of its action and to the object and purpose of the Convention? Is it not a well-established principle of the Court's case-law that human rights provisions (except for their limitations) should not be interpreted restrictively,[7] and that a restrictive interpretation of them would violate the principle of effectiveness and international law?

26. To argue that negative obligations are wider than positive obligations in terms of the States' and the Court's jurisdiction, by using Article 1 as a legal basis and confining it to the territoriality criterion (with some limited exceptions), is in my view legally untenable, and therefore such an endeavour would be futile and must be rejected, as has been done in the judgment in the present case, with which I have concurred. Having concluded that the complaint at issue could not be based on Article 1, I would argue that although the Convention is a living instrument, it could not evolve on the basis of that Convention provision as regards the complaint in question, even in the form of a new exception to that provision. The doctrine that the Convention is a living instrument has its limits, and the Convention cannot evolve *contra legem* or on an incorrect legal basis. Article 1 cannot be stretched so as to cover a complaint which its wording cannot allow. On the other hand, if member States' and the Court's jurisdiction over breaches of negative obligations were to be examined and decided not on the basis of Article 1 but on the basis of other Convention provisions and the inherent jurisdiction of the Court, which do not seem to impose any territorial restriction, that would probably be one of the most important and novel issues concerning the functioning of the Convention,

7 See, *inter alia*, *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"*, 23 July 1968, p. 24, § 4, and p. 31, §§ 3 *in fine* and 4, Series A no. 6; *Wemhoff v. Germany*, 27 June 1968, p. 23, § 7, Series A no. 7; *Artico v. Italy,* 13 May 1980, § 33, Series A no. 37; and *İzzettin Doğan and Others v. Turkey*, [GC], no. 62649/10, § 114, 26 April 2016. See more on this principle, *inter alia*, in Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, Oxford, 2008, repr. 2013, at p. 414; Hersch Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties", *British Yearbook of International Law*, 1949, vol. XXVI, 48, at pp. 51-52 and 59; Sir Hersch Lauterpacht, *The Development of International Law by the International Court*, London, 1958, at p. 227; Mustafa Kamil Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", 151, *Recueil des Cours* (1976-III), 1, at p. 72; and Daniel Rietiker, "The Principle of 'Effectiveness'", *op. cit.*, at p. 259.

the application of the principle of effectiveness and the development of the living-instrument doctrine.

27. To conclude: all the above serious reflections, which have deeply occupied my mind and which I have expressed in a Platonic dialectic manner, without, however, answering them, have assisted me in seeing the issue in question in a broader context and in making my conviction even more firm about the correctness of the stand I took regarding point 1 of the operative part of the judgment. To my mind, on the one hand, the issue in question cannot come under Article 1 of the Convention owing to the territoriality restriction; on the other hand, the issue was not raised by the applicant State on any legal basis other than Article 1 and the door is therefore not closed for the issue to be examined in future cases on any such other legal bases where it may arise.

Consequently, in my humble view, the answer by the Court to the complaint at issue is neither strict nor unfair, taking into account (i) the wording of Article 1 of the Convention, (ii) the fact that the complaint was raised only on the basis of Article 1 and not on any other legal basis, that being the strategic legal choice of the applicant State; and (iii) the fact that the complaint was rejected only on the basis on which it was raised and argued, without the Court examining the complaint on any other possible legal basis.

Oliver Wendell Holmes insightfully said that he found that "the great thing in the world is not so much where we stand, as in what direction we are moving".[8] The same applies, I would submit, regarding the jurisdiction of the Court and all other important issues concerning the Convention. The Court in the present case decided that the complaint at issue was inadmissible as not falling within the respondent State's jurisdiction and its own jurisdiction under Article 1. Once we have decided this, the greatest thing is then in what direction the Court is moving as regards its jurisdiction in ensuring the observance of States' negative obligations. In that direction, I hope that the reflections set out in this opinion may offer some assistance.

8 See Oliver Wendell Holmes, *The Autocrat of the Breakfast-Table: Every Man his own Boswell*, Boston, 1891, at p. 110.

PARTLY DISSENTING OPINION OF JUDGE LEMMENS

1. I voted with the majority on all points, except for operative point 1. In my opinion, the alleged victims of the alleged violations of human rights during the active phase of the hostilities fell within the jurisdiction of the Russian Federation.

2. I had the advantage of reading the separate opinion of Judge Chanturia. I can agree with some of the arguments set out therein, and I do not find it necessary to develop further arguments.

In particular, I agree with Judge Chanturia that it is unfortunate that the precedent of *Banković and Others v. Belgium and Others* ((dec.) [GC], no. 52207/99, ECHR 2001-XII) is "resuscitated" in this case (see separate opinion of Judge Chanturia, § 14). In my opinion, there have been a number of more recent cases that clearly went into another direction than the *Banković* doctrine as revisited in the present case. These other cases have been based on 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.

I also agree with Judge Chanturia that 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. I do not see the relevance of the distinction between "isolated and specific acts involving an element of proximity" (paragraph 132 of the judgment) and "bombing and artillery shelling ... seeking to put the [other] army *hors de combat* and to establish control over areas forming part of the [other country]" (see paragraph 133 of the judgment). From the point of view of the victims and their rights, there is no difference between the two situations. In both situations, State agents use physical force aimed at injuring or killing human beings, and the force used is normally even much more serious in the case of large-scale activities than with isolated and specific acts.

Finally, like Judge Chanturia, I find the statements in paragraphs 141-142 of the judgment troubling. Are the majority suggesting that there is no legal basis in the Convention for assessing acts of war and active hostilities in the context of an international armed conflict? Or are they holding that, given the practical difficulties to be encountered with respect to evidence-gathering, the Court should refrain from giving effect to the Convention provisions in such a context? Whatever the right interpretation, I cannot agree with either of the statements.

3. In sum, I conclude that the alleged victims of the military operations carried out by the Russian armed forces during the active phase of the hostilities fell within the jurisdiction of the Russian Federation.

I regret that the majority have taken a step back and restricted the scope of the Convention in situations where human rights are at great risk.

4. Had the Grand Chamber come to the conclusion that the alleged victims fell within the jurisdiction of Russia, it would have had to examine to what extent the guarantees of Article 2 of the Convention applied during an armed conflict. It would thus have had to examine the relationship between the Convention and international humanitarian law.

Given the majority's decision on jurisdiction, the above issue has become devoid of any practical relevance for the present case. I therefore consider that there is no need to deal with it any further in the context of this separate opinion.

PARTLY DISSENTING OPINION OF JUDGE GROZEV

This is undoubtedly a very important judgment of the Court, which puts right many human rights wrongs. While I am in large part in agreement with it, I still found myself unable to follow the majority on one issue, namely the existence of jurisdiction of the respondent State during the active phase of hostilities (see paragraphs 125-44 of the judgment), as in my view, the respondent State did have jurisdiction during the active phase of hostilities.

Jurisdiction during an international armed conflict is a novel issue for the Court, and a question of significant importance for the future application of the Convention. It is the first time that the Court has been required to examine military operations (armed attacks, bombing, shelling) in the context of an international armed conflict. In addition, this is an armed conflict between two High Contracting Parties to the Convention. The relevant facts for the active phase of hostilities between the Russian army and the Georgian army involve bombing and artillery shelling by the Russian armed forces on Georgian territory, with the aim of taking control over areas of that territory.

The majority formulated the question of jurisdiction as one of "military operations carried out during an international armed conflict" (see paragraph 125 of the judgment). Thus, the question analysed in the judgment is whether a Contracting Party that engages in an armed conflict outside its own territory exercises jurisdiction within the meaning of Article 1 of the Convention over individuals who are allegedly victims of the use of armed force. Formulated thus, the question leaves out a key element of the case before the Court. This is not simply a case of extraterritorial application of the Convention in an international armed conflict. It is a case of an international armed conflict between two High Contracting Parties to the Convention. For me, the legal question the Court must answer in this case should reflect this aspect of the case. Thus, the question the Court has to answer in the present case is whether the Convention applies in an international armed conflict between two High Contracting Parties, taking place on the territory of one of them.

It is the type of question that courts have particular difficulties answering. The reason for this is that the text of the Convention contains very little in terms of instructions and the *travaux préparatoires* do not reveal any particular discussion of the issue and thus give us little guidance. Besides the limited textual references to "war", the only compass we are left with are the general principles, the purpose, and the objective of the Convention. While these are certainly important elements in giving an overall direction for the interpretation of the Convention, one can easily see why views on how exactly they should apply to the specific issue can and do vary.

The starting-point of my analysis is that the text of the Convention is very clear in indicating that it applies in time of war. Thus, Article 15 § 1 of the Convention affords the possibility for any High Contracting Party to submit a derogation "in time of war", and Article 15 § 2 provides that in exceptional cases, a High Contracting Party may make a derogation under Article 2 of the Convention "in respect of deaths resulting from lawful acts of war". The drafters of the Convention therefore intended, beyond any doubt, to ensure the protection of the most fundamental rights, including the right to life enshrined in Article 2, from "acts of war".

Admittedly, this inclusion by the Convention of "acts of war" within its field of application could be read as limited. One could interpret it as applying only within a traditional, territorial conception of jurisdiction, fully in line with the basic approach developed by the Court in that area. The Court has always insisted, drawing on general principles of public international law, that the jurisdiction envisaged as a precondition for the application of the Convention in Article 1 is to be read as primarily territorial (see *Catan and Others v. Moldova and Russia* [GC], nos. 43370/04 and 2 others, § 104, ECHR 2012). Such an interpretation would create no particular difficulty with the text of the Convention. It would read the Convention as an international treaty under which a Contracting State undertakes to guarantee the right to life under Article 2 of the Convention to everyone on its territory, including in times of war. Under such a reading, no such obligation exists when a Contracting State uses its armed forces outside its own territory.

As long as this territory is outside Convention territory, I would agree with such a reading. A broad definition of extraterritorial jurisdiction, covering any armed conflict around the world, would easily deprive the concept of jurisdiction of any meaningful independent existence, as noted by the majority (see paragraph 134 of the judgment). Whether this is based on a "direct impact on the persons concerned" approach, or on some other legally construed jurisdictional link, it would effectively render the use of the words "within their jurisdiction" "superfluous and devoid of any purpose" (see *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, § 75, ECHR 2001-XII). There is also nothing in the drafting of the Convention, and in my view little in the subsequent behaviour of the High Contracting Parties, to support such a broad definition of extraterritorial jurisdiction.

That being said, the difficulty with a narrow reading of the concept of jurisdiction, limiting it to the territory of the respective Contracting State, is that the case before us is not a case of a Contracting State engaged in an armed conflict on the territory of a third party. It is a case of an armed conflict between two High Contracting Parties to the Convention, on the territory of one of them. When looked at from this perspective – a conflict between two High Contracting Parties on the territory of one of them – the

narrow interpretation of jurisdiction faces significant challenges. Such an interpretation will have to accept either that the application of Article 2 of the Convention will be lopsided, applying to one of the protagonists in the armed conflict but not to the other, or that Article 2 does not apply to either of them. Both options create significant contradictions with the explicit text of the Convention, and/or with the basic underlying principles, laid down both in the Convention itself and its subsequent interpretation by the Court.

The applicant Government have relied on one of the exceptions to the territorial principle for defining jurisdiction as developed in the case-law of the Court, namely the "effective control" doctrine (see *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 138, ECHR 2011). They argued that prior to the armed conflict, the respondent Government had controlled some of the territory on which the armed conflict took place. This argument is difficult to accept. Any attempt to apply the "effective control prior to the conflict" criterion in a situation of international armed conflict faces a serious conceptual hurdle. Military operations carried out by a State's armed forces in the context of an international armed conflict are in the standard scenario an attack on an area which that State does not control, with the purpose of taking control of it – an argument rightly put forward by the respondent Government. This was also the situation in the present case. Even if one tries to develop a more nuanced "effective control" doctrine, this would still not provide a working legal tool. Efforts to take into account the nature and dynamics of a military conflict, with changing lines of engagement and control over territory, in order to apply a more narrow definition of the "effective control" criterion, would not change this basic conceptual hurdle. Military force of the type at issue in the present case, namely bombing and shelling, is used on territory which by definition is not controlled by the State using such force.

With the "effective control" doctrine not providing a workable criterion in the context of armed conflict, the Court faces the dilemma outlined above. A strict territorial approach would mean that only one of the Contracting States – the one on whose territory the armed conflict takes place – would be bound by its Convention obligations. Such an unequal distribution of responsibilities is difficult to accept. Whereas both Contracting States have undertaken to respect and safeguard the rights enshrined in the Convention, only one of them would be bound by that undertaking. Such an end result would be contrary to the basic principles of the Convention as an international treaty, with Contracting States undertaking mutual obligations.

The alternative, a strict application of the "effective control" criterion, would exclude the exercise of jurisdiction by both parties to the armed conflict, as generally neither of them really controls the theatre of armed hostilities, and in particular, the territory which is bombed and shelled. As a result, even the Contracting State on whose territory the armed conflict

takes place would not have jurisdiction. Such a result would run counter to the very text of the Convention, namely Article 15 §§ 1 and 2 (see above), and would effectively create a legal vacuum in the system of human rights protection, in clear contravention of a basic principle established by the Court under the Convention.

The legal principles relied on above are well developed in the case-law of the Court. When interpreting the concept of jurisdiction under the Convention, the Court has insisted on two key elements. First, it has underlined that the Convention is a regional international treaty ensuring the protection and collective enforcement of the rights enshrined in the Convention in an essentially regional context, and notably in the legal space of the Contracting States. Second, taking into account the purpose and objective of the Convention as a human rights treaty, it has insisted on guarantees for the effective protection of human rights. It has held that no black holes can exist in the system of human rights protection in the legal space under the Convention. To allow this would be entirely at variance with the fundamental principles of the Convention.

As to the first point, the Court has expressed on different occasions its understanding of the Convention as a multilateral treaty, whereby Contracting States undertake mutual obligations towards one another to guarantee basic rights. It has held that "[u]nlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement'" (see *Ireland v. the United Kingdom*, 18 January 1978, § 239, Series A no. 25). The Court has also held that it "must have regard to the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings and its mission, as set out in Article 19 of the Convention, 'to ensure the observance of the engagements undertaken by the High Contracting Parties'", and furthermore, that the Convention does not allow a "vacuum in the system of human rights protection in the territory in question by removing from individuals there the benefit of the Convention's fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court" (see *Cyprus v Turkey* [GC], no. 25781/94, § 78, ECHR 2001-IV).

For these reasons, the interpretation of the Convention most in line with its text providing protection from "acts of war", and the general principles established under it, excluding any "vacuum" in human rights protection, would be that the alleged victims of the military operations of the respondent Government during the active phase of the hostilities fall under its jurisdiction. While a State's jurisdictional competence for the purposes of Article 1 of the Convention is primarily territorial, exceptional

circumstances do exist, on the basis of the mutual, bilateral undertakings of the Contracting Parties to guarantee effectively the rights set forth in the Convention, where a Contracting State engages in acts of war on its own territory or on the territory of another High Contracting Party to the Convention.

JOINT PARTLY DISSENTING OPINION OF JUDGES YUDKIVSKA, PINTO DE ALBUQUERQUE AND CHANTURIA

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1. Introduction

1. With our esteemed colleagues in the minority, we consider that the victims of the military operations carried out by the Russian Federation during the active phase of the hostilities (8 to 12 August 2008) fell within the jurisdiction of the Russian Federation for the purposes of Article 1 of the European Convention on Human Rights ("the Convention"), and therefore we voted for the dismissal of the preliminary objection raised by the respondent Government in that regard. We would like to clarify that, had there been a majority in favour of overcoming the jurisdictional threshold in regard to the events that occurred during the active phase of hostilities, we would have voted for the full applicability of Article 2 of the Convention to those events. This opinion will thus explain our views on 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. We find this clarification indispensable in view of the convoluted case-law on this extremely sensitive issue.

2. Interplay between the Convention and international humanitarian law

a. Precautionary protection of civilians in south-east Turkey

2. The Court has frequently assessed the State's substantive obligations under Article 2 of the Convention in situations of non-international armed conflicts, like those in south-east Turkey involving armed conflict between

the security forces and members of the PKK. In the leading case of *Ergi v. Turkey*[1], the Court examined whether the security forces' operation had been planned and conducted in such a way as "to avoid or minimise, to the greatest extent possible, any risk to the lives of the villagers, including from the fire-power of the PKK members caught in the ambush"[2], since according to the precautionary principle, the State has an obligation to protect civilians from the risks of fire from State agents and enemy forces[3], and concluded that "it can reasonably be inferred that insufficient precautions had been taken to protect the lives of the civilian population"[4]. While restating the principle set forth in that case, the Court reached the opposite conclusion in *Ahmet Özkan and Others v. Turkey*[5], in which it ruled that the opening of intensive fire by the Turkish army at a village in south-east Turkey had been absolutely necessary for protecting life, since the security forces had been fired at by people from the village and had made an effort to minimise incidental loss of civilian population. The language of the Court was the following:

> "... the security forces' tactical reaction to the initial shots fired at them from the village on 20 February 1993 cannot be regarded as entailing a disproportionate degree of force. In so finding, the Court has also taken into consideration the fact that, apart from Abide Ekin, no civilians were injured as a result of the security forces' intensive firing." [6]

3. The salient point of both judgments is that the Court made a distinction between the lives of combatants and of the civilian population under the influence of international humanitarian law[7], legitimising the use of lethal force against the former and seeking to minimise incidental loss of the latter. Hence, this implicit application of international humanitarian law allowed the Court to depart clearly from the basic tenet of human rights law

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1 *Ergi v. Turkey*, 28 July 1998, § 79, *Reports of Judgments and Decisions* 1998-IV,.
2 Ibid., § 79. This criterion mirrors literally Article 57 § 2 (a) (ii) of Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 ("Protocol I").
3 In international armed conflicts, the duty of each party to the conflict to take all feasible precautions to protect the civilian population and civilian objects under its control against the effects of attacks is set forth in Article 58 (c) of Protocol I. Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 ("Protocol II"), does not explicitly require precautions against the effects of attacks, but in Article 13 § 1 it requires that "the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations". The requirement to take precautions against the effects of attacks has, moreover, been included in more recent treaty law applicable in non-international armed conflicts, namely the Second Protocol to the Hague Convention for the Protection of Cultural Property.
4 *Ergi*, cited above, § 81.
5 *Ahmet Özkan and Others v. Turkey*, no. 21689/93, § 297, 6 April 2004.
6 Ibid., § 306.
7 See Articles 50, 51, 57 § 1 and 58 of Protocol I and Article 13 of Protocol II.

of strict necessity for the use of lethal force against any individual, regardless of that individual's civilian or combatant status, as enshrined in Article 2 of the Convention.

b. Prohibition of massive use of indiscriminate weapons in Grozny

4. The impact of international humanitarian law on the interpretation of the Convention was tested again in relation to the Chechen armed conflict. Initially, in *Isayeva v. Russia*[8], the Court considered that the situation in Grozny was "outside wartime" and should be judged "against a normal legal background", since "[n]o martial law and no state of emergency has been declared in Chechnya, and no derogation has been made under Article 15 of the Convention"[9]. Yet it found that "the massive use of indiscriminate weapons" in a populated area was incompatible with the standard of care prerequisite to the use of lethal force by State agents and had thus breached Article 2[10]. In other words, the Court grounded its finding of a violation on the wrongful classification of aerial bombs, like the one that killed the applicant's family, as "indiscriminate weapons"[11], which is a clearly defined concept of international humanitarian law[12].

5. In *Isayeva, Yusupova and Bazayeva v. Russia*[13], the Court came closer to the standards of international humanitarian law, when it accepted that

> "the situation that existed in Chechnya at the relevant time called for exceptional measures on behalf of the State in order to regain control over the Republic and to suppress the illegal armed insurgency. These measures could presumably include employment of military aviation equipped with heavy combat weapons. The Court is also prepared to accept that if the planes were attacked by illegal armed groups, that could have justified use of lethal force, thus falling within paragraph 2 of Article 2."[14]

Although the Government failed to submit any concrete evidence that could be relevant to legitimise the armed forces' conduct, the Court assumed that the Russian armed forces had "reasonably considered" that there was an attack or a risk of an attack from illegal Chechen insurgents who held the city of Grozny. On that basis, the Court admitted that the

8 *Isayeva v. Russia*, no. 57950/00, 24 February 2005. Paragraph 176 repeats the doctrine of *Ergi*, cited above, § 79.
9 *Isayeva*, cited above, § 191. The exact same argument was used in *Kerimova and Others v. Russia*, nos. 17170/04 and 5 others, § 253, 3 May 2011.
10 The findings of *Isayeva* are reiterated explicitly in *Abuyeva and Others v. Russia*, no. 27065/05, §§ 199-203, 2 December 2010.
11 See also, for a similar legal error, *Abuyeva and Others*, cited above, § 199; *Kerimova and Others*, cited above, § 253; and *Finogenov and Others v. Russia*, nos. 18299/03 and 27311/03, §§ 584 and 588, 20 December 2011.
12 Article 51 § 4 (b) and (c) of Protocol I.
13 *Isayeva, Yusupova and Bazayeva v. Russia*, nos. 57947/00 and 2 others, 24 February 2005.
14 Ibid., § 178.

Russian air strike had been a legitimate response, although there had been no immediate threat to the Russian forces[15]. Nevertheless, it did not accept that the operation near the village of Shaami-Yurt had been planned and executed with the "requisite care for the lives of the civilian population"[16].

6. The Court's ill-fated case-law has problematic practical consequences. In addition to undermining the absolute necessity test in Article 2 cases, it condones military attacks in the absence of an immediate threat. The lowering of Article 2 protection in internal armed conflicts is compounded by the fact that the Court fails to define civilians, combatants or indiscriminate weapons, seemingly assuming that those concepts should be understood as in international humanitarian law. Furthermore, the Court does not put forward a comprehensive analysis of the nature of each individual armed conflict to justify the applicability of a specific set of rules under international humanitarian law. By so doing, the Court does not differentiate properly between armed conflicts and other military operations, such as anti-terrorist operations, and thus incentivises disobedience and political manoeuvring by the Contracting Parties, who are tempted to invoke such precedents of lower protection outside the context of an armed conflict.

c. The *Varnava and Others* principle

7. It is true that the Court has set out the general principle concerning the relationship between the Convention safeguards and the rules of international humanitarian law when dealing with the armed conflict in Cyprus. Strangely enough, in *Varnava and Others v. Turkey*[17], which concerned the respondent State's procedural obligations under Article 2 of the Convention, the Court laid down the following substantive principle:

> "Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflict (see *Loizidou*, cited above, § 43). The Court therefore concurs with the reasoning of the Chamber in holding that in a zone of international conflict Contracting States are under obligation to protect the lives of those not, or no longer, engaged in hostilities. This would also extend to the provision of medical assistance to the wounded; where combatants have died, or succumbed to wounds, the need for accountability would necessitate proper disposal of remains and require the authorities to collect and provide information about the identity and fate of those concerned, or permit bodies such as the ICRC to do so."[18]

15 See also *Isayeva, Yusupova and Bazayeva*, cited above, § 177, and *Damayev v. Russia*, no. 36150/04, § 60, 29 May 2012.
16 *Isayeva, Yusupova and Bazayeva*, cited above, § 199.
17 *Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, ECHR 2009.
18 *Varnava and Others*, cited above, § 185. It is important to stress that this statement was reiterated in the admissibility decision delivered in the present case (see *Georgia v. Russia (II)* (dec.), no. 38263/08 § 72, 13 December 2011).

8. Hence, the Court roundly rejected the opinion that international humanitarian law displaces the Convention during armed conflicts. Instead it established an overarching interpretative rule, according to which, where possible ("in so far as possible"), the right to life enshrined in the Convention should be interpreted harmoniously with international humanitarian law, regardless of whether Article 15 has been invoked or not. The exact same principle had already been affirmed by the International Court of Justice when it stated that "whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself", while at the same time rejecting the notion that the provisions of international humanitarian law would completely disapply the International Covenant on Civil and Political Rights.[19] The same position was later echoed by the Human Rights Committee[20] and the Inter-American Commission on Human Rights[21].

3. Subversion of the Convention by international humanitarian law

a. The departure from the absolute necessity test

9. Nevertheless, the Court's occasional departure from the absolute necessity test under Article 2 of the Convention has not been justified by principled reasoning. We cannot but mention in this regard that on one occasion the Court went so far as to state, in a well-known, dramatic Russian hostage-taking case, that the absolute necessity test under Article 2 of the Convention could be set aside "where certain aspects of the situation lie far beyond the Court's expertise and where the authorities had to act under tremendous time pressure and where their control of the situation was minimal."[22] This is, in our view, an inadmissibly vague criterion for abandoning a literal Convention requirement (the absolute necessity test) to justify the use of lethal force. That vagueness is further aggravated by the Court's surprising argument that the narcotic gas used against the hostages and the hostage-takers, although "potentially lethal", was not used indiscriminately "as it left the hostages a high chance of survival, which depended on the efficiency of the authorities' rescue effort."[23] In spite of the fact that the narcotic gas used by the Russian security forces was an

19 International Court of Justice, "Legality of the Threat or Use of Threat of Nuclear Weapons", Advisory Opinion, *ICJ Reports* 1996, 8 July 1996, § 25.
20 Human Rights Committee, General Comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, § 11.
21 Inter-American Commission on Human Rights, *Coard et al. v. United States*, report no. 109/99, 29 September 1999, § 39.
22 *Finogenov and Others*, cited above, § 211.
23 Ibid., § 232.

inherently indiscriminate weapon, on account of the uncontrolled effect of the chemical dispersed over all the people confined in the Moscow theatre, hostages and hostage-takers alike, the Court assessed the effects of that chemical on the basis of an assumption of a possible "rescue effort" by the authorities, entirely distorting the evaluation of the nature of an indiscriminate weapon, as if this concept were dependent on the *ex post facto* possibility of rescuing the victims. Even less precise is the language of the Court when it has admitted that it applies "different degrees of scrutiny" to the absolute necessity test[24].

10. Thus, at times the Court has bent its rules on the absolute necessity test without adequate justification. At other times it has strictly enforced these same rules. In some instances concerning the Chechen armed conflict, the Court has applied the normal standard of absolute necessity and has not distinguished between combatants and civilians. For example, in *Esmukhambetov and Others v. Russia*, the Court stated:

> "... the Government failed to demonstrate that the necessary degree of care had been exercised in evaluating that information and in preparing the operation of 12 September 1999 in such a way as to avoid or minimise, to the greatest extent possible, risks of loss of lives, both of persons at whom the measures were directed and of civilians, and to minimise the recourse to lethal force (see *McCann*, cited above, §§ 194 and 201). In particular, in so far as the Government relied on Article 2 § 2 (b) of the Convention, the Court considers the deployment of military aviation equipped with heavy weapons to be, in itself, grossly disproportionate to the purpose of effecting the lawful arrest of a person."[25]

11. That same doctrine was reiterated in *Kerimova and Others v. Russia*, where the Court concluded that it was not convinced that "the necessary degree of care was exercised in preparing the operations of 2 and 19 October 1999 in such a way as to avoid or minimise, to the greatest extent possible, the risk of a loss of life, both for persons at whom the measures were directed and for civilians"[26].

12. Finally, in a number of Chechen cases the Court has refused to find flagrant substantive violations of Article 2, with the justification that the source of harm caused to the applicants or their relatives (whether by the

24 *Tagayeva and Others v. Russia*, nos. 26562/07 and 6 others, § 481, 13 April 2017. In spite of the disturbing language used by the Court in this case, it ultimately applied the absolute necessity test (ibid., § 605) to the large-scale anti-terrorist operation mounted by the Russian army in the Beslan school siege, criticising, among other things, the indiscriminate use of weapons aimed at the school while the terrorists and the hostages were intermingled.

25 *Esmukhambetov and Others v. Russia*, no. 23445/03, § 146, 29 March 2011.

26 *Kerimova and Others*, cited above, § 248. See also *Khamzayev and Others v. Russia*, no. 1503/02, § 180, 3 May 2011.

State or by insurgents) had not been identified, thus neglecting the principle of precaution set out in the Turkish case-law in factually similar cases[27].

13. This unsatisfactory state of affairs is evidently promoted by the principle that the Convention obligations may be "divided and tailored" to the specific exigencies of the situation when State agents act extraterritorially[28]. We regret that in the present case, instead of dispelling the inherent uncertainty over the scope and content of the State's obligations during military operations, the Court has compromised the "universal and effective recognition and observance"[29] of the rights enshrined in the Convention and aggravated the state of legal uncertainty with inconsistent case-law on the interaction between the Convention and international humanitarian law.

b. The need for a derogation regime

14. The only possible way to bring clarity to the Court's case-law is to read the Convention as a whole, as provided for in Article 31 § 2 of the Vienna Convention on the Law of Treaties, and take the term "war" in Article 15 of the Convention to refer to "armed conflict", be it an international conflict or a non-international armed conflict between a State and a non-State actor that has reached the minimum intensity needed to trigger the applicability of international humanitarian law. Article 15 is the sole Article in the Convention that refers to war. This was not a whimsical choice of the founding fathers. The aim of Article 15 is precisely to allow the States to derogate from Convention obligations particularly in a situation of "war", and thus of armed conflict, or in any "other public emergency threatening the life of the nation", "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law". Article 15 § 2 clarifies which international law is then applicable in the context of Article 2, since it prohibits derogation from Article 2 "except in respect of deaths resulting from lawful acts of war". There is therefore an explicit reference to international humanitarian law as regards derogation from Article 2. Hence, the Contracting Parties to the Convention expressed their crystal-clear wish that, given the paramount value of the right to life, derogation under Article 15 should be the only mechanism allowing the Court to expand the exceptions to Article 2 in the light of international humanitarian law.

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27 Compare and contrast *Ergi*, cited above, § 79, with *Nakayev v. Russia*, no. 29846/05, § 80, 21 June 2011, and *Udayeva and Yusupova v. Russia*, no. 36542/05, § 78, 21 December 2010.

28 *Al-Skeini v. United Kingdom* [GC], no. 55721/07, ECHR 2011.

29 As envisaged by the Preamble itself to the Convention.

15. Consequently, having derogated from their Article 2 obligations, States may use lethal force in armed conflicts in accordance with the rules of international humanitarian law and will only be obliged to investigate a death or life-threatening injury where a violation of international humanitarian law is suspected which limits the scope of the procedural obligation to a more manageable level and simultaneously reinforces the effective enforcement of international humanitarian law[30]. The proportionality requirement of Article 15 of the Convention ("to the extent strictly required by the exigencies of the situation") allows for some accommodation of the needs of military action, while at the same time imposing a less permissive normative framework governing the use of force than in international humanitarian law and, most importantly, ensuring the indispensable Strasbourg oversight over military action during armed conflicts. Accordingly, States should not be given a wide margin of appreciation to decide on the presence of the triggering events (war, or armed conflicts, or any other public emergency threatening the life of the nation) or on the nature, scope and continued necessity of the derogation regime, otherwise the Court would abdicate its power to uphold the core of the Convention in troubled times, precisely when it is most needed[31]. The wider the margin of appreciation, the higher the risk of inconsistency in the Court's scrutiny and the lower the level of guidance provided to the Contracting Parties. The Court should not allow the Contracting Parties to yield to the temptation to broaden their powers by adopting emergency measures when the situation could still be managed under ordinary legislation. Any modifications of the Convention obligations accepted by the Court will be limited to the specific context of the derogation regime and cannot be extrapolated to the Court's general case-law.

16. It could be argued that, by adopting a holistic interpretation of the Convention, some provisions of international humanitarian law (such as Articles 48, 51, 52 and 57 of Protocol I) should themselves be interpreted as exceptions to the prohibition on the intentional infliction of death laid down in Article 2 § 1, going beyond the exceptions provided for in Article 2 § 2. This simplistic line of argument, which aims to dispense with the derogation regime during armed conflicts, is not acceptable since it cuts some corners.

17. Firstly, there is an irremediable conflict between Article 2 of the Convention and the relevant provisions of international humanitarian law

30 The Court has acknowledged that the procedural obligation under Article 2 applies in the context of armed conflict (see the admissibility decision in the present case, cited above, § 72, and the case-law cited therein). Since the derogation from Article 2 only encompasses lawful acts of war, procedural obligations regarding military operations outside an armed conflict, such as anti-terrorist operations, must be assessed under the standard Article 2 rules.

31 See paragraph 4 of the separate opinion of Judge Martens in *Brannigan and McBride v. United Kingdom*, 26 May 1993, Series A no. 258-B. His illuminating interpretation is the only one that sits well with the letter and the spirit of Article 15.

governing military operations. In particular, the wording of Article 2 § 1 – "No one shall be deprived of his life intentionally" – clashes with the relevant provisions of international humanitarian law governing international armed conflict. Those provisions permit members of the enemy State's armed forces to be deliberately targeted on account of their status, whether or not they represent a threat and are taking part in hostilities when they are targeted, on condition that the principles of distinction, precaution and proportionality are complied with. Moreover, the exceptions provided for in Article 2 § 2 are exhaustive and do not cover deaths occurring during an international armed conflict, which by its very nature differs from situations involving a riot or insurrection within national territory. Lastly, the standards of "absolute necessity" of the use of force and "strict proportionality" applied by the Court in its case-law concerning Article 2[32] are entirely different from the specific concepts of military necessity and proportionality in international humanitarian law[33].

18. In sum, if States have difficulties in upholding their Article 2 obligations during armed conflicts, at home or abroad, inside or outside Europe, they have only one way out of these difficulties: to derogate from the Convention and to comply with both the Article 15 proportionality clause ("to the extent strictly required") and "the other obligations under international law", namely with international humanitarian law, which sets the lowest permissible level of rights protection.

c. Revisiting *Hassan v. the United Kingdom*

19. It is true that in *Hassan v. the United Kingdom*, the States' practice of not making such a derogation led the Court to conclude that the absence of a formal derogation under Article 15 of the Convention did not prevent it from taking account of the context and the rules of international humanitarian law for the purposes of interpreting and applying Article 5 in a situation of international armed conflict outside Europe[34]. The Court added a caveat, according to which "the provisions of Article 5 will be interpreted and applied in the light of the relevant provisions of international humanitarian law only where this is specifically pleaded by the respondent State"[35]. We do not agree with this view.

20. The majority in *Hassan* rendered Article 15 futile as regards the right to liberty in times of international armed conflicts outside Europe (and

32 See, among many other authorities, *McCann and Others v. the United Kingdom*, 27 September 1995, §§ 148-49, Series A no. 324; *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 94, ECHR 2005-VII; and *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, §§ 175-76, ECHR 2011 (extracts).

33 Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, 2002, § 109.

34 *Hassan v. the United Kingdom* [GC], no. 29750/09, ECHR 2014.

35 Ibid., § 107.

a fortiori in Europe), putting forward a blatantly *contra legem* reading of the exhaustive list of grounds for detention under Article 5 that contravenes not only the black letter of the provision, but also its spirit[36]. Such a reading of Article 5 was based on a precipitate interpretation of State practice as if it allowed States to lower human rights standards by simply disobeying them [37]. Even worse, the Court's caveat allows the respondent State to choose *ex post facto* the legal standard by which it will be judged, in other words, to engage in the sheer manipulation of the applicable legal criterion. This is an unacceptable argument that puts the effectiveness of the Convention guarantees in the hands of the Contracting Parties while they pretend to remain bound by it. Equally unacceptable is the argument that the majority in *Hassan* saved the Convention and the protective thrust of its Article 5 from being completely overridden by the *lex specialis* approach to international humanitarian law proposed by the Government[38]. This is an *ad terrorem* argument, which concedes to a regrettable result, only because it could have been much worse.

21. In any event, even assuming the correctness of the *Hassan* judgment for the sake of discussion, we consider that the present case must be distinguished from it. In that case the Court found that in the context of an international armed conflict outside Europe it was possible to reconcile the "lawfulness" of a deprivation of liberty imposed by virtue of the powers conferred under international humanitarian law and "the fundamental purpose of Article 5 § 1, which is to protect the individual from arbitrariness"[39]. By contrast, the guarantees laid down in Article 2 of the Convention are, as indicated above, inconsistent with the relevant rules of international humanitarian law. The fact that the *Hassan* majority interpreted the list of grounds for detention under Article 5 of the Convention as including the right to detain someone under international humanitarian law does not allow the Court to read into the exhaustive list of

36 See, for example, *Khlaifia and others v. Italy* [GC], no. 16483/12, § 88, 15 December 2016 ("Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list …"). Compare and contrast with Article 6 § 1 of the International Covenant on Civil and Political Rights, Article 4 § 1 of the American Convention on Human Rights and Article 4, third sentence, of the African Charter on Human and People's Rights, which do not contain a list of exceptions.

37 See the dissenting opinion in *Hassan*, cited above. It is to be noted that on 10 June 2015 Ukraine derogated from Article 5 in the context of its armed conflict with Russia. This happened after the publication of *Hassan*, which shows that changing Convention obligations on the basis of alleged State practice was a very imprudent interpretative manoeuvre, to say the least.

38 The respondent State in *Hassan* put forward the following argument: the Convention should be disapplied or, more euphemistically, "displaced" in times of armed conflict because international humanitarian law is then the *lex specialis* and therefore prevails over the Convention (*Hassan*, cited above, § 71).

39 *Hassan*, cited above, § 105.

grounds for depriving someone of the right to life the right to kill in conformity with international humanitarian law.

22. Furthermore, in view of the Court's caveat in *Hassan*, international humanitarian law could not be applied in the present case, according to the position of the Russian Government. As a matter of fact, the respondent State expressly challenged the jurisdiction of the Court to apply and interpret international humanitarian law[40].

23. Moreover, since the Convention "should so far as possible be interpreted in harmony with other rules of international law of which it forms part", and in particular with international humanitarian law[41], it is precisely the application of Article 15 following a notice of derogation which permits a harmonious interpretation, in particular with regard to complaints raised under Article 2 of the Convention where there is an irreconcilable conflict of norms between the two legal regimes.

24. Finally, Article 53 of the Convention requires a Contracting Party occupying the territory of another Contracting Party to respect the rules of international humanitarian law, but also the Convention and even the domestic law of the occupied country where they offer a higher level of protection of human rights. International humanitarian law cannot be used to undermine the Convention, in clear subversion of the logic and purpose of its Article 53. Only derogation under Article 15, with all its incorporated guarantees, can give precedence to international humanitarian law.

4. Conclusion

25. We note that in the present case, neither Party to the Convention gave notice of a derogation under Article 15 of the Convention in the context of the armed conflict which broke out between them in August 2008[42]. Accordingly, we find that in the absence of a formal derogation under Article 15 by the Russian Federation in the context of the present international armed conflict, its 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 Convention, as they cannot be justified under Article 2 § 2.

26. In the admissibility decision, the Court held that "the question of the interplay of the provisions of the Convention with the rules of international humanitarian law in the context of an armed conflict belongs in principle to the merits stage of the procedure"[43]. That promise was not kept. We regret that the Court failed to engage, at the merits stage of the procedure, with the

40 See paragraphs 49 and 87 of the present judgment.
41 *Hassan*, cited above, § 102.
42 See the admissibility decision in the present case, § 73.
43 See the admissibility decision in the present case, § 71.

most important legal issue at stake in the present case, namely whether the alleged bombardments of the villages of Eredvi, Karbi and Tortiza and the town of Gori, from 8 to 12 August 2008, by the Russian armed forces amounted to a violation of Article 2 of the Convention.

JOINT PARTLY DISSENTING OPINION OF JUDGES YUDKIVSKA, WOJTYCZEK AND CHANTURIA

1. *Silent enim leges inter arma* ("In times of war law falls silent"). This Latin maxim stemming from *Pro Tito Annio Milone ad iudicem oratio*, written by Marcus Tullius Cicero back in the first century BC, was confirmed by the majority in the present judgment. We believe that in modern times we are very far from that historical context, and we thus respectfully disagree with the finding that the events which occurred during the active phase of the hostilities (8 to 12 August 2008) did not fall within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention. We consider that this part of the application is admissible.

I. The notion of jurisdiction in Article 1 of the Convention

2. Human rights protect individuals *vis-à-vis* State power but may also require the State to use its public power to protect right-holders *vis-à-vis* private parties. In any event, they are limitations upon the exercise of public power by States. The different provisions defining the general scope of the Convention (such as Article 1) have to be read in this context, taking into account that its purpose is to set boundaries upon the exercise of public power.

3. The Convention defines its scope in Article 1. This provision reads:

Obligation to respect human rights

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

The Convention's scope of application is defined here by the terms "*juridiction*" in the French version and "jurisdiction" in the English. It is clear from the *travaux préparatoires* that the words "within its jurisdiction" were introduced into the text of the Convention in order to expand rather than to restrict the scope of the Convention, because these words replaced the words "residing within" in the initial draft.

The starting-point for establishing this scope is the concept of jurisdiction in international law (see, for example, *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 312, ECHR 2004-VII). International law recognises different jurisdictional titles for the lawful exercise of State power. Therefore, jurisdiction in this sense defines the spatial and functional scope of internationally lawful State power, especially for the purpose of limiting the risk of overlapping of States' power.

One has to stress here that the scope of lawful State power and the scope of actual State power do not always coincide. On the one hand, a State can be prevented by other States from exercising public power on parts of its own territory. On the other hand, a State may in fact exercise public power

without a valid jurisdictional title, beyond the scope of its jurisdiction as defined by the general rules of international law. This may happen, for instance, if one State unlawfully occupies another State's territory.

In principle, the Convention applies within the area of jurisdiction of each High Contracting Party, defined in accordance with the applicable rules of international law. However, if a State cannot effectively exercise full territorial jurisdiction over part of its territory, the Convention applies only to the extent that the State can effectively exercise public power (see *Loizidou v. Turkey* (preliminary objections), 23 March 1995, Series A no. 310; *Cyprus v. Turkey* [GC], no. 25781/94, §§ 76-80, ECHR 2001-IV; and *Ilaşcu and Others*, cited above, § 312). At the same time, if a State exercises public power beyond its internationally recognised scope of jurisdiction, the actions undertaken by the State beyond this domain nonetheless fall within the scope of the Convention and must comply with the rights guaranteed by that treaty (compare with *Ilaşcu and Others*, cited above, § 314, and *Öcalan v. Turkey* [GC], no. 46221/99, § 91, ECHR 2005-IV). The term "jurisdiction" in the Convention therefore reflects the scope of public power effectively exercised by the State (see on this question the views expressed in the partly dissenting opinion of Judge Wojtyczek appended to the judgment in the case of *Naït-Liman v. Switzerland* [GC], no. 51357/07, 15 March 2018, paragraph 3).

It is important to add that this scope of public power effectively exercised by the State covers not only the domain of the State's acts actually undertaken beyond the lawful scope of its power as delineated by international law but also the domain in which the State refrains from acting despite having a legal title to exercise power and facing no obstacles in this respect from other States. In other words, voluntary abstention from acting may also be a way of exercising public power (see on this question the views expressed in the partly dissenting opinion of Judge Wojtyczek, cited above, paragraph 3).

Effective State power over persons may vary in intensity from sovereignty over a territory to an isolated act of public power affecting a person outside the State's territory in a very limited sphere of life. The extent of the person's sphere of life under effective State power may therefore vary considerably. Therefore, under the Court's well-established case-law, jurisdiction is a gradable notion and may vary in scope. As explained by the Court, "[i]t is clear that, whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored'" (see *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 137, ECHR 2011, quoted in paragraph 81 of the present judgment).

Under these circumstances, Article 1 of the Convention should be read in the following way: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention to the extent these persons are under their jurisdiction". Or in other words: "a High Contracting Party shall secure the rights and freedoms defined in Section I of this Convention to everyone under its State power and the scope the rights and freedoms to be secured should be adequate to the extent of the scope of effective State power".

The clause under consideration limits the scope of State responsibility for human rights violations to violations stemming from actions and omissions within the scope of effective State power. This limitative function is particularly visible in respect of positive obligations but may also operate in respect of negative obligations. A High Contracting Party has no obligation to secure rights and freedoms to persons who do not find themselves under its State power – but only to the extent that these persons remain outside the scope of its effective power.

4. The Court's case-law, when answering the question whether someone is under the jurisdiction of a State, adopts as a starting-point the very general criterion of "jurisdictional link" (see, in particular: *Ben El Mahi and Others v. Denmark* (dec.), no. 5853/06, § ECHR 2006-XV; *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, § 82, ECHR 2001-XII; *Mirzoyan v. Armenia*, no. 57129/10, § 56, 23 May 2019; *Markovic and Others v. Italy* [GC], no. 1398/03, § 55, ECHR 2006-XIV; *Al-Skeini and Others*, cited above, §§ 149-50; and *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, § 180, 29 January 2019). Sometimes the term used is "connecting link" (see *Naït-Liman*, cited above, § 183). The jurisdictional link may have a factual or normative or mixed nature.

In some cases, the Court relies solely on this general criterion in order to make a case-by-case assessment. In other cases, the Court tries to concretise the general criterion by more specific principles. Thus, its case-law has identified certain typical situations with an extraterritorial dimension in which a jurisdictional link exists. Such typical situations may be referred to in particular as "control over a territory" or "control over persons". It is important to note that the notion of "control over persons" is understood in a very extensive way in the Court's case-law. It encompasses, *inter alia*, situations in which a State operates a checkpoint in a foreign territory:

> "The Court is satisfied that the respondent Party exercised its 'jurisdiction' within the limits of its SFIR mission and for the purpose of asserting authority and control over **persons passing through the checkpoint.**" (see *Jaloud v. the Netherlands* [GC], no. 47708/08, § 152, ECHR 2014, emphasis added)

The Court also considered that a victim shot in the United Nations neutral buffer zone by Turkish-Cypriot forces operating in the northern part of Cyprus was "under the authority and/or effective control of the

respondent State through its agents" (see *Solomou and Others v. Turkey*, no. 36832/97, § 51, 24 June 2008). Under this approach, the act of firing shots beyond a territory under a State's control brings the affected persons under that State's control.

There is no doubt that this list of typical situations in which a jurisdictional link arises is not exhaustive. In *M.N. and Others v. Belgium* ((dec.) [GC], no. 3599/18, § 104, 5 May 2020) the Court identified the following further types of situations with an extraterritorial dimension:

> "... the Commission and subsequently the Court concluded that a State was exercising its jurisdiction extraterritorially when, in an area outside its national territory, it **exercised public powers** such as authority and responsibility in respect of the maintenance of security (see *X. and Y. v. Switzerland*, cited above; *Drozd and Janousek v. France and Spain*, 26 June 1992, §§ 91-98, Series A no. 240; *Gentilhomme, Schaff-Benhadji and Zerouki v. France*, nos. 48205/99 and 2 others, § 20, 14 May 2002; *Al-Skeini and Others*, cited above, §§ 143-50; and *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, §§ 75-96, ECHR 2011) ..." (emphasis added)

The Court has also explicitly identified the existence of a jurisdictional link in other situations with an extraterritorial dimension, without trying to define them in a general way (see *Markovic and Others*, cited above, § 54; *Naït-Liman*, cited above, § 183; and *Güzelyurtlu and Others*, cited above, § 188).

There are also cases with an extraterritorial dimension in which the existence of a jurisdictional link is not examined explicitly but is only implicitly assumed. Without trying to establish an exhaustive list of such cases, we can give a few examples here.

For instance, an asylum-seeker turned back at the border within minutes nonetheless comes within the jurisdiction of the State which refuses asylum. The only jurisdictional link stems from brief physical contact with the State border or with State border guards (see, for instance, *M.A. and Others v. Lithuania*, no. 59793/17, 11 December 2018).

In many child abduction cases brought by the parent whose child has been abducted, the only jurisdictional link between the applicant and the respondent State consists in the fact that the abducted child remains on the territory of the respondent State (see, for instance *R.S. v. Poland*, no 63777/09, 21 July 2015). The applicants are neither on a territory controlled by the respondent State nor under the control of its agents. Moreover, in such cases, under the Article 16 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, the respondent State – in principle – does not have jurisdiction to decide on the merits of the family dispute but can rule only on the return of the child.

In cases involving the execution of foreign judgments, the only jurisdictional link between the applicant and the respondent State may consist in the fact that the applicant requests the execution of the judgment in the respondent State, usually because the assets of the defendant are

located there (see, for instance, *Avotiņš v. Latvia* [GC], no. 17502/07, 23 May 2016). The applicant is neither on a territory controlled by the respondent State nor under the control of its agents.

In the case of *Naït-Liman v. Switzerland* (cited above), the Court implicitly assumed that the respondent State had jurisdiction in respect of a tort case in which the sole link with Switzerland was the place of residence of the plaintiff, who had moved to Switzerland after damage had allegedly been caused to him in Tunisia by the Tunisian authorities.

In the case of *L.Z. v. Slovakia* ((dec.), no. 27753/06, 27 September 2011, application declared manifestly ill-founded) the sole jurisdictional link with the respondent State was the Slovak nationality of the applicant, who was residing in Prague. The applicant, who alleged that he was offended by the name of a street in Slovakia, was neither on a territory controlled by the respondent State nor under the control of its agents.

5. Against this backdrop, in our view, a jurisdictional link arises in particular every time a State undertakes pre-planned extraterritorial actions involving the use of instruments of State power directly affecting private parties, such as coercion or force. The process of planning and deciding about general methods and specific actions, as well as carrying out the decisions taken, creates a jurisdictional link and places the persons affected under the public power of the State in question, or – to use other words – under the control of that State.

II. The question of jurisdiction during armed conflicts

6. According to the classical theory of the State, one of the forms of the exercise of State power is the so-called "military power" or "military sovereignty" (in German legal scholarship: *Wehrhoheit*). Military power – in accordance with established legal scholarship – encompasses not only the power to create and organise an army but also to use it, including in combat. The use of constraint in the form of military force is one instrument (among many) of the exercise of State power (on this issue see, for instance, M. Sachau, *Wehrhoheit und Auswärtige Gewalt*, Duncker und Humblot, Berlin 1967, pp. 29-32, and the scholarly authorities quoted therein). The exercise of military power is regulated by both national and international law and requires different types of legal acts.

An army may be used for different purposes, such as rescue operations in natural calamities, policing the streets in order to secure public order or in combat. An army may be used in combat in a domestic conflict to suppress a rebellion and re-establish control over part of the national territory which has previously been seized by insurgents. An army may be used in combat in an inter-State conflict for the purpose of preserving control over the national territory or re-establishing control over the national territory

(occupied by a foreign power), or seizing control over the territory of another State.

It is obvious that combat is a different army mission from rescue operations or policing. Yet there can be no doubt that the use of the army to combat insurgents in a civil war is a form of exercise of public power and therefore of exercise of jurisdiction (*ultima ratio regum*). From the perspective of State power, the use of the army for fighting against the troops of another State is exactly the same in nature as the use of troops for fighting against insurgents in a civil war. Both situations are forms of exercise of State sovereignty and at the same time of exercise of public power over the persons affected. An order to bomb specific targets in a city is an act of public power, not only in respect of the troops which will execute it but also over the persons who are in the city in question and who will suffer.

7. The issuance of orders by the military command is regulated in detail by international humanitarian law. The persons issuing military orders have to comply with a long list of obligations and have to establish and take into account a certain number of factual elements. These obligations are defined in the 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. We note that both the applicant and the respondent States are parties to this treaty.

The most important obligations concerning the protection of civilians during combats are enshrined in Article 57 of Protocol I, which codifies the existing customary international law. This provision is worded as follows (emphasis added):

Article 57 - Precautions in attack

"1. In the conduct of military operations, **constant care** shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:

(a) those **who plan or decide** upon an attack shall:

(i) do everything feasible **to verify** that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;

(ii) 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;

(iii) **refrain from deciding** to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(b) an attack **shall be cancelled or suspended** if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(c) **effective advance warning** shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

3. When a choice is possible between several military objectives for obtaining a similar military advantage, **the objective to be selected** shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, **take all reasonable precautions** to avoid losses of civilian lives and damage to civilian objects.

5. No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects."

It is clear that international humanitarian law establishes and regulates in detail a legal relationship between a belligerent State and the civilian population in areas of military combat. There is a clear normative link between the civilian population and the belligerent State which carries out a military operation in a specific area. This link exists even if we assume that the civilians concerned do not have any subjective rights whatsoever under international humanitarian law.

Commanding an army carries with it extensive negative and positive legal obligations concerning military intelligence and the planning of operations and may engage the international responsibility of the State, as well as the criminal liability of its agents. In any event, the presence of civilians and their more precise location are elements which the military commanders have to establish and to take into account when they issue their orders to the troops. The civilians thus become an essential element in the military decision-making process. It cannot be denied that military orders are decisions weighing the military advantages against the damage to civilians, and thus affecting the fate of the civilian population in the areas of the troops' operations. The civilians concerned clearly find themselves – unwillingly – under the decision-making power of the above-mentioned military commanders. They thus enter within the scope of jurisdiction of the belligerent State.

8. To sum up this part of our opinion: the victims of the alleged human rights violations in the instant case committed during the active phase of the hostilities (8 to 12 August 2008) fell within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention.

III. The reasoning adopted by the majority

9. The instant judgment is based upon a series of assumptions and arguments with which we disagree.

Firstly, the majority affirm the following in paragraph 125:

> "In the present case the Court is required to examine whether the conditions applied by the Court in its case-law to determine the exercise of extraterritorial jurisdiction by a State, namely, 'State agent authority and control' over others or 'effective control' over an area, may be regarded as fulfilled in respect of military operations carried out during an international armed conflict."

We disagree with this statement. In the present case the Court was required to establish whether there was **a jurisdictional link** between the persons affected by the actions of the respondent State, identified in the application submitted by Georgia, and the respondent State. As rightly stated in paragraph 115 of the judgment, "[t]he two **main** criteria established by the Court in this regard are that of 'effective control' by the State over an area (spatial concept of jurisdiction) and that of 'State agent authority and control' over individuals (personal concept of jurisdiction) (see *Al-Skeini and Others*, cited above, §§ 133-40)" (emphasis added). "State agent authority and control" over individuals and "effective control" over an area are the **main** types of jurisdictional link, yet they are not the only ones.

Secondly, the majority affirm the following:

> "131. Admittedly, in other cases concerning fire aimed by the armed forces/police of the States concerned, the Court 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 (see, for example, *Issa and Others*; *Isaak and Others*; *Pad and Others*; *Andreou*; and *Solomou and Others*, all cited above – see paragraphs 120-123 above).
>
> 132. However, those cases concerned isolated and specific acts involving an element of proximity."

We 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*).

Thirdly, the majority state the following (see paragraph 137 of the judgment):

> "In this connection, the Court attaches 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 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."

We disagree with this view. As shown above, the very conduct of modern military operations presupposes certain forms of "State agent authority and control" over individuals. If the very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos makes it necessary to exclude any form of "State agent authority and control" over individuals, then it is not possible to apply international humanitarian law.

Fourthly, the majority put forward the following argument (see paragraph 141 of the judgment):

> "However, 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, 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."

We are simply astonished by these arguments. In our view, the role of this Court consists precisely in dealing in priority with difficult cases characterised by "the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances". Moreover, "the fact that such situations are predominantly regulated by legal norms other than those of the Convention" should not be an obstacle for the application of the Convention. Furthermore, we are not proposing that the Court should "develop its case-law beyond the understanding of the notion of 'jurisdiction' as established to date" but rather that it should confer more consistency on the general principles established in the case-law and apply those principles in a more coherent way.

10. Additionally, as to the Court's justifications for not finding jurisdiction, the majority's decision assumes that the "practice of the High Contracting Parties in not derogating under Article 15 of the Convention in situations where they have engaged in an international armed conflict outside their own territory" means that the Contracting Parties are, in fact, "considering that in such situations, they do not exercise jurisdiction within the meaning of Article 1 of the Convention" (see paragraph 139 of the judgment), as also argued by the respondent State in this case (see paragraphs 86 and 107). We find it very unfortunate that the Court relied on such a fragile assumption in its conclusion, since the choice of States not to derogate could, for instance, represent a political strategic position to avoid international repercussions or the "embarrassment of negative public opinion" (see Alexander Orakhelashvili, "Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights", 14 *European Journal of International Law* 529, at p. 541

(2003) attached to a derogation under Article 15, as other international actors could interpret the derogation as an intention to violate human rights during the hostilities, before the actual events took place (ibid.), or simply as meaning that States did not expect to carry out any violation of the Convention with their military actions (see Erik Roxstrom, Mark Gibney and Terje Einarsen, "The NATO Bombing case (*Banković et. al. v. Belgium et. al.*) and the Limits of Western Human Rights Protection", 23 *Boston University International Law Journal* 55, at p. 119 (2005)). We note that a lack of derogation under Article 15 may also be interpreted as the State's choice not to exempt itself from the consequences of potential violations of some Convention rights in the event of hostilities.

11. We further note that the majority not only quote the decision in the case of *Banković and Others* (cited above) but also rely upon the views expressed therein. We would like to stress in this context that we do not contest the general principles and views stated in paragraphs 54-73 of the decision rendered in that case. The approach proposed above aims to develop, complement and refine the principles and views stated therein. At the same time, we are not sure that the Court could ever be bound by the way these principles were applied to the specific circumstances in the case of *Banković and Others*.

We note that in that case the reasoning focused on responding to the specific arguments put forward by the applicants. It stressed, *inter alia*, that the Convention operated in an essentially regional context and notably in the legal space ("*espace juridique*") of the Contracting States, and that the Former Republic of Yugoslavia did not fall within that legal space, whereas the application lodged by Georgia in the present case pertains to facts which did occur within that legal space. Moreover, the key argument in *Banković and Others* (cited above, § 75) – the first one formulated by the Court – was the following:

> "[The respondent Governments] claim that the positive obligation under Article 1 extends to securing the Convention rights in a manner proportionate to the level of control exercised in any given extraterritorial situation. ... However, the Court is of the view that the wording of Article 1 does not provide any support for the applicants' suggestion that the positive obligation in Article 1 to secure 'the rights and freedoms defined in Section I of [the] Convention' can be divided and tailored in accordance with the particular circumstances of the extraterritorial act in question and it considers its view in this respect supported by the text of Article 19 of the Convention."

This argument was explicitly rejected in the judgment in the case of *Al-Skeini v. the United Kingdom* (cited above), in the passages quoted above. If one of the main arguments which lie at the foundation of the reasoning of the decision in the case of *Banković and Others* is rejected by subsequent case-law, whereas other arguments therein are case-specific, then the thrust of the whole decision is called into question and the whole issue should be revisited.

In the instant case, the *per curiam* opinion states the following in paragraph 124:

> "Subsequently, in *Medvedyev and Others* (cited above, § 64) the Court explicitly reiterated, with reference to the *Banković and Others* decision (cited above), that a State's responsibility could not be engaged in respect of 'an instantaneous extraterritorial act, as the provisions of Article 1 did not admit of a "cause and effect" notion of "jurisdiction"'. More recently, it adopted a similar approach in *M.N. and Others* (cited above, § 112), finding that 'the mere fact that decisions taken at national level had an impact on the situation of persons resident abroad is also not such as to establish the jurisdiction of the State concerned over those persons outside its territory'."

This approach triggers three remarks.

Firstly, if the term "instantaneous act" has the same meaning as in international law on State responsibility, then it is necessary to stress that this branch of international law distinguishes between instantaneous and continuous acts. All State acts which are not continuous are instantaneous. Viewed from this perspective, most Convention violations are not continuous acts but instantaneous acts. For instance, an arrest carried out on a foreign territory is an instantaneous act. *Refoulement* of asylum-seekers at the State border is also an instantaneous act.

Secondly, if the term "instantaneous act" is used in its ordinary meaning, designating an act of a very short duration (something which occurs "in seconds"), then it is necessary to observe that the use of military force abroad is never an "instantaneous act" in this sense but is always a complicated process with a decision-making stage and an execution stage. It requires a military command and commences with orders issued by the military command. One has to stress here that the army is a strongly hierarchical structure based upon obedience and chains of command.

Thirdly, the very reality of armed confrontation and fighting between enemy military forces encompasses the existence of a chain of command, the gathering of military intelligence and a complex – although usually particularly speedy – decision-making process involving a balancing of colliding values. Military orders are decisions addressed by military commanders (that is, agents of the State) to specific military units (consisting of other State agents) and determining – at least indirectly – the situation of the civilians in the relevant areas. The decision-making goes on even when the chain of command is broken and an army is retreating in apparent chaos, as long as some compact military units continue to operate under any military command, be it at low level.

The majority further express the following view:

> "134. The Court observes that in *Banković and Others* (cited above) it found that the wording of Article 1 of the Convention did not accommodate the theory that 'anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby "brought within" the "jurisdiction" of that State for the purpose of Article 1 of the Convention'

(ibid., § 75). It added that interpreting the concept of jurisdiction in that way was tantamount 'to equat[ing] the determination of whether an individual falls within the jurisdiction of a Contracting State with the question of whether that person can be considered to be a victim of a violation of rights guaranteed by the Convention. These are separate and distinct admissibility conditions, each of which has to be satisfied in the aforementioned order, before an individual can invoke the Convention provisions against a Contracting State' (ibid., § 75 *in fine*).

...

136. The Court sees no reason to decide otherwise in the present case. ..."

We do not contest the view expressed in the *Banković and Others* decision (cited above, § 75) that the determination of whether an individual falls within the jurisdiction of a Contracting State and the question of whether that person can be considered to be a victim of a violation of rights guaranteed by the Convention are separate and distinct admissibility conditions, each of which has to be satisfied in the afore-mentioned order, before an individual can invoke the Convention provisions against a Contracting State.

It cannot be said that the approach presented above in this opinion brings anyone affected by an act imputable to a State within the jurisdiction of that State. It is clear that not everyone affected by a State act can claim to be under the jurisdiction of that State. There needs to be a jurisdictional link. The approach proposed here simply maintains under the State's jurisdiction those who have already been brought there by the existing rules of international law, independently from the Convention, and – in this case – by international humanitarian law. *A contrario*, the explosion of a nuclear plant does not bring *per se* under the jurisdiction of the State in which it occurs the populations affected by the explosion who live in neighbouring countries, even if the explosion is caused by human deficiencies.

The approach developed above is not based upon a "cause and effect" notion of jurisdiction. The "cause and effect" approach would have been adopted if military operations could be reduced to the crude and blind deployment of military force without looking at the scope of possible damage which may be caused to civilians. International humanitarian law requires informed military decisions based upon intelligence and careful planning, including planning in respect of collateral damage and possible civilian casualties. The effects produced by the use of troops in combat are the result of a complex decision-making process regulated in detail by international law. The problem does not commence with the dropping of bombs itself but with the way the bombing was prepared and ordered.

IV. Jurisdiction and interim measures

12. On 11 August 2008, in the context of a military attack by the Russian Federation, Georgia requested the application of Rule 39 of the Rules of Court in the present case. The request was granted: given that interim measures are designed to prevent irreparable damage in urgent situations, the standard of proof for indicating interim measures is significantly lower than that required for the full determination of the merits of a case. The Court's practice is that jurisdiction needs only be established on a prima facie basis. In a similar vein, the International Court of Justice held in the case of *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures*, Order of 28 May 2009, *ICJ Reports* 2009, p. 147, § 40:

> "... when dealing with a request for the indication of provisional measures, there is no need for the Court, before deciding whether or not to indicate such measures, to satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case; ... it may only indicate those measures if the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded."

As at the time of the Rule 39 request in the present case the issue of jurisdiction for active military phase had a prima facie basis, the decision to grant the interim measure was justified.

It is, however, striking, that having now fully rejected the jurisdiction under the Convention of any State in respect of the active phase of the hostilities, in September, October and November 2020 the Court still granted Rule 39 requests in three inter-State cases on hostilities in Nagorno-Karabakh: *Armenia v. Azerbaijan* (no. 42521/20), *Armenia v. Turkey* (no. 43517/20) and *Azerbaijan v. Armenia* (no. 47319/20). Without any intention to comment on those cases as such, we note that by applying Rule 39 the Court admitted the existence of at least prima facie jurisdiction of the States involved during the active military phase – in clear contradiction to the conclusion reached by the majority in the present case.

V. Confusion in the case-law

13. We would further like to note the following inconsistencies in the Court's case-law concerning the application of the Convention in armed conflicts. In *Hassan v. the United Kingdom* ([GC], no. 29750/09, § 76, ECHR 2014) the Court found that the United Kingdom, during the active phase of the conflict, did have jurisdiction based on the standard of "physical power and control" over the victim, and was therefore responsible for violations of the applicant's rights. The Court justified not assessing whether the United Kingdom had "effective control" over the events by the

fact that jurisdiction had already been established through another standard, that of "physical power and control".

In the case of *Hassan* (ibid., § 71), the respondent Government raised the argument 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 Contracting State would, instead, be subject to all the requirements of international humanitarian law". A similar argument was also raised by Russia in the present case (see paragraph 107 of the judgment).

However, in *Hassan* (cited above, § 77) the Court addressed that argument by saying: "[t]he Court is not persuaded by this argument. *Al-Skeini and Others* was also concerned with a period when international humanitarian law was applicable, namely the period when the United Kingdom and its coalition partners were in occupation of Iraq. Nonetheless, in that case the Court found that the United Kingdom exercised jurisdiction under Article 1 of the Convention over the applicants' relatives." With this reasoning the Court made it very clear that it did not accept the argument that extraterritorial jurisdiction could not be established during the active phase of conflicts because "effective control" could not be established when countries were fighting for control; nor did it accept the complementary argument that, in such context, it was international humanitarian law alone that should govern the events. We thus find it inexplicable that in the present case the majority not only accepted, but primarily based their decision on that same flawed argument that was rejected in *Hassan*.

The incongruences between the judgment in the present case and that in *Hassan* are taken even further, as in the latter case (ibid., § 77) the Court went on to say: "to accept the Government's argument on this point would be inconsistent with the case-law of the International Court of Justice, which has held that international human rights law and international humanitarian law may apply concurrently ... As the Court has observed on many occasions, the Convention cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part ... This applies equally to Article 1 as to the other Articles of the Convention." Thus, whereas in *Hassan* the Court consciously chose to take the path most in harmony with the purpose of the Convention and with the widest possible respect for and application of Convention rights, in the present judgment, without proper justification based on the law and on the facts, the majority have chosen the opposite direction.

14. We regretfully observe that the lack of sufficiently convincing reasoning for the finding of no jurisdiction during the active phase of the hostilities has given rise to confusion concerning the meaning of the case-law on extraterritorial jurisdiction and the scope of obligations for States in armed conflicts.

Our colleague Judge Bonello has already drawn the Court's attention to the inconsistency of its case-law concerning Article 1, by asserting that it "has, so far, been bedevilled by an inability or an unwillingness to establish a coherent and axiomatic regime, grounded in essential basics and even-handedly applicable across the widest spectrum of jurisdictional controversies", adding that "the judicial decision-making process in Strasbourg has, so far, squandered more energy in attempting to reconcile the barely reconcilable than in trying to erect intellectual constructs of more universal application. A considerable number of different approaches to extraterritorial jurisdiction have so far been experimented with by the Court on a case-by-case basis, some not completely exempt from internal contradiction" (see the concurring opinion of Judge Bonello appended to the judgment in *Al-Skeini and Others*, cited above, paragraphs 4 and 7). The Court had the opportunity to escape from this detrimental trend in the present judgment by deeply engaging with the relevant legal arguments and connecting them to the factual considerations of the case while confirming or dismissing previous contradictory positions; however, the majority preferred to evade the core debate. In this scenario, Judge Bonello's claim is again very timely, as he suggests that the Court should "stop fashioning doctrines which somehow seem to accommodate the facts, but rather, to appraise the facts against the immutable principles which underlie the fundamental functions of the Convention" (see the concurring opinion of Judge Bonello, cited above, paragraph 8).

We agree that a continuing state of confusion defeats the core purpose of the Convention to establish peace in Europe after the events of the Second World War. Domestic courts are already confused by the different standards, lack of clarity and omissions of the Court in dealing with cases of extraterritorial jurisdiction, as shown in the domestic treatment of the *Al-Skeini* case by the High Court and Court of Appeal in England. For instance, Lord Sedley expressed his doubts concerning the meaning of "effective control" by arguing that "[t]he decisions of the European Court of Human Rights do not speak with a single voice on the question whether such a level of presence and activity engages the responsibility of a member state on foreign soil" (*The Queen (on the application of Al Skeini and Others) v. the Secretary of State for Defence*, [2005] EWCA Civ 1609, [2006] 3 WLR 508, § 192).

VI. Conclusion

15. In conclusion to our opinion, we would like to stress the following points. It is true that the scope of a State's jurisdiction in armed conflict is limited but its legal existence cannot be denied. A State Party to the Convention has to secure – during the phase of combat – to the civilian populations affected only such rights and freedoms as are adequate given

the scope of jurisdiction, or 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. In practice, this means the right to life (Article 2) and the prohibition of torture and inhuman or degrading treatment (Article 3).

Under such circumstances, to deny the jurisdiction of belligerent States over civilian populations in an area of military combat in an international conflict undermines the very logic of international humanitarian law, which, precisely, shifts civilians to the core of the military decision-making process and places them in complex legal relationships with the belligerent States, even before the first bullets are fired.

16. Finally, we are also of the opinion that Article 2 was violated in the present case during the active phase of the hostilities. This conclusion stays the same regardless of whether the Court applies 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, the evidence gathered by the Court leads us to conclude that the principles of international humanitarian law applicable to the assessment of the lawfulness of deprivation of life in armed conflicts – such as proportionality and precaution – were not adequately observed.

PARTLY DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

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1. Introduction

1. This is the first time that the European Court of Human Rights ("the Court") has been required to examine military operations in the context of an international armed conflict in Europe since the case of *Banković and Others v. Belgium and Others*[1], in which the application was declared inadmissible on the grounds that the events in question did not fall within the jurisdiction of the respondent State. The present judgment is a pernicious progeny of *Banković and Others*. The first part of this opinion will seek to demonstrate the "patchwork"[2] state of the Court's case-law on extraterritorial jurisdiction in times of armed conflict, on the basis of an analysis of the key judgments and decisions that have led to the present judgment.

2. This analysis would not be complete without a discussion of the parallel issue of extraterritorial jurisdiction with regard to non-admission border management decisions. In fact, the majority themselves cite *M.N. and Others v. Belgium*[3] as an authority in matters of extraterritorial jurisdiction in two core paragraphs of the present judgment[4]. Hence, the second part of this opinion will explain the interplay between the case-law prompted by the migration crisis and the case-law in the context of armed

1 *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, ECHR 2001-XII.
2 Judge Bonello used this adjective in paragraph 5 of his opinion in *Al-Skeini and Others v. the United Kingdom*, no. 55721/07, ECHR 2011. Not much has changed since then, unfortunately.
3 *M.N. and Others v. Belgium* (dec.) [GC], no. 3599/18, § 112, 5 March 2018.
4 See paragraphs 124 and 135 of the present judgment.

conflicts. I find that both lines of case-law on extraterritorial jurisdiction are not only promoting fragmentation in international law, but also pushing the Court to an extremely isolated position worldwide and thus discrediting its role as a human rights guarantor in Europe. The critique of these jurisdictional developments lays the ground for my vote in favour of finding that the Russian Federation had jurisdiction with regard to the victims of the military operations carried out by the Russian Federation during the active phase of the hostilities (8 to 12 August 2008), for the purposes of Article 1 of the European Convention on Human Rights ("the Convention").

2. Jurisdiction in times of armed conflict

a. Boots on the ground in northern Cyprus

3. State extraterritorial jurisdiction was first affirmed on personal grounds, namely the authority or *de facto* control of a State agent over a person or a group of persons. Authorised agents of the State, such as diplomatic or consular agents and armed forces, remain under its jurisdiction when acting abroad and bring any person or property within the jurisdiction of the State to the extent that they exercise authority over such persons or property. This was the case for the alleged human rights violations committed by Turkish soldiers during the invasion of northern Cyprus. Since they exercised control over persons and property, the Turkish soldiers' actions constituted an exercise of State jurisdiction, and whenever they affected such persons' rights and freedoms under the Convention, they engaged the responsibility of Turkey[5].

4. The extraterritorial jurisdiction of a Contracting Party to the Convention was subsequently acknowledged on spatial grounds. State jurisdiction also results from the State's effective control over an area, be it exercised directly, through its armed forces ("boots on the ground"), or indirectly through a subordinate local administration. This was the case for the territory of northern Cyprus, which was occupied by Turkey, even though an autonomous local administration had been installed in 1983[6]. For the Court, it was obvious from "the large number of troops engaged in active duties in northern Cyprus" that Turkey's army exercised "effective overall control over that part of the island"[7]. Consequently, Turkey's

5 *Cyprus v. Turkey (I) and (II), nos. 6780/74 and 6950/75*, Commission decision of 26 May 1975, Decisions and Reports (DR) 2, p. 125, § 8.

6 *Loizidou v. Turkey* (preliminary objections), 23 March 1995, § 62, Series A no. 310, reiterated in *Loizidou v. Turkey* (merits), 18 December 1996, § 52, *Reports of Judgments and Decisions* 1996-VI, and Cyprus v. Turkey (merits) [GC], no. 25781/94, § 76, ECHR 2001-IV.

7 *Loizidou v. Turkey* (merits), cited above, § 56, and *Cyprus v. Turkey* (merits), cited above, §§ 76 and 77. The fundamental character of the military presence was also stressed in the case of the Moldovan Republic of Transdniestria in *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII. During the Moldovan conflict in 1991 to

responsibility under the Convention could not be limited to the acts of its own soldiers and officials operating in northern Cyprus but was also engaged by virtue of the acts of the local administration, which survived by virtue of Turkish military and other support. According to the Court, Turkey had an obligation to secure in all that area the entire range of substantive rights set out in the Convention and those additional Protocols which it had ratified[8]. As a matter of principle, the Court acknowledged that the concept of "jurisdiction" within the meaning of Article 1 of the Convention was not necessarily restricted to the national territory of the High Contracting Parties [9].

b. Serbia outside the European legal space

5. Quite abruptly, the Court abandoned this consistent line of case-law in the most regrettable *Banković and Others* decision, by taking an extremely restrictive approach to jurisdictional issues. Interpreting extraterritorial jurisdiction in the light of general international law, the Court limited it to legally permitted extensions of domestic jurisdiction "including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality", defined against the background of the sovereign territorial rights of the other relevant States[10]. By so doing, the Court confused the essentially facts-centred concept of jurisdiction in Article 1 of the Convention with the legal grounds of extraterritoriality in general international law. In a sign of narrow-minded parochialism, it further confined the applicability of the Convention to the European territory of the Contracting Parties, the so-called "European legal space", ignoring the express provision of Article 56 of the Convention – which is a clear indication of the founding fathers' wish that the Convention should be applied all over the world, in the overseas territories of the Contracting Parties, save for some exceptional cases[11] – and disregarding the agenda

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1992, forces of the USSR Fourteenth Army, stationed in Transdniestria, had fought with and on behalf of the Transdniestrian separatist forces. Even after 5 May 1998, when the Convention came into force in respect of Russia, the Russian army was still stationed in Moldovan territory.

8 *Loizidou v. Turkey* (merits), cited above, § 56, and *Cyprus v. Turkey* (merits), cited above, §§ 76 and 77.

9 Ibid.

10 *Banković and Others*, cited above, § 59.

11 The present Article 56 corresponds to Article 63 of the original version of the Convention. In *Tyrer v. United Kingdom* (25 April 1978, § 38, Series A no. 26), the Court admitted that "the system established by Article 63 was primarily designed to meet the fact that, when the Convention was drafted, there were still certain colonial territories whose state of civilisation did not, it was thought, permit the full application of the Convention".

heralded in its Preamble[12], which does not suggest any geographical limitation to the observance of the rights and freedoms enshrined in the Convention.

6. On this basis, the Court rejected State jurisdiction in relation to the bombing of a television and radio station which had resulted in killing and injuring non-combatants, obfuscating the fact that in the past the Convention had already been applied to other instantaneous acts, such as arrests, performed by the Contracting Parties' agents in places as far apart as Costa Rica[13], Saint Vincent[14] and Sudan,[15] and neglecting the teachings of such an authoritative source of international human rights law as the Inter-American Commission of Human Rights, which had acknowledged a jurisdictional link between Cuba and the conduct of the Cuban military in shooting down a civilian aircraft in international airspace[16]. It was difficult to make sense of the practical result of the Court's reasoning in *Banković and Others*: extraterritorial jurisdiction was accepted when State agents detained a person, but not when they killed or maimed him or her.

7. The Court was quick to amend the "ludicrous result"[17] of *Banković and Others*. In the context of a discussion on spatial jurisdiction, it did not exclude the possibility that, as a consequence of military action, Turkey had temporarily exercised effective control over a particular portion of the territory of northern Iraq, which would be sufficient to find that it had had jurisdiction[18]. The Court came very close to acknowledging a cause-and-effect view of extraterritorial jurisdiction, when it stated that "[a]ccountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory".[19]

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12 The Preamble to the Convention refers to "the universal and effective recognition and observance" of fundamental human rights.

13 *Freda v. Italy*, no. 8916/80, Commission decision of 7 October 1980, DR 21, p. 254.

14 *Reinette v. France*, no. 14009/88, Commission decision of 2 October 1989, DR 63, p. 192.

15 *Sánchez Ramirez v. France*, no. 28780/95, Commission decision of 24 June 1996, DR 86-B, p. 155.

16 Inter-American Commission of Human Rights, *Alexandre v. Cuba*, Report no. 86/99, 29 September 1999, § 25. This opinion was universally confirmed in paragraph 63 of General Comment no. 36 on the right to life (Article 6 of the International Covenant on Civil and Political Rights), adopted on 30 October 2018 by the United Nations Human Rights Committee.

17 As Judge Loucaides put it in "Determining the Extra-territorial Effect of the European Convention: Facts, Jurisprudence and the Bankovic case", in 2006 *EHLRR* 395.

18 *Issa v. Turkey*, no. 31821/96, § 74, 16 November 2004.

19 Ibid., § 71. This argument was reiterated in *Isaak v. Turkey* (dec.), no. 44587/98, 28 September 2006, with the identification of its source, namely the views adopted by the Human Rights Committee on 29 July 1981 in the cases of *Lopez Burgos v. Uruguay* and *Celiberti de Casariego v. Uruguay*, nos. 52/1979 and 56/1979, at §§ 12.3 and 10.3

8. The same happened when the Court concluded, in the framework of a discussion on personal jurisdiction, that Turkey had jurisdiction when Mr Öcalan was handed over to Turkish officials by Kenyan officials in the international zone of Nairobi Airport[20]. In another case with a set of facts very close to those of *Banković and Others*, the Court even conceded that the fact that Turkish helicopters had opened fire and killed suspected smugglers at the Turkish-Iranian border, without it being clear on which side the victims had been at the relevant time, brought the victims within Turkey's jurisdiction[21]. The same conclusion was reached when a protester was beaten to death by a group of people including Turkish soldiers in the United Nations demilitarised zone between the "Turkish Republic of Northern Cyprus" and the Government-controlled part of Cyprus[22], when a Greek-Cypriot demonstrator was shot dead by Turkish or Turkish-Cypriot soldiers while he entered the United Nations-controlled buffer zone and tried to remove a Turkish flag hanging in a flagpole in the territory of the "Turkish Republic of Northern Cyprus"[23], and when a shot was fired by Turkish or Turkish-Cypriot uniformed personnel from the Turkish-controlled northern part of Cyprus to the southern part and injured a person on the southern side of the border[24]. The crucial point made by the Court in all these judgments was that, for the purposes of Article 1 of the Convention, jurisdiction depended upon the *de facto* authority exercised by the State over a person, a group of persons, property or an area, regardless of the instantaneous or continuous nature of the State action, or the intentional, deliberate, negligent or collateral character of the damage caused, or the legality of the State action or even the determination of the substantive law applicable to the facts in issue.

c. Double standards in Iraq

9. Yet when called upon to revisit the *Banković and Others* decision, the Grand Chamber insisted on the *ratio* of that decision in the *Medvedyev v. France* case, reaffirming that "the provisions of Article 1 did not admit of a 'cause and effect' notion of 'jurisdiction'"[25]. The erratic state of the

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respectively. In *Solomou and Others v. Turkey* (no. 36832/97, § 45, 24 June 2008) the same argument was put forward again, this time without mentioning its source.

20 *Öcalan v. Turkey* [GC], no. 46221/99, § 91, ECHR 2005-IV.

21 *Pad and Others v. Turkey* (dec.), no. 60167/00, § 54, 28 June 2007.

22 *Isaak*, cited above.

23 *Solomou and Others*, cited above, §§ 48-49. The Court did not take a final position as to the territory on which the killing had taken place, since it considered that "in any event the deceased was under the authority and/or effective control of the respondent State through its agents (see, *mutatis mutandis*, *Isaak* (dec.), cited above)" (ibid., § 51).

24 *Andreou v. Turkey*, no. 45653/99, § 25, 27 October 2009.

25 *Medvedyev v. France* [GC], no. 3394/03, § 64, ECHR 2010-III.

Court's case-law was not clarified by *Al-Skeini and Others*[26], which artificially mixed the concepts of spatial and personal jurisdiction. For the sake of fairness, it should be acknowledged that the Court discarded the "*espace juridique*" limitation in *Al-Skeini and Others*[27], but it did not go so far as to entirely reverse *Banković and Others*. The casualties caused by the British army in Iraq came under the United Kingdom's jurisdiction because, according to the Court, the British army had assumed "some of the public powers normally to be exercised by a sovereign government", such as the responsibility to perform security operations, and "exercised authority and control over individuals killed in the course of such security operations"[28]. Judge Bonello could not be more correct when he called this artificial construction "one of those infelicitous legal fictions a court of human rights can well do without".[29] Indeed, not only did the Court fail to identify exactly which "public powers" must be exercised and for how long in order to trigger jurisdiction and to what extent the exercise of those "public powers" was a necessary or a sufficient condition for the determination of personal or spatial jurisdiction, but it also did not acknowledge, in the light of the previous case-law on the incidents in the United Nations buffer zone in Cyprus, that likewise the act of the United Kingdom soldiers in shooting the applicants' relatives automatically created a jurisdictional link to the United Kingdom, regardless of any State control over the area in which the victim or the State agent found themselves. The shooting of an individual by State agents constitutes the ultimate form of the exercise of State control, no matter the precise location of the actual shooter or the victim, the control exerted over the area where the shooter or the victim find themselves or the deliberate or negligent nature of the shooting.

10. The uncertainty of the case-law was further aggravated by the fact that, contrary to *Banković and Others*, the Court admitted in *Al-Skeini and Others* the possibility of tailoring the Article 1 obligation to secure the rights and freedoms of the Convention in accordance with the particular circumstances of the extraterritorial act[30], but did not posit black-letter rules

26 *Al-Skeini and Others*, cited above.

27 Ibid., § 142. The Court explicitly rejected the idea that "jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe member States".

28 Ibid., § 149. This purposely convoluted paragraph is the source of the future disarray in the Court's case-law. See the United Kingdom's position in *Hassan*, cited above, § 70.

29 See *Al-Skeini and Others*, cited above, concurring opinion of Judge Bonello, § 14.

30 Compare and contrast *Al-Skeini and Others* (cited above, § 137) with *Banković and Others* (cited above, § 73), and later *Assanidze v. Georgia* ([GC], no. 71503/01, §§ 141-42, ECHR 2004-II), which both stand for the indivisible nature of Article 1 jurisdiction: it cannot be "divided and tailored". As *Banković and Others* had pointed out (§ 40), "the applicant's interpretation of jurisdiction would invert and divide the positive obligation on

on the nature and scope of Convention obligations, including procedural obligations to investigate, imposed on States when they exercise personal jurisdiction or spatial jurisdiction or both, and whether these vary where the territory under control is that of another Contracting Party or that of a third State.

11. The subsequent cases of *Pisari v. the Republic of Moldova and Russia*[31] and *Jaloud v. the Netherlands*[32] changed nothing in this regard. In both cases the Court grounded jurisdiction essentially on the spatial element (control over the area of the checkpoint), mixed with the instantaneous act of the shooting of the victims by a Russian soldier at a Moldovan checkpoint and by Dutch soldiers at a checkpoint in south-eastern Iraq respectively.

12. As if the situation were not already complicated enough, *Chiragov and Others*[33] showed another problematic facet of Strasbourg judicial policy: its double standards regarding certain States. It is not understandable why the Court did not consider independently the exercise of spatial jurisdiction by the United Kingdom in *Al-Skeini and Others* in spite of the strength of that State's military force on the ground and its exercise of powers of government in Iraq[34], whereas in *Chiragov and Others* it did. The Court's double standards are even more blatant if one takes into account the fact that *Al-Skeini and Others* regarded "the strength of the State's military presence in the area" as the "primary" element for assessing whether effective control existed over an area outside the national territory and considered that other indicators, such as "the extent to which its military, economic and political support for the local subordinate administration provide[d] it with influence and control over the region" were "relevant", but could evidently not replace the "primary" factor[35]. That is exactly what happened in *Chiragov and Others*, since the Court's criteria were turned upside down in that case. Strangely enough, in *Chiragov and Others* the majority of the Grand Chamber gave up the "primary factor" of "boots on the ground" and replaced it with an unclear mix of other factors, involving "military support". Ultimately, the Court equated situations such as that of northern Cyprus, where large number of Turkish troops were engaged in active duties, and that of Nagorno-Karabakh and the surrounding territories, including Lachin, where no such presence of military forces of Armenia

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Contracting States to secure the substantive rights in a manner never contemplated by Article 1 of the Convention".

31 *Pisari v. the Republic of Moldova and Russia*, no. 42139/12, 21 April 2015.

32 *Jaloud v. Netherlands* [GC], no. 47708/08, ECHR 2014.

33 *Chiragov and Others v. Armenia* [GC], no. 13216/05, ECHR 2015. See paragraph 34 of my separate opinion in this case.

34 *Al-Skeini and Others*, cited above, §§ 143-48.

35 Ibid., § 139.

could be found[36]. If in northern Cyprus, Turkish jurisdiction extended to acts of the local administration which survived there essentially by virtue of Turkish military presence, in Lachin the order of the factors was altered, and the alleged military support of Armenia was only a secondary factor in comparison with the other purported political and economic support factors. But neither of these criteria that were applied to the Turkish and Armenian military forces were applied consistently to the United Kingdom military forces, with the politically convenient consequence that the Convention did not apply *per se* to the occupied territory in Iraq. In other words, the *Al-Skeini and Others* judgment did not dare to go further than the red line set by the House of Lords[37]. In fact, jurisdiction was even denied in the case of Saddam Hussein, when the Contracting Parties to the Convention "formed part (at varying unspecified levels) of a coalition with the US, when the impugned actions [the applicant's capture, detention and handover to the Iraqi authorities] were carried out by the US, when security in the zone in which those actions took place was assigned to the US and when the overall command of the coalition was vested in the US"[38], which means that active participation of the armed forces of a Contracting Party in an occupying "coalition of the willing" that includes a non-Contracting Party is *per se* exempted from Strasbourg oversight, regardless of the type of (spatial or personal) control exercised by the members of the coalition. Put differently, an occupying Contracting Party can evade its liability under the Convention by setting up a military coalition with a non-Contracting Party in the occupied territory[39]. At the end of the day, it seems that occupation does not automatically trigger spatial jurisdiction in the occupied territory, let alone personal jurisdiction, because all belligerent occupiers are equal in the eyes of the Court, but some are more equal than others.

3. Jurisdiction in times of migration crisis

a. Hungarian "transit zones" for migrants

13. In two core paragraphs of the judgment in the present case[40], the majority cite *M.N. and Others v. Belgium*[41] as an authority in matters of

36 Compare and contrast *Chiragov and Others*, cited above, § 180, and *Banković and Others*, cited above, § 70.

37 *R. (Al-Skeini) v. Secretary of State for Defence* (2007) UKHL 26 at 83, conscientiously referred to in *Al-Skeini and Others*, cited above, § 87. It is also very instructive to read the opinion of an insider (Clare Ovey, "Application of the ECHR during international armed conflicts", in Katja Ziegler and others (eds.), *The UK and European Human Rights: A strained relationship?*, Hart, 2015, p. 230).

38 *Saddam Hussein v. Albania and Others* (dec.), no. 23276/004, 14 March 2006.

39 This was, and continues to be, the position of the United Kingdom (see *Hassan*, cited above, § 72: "bipartite or joint control was not sufficient to establish jurisdiction for the purposes of Article 1").

40 Paragraphs 124 and 135 of the present judgment.

extraterritorial jurisdiction. This is the third in a row of three recent Grand Chamber judgments which have sought to reverse the Court's traditional refugee and asylum-seeker-friendly case-law: they are *Ilias and Ahmed v. Hungary*[42], *N.D. and N.T. v. Spain*[43] and *M.N. and Others v. Belgium*.

14. In *Ilias and Ahmed v. Hungary*, the Grand Chamber evaluated the situation of migrants detained in the Röszke transit zone on the border between Hungary and Serbia. Quite rightly, the Court restated that Article 3 of the Convention could only be meaningfully upheld by means of a legal procedure involving a detailed examination of the merits of asylum applications, even if later on the asylum claims proved to be unfounded. But migration detention centres were travestied as "transit zones", where Article 5 of the Convention was not applicable. The strategy of resorting to double-speak such as labelling migration detention centres as "foreigners' admission and accommodation centres", "transit centres" or "guest houses" now has the full consent of the Court[44].

15. In the specific circumstances of the Hungarian case, this diversion strategy was pursued at the cost of basic logic. Indeed, the judgment is blatantly contradictory, since when assessing the issue of detention, the Court concluded that Hungary had violated Article 3 on account of the lack of a rigorous assessment of the real risks the applicants were facing as a result of their expulsion to Serbia, but at the same time it affirmed, in contradiction to the evidence available[45], that the applicants were not being detained by Hungary for the purposes of Article 5 and could leave for Serbia in view of the lack of real risk in that country[46]. In so doing, the Court contradicted the unanimous findings of the Court of Justice of the European Union[47], the Council of Europe Committee for the Prevention of Torture (CPT)[48] and the United Nations Working Group on Arbitrary Detention[49], concerning precisely the treatment of asylum-seekers in the

41 *M.N. and Others*, cited above, § 112.
42 *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, 21 November 2019.
43 *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, 13 February 2020.
44 *Abdullahi Elmi and Aweys Abubakar v. Malta*, nos. 25794/13 and 28151/13, 22 November 2016, paragraph 4 of my concurring opinion.
45 As noted by the CPT, the possibility of leaving for Serbia was practically excluded (CPT/Inf (2018) 42, §§ 28 and 32).
46 I cannot understand how the Court could formulate the evidently irreconcilable statements in paragraphs 165 and 223 of the *Ilias and Ahmed* judgment (cited above).
47 CJEU judgment of 14 May 2020, Joined Cases C-924/19 PPU and C-925/19 PPU, §§ 226-31, ruling that being held in the Röszke transit zone amounts to detention under Directive 2013/33/EU, Reception Conditions Directive, Article 2(h).
48 CPT/Inf (2018) 42, § 42, with its findings after the visit to the transit zones at Röszke and Tompa in 2017.
49 United Nations Working Group on Arbitrary Detention, Opinions adopted by the Working Group on Arbitrary Detention at its eighty-seventh session, 27 April–1 May 2020, Opinion No. 22/2020 concerning Saman Ahmed Hamad (Hungary), 5 June 2020, § 70.

Röszke transit zone at the EU's Hungarian-Serbian border. This self-inflicted international isolation of the Court is incomprehensible.

16. More importantly, by arguing that the applicants had entered Hungary voluntarily to seek asylum and were at liberty to leave the transit zone towards Serbia, the Court not only put the blame of the situation on the complainants[50], implicitly criticising asylum-seekers for seeking to get out of their desperate situation, but also showed a great lack of sensitivity to the real situation leading people to seek asylum. For the Court, Article 5 is inapplicable because the applicants can choose between liberty and the pursuit of a procedure ultimately aimed at sheltering them from the risk of exposure to treatment in breach of Article 3 of the Convention[51]. This is simply intolerable.

b. "Hot returns" of African migrants

17. In *N.D. and N.T. v. Spain*, the Court clarified that the Convention concept of expulsion included non-admission border management decisions in accordance with the interpretation of the United Nations International Law Commission draft articles on the expulsion of aliens, and that it applied to every individual irrespective of whether or not they were seeking asylum or had a legitimate claim of international protection[52]. More importantly, it established that States should not excise certain parts of their territory through law or other means as "non-territory" to escape from their Convention obligations and should provide "genuine and effective" access to legal entry mechanisms for purposes of asylum and a "sufficient number" of crossing points[53]. This positive obligation on the State is a condition *sine qua non* of a Convention-compliant border management policy.

18. In the *N.D. and N.T.* case, relating to the Spanish territory of Melilla, that requirement was not fulfilled, owing to the abundant evidence of the lack of practical accessibility to the applicants of legal channels for admission to Spain, but the Court neglected that evidence[54]. Worse still, by focusing on the individuals' own conduct, the Court inverted the role of the

50 *Ilias and Ahmed*, cited above, § 213.

51 To put it in the words of the United Nations Working Group on Arbitrary Detention: "The Working Group cannot accept that an individual who must either agree to remain in the transit zones or lose the possibility of lodging an asylum application could be described as freely consenting to stay in the transit zones" (Opinion no. 22/2020, cited above, § 69).

52 As I had advocated in my separate opinion in *M.A. and Others v. Lithuania*, no. 59793/17, 11 December 2018.

53 *N.D. and N.T. v. Spain*, cited above, § 209.

54 The Court simply discarded the evidence put forward by the United Nations High Commissioner for Refugees, the Office of the High Commissioner of Human Rights, the Council of Europe Commissioner for Human Rights and a group of civil-society institutions, as third party interveners, concluding that the various reports were "not conclusive" (*N.D. and N.T. v. Spain*, cited above, § 218).

complainants and the respondent State, treating the applicants as if they were defendants accused of intentionally disruptive and aggressive behaviour and the Spanish State as the accuser. The Court's choice in first assessing whether the applicants were worthy of human rights protection under the Convention was fundamentally wrong in that it assumed that the right of access to human rights[55] was not inherent to every persecuted human being, but was dependent on the complainant's conduct. When the *Hirsi Jamaa and Others v. Italy*[56] judgment held that there would not be a violation of Article 4 of Protocol No. 4 "if the lack of an expulsion decision made on an individual basis is the consequence of the person's own culpable conduct"[57], it did not mean, and cannot be read as meaning, that the guarantee of the absolute prohibition of *refoulement* would be dependent on the individual's conduct when crossing the border. Such a reading of *Hirsi Jamaa and Others* would be manifestly wrongful in the light of the broad interpretation of the term "expulsion" in paragraph 174 of that same judgment, reiterated in paragraph 185 of the *N.D. and N.T.* judgment, which correctly stresses the point that the term refers to "any forcible removal of an alien from a State's territory, irrespective of the lawfulness of the person's stay, the length of time he or she has spent in the territory, the location in which he or she was apprehended, his or her status as a migrant or an asylum-seeker and *his or her conduct when crossing the border*" (my italics). Furthermore, it is also wrong that *Berisha and Haljiti v. "the former Yugoslav Republic of Macedonia"*[58] and *Dritsas v. Italy*[59] are invoked as authorities supporting such a restrictive reading when they do not relate at all to a similar situation[60].

19. The fallacy of the Court's line of argument is even more patent when it is stretched *ad absurdum* to deny the right of access to human rights to criminals or other "disruptive" people, whatever that might mean. Going down this road, the Court is not only practically encouraging Spain's pushback practice in Melilla and elsewhere, but it is categorising applicants as first and second-class persons, those "good" people who have the right of access to human rights, and specifically the right of access to a procedure which assesses their needs for international protection, and those "disruptive" people who do not. For the Court, Africans who are apprehended in Melilla – that is, Spanish territory – after having climbed the

55 I insist on my reading of the Convention in the light of this right, which I have already set out in one of my first separate opinions at the Court (see *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012). The fact that I must go back to that same point at the end of my term of office is a sign that the Court has not moved forward.
56 *Hirsi Jamaa and Others*, cited above.
57 Ibid., § 184.
58 *Berisha and Haljiti v. "the former Yugoslav Republic of Macedonia"* (dec.), no. 18670/03, ECHR 2005-VIII.
59 *Dritsas v. Italy* (dec), no. 2344/02, 1 February 2011.
60 *N.D. and N.T. v. Spain*, cited above, § 200.

Spanish-Morocco border fences are second-class "disruptive" persons and therefore they can be immediately "pushed back" to Morocco without access to any legal procedure or protection. At the borders of Europe, people are chased away just like animals that have invaded our backyard, and the Court has nothing to say to this.

20. The most appalling aspect of this line of reasoning is its *reductio ad Hitlerum*, as Leo Strauss would put it. The suggested rationale of the Court is one of guilt by association, whereby all Africans climbing the border fences in Melilla act in the same manner, share the same intention and are in the same personal situation[61]. In *N.D. and N.T. v. Spain*, the specific intentions of the applicants to disrupt and endanger public safety were never established and no evidence was ever put forward regarding any concrete violent acts committed by them or any other person crossing on that day[62]. When reading the judgment, one gets the impression that the principle of individual responsibility has been completely obfuscated. The rule of law requires the Court to analyse the real situation of each applicant in Strasbourg and not to trivialise its specific characteristics. This is obvious and it is a remarkable state of affairs in Strasbourg that the point even needs to be made.

21. Nevertheless, beyond the obvious, there is one absolute red line that should not have been crossed, and it was. Article 31 of the 1951 Convention relating to the Status of Refugees embodies the non-penalisation principle, which requires Contracting States not to impose upon migrants "penalties, on account of their illegal entry or presence". The Court did not care much for the absolute nature of the *non-refoulement* principle when it admitted that States could require asylum claims to be submitted "at the existing border crossing points", and that they could "refuse entry to their territory to aliens, including *potential asylum-seekers*, who have failed ... to comply with these arrangements" (my italics)[63]. The opposite doctrine has been consistently supported by Council of Europe bodies such as the Parliamentary Assembly[64], the Commissioner for Human Rights [65] and the Special Representative of the Secretary General on migration and refugees

61 The *ad hominem* language of the Court is telling: "the conduct of persons who cross a land border in an unauthorised manner, deliberately take advantage of their large numbers and use force, is such as to create a clearly disruptive situation which is difficult to control and endangers public safety" (see *N.D. and N.T. v. Spain*, cited above, § 201).

62 The use of the word "storming" in the judgment, most importantly in paragraph 231, is equivocal, because it confuses the use of force with the mass arrival of people. Moreover, the available video evidence of the events does not prove any use of force.

63 *N.D. and N.T. v. Spain*, cited above, § 210.

64 Parliamentary Assembly, Recommendation 2161 (2019) on pushback policies and practice in Council of Europe member States.

65 2015 Annual Report by the Commissioner for Human Rights, Nils Muižnieks, 14 March 2016, § 41.

[66], and by all relevant United Nations bodies, such as the Office of the United Nations High Commissioner for Human Rights[67], the United Nations Committee on the Rights of the Child[68], the United Nations Human Rights Council[69], the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[70], and the Committee on the Elimination of Discrimination against Women[71]. At least for the sake of international courtesy, if not of analytical rigour, the Court should have made an effort, or at least given the impression of making one, to discuss and contradict these authorities. As in *Ilias and Ahmed*, it is highly regrettable that, instead of promoting effective convergence between its case-law and general international human rights law, the Court engaged in *N.D. and N.T. v. Spain* on a tortuous path of fragmentation of international law[72].

c. Syrian migrants expelled from humanity

22. The morally and legally untenable position of the Court on the jurisdictional threshold is further compounded by its decision in *M.N. and Others v. Belgium*[73]. The worst face of the Court, indifferent to the tragic consequences of the Contracting Parties' decisions on aliens outside their territories, that face so cold-bloodedly exposed in *Banković and Others*[74], is shown again here. The Court stated in unequivocal and uncompromising terms that "the mere fact that decisions taken at national level had an impact

66 Special Representative of the Secretary General on migration and refugees, Report of the fact-finding mission to Spain, 18-24 March 2018, SG/Inf(2018)25, 3 September 2018.
67 United Nations, Report of the Office of the United Nations High Commissioner for Human Rights (OHCHR), HRC/WG.6/35/ESP/2, 18 November 2019. See also the 2014 "Recommended Principles and Guidelines on Human Rights at International Borders", which call upon States to "respect, promote and fulfil human rights wherever they exercise jurisdiction or effective control, including where they exercise authority or control extraterritorially" and "ensure that all border governance measures taken at international borders, including those aimed at addressing irregular migration ..., are in accordance with the principle of non-refoulement and the prohibition of arbitrary and collective expulsions".
68 UN Committee on the Rights of the Child, *D.D. v Spain*, Views concerning Communication No. 4/2016, 15 May 2019.
69 UN Human Rights Council, Report of the Working Group on the Universal Periodic Review, Spain, A/HRC/29/8, 13 April 2015, §§ 131.166 and 131.182.
70 UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT OP), Visit to Spain undertaken from 15 to 26 October 2017: observations and recommendations addressed to the State party, 2 October 2019, CAT/OP/ESP/1, § 93.
71 CEDAW, Concluding observations on the 7th and 8th report of Spain, CEDAW/C/ESP/CO/7-8 (2015), §§ 36-37.
72 I have already had occasion to regret this in my opinion joined to C*orreia de Matos v. Portugal* [GC], no. 56402/12, 4 April 2018.
73 *M.N. and Others*, cited above.
74 *Banković and Others*, cited above, § 75.

on the situation of persons resident abroad is also not such as to establish the jurisdiction of the State concerned over those persons outside its territory".[75] *A fortiori*, this means that the "persons outside its territory" do not have a Convention right of access to legal mechanisms for the purposes of claiming asylum, even when decisions taken at national level have had an impact on their civil rights and freedoms.

23. The *M.N. and Others v. Belgium* decision and its *ratio* raise some delicate questions in the light of the Court's recent case-law. In *N.D and N.T. v. Spain* the Court argued that the African applicants could have applied for international protection at Spain's diplomatic and consular representations in their countries of origin or transit[76], in order to conclude that Spanish law afforded the applicants several possible regular means of seeking admission to the national territory and therefore to justify the pushback ("hot return" – *devoluciones en caliente*) of irregular migrants. Considering this line of argument set out in *N.D. and N.T.*, how could the Court conclude in *M.N. and Others* that a regular application for a visa in a Belgian consulate in Syria did not trigger a jurisdictional link with Belgium? Furthermore, in *N.D. and N.T.* the Court explicitly refused to excise a part of the territory for the purposes of circumventing international obligations[77]. In view of this refusal in *N.D. and N.T.*, how could the Court in *M.N. and Others* be ready to excise Belgian consular and diplomatic posts where they exercised their authority in respect of aliens, taking decisions that had enduring effects on the latter's civil rights and freedoms? These questions warrant an answer that the Grand Chamber failed to give. Such an answer is even more required after the shocking refusal of the Belgian authorities to implement the initial decisions of the Aliens Appeals Board in the applicants' favour, as if Belgium were a banana republic with political interests dictating in a totally opportunistic way whether judicial decisions should be complied with or not.

24. The sole argument put forward by the majority is a classical *ad terrorem* fallacy: accepting jurisdiction would "enshrin[e] a near-universal application of the Convention on the basis of the unilateral choices of any individual, irrespective of where in the world they find themselves, and therefore ... create an unlimited obligation on the Contracting States to allow entry to an individual who might be at risk of ill-treatment contrary to the Convention outside their jurisdiction"[78]. Ruminating about catastrophic,

75 *M.N. and Others v. Belgium*, cited above, § 112.

76 *N.D. and N.T. v. Spain*, cited above, §§ 212, 214 and especially 228.

77 Ibid., § 209.

78 *M.N. and Others v. Belgium*, cited above, § 123, following the most unfortunate *Abdul Wahab Khan v. the United Kingdom* (dec.), no. 11987/11, § 27, 28 January 2014. The Court did not even care to consider that the appeal procedure in the *Abdul Wahab Khan* case had concerned the withdrawal of leave to remain, decided on the basis of a finding that the applicant posed a threat to national security, and the exclusively extraterritorial impact of the contested decision had not been attributable to the United Kingdom but to the

worst-case scenarios has never been a proper method of legal reasoning[79]. Besides, "the principle of *non-refoulement* would be purely fictional if the State could prevent the application of the principle by means of push-back policies or non-admission or rejection at the border".[80]

25. In *M.N. and Others v. Belgium*, the existence of genuine and effective access to legal entry mechanisms for the purposes of asylum vanishes as a condition *sine qua non* of a Convention-compliant border management policy[81]. The availability of legal pathways to protection such as asylum procedures through embassies and/or consular representations was considered by the Court to the detriment of the African applicants, because they had not used them, yet it was not considered for the benefit of the Syrian applicants, who had used them. This is yet another example of the Court's "patchwork case-law" on jurisdiction, to say the least[82]. In simple words, if asylum seekers are "mean" people who jump border fences in Africa they can be dead sure that they won't get justice from the Strasbourg Court, but if they are "good" people who try to seek asylum in an orderly fashion all the way up the consular, administrative and judicial apparatus, they can also be dead sure that they will not get justice from this Court either. If the Court is implacable with rebellious asylum-seekers, it can be no less ruthless with law-abiding asylum-seekers, like the distant, disgraced Syrian applicants in the Belgian case. They were indeed expelled from humanity, as Hannah Arendt would have put it.

4. Conclusion

26. I have defended a principled interpretation of jurisdiction, according to which "immigration and border control is a primary State function and all

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applicant, on account of his activities and his decision to return to Pakistan. To sum up, this is a totally different factual situation from that of the Syrian applicants in the Belgian case.

79 This kind of apocalyptical narrative of fear of an invasion of Europe by foreigners is frequently used in the field of migration law, as has been demonstrated in my separate opinions in *S.J. v. Belgium* (striking out) [GC], no. 70055/10, 19 March 2015; *De Souza Ribeiro v. France* [GC], no. 22689/07, ECHR 2012,, and *M.A and Others v. Lithuania*, cited above, § 17.

80 See my separate opinion in *M.A and Others v. Lithuania*, cited above, § 7.

81 Subsequent case-law proves the point I am making. In the recent judgment in *Asady and Others v. Slovakia* (no. 24917/15, 24 March 2020), the majority did not say a word regarding the lack of legal avenues for the applicants, who had entered the Slovakian territory irregularly, to ask for international protection at Slovakian diplomatic missions or consulates abroad. The violation of the applicants' right under Article 4 of Protocol No. 4 is further compounded by a simulacrum of an individualised examination of the applicants' situation by the Slovakian authorities. No genuine and effective opportunity was given to them to submit arguments against their expulsion.

82 The expression used by Judge Bonello in his separate opinion in *Al-Skeini and Others* (cited above) has already been quoted above.

forms of this control result in the exercise of the State's jurisdiction"[83]. In the light of that, I would have no qualms admitting the existence of a jurisdictional link with Belgium, based on State decisions taken at national level, including the decisions of diplomatic and consular officials, that had an impact on the situation of aliens abroad, regardless of any territorial or personal physical control[84]. Furthermore, having overcome the jurisdictional threshold, I would reiterate that "if a person in danger of being tortured in his or her country asks for asylum in an embassy of a State bound by the European Convention on Human Rights, a visa to enter the territory of that State has to be granted"[85]. Article 3 of the Convention encompasses the principle of *non-refoulement* as it obliges States not to reject a visa for an alien where substantial grounds have been shown for believing that the person in question, if left in his or her country, would face a real risk of being subjected to treatment contrary to that Article[86].

27. In my view, large-scale military operations outside national territory are no less the expression of State power than targeted policing operations within the State's borders, and the conduct of hostilities abroad is no less a State prerogative than any law-enforcement activity on national territory. In principled terms, engaging in an armed conflict is no less a State function than controlling borders. Hence the Court cannot evade this principle with the argument that "the very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a

83 See my separate opinions in *Hirsi Jamaa and Others*, cited above; *De Souza Ribeiro*, cited above; and *M.A and Others v. Lithuania*, cited above, §§ 3-8.

84 For the Inter-American Court of Human Rights, the acts of diplomatic officials regarding a person who enters the embassy of a foreign State to seek protection automatically fall under the jurisdiction of that State (Advisory Opinion OC-25/18 of 30 May 2018, The institution of asylum and its recognition as a human right in the Inter-American system of protection (Interpretation and scope of Articles 5, 22.7 and 22.8 in relation to Article 1 § 1 of the American Convention on Human Rights), §§ 188, 192 and 194). The Inter-American Court was inspired by the former European Commission of Human Rights in *M. v. Denmark*, no. 17392/90, Commission decision of 14 October 1992, DR 73, p. 193, and by the United Nations Human Rights Committee, *Mohammad Munaf v. Romania*, Communication No. 1539/2006, UN Doc. CCPR/C/96/D/1539/2006, 21 August 2009, §§ 14.2 and 14.5. It is true that the Danish case involved acts of force over the alien, but neither the Romanian case nor the Advisory Opinion set as a condition for jurisdiction that the acts of diplomatic officials must involve physical control over the alien by the diplomatic officials or other persons at the request of diplomatic officials.

85 See my opinion in *Hirsi Jamaa and Others*, cited above.

86 According to the Inter-American Court of Human Rights, there is an obligation to respect the principle of *non-refoulement* in diplomatic missions (Advisory Opinion OC-25/18, cited above, §§ 192 and 194), which implies positive and negative obligations for the State, namely the obligation to carry out an assessment of whether there would be a real risk of *refoulement* if the person were to leave the embassy and, if such a risk is determined, the obligation to adopt all necessary diplomatic measures, including requesting the State on whose territory the diplomatic mission is located to arrange safe passage for the person (ibid., §§ 194-98).

context of chaos"[87] excludes jurisdiction. If detaining, injuring or killing a person abroad triggers jurisdiction, as the Court admitted in the above-mentioned Turkish and Cypriot cases, killing many more people cannot exclude jurisdiction, at least personal jurisdiction, regardless of any element of proximity between the State agents and the targeted population. It is not because the State acts far away from its borders that it can do abroad what it cannot do at home. 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. In any event, even if one were to accept that jurisdiction implies an "element of proximity", for the sake of argument, it could not be excluded when the State plans and carries out a large-scale military operation in the vicinity of its borders, as the respondent State did in the present case.

28. The absence of an Article 15 derogation has obviously nothing to do with jurisdiction, as the Court itself has previously admitted[88]. The Court cannot give away its own *Kompetenz-Kompetenz* under Article 1 of the Convention just because the Contracting Parties have simply ignored Article 15. Confusing the jurisdictional issue and the issue of the law applicable to the facts, as the majority do in the present judgment[89], only diverts from the fundamental question of the irrationality of the majority's position that the graver the State military conduct, the less intensive the Strasbourg oversight. Nor does it help to argue that the Court's jurisdiction should be determined by the practical difficulties it may face when dealing with a "large number of alleged victims and contested incidents", or with "the magnitude of the evidence produced", in sum, with "the difficulty in establishing the relevant circumstances"[90]. It is inconceivable that the Court should delimit its jurisdiction not in accordance with the legal criteria set out in the Convention, but in view of possible future procedural and technical complications in gathering and evaluating evidence. Moreover, the Court itself has long since adopted rather successful techniques of evidence-gathering and evaluation in complicated military situations, such as the selection of "representative incidents"[91], and there is no reason why these same techniques should not be applied in the present case. It looks as though the Court is intentionally running away from trouble, forgetting that the maintenance of peace was one of the most important, if not the most important goal of the founding fathers of the Convention in Rome, as its Preamble so forcefully shows.

87 See paragraph 137 of the present judgment. The argument is copied from the position of the United Kingdom in *Hassan*, cited above, § 71.
88 *Hassan*, cited above, §§ 101 and 107-10.
89 See paragraph 139 of the present judgment.
90 See paragraph 141 of the present judgment.
91 This technique had already been adopted in *Cyprus v. Turkey*, nos. 6780/74 and 6950/75, Commission's report of 10 July 1976, § 77.

29. Equally unconvincing is the argument that the Court should not delve into "such situations [that] are predominantly regulated by legal norms other than those of the Convention"[92], since it is oblivious to the patent fact that the majority themselves compare and contrast Convention-based substantive obligations and obligations derived from international humanitarian law[93]. Worse still, the Court had explicitly rejected this line of argument in *Hassan*. In fact, the respondent Government in *Hassan* submitted that "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"[94]. The straight answer of the Court was as follows:

> "The Court is not persuaded by this argument. ... to accept the Government's argument on this point would be inconsistent with the case-law of the International Court of Justice, which has held that international human rights law and international humanitarian law may apply concurrently ... As the Court has observed on many occasions, the Convention cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part (see, for example, *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI). This applies equally to Article 1 as to the other Articles of the Convention."[95]

30. In sum, the Court will face a gargantuan task to restore the damage to its credibility caused by this judgment. The revival of *Banković and Others*, both in the present case and in the recent decision in *M.N. and Others v. Belgium*, is indeed deeply regrettable in the eyes of the victims, and in their eyes it does not serve the cause of justice better to lament the "unsatisfactory"[96] result of these judgments. To victims and their relatives these laments could look like crocodile tears.

92 See paragraph 141 of the present judgment.
93 See paragraphs 196-99, 235-37, 266-67, 290-91 and 310-11 of the present judgment.
94 *Hassan*, cited above, § 76.
95 Ibid., § 77.
96 To use the wording of paragraph 140 of the present judgment.

PARTLY DISSENTING OPINION OF JUDGE DEDOV

11. My voting against some of the conclusions of the majority was based on the lack of evidence, and on the lack of impartiality of those who provided evidence against the Russian Federation. I think that the whole political context of the present case is not fair, and I see systemic problems with the clarity and effective implementation of public international law in the sphere of self-determination and local governance.

12. Let me first explain my position on the question of jurisdiction and control during the phase of hostilities. I believe that control cannot be established in relation to the time when both parties are fighting for such control using their military resources against each other, and when their forces are relatively equal. Effective control and authority can be exercised only if overwhelming force is applied. Therefore, the issue of control in the present case arose during the first hours when the Georgian army started to engage in artillery shelling of the peacefully sleeping city of Tskhinvali and the headquarters of the Russian peacekeepers in the night of 7 to 8 August 2008. There was no military resistance equal to the Georgian army. That part of the events was not examined by the Court as it fell outside the scope of its examination, and Georgia thus remains responsible for killing ordinary citizens.

13. Similarly, the active phase in the present case should be distinguished from the *Banković* case (*Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, ECHR 2001-XII), where the NATO air forces organised the bombing of a civilian object – the Radio-Television Serbia headquarters in Belgrade – and the bombing was carried out without any tangible military resistance, even outside the territory of the respondent States. Therefore, the Court had to examine the merits of the complaints, and the respondent Governments in the *Banković* case bore the burden of proving that there had been circumstances allowing military force to be applied to a civilian object under international humanitarian law or that there were other reasons justifying the use of lethal force under Article 2 of the Convention. I am not surprised that the *Banković* decision was heavily criticised by experts, although for different reasons.

14. The political context in the present case is quite controversial; it makes it very difficult for the Court to examine the case in a safe manner. From the very beginning, when the new State of Georgia was acknowledged by the Western international community, the Georgian government immediately decided to revoke the ethnic autonomy which Abkhazia and South Ossetia had enjoyed during their centuries-old history. Such an action, incompatible with the principles of international law (self-determination, self-governance, regional and ethnic autonomy), was not criticised by the Western international community. Although the above principles have been developed by international organisations including the

Council of Europe[1] , at that time there was no reaction, even after the 1991-92 war launched by the Georgian government. This is hard to believe, because the European Charter of Local Self-Government had been adopted in 1985, just five years beforehand. The Charter contains important safeguards to protect the right to local self-governance. In particular, Article 5 of the Charter provides that changes in local authority boundaries cannot be made without prior consultation of the local communities concerned, possibly by means of a referendum where this is permitted by statute.

15. There was no tangible reaction notwithstanding that that war ended with inter-ethnic violence, hundreds killed and wounded, and thousands of displaced persons and destroyed houses. Such a policy (arbitrary deprivation of ethnic autonomy), violating the principles of international law, provoked inter-ethnic tensions in that region for a long time. The policy was not officially criticised by the international community, which presumed the integrity of the territory of Georgia; on the contrary, the Georgian government was provided with financial, military and other assistance to modernise and reinforce its military machinery and to prepare for a new war, which became inevitable in 2008. Immediately after the Georgian invasion into South Ossetia, the international community contributed to the media support for the Georgian government, claiming that it was Russia that had attacked Georgia. In fact, the Georgian government was encouraged to take control over the rebel regions by military means, notwithstanding that many innocent lives would be taken in order to achieve this task.

16. Such a policy may change the whole concept of democracy, since democracy now appears to be compatible with military aggression aimed at suppressing self-determination and self-governance, and to allow persecution of ethnic minorities who quite naturally want to enjoy their autonomy. This new concept undermines modern democracy. It proves that force (prepotency) remains a decisive criterion for the decision-making process, and that peace, solidarity and dialogue are not priorities for democratic regimes in their relations with their ethnic autonomous communities. I would not be surprised to know that many ordinary people are now disappointed in democracy.

17. Although there are many international documents aimed at supporting regional or ethnic autonomy, they are not effective enough as

1 Among multiple authorities, it is worth mentioning the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted by United Nations General Assembly Resolution 2625 (XXV) of 24 October 1970 ("the Friendly Relations Declaration"), and two Council of Europe instruments: the Framework Convention for the Protection of National Minorities and the European Charter of Local Self-Government, the latter of which is implemented by the Congress of Local and Regional Authorities of the Council of Europe.

they do not provide any comprehensive criteria or thresholds for establishing autonomy (safeguarding human rights, maintaining good governance, keeping control over corruption, and so on) and then for gradually expanding regional powers in various fields, including local taxes and budgetary relations. Such guidelines would help to avoid many regional conflicts and tensions between regional and central authorities. The Parliamentary Assembly of the Council of Europe has recognised that the positive experience of autonomous regions can act as a source of inspiration for conflict resolution in Europe and that territorial self-government arrangements may play an important role for the effective protection of the rights of national minorities (see Resolutions 1334 (2003) and 1985 (2014)).

18. In the present case, the international support for the anti-ethnic actions of the Georgian government objectively made the conduct of independent and impartial fact-finding missions impossible. In fact, the reports examined by the Court gave the impression that their authors were aiming to acquit the Georgian government (by saying that Georgia's military actions did not cause a lot of damage) and to blame the Russian government (by saying that its actions caused much more damage and other negative consequences) for the results of the 2008 war, ignoring the fact that the attack was committed by the Georgian government without declaring war, in violation of the Hague Convention (III) of 1907 on the Opening of Hostilities. Today, international law is applied selectively, and a second Tokyo War Crimes Trial would not be possible. Instead, the inter-State application against the Russian government, which waged a just war (*jus ad bellum*), was declared admissible. In my view, the difficulty of the present case before the Court was that there were no reliable sources of information on almost all issues raised by the applicant Government, except the OSCE report, which was written in an impartial tone. Unlike other reports, the OSCE concentrated on the facts without making any assessment of a political nature and without reaching conclusions on human rights violations which might prejudice the conclusions of the Court. In particular, the European Union Fact-Finding Mission reached conclusions on every aspect of the present case (jurisdiction during occupation, effective control, effective investigation, ill-treatment and others), which put the Court under political pressure.

19. My conclusion is that the Georgian government, and indirectly those States which provided any political, financial or military support (either through action or inaction) for its plans to gain control over South Ossetia by means of military intervention in violation of the principle of ethnic autonomy, should share responsibility for provoking inter-ethnic violence, the displacement of civilians and other atrocities. This becomes even more evident if we take into account the fact that Russian agents were not involved in atrocities against civilians, and made efforts to protect victims from both sides, but their control over the territory was very limited as they

had to concentrate on the task of preventing and countering any new military operations by the Georgian army, rather than creating an administration on the occupied territories. Owing to the conflict of interests, those efforts were not noticed or adequately evaluated.

PARTLY DISSENTING OPINION OF JUDGE CHANTURIA

1. I voted with the majority as regards points 2-16 of the operative part of the judgment. The Court's ruling in this respect carries particular historical and practical significance. It has finally, after a careful examination of all the relevant facts, given a definitive answer to one of the key questions associated with the impugned events of August 2008 (which have been nicknamed "a little war that shook the world"[1]). This question is who the real victims of the Russo-Georgian war of August 2008 are.

2. The Court has found that the "little war" entailed the systematic killing of Georgian civilians and the torching and looting of houses in the Georgian villages situated in the conflict zone (point 3 of the operative part of the judgment); that Georgian civilians were routinely subjected to inhuman and degrading treatment during their unlawful detention in Tskhinvali in August 2008 (points 5 and 6); and that there was an administrative practice of Georgian prisoners being subjected to torture (point 8). Furthermore, under the relevant rules governing extraterritorial jurisdiction, the Russian Federation is responsible for the commission of all these crimes, since, as the Court has established, it is that State which has been exercising "effective control" over the conflict zones from the date of the ceasefire agreement of 12 August 2008 onwards (see points 2, 4, 7 and 9 of the operative part). The respondent State has a further international obligation to carry out an effective investigation not only into the events which occurred after the cessation of the hostilities but also into the events, including those relating to killings, that occurred during the active military operations in the period of 8 to 12 August 2008 (see point 12).

3. The Court has established the lasting inability of Georgian civilians to return to their homes in the Abkhazian and South Ossetian regions (see point 10 of the operative part and paragraphs 296-301 of the judgment), which constitutes judicial acknowledgment of the continuing factual situation of ethnic cleansing of the Georgian population from these regions. This finding has prompted the Court to remind the Russian Federation, "which has 'effective control' over those regions", that it has "a duty to enable inhabitants of Georgian origin to return to their respective homes, pursuant to [its] obligations under the Convention" (see paragraph 298 of the judgment). The fact of the occupation of these two Georgian regions by the Russian State has been recognised by an international judicial body (see the sub-chapter entitled "Occupation phase after the cessation of hostilities" of the judgment, paragraphs 145-222, as well as paragraph 336).

4. However, where my and the majority's views differ is in relation to point 1 of the operative part of the judgment, where the majority stated that

1 Ronald D. Rasmus, *A Little War That Shook the World: Georgia, Russia, and the Future of the West*, St. Martin's Press, 11 January 2010.

the events which had taken place during the active phase of the Russo-Georgian war (from 8 to 12 August 2008) did not fall within the jurisdiction of the Russian Federation.

5. I disagree with this finding for three reasons: (A) firstly, because the arguments put forward by the majority in this respect are not convincing and not consistent with the Court's recent case-law; (B) secondly, because the majority resorted to a faulty methodology for examining the question of extraterritorial jurisdiction during the active phase of the military conflict; and (C) finally, because I believe that the majority have created a vacuum in the Convention system for the protection of human rights in Europe.

A. A closer look at the majority's arguments

6. The majority mainly relied on the following five arguments to conclude that the respondent State did not have extraterritorial jurisdiction over the events that had taken place during the active phase of the hostilities:

1. that such a finding was consistent with its earlier case-law, notably the case of *Banković and Others v. Belgium and Others* ((dec.) [GC], no. 52207/99, ECHR 2001-XII) (see paragraphs 134 and 136 of the judgment);

2. that the reality of an international armed conflict excluded any form of either "effective control" or "State agent authority and control" over individual victims (see paragraphs 126, 133 and 137-38 of the judgment);

3. that the practice of non-derogation under Article 15 of the Convention should be interpreted as an indication of the non-existence of extraterritorial jurisdiction during an armed international conflict (see paragraph 139 of the judgment);

4. that owing to the large number of alleged victims and the magnitude of the evidence produced, the Court had "difficulty in establishing the relevant circumstances" (see paragraph 141 of the judgment); and

5. that the events complained of were predominantly regulated by norms of international humanitarian law (see paragraphs 141-43 of the judgment).

1. Why Banković is no longer valid case-law on the question of extraterritorial jurisdiction

7. As regards the parallels drawn by the majority with the *Banković and Others* case, it is already a matter of common legal knowledge that the case-law on the question of extraterritorial jurisdiction has significantly evolved since the decision in that case. In particular, as stated by the Court in *Al-Skeini and Others v. the United Kingdom* ([GC], no. 55721/07, § 137,

ECHR 2011), "whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual [in French: '*qui concernent son cas*']. In this sense, therefore, the Convention rights can be 'divided and tailored'". The Court has also held, with reference to its own case-law, 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" (ibid., § 136).

8. In most of the cases that the Court has examined since its decision in *Banković and Others* (cited above), the Court has found that the decisive factor in establishing "State agent authority and control" over others outside the State's territory in the context of arrest or detention was "the exercise of physical power and control over the person in question" (see *Al-Skeini and Others*, cited above, § 136 *in fine*). In other cases concerning fire aimed by the armed forces of the States concerned, the Court has applied the concept of "State agent authority and control" over others to scenarios going even beyond physical power and control exercised over the persons in question in the context of arrest or detention (see, for example, *Jaloud v. the Netherlands* [GC], no. 47708/08, §§ 140-53, ECHR 2014; *Solomou and Others v. Turkey*, no. 36832/97, §§ 41-52, 24 June 2008; *Andreou v. Turkey* (dec.), no. 45653/99, 3 June 2008; *Pad and Others v. Turkey* (dec.), no. 60167/00, 28 June 2007; *Isaak and Others v. Turkey* (dec.), no. 44587/98, 28 September 2006; and *Issa and Others v. Turkey*, no. 31821/96, §§ 68, 71 and 74, 16 November 2004).

9. Thus, to give a few illustrative examples, in *Andreou* (cited above) the Court accepted that the victims fell within Turkey's extraterritorial jurisdiction despite the fact that the shooting of the victims had occurred in Cyprus:

> "In these circumstances, even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as 'within [the] jurisdiction' of Turkey within the meaning of Article 1 and that the responsibility of the respondent State under the Convention is in consequence engaged."

10. In *Issa and Others* (cited above, § 71) the Court noted the following (emphasis added):

> "Moreover, a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State ... **Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention**

> **on the territory of another State, which it could not perpetrate on its own territory** (ibid.)."

11. What all the above-mentioned post-*Banković* cases have in common is the use of physical force by the State agents in question. The concept of State agent "authority and control" over others is to be viewed in the sense of "power" exercised by State agents over individuals, particularly through the use of physical force, whether in the context of arrest or detention or when targeting individuals in order to kill or wound them. In this connection, a few comparative-law parallels can be drawn. In its *Alejandre v. Republic of Cuba* decision, concerning the shooting down of two civilian aircraft by a Cuban military plane in international airspace, the Inter-American Commission on Human Rights concluded that, through those deliberate strikes, Cuba had acquired "control" of the members of the aircraft crew in question. As a result, the crew members fell within the jurisdiction of the respondent State, in accordance with Article 1 of the American Convention on Human Rights[2], the wording of which is similar to that of Article 1 of the Convention.

12. Furthermore, in General Comment no. 36 on the right to life (Article 6 of the International Covenant on Civil and Political Rights), adopted on 30 October 2018, the United Nations Human Rights Committee stated as follows (emphasis added):

> "63. ... In light of article 2 (1) of the Covenant, a State party has an obligation to respect and ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. **This includes persons located outside any territory effectively controlled by the State whose right to life is nonetheless affected by its military or other activities in a direct and reasonably foreseeable manner** ..."

13. Having regard to all the above considerations, I regret that the majority chose to base their findings on extraterritorial jurisdiction on the clearly outdated *Banković and Others* decision instead of relying on much more recent and relevant case-law such as *Jaloud*, *Solomou and Others*, *Andreou*, *Pad and Others*, *Isaak and Others* and *Issa and Others* (all cited above).

14. What the majority have done was not merely resuscitate the otherwise lifeless *Banković* precedent (for which the Court was heavily criticised, and probably rightly so, in the past[3]); they took a step backwards

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2 *Armando Alejandre Jr., Carlos Costa, Mario de la Pena y Pablo Morales v. Republica de Cuba*, Case 11.589, Report No. 86/99, OEA/Ser.L/V/II.106 Doc. 3 rev. at 586 (1999).

3 See, in that connection, among many others: R. Lawson, "Life after Banković: On the Extraterritorial Application of the European Convention on Human Rights", in F. Coomans and M. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (2004); O. De Schutter, "Globalization and Jurisdiction: Lessons from the European Convention on Human Rights", 6 *Baltic Yearbook of International Law* (2006) 183; A. Orakhelashvili, "Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the

by deviating from the spatial concept of extraterritorial jurisdiction introduced by the very same *Banković* case on which the majority themselves relied. In *Banković and Others* the Court at least attempted to justify its position by coming up with the "legal space" argument[4]. By contrast, in the present case the majority failed to give due consideration to the fact that the applicant and respondent States were both High Contracting Parties to the Convention at the material time of the events, and that the shelling and bombing during the active phase of the hostilities had clearly occurred within the legal space (*espace juridique*) of the Convention (see sub-heading C below).

2. Why the reference to the reality of an international armed conflict cannot be a valid excuse for not extending extraterritorial jurisdiction

15. As regards the majority's reference to the reality of an international armed conflict as something peculiar to the extent that it does not warrant protection under the Convention, this argument is ill-fitting. It is true that all the relevant post-*Banković* cases that I have cited above (see paragraph 8 above) concerned matters such as operations for the protection of public order and isolated and targeted actions comprising an element of proximity. The active phase of hostilities which the Court was required to examine in the present case, on the other hand, concerned large-scale bombing and artillery shelling by Russian armed forces seeking to put the Georgian army *hors de combat* and establish control over areas forming part of Georgia.

16. However, while there is certainly a difference in scale between policing operations and large-scale military conflict, there cannot be any real difference in nature, and in practice it is impossible to draw a dividing line between targeted actions and larger-scale military operations. It also appears arbitrary and inconsistent with humanitarian considerations to consider that in the event of targeted policing operations, potential victims

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European Court of Human Rights", 14 *EJIL* (2003) 529; R. Wilde, "Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties", 40 *Israel Law Review* (2007) 503.

4 "It is ... difficult to contend that a failure to accept the extraterritorial jurisdiction of the respondent States would fall foul of the Convention's *ordre public* objective, which itself underlines the essentially regional vocation of the Convention system ... In short, the Convention is a multilateral treaty operating … in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The [Federal Republic of Yugoslavia] clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention" (see *Banković and Others*, cited above, § 80).

fall within the jurisdiction of the State in question, whereas this would not be the case with larger-scale military operations.

3. Why the practice of non-derogation under Article 15 of the Convention cannot possibly obstruct the exercise of extraterritorial jurisdiction

17. To say, as the majority seem to suggest in paragraph 139 of the judgment, that a High Contracting Party may be absolved from its international responsibility under Article 1 of the Convention for war crimes and other serious human rights violations committed during an international armed conflict provided that it has not requested a derogation under Article 15 is, in my view, inadequate.

18. I firmly believe that since Article 15 forms part of the Convention, this Article should be given practical effect by the Court. The aim of Article 15 is to allow States to derogate from the relevant Convention obligations in a situation of "war", and thus of armed conflict, or in any "other public emergency threatening the life of the nation", "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with [their] other obligations under international law". It is noteworthy that with regard to Article 2 of the Convention, Article 15 does not permit any derogation, "except in respect of deaths resulting from lawful acts of war". There is therefore an express reference in the text of Article 15 to international law, and in particular to international humanitarian law as regards Article 2. Thus, although the Convention should so far as possible be interpreted in harmony with other rules of international law, I believe that the Convention is always to be applied as the primary legal source whenever no derogation has been made under Article 15. If a notice of derogation has been submitted, then it is only through the most meticulous application of Article 15 that the Court can achieve a harmonious interpretation of the provisions of the Convention with rules of international public law, in particular the correlation between the standards of protection under Article 2 and those contained in rules of international humanitarian law.

19. Not only has the majority's above-mentioned argument undermined the derogation mechanism of the Convention – which arguably weakens the Convention as a whole – it also contradicts the Court's previous case-law on this precise issue. It is to be recalled that in the landmark case of *Hassan v. the United Kingdom* ([GC], no. 29750/09, ECHR 2014), the absence of a formal derogation by the United Kingdom under Article 15 of the Convention did not in any manner hinder the establishment of the respondent State's extraterritorial jurisdiction over the events which had occurred in south-east Iraq (ibid., §§ 74-80, 101 and 107-10).

4. Why the Court cannot hide behind difficulties associated with evidence-gathering

20. To rely, as the majority seem to suggest in paragraph 141 of the judgment, on a difficulty associated with evidence-gathering as an excuse for a court not to administer justice is not convincing either. This is particularly so when a number of proven procedural techniques relating to the task of fact-finding are at this Court's disposal.

21. One such technique is, whenever there are a large number of alleged victims and contested incidents, to make a selection of a few "representative incidents" and to examine the selected incidents only. This was exactly how the European Commission of Human Rights proceeded in the first two *Cyprus v. Turkey* cases, where it indicated that in view of the sheer number of alleged violations, it had "to restrict its investigation of alleged violations and [had] tested only a limited number of cases selected as representative" (see *Cyprus v. Turkey*, nos. 6780/74 and 6950/75, Commission's report of 10 July 1976, § 77; the Court, following the Commission, adopted the same approach to selected "illustrative cases" in its first inter-State judgment in *Ireland v. the United Kingdom*, 18 January 1978, § 93, Series A no. 25).

22. The same holds true in the present case. Having regard to the extent of the military operations undertaken and to the violations alleged, the Court chose, at a very early stage of the proceedings, to examine only four "representative incidents": it shortlisted for scrutiny the alleged air attacks on the town of Gori and the villages of Karbi and Tortiza in the "buffer zone", all three being situated outside of the South Ossetian region, and on the village of Eredvi in the part of the South Ossetian region which had been under Georgian control prior to the outbreak of the conflict (see paragraph 112 of the judgment). According to the information submitted by the applicant Government and set out in the various reports by international organisations, the chosen locations covered different conflict zones, and the town of Gori and the villages of Karbi and Tortiza were located in areas where the majority of the most intense fighting had taken place. Furthermore, the military operations carried out in the chosen four locations were particularly well documented.

23. To illustrate the fact that the Court had at its disposal more than enough evidence for a judicial assessment, I will now provide a very brief overview of the evidence available in the case file concerning the military actions conducted in the four above-mentioned "representative" settlements:

a. the flight logs, together with video-recordings (ordinary and accelerated versions) of the respective radars, which showed the dates and times, trajectory, flight altitude and velocity of the Russian military jets entering Georgian airspace and flying over Eredvi, Tortiza, Karbi and Gori in the period between 8 and 12 August 2008;

b. independent satellite imagery from the report "High-Resolution Satellite Imagery and the Conflict in South Ossetia", compiled by the Geospatial Technologies Project at the American Association for the Advancement of Science (AAAS), describing in detail various examples of bomb crater damage found in Eredvi, Tortiza, Karbi and Gori;
c. demining reports produced by a British company, the HALO Trust, and a Norwegian company, Norwegian People's Aid, which listed the bombs and missiles (type FAB-500, FAB-250-270 and FAB-100, as well as S-8 missiles) purportedly dropped/fired by Russian aircrafts or rocket systems in over thirty towns and villages populated by civilians, including Eredvi, Tortiza, Karbi and Gori;
d. a report on the "Storimans investigative mission" (published on 20 October 2008), commissioned by the Dutch Ministry of Foreign Affairs and conducted by independent international military experts, the findings of which confirmed the fact of the shelling of Gori by an 92-cm Iskander missile (also known as SS-26 Stone) carrying cluster munitions. That aerial attack on Gori caused numerous casualties amongst the civilian population, including the death of the Dutch journalist Mr Stan Storimans; and
e. confirmation of the shelling of Gori by an Iskander missile as shown by video and photo footage of the damage caused by the strike, all taken by independent international journalists and military experts.

24. Furthermore, between 6 and 17 June 2016 the Court took evidence from witnesses in Strasbourg. Several key findings can be discerned from the verbatim record of the witness hearings.

a. Most of the witnesses who were inhabitants of the relevant four settlements confirmed that aerial strikes had occurred in the areas selected as illustrative, namely the villages of Eredvi, Karbi and Tortiza and the town of Gori.
b. Most of the same witnesses testified that as a result of the strikes, civilians had been killed and injured in front of their eyes.
c. Some of the same witnesses stated that military aircraft bombing the above-mentioned four settlements had been readily recognisable as Russian SU-25 military jets through their specific features (red star on the underside, green colour, and so on).
d. All of the above-mentioned witnesses confirmed that there had been no Georgian military presence either in Gori or in the three villages (which can be taken as an indication that aerial strikes by the Russian army could not have pursued any legitimate military aims in any of the "representative" settlements).
e. Other relevant witnesses, notably those who had held military or other public offices in either the Georgian or Russian governments at the time of the events (including a Russian colonel), further

confirmed that Georgian air forces had been inoperative from the very beginning of the active phase of the hostilities as a result of the Russian aerial strikes on and the destruction of all military aerodromes in Georgia in the early hours of 8 August 2008. This finding excluded any possibility of aerial bombings by Georgian military aircraft[5].

f. The fact that the Georgian army had left the town of Gori and all of the buffer zone and the villages in the South Ossetian region by the early hours of 11 August 2008 at the latest was further confirmed by the EU Fact-Finding Mission (which fact excluded any possibility that the four settlements in question had been bombed and shelled by the Russian forces for any legitimate military purpose).

25. A number of international reports containing relevant factual findings provided an additional and invaluable source of information. For instance, in its report "Human Rights in the war-affected areas following the conflict in Georgia" (see paragraph 63 of the judgment), the ODIHR/OSCE established the following facts with respect to Eredvi (on page 35 of the report):

> "One of the worst hit villages was Eredvi. Several former residents of Eredvi provided similar accounts to the HRAM of their experiences there. The aerial bombardment began at noontime on 8 August. One resident reported seeing dead bodies in the street after the Russian planes passed over. Two residents separately reported seeing two aircraft bomb the village, resulting in at least six persons killed. The bombing was followed by a ground attack, during which the village sustained fire from small arms and Russian tanks. The Russians were joined by Ossetian militia, who also fired on the population. Once the troops were inside the village, some civilians were threatened with firearms."

26. Human Rights Watch, in its report "Up in Flames: Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia" (see paragraph 63 of the judgment), established the following facts with respect to Karbi (on pages 96-97 of the report):

> "V[.]T[.], the village administrator, described to Human Rights Watch the aftermath of the second attack: 'There were many wounded. I had to decide who had better chances of survival and stuff them into the ambulance. We buried the dead in the yards of houses and fled the village.'
>
> According to V[.]T[.] and two other villagers, there was no Georgian military base in the village and there were no Georgian military forces present at the time of the attack. Two other villagers, interviewed separately, told Human Rights Watch that while there were no Georgian troops in the village itself, there was Georgian artillery in fields about three kilometers from the village.
>
> The distance of the village from the Georgian artillery, combined with the fact that the village was hit twice in two separate attacks, suggests that the village may have been deliberately targeted, or at a minimum that the village was hit as part of an

5 The same fact was confirmed by the report of the EU Fact-Finding Mission (Volume I, p. 20).

> indiscriminate attack on the area, and the Russian forces failed to direct the attack solely at the military targets located at some distance from the populated areas. In either event the civilian casualties in Karbi appear to be the result of serious violations of humanitarian law."

27. Human Rights Watch also established the following facts with respect to Tortiza (on pages 97-100 of the above-mentioned report):

> "Tortiza is a small village situated several kilometers from a main road connecting Gori and Tskhinvali ... Many civilians fleeing bombing and shelling in other villages in the area went to Tortiza. Both Tortiza residents and those arriving from other villages reported to Human Rights Watch that they believed the village's location away from the main road meant that it was of no strategic importance and that it therefore would not be targeted. However, on August 12, at around 9:45 a.m. Russian aircraft fired S-8 rockets at Tortiza, killing three civilians, injuring dozens, and damaging nearly every house in the village. ...
>
> While it has not been possible to establish the total number of rockets Russian forces fired in their attack, villagers told Human Rights Watch that a demining organization had cleared 148 S-8 rockets, many of them unexploded, in Tortiza during the first weeks of October. L[.]M[.], 45, told Human Rights Watch, 'In every house, they cleared stuff.' Z[.]K[.], 72, told Human Rights Watch that four rockets fell in her house alone. She showed Human Rights Watch researchers the remaining craters and described the attack. ...
>
> Villagers told Human Rights Watch that there were no Georgian military or police forces in the area. Human Rights Watch examined the damage to many houses in the village which, together with witness accounts, provided compelling evidence that Russian aircraft fired at civilian houses.
>
> This direct attack on what appears to have been a purely civilian target constitutes a serious violation of humanitarian law and a war crime."

28. The above-mentioned brief overview, which is just an example of the evidence that the Court had at its disposal in the case file, is meant to show that the majority's argument about the lack of the evidentiary basis for reaching a judicial decision is difficult to comprehend. The proceedings in the present inter-State case were pending for some twelve years, and during this period plenty of relevant documents and information were collected by the Court. Had the majority established the extraterritorial jurisdiction of the Russian Federation over the events that took place during the active phase of the military conflict, I have no doubt that the Court could easily have established the fact of wanton and disproportionate use of military power by the Russian Federation, which caused numerous casualties amongst the civilian population, in breach of Article 2 of the Convention. I regret that the majority deprived the Court of an opportunity to carry out a proper assessment of the evidence available in the case file.

5. Why the alleged inability to interpret international humanitarian law was not a valid argument

29. In paragraphs 141-43 of the judgment, the majority seem to contend that the Court is not well suited for applying rules of international humanitarian law (IHL). Such a supposition, however, contradicts the Court's previous case-law.

30. If in the landmark case of *Hassan* the Court was able to apply the relevant rules of IHL in conjunction with Article 5 of the Convention in relation to actions carried out by the United Kingdom authorities in south-east Iraq (see *Hassan*, cited above, §§ 101-11), why then could the majority not do the same in the present case in relation to Article 2 as regards the use of military power by the Russian Federation?

31. It is true that it is not within the Court's jurisdiction to interpret and apply international humanitarian law as such. However, the Court clearly has jurisdiction to interpret and apply the Convention, which is undoubtedly the only legal basis for its judicial assessment, while at the same time having regard to other rules of international law, including international humanitarian law, and this is true irrespective of the position of the respondent State (ibid., § 102). I believe that what the majority needed to do in the present case was not to determine the question of the legality under international law of the armed conflict conducted by the Russian Federation (*jus ad bellum*), but merely to establish – and this task fell squarely within the Court's mandate under the Convention – whether the acts carried out by the Russian armed forces during the active phase of the conflict amounted to violations of Article 2 of the Convention, by applying Article 2, as would have been appropriate in the particular circumstances of the present case, either alone or in the light of international humanitarian law (*jus in bello*).

B. An issue with the approach to extraterritorial jurisdiction during an international armed conflict

1. Methodology

32. At the beginning of my opinion I mentioned that the majority had resorted to a questionable methodology for the assessment of extraterritorial jurisdiction as regards the active phase of the military conflict between the two Contracting States (see paragraph 5 above). I will now try to elaborate on this point further.

33. In my opinion, the fallacy of the methodology applied by the majority started with the separation of the active phase of the military conflict between Georgia and Russia from the subsequent period of occupation (see paragraph 83 of the judgment). The majority stated that "a distinction needs to be made" between the two periods but failed to explain why exactly that distinction was necessary. It is difficult to understand the

logic for this approach and the unintended consequence of this separation appears to be an alteration of the scope of the inter-State application at stake.

34. It would have been more logical and compatible with the scope of the application as lodged by the applicant State to examine, for the purposes of determining the issues of jurisdiction, attributability and imputability, the active phase of the conflict not as a distinct, instantaneous event detached from the historical background but rather as a part of a continuing situation which included both the events that had occurred prior to the outbreak of the military conflict and those which happened afterwards. This "continuous" approach to the assessment of the military conflict of 8 to 12 August 2008 in conjunction with the preceding and subsequent events was exactly the method used by the EU Independent International Fact-Finding Mission in describing the conflict (see the structure of its report), as well as by Pre-Trial Chamber I of the International Criminal Court (ICC), when the latter described the relevant factual situation in its decision of 27 January 2016 authorising the Prosecutor of the ICC to proceed with an investigation into the crimes allegedly committed in and around South Ossetia, Georgia, between 1 July and 10 October 2008[6]. See, in particular, the following excerpt from the Chamber decision of the ICC of 27 January 2016 (emphasis added):

> "In addition, the Chamber considers, at this stage, that there is sufficient indication that the Russian Federation exercised overall control over South Ossetian forces, **meaning that also the period before the direct intervention of Russian forces may be seen as an international armed conflict**."

35. Most importantly, the inter-State application form was presented in a manner that directly requested the Court to apply the above-mentioned holistic approach to the facts of the case. Thus, the applicant Government explicitly and on numerous occasions requested the Court to take into account the jurisdictional situation affecting South Ossetia and Abkhazia prior to the outbreak of the active phase of the hostilities[7].

36. The third-party intervener in the case, the Human Rights Centre of the University of Essex (see paragraph 80 of the judgment), advised the Court that in order to determine whether the violations allegedly committed during the armed conflict fell within the jurisdiction of the respondent State, the Court needed to ask itself the following questions (emphasis added):

> "What was the nature of the control, if any, exercised by Russia in South Ossetia and Abkhazia prior to the armed conflict? ... Did the nature of the control exercised by Russia in South Ossetia and Abkhazia **change upon** the break of hostilities? ... **After**

6 The ICC's decision can be consulted here: https://www.icc-cpi.int/CourtRecords/CR2016_00608.PDF

7 See, for instance, (1) pages 6-23 and 60-62 of the original application form lodged with the Court by the Georgian Government, as well as (2) pages 13-23 of the Georgian Government's subsequent observations on the merits of the case.

> **the end of the active hostilities**, what was the nature of the control exercised by Russia in areas outside ... [and] within South Ossetia and Abkhazia?"

37. In the light of all the aforementioned factors, I believe that the only correct methodology in the present case for addressing the issues of jurisdiction, attributability and imputability during the active phase of the hostilities would have been for the Court to start its examination with the question of whether the respondent State had exercised effective control over South Ossetia and Abkhazia before the outbreak of the hostilities. In the affirmative, and coupled with the Court's existing finding that the Russian Federation has remained the occupying power in the two regions after the end of the hostilities, it would have become evident that the direct military intervention by the Russian Federation in the period between 8 and 12 August 2008 was nothing else but an intensified form of the military support that had otherwise already been provided by the respondent State to the *de facto* authorities of the two breakaway regions for many years on an uninterrupted basis prior to the outbreak of the "little war".

38. The main driving force behind the Russian military operation against Georgia was to consolidate Russia's already existing effective control over the two regions of Georgia in issue and to extinguish any attempts by Georgia (be they political, diplomatic or economic) to claim back its right of sovereign control over those regions. A direct consequence of the respondent State's decision to engage in a large-scale international conflict with the applicant State was an even further consolidation of its status as the occupying power. From a passive occupying power the respondent State became a belligerent occupying power. This is, by the way, exactly what differentiates the present inter-State case from the situation examined in *Banković and Others* (cited above), where the NATO forces' narrowly tailored military operation in Belgrade never pursued any purpose of occupying territories of the then Yugoslavia.

39. Indeed, unlike NATO's actions in the *Banković* case, during the five-day war the Russian Federation did not limit its military intervention to aerial or artillery strikes only. What Russia did was carry out a full-scale intervention with all of its military might, including, most importantly, the advancement of its ground forces into Georgian territory by early 10 August 2010 at the very latest, a fact which was indirectly acknowledged by the majority as well[8]. In this connection, it should be borne in mind that the principle of "boots on the ground" always calls for very careful scrutiny by the Court, as intervention and occupation by the ground army is a *sine qua non* for either maintaining or establishing overall control over the foreign territory (compare, for instance, *Chiragov and Others v. Armenia* [GC], no. 13216/05, § 96, ECHR 2015).

8 This fact was further confirmed by the report of the EU Fact-Finding Mission (Volume II, p. 210).

2. Evidence in the case file

40. I would like to provide a very brief overview of the documentary evidence attesting to the nature of the control exercised by the respondent State over South Ossetia and Abkhazia prior to the hostilities. It should be noted that all the relevant documents formed part of the case file.

41. The Russian Federation exercised effective authority and control over South Ossetia and Abkhazia at all relevant times and prior to the conflict. The following facts are examples of such control/authority: appointment of high-ranking Russian civil servants and military officers to serve in the *de facto* governments of the two breakaway regions of Georgia, Russia's continuous financial support for South Ossetia and Abkhazia, its role in securing the economy in the two regions, and the "passportisation" and visa-free movement secured by the Russian Federation for residents of South Ossetia and Abkhazia.

42. The level of control exercised by the Russian Federation was confirmed by the then leader of the *de facto* government of South Ossetia, Eduard Kokoity, who stated the following in an interview on 10 June 2006: "I wish to emphasise that South Ossetia is already *de facto* an entity of the Russian Federation because 95% of South Ossetians are Russian citizens ... Russian laws apply in the Republic of South Ossetia; the currency is the Russian rouble; .... South Ossetia is a *de facto* entity of the Russian Federation and we simply have to consolidate this legally."

43. The EU's Fact-Finding Mission confirmed all the above in the following findings (emphasis added):

> "First, as the majority of people living in South Ossetia have acquired Russian citizenship, Russia can claim personal jurisdiction over them. From the point of view of Russian constitutional law, the legal position of Russian citizens living in South Ossetia is basically the same as the legal position of Russian citizens living in Russia.
>
> **Second – and still more importantly – Russian officials already had *de facto* control over South Ossetia's institutions before the outbreak of the armed conflict, and especially over the security institutions and security forces**. The *de facto* Government and the 'Ministries of Defense', 'Internal Affairs' and 'Civil Defence and Emergency Situations', the 'State Security Committee', the 'State Border Protection Services', the 'Presidential Administration' – among others – have been largely staffed by Russian representatives or South Ossetians with Russian citizenship that have worked previously in equivalent positions in Central Russia or in North Ossetia ... Even if South Ossetia was not formally dependent on any other state, Russian foreign influence on decision-making in the sensitive area of security issues was so decisive that South Ossetia's claim to independence could be called into question.
>
> To sum up, Russia's influence on and control of the decision-making process in South Ossetia concerned a wide range of matters with regard to the internal and external relations of the entity. **The influence was systematic, and exercised on a**

> **permanent basis. Therefore the *de facto* Government of South Ossetia was not 'effective' on its own**."[9]

44. At a press conference on 14 February 2008 the Russian President, Vladimir Putin, declared that if Kosovo was recognised as an independent State, the international community should grant South Ossetia and Abkhazia the same status.

45. On 21 March 2008 the Russian State Duma adopted a resolution calling on the Russian Government to consider "the expediency of recognising the independence" of South Ossetia and Abkhazia and calling for greater support to "Russian citizens" in both regions.

46. On 29 April 2008 the Russian Defence Ministry officially announced its decision to increase the number of its troops stationed in Abkhazia. On 8 May 2008 it stated that it had strengthened the Abkhaz contingent so that it comprised 2,542 Russian soldiers. Following this build-up of troops and equipment, the European Parliament adopted a resolution on 5 June 2008 stating that Russian troops could no longer be considered neutral and impartial peacekeepers.

47. Between 15 July and 2 August 2008 the Russian Federation conducted large-scale military drills referred to as "Caucasus-2008" in the immediate vicinity of Georgia's northern border. The Russian Defence Ministry claimed that the drills, involving over 8,000 troops and 700 pieces of military hardware, were aimed at preparing for, *inter alia*, "peace-enforcement operations in Abkhazia and South Ossetia"[10].

48. In August 2012 President Vladimir Putin conceded in a public interview that the military operation against Georgia in August 2008 had been planned well in advance: "It is not a secret that there had been a plan long before the August 2008 conflict ... We had trained the South Ossetian militia under this plan ... It proved more than effective."[11]

49. The statements given to the Court by a former member of the Parliamentary Assembly of the Council of Europe, who was heard as a witness during the hearing of 9 to 17 June 2006, constitute a perfect description of the type (and methods) of the control exercised by the Russian State prior to the outbreak of the hostilities:

> "[The witness] also stated that he agreed with Carl Bildt that the Russian activities in relation to South Ossetia were comparable to the annexation of Sudetenland by Nazi Germany, given that Russia had first distributed its passports to South Ossetians and had then invoked protection of its citizens as a pretext for its intervention in Georgia ..."

50. The above-mentioned very brief overview of the documentary evidence available in the case file proves that the respondent State had

9 Ibid., Volume II, p. 133.

10 Roger N. McDermott, "Russia's Conventional Armed Forces and the Georgian War", *U.S. Army War College Quarterly: Parameters*, 39, no. 1 (2009).

11 https://www.rt.com/politics/putin-ossetia-war-plan-168/

overwhelming military, economic and political control over Abkhazia and South Ossetia prior to the outbreak of the hostilities on 8 August 2008 (compare with *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, §§ 388-94, ECHR 2004-VII). Of particular significance was the strength of the Russian military presence in the areas prior to the outbreak of the "little war" (see *Loizidou v. Turkey* (merits), 18 December 1996, §§ 16 and 56, *Reports of Judgments and Decisions* 1996-VI). It is consequently evident that the Russian Federation exercised control over those areas prior to the armed conflict.

51. Having regard to the latter finding, coupled with the majority's own recognition of the fact that the respondent State has appeared to be the sole occupying power after the end of the active phase of the hostilities, I regret that the majority have failed to see what is obvious: that during the August 2008 war as well, the respondent State continued to provide military support, albeit in a much more intensified form, to the *de facto* authorities of the two breakaway regions of Georgia.

C. An unsage predecent

52. In conclusion, I would like to express a few thoughts on judicial-policy considerations associated with such a delicate and unusual issue as an international armed conflict between two Contracting Parties to the Convention.

53. I believe that the main *raison d'être* of this Court is to contribute to the task of securing collective public order in Europe. As has been stated on numerous occasions, the Convention is a constitutional instrument of European public order (see *Al-Skeini and Others*, cited above, § 141). Indeed, an applicant State bringing an inter-State case is "not to be regarded as exercising a right of action for the purpose of enforcing its own rights, but rather as bringing before [the Court] an alleged violation of the public order of Europe" (see *Austria v. Italy*, no. 788/60, Commission decision of 11 January 1961, and *Cyprus v. Turkey* [GC], no. 25781/94, § 78, ECHR 2001-IV). Collective public order, however, cannot exist without peace reigning in the territories of the member States. How can this Court act as the guarantor of peace and public order in Europe if it turns its back on an armed conflict occurring within the member States' legal space? Who else, if not the Court, should carry out supervision of human-rights protection during armed conflicts occurring on the European continent?

54. It goes without saying that human rights are universal. It should not, however, be forgotten that the Convention is first of all a regional European mechanism of human rights protection, and hence there is a compelling need to stay particularly vigilant with respect to armed conflicts occurring in Europe. The Court has not only a legal but also a moral obligation to stay active and exercise its duty of European supervision in the event of armed

conflicts occurring within the legal space of the Convention, on pain of leaving individual victims of such military conflicts in a legal vacuum, which would amount to a denial of human-rights protection to those who most need it (see, as a recent authority, *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, § 195, 29 January 2019, where the Grand Chamber emphasised the inappropriateness of leaving without the requisite human-rights protection individuals living in a territory forming part of the legal space of the Convention).

55. I am afraid that the majority's ruling as regards the question of extraterritorial jurisdiction during the active phase of hostilities has given birth to such a vacuum, and this runs counter to the spirit of the Convention.

ANNEX

SUMMARY OF STATEMENTS
of witnesses heard by the Court at the Witness hearing conducted in Strasbourg from 6 June to 17 June 2016

LIST OF WITNESSES

A. Witnesses proposed by the Government of Georgia

1. W1, eyewitness to the military operation in Eredvi
2. W2, eyewitness to the military operation in Eredvi
3. W3, eyewitness to the military operation in Karbi
4. W4, eyewitness to the military operation in Karbi
5. W5, eyewitness to the military operation in Tortiza
6. W6, eyewitness to the military operation in Tortiza
7. W7, former prisoner of war
8. W8, former prisoner of war
9. W9, former prisoner of war
10. W10, former civilian detainee
11. W11, former civilian detainee
12. W12, former civilian detainee
13. W13, eyewitness to the killing of Ivane Lalashvili
14. W14, eyewitness to the killing of Natela Kaidarashvili
15. W15, eyewitness to looting and burning of houses in Vanati

B. Witnesses proposed by the Government of the Russian Federation

1. W16, Russian Armed Forces
2. W17, Russian Armed Forces
3. W18, Russian Armed Forces
4. W19, official of the *de facto* authorities of South Ossetia
5. W20, Russian official
6. W21, Russian Armed Forces
7. W22, Russian Armed Forces
8. W23, Russian Armed Forces
9. W24, official of the *de facto* authorities of South Ossetia
10. W25, official of the *de facto* authorities of South Ossetia
11. W26, Ossetian whose house was allegedly destroyed by unknown perpetrators during or immediately after the cessation of hostilities
12. W27, Ossetian whose house was allegedly destroyed by unknown perpetrators during or immediately after the cessation of hostilities

C. Witnesses proposed by the Court

1. W28, former Ambassador of the Netherlands
2. W29, former Commander of the Royal Netherlands Military Constabulary
3. W30, former member of the Parliamentary Assembly of the CoE
4. W31, former member of the Parliamentary Assembly of the CoE
5. W32, American Association for the Advancement of Science
6. W33, former member of the British Armed Forces, former Deputy Chief of UNOMIG and former British defence attaché in Russia and the South Caucasus

SUMMARY OF STATEMENTS

A. Active conduct of hostilities during the five days' armed conflict (8-12 August)

1. **W1**, eyewitness to the military operation in Eredvi, born in 1969

He stated that on 6/7 August 2008 people started to leave Eredvi because of the shelling of nearby settlements and because of rumours that Eredvi would not escape the same fate[1]. On 7 August or in the morning of 8 August (the witness changed his account in the course of his examination) he took his two sisters and their husbands and children to Gori. He then immediately returned to Eredvi. On 8 August (the witness initially stated that it was in the morning, but later changed his account, stating that it was in the afternoon) he was standing in front of the village church together with many other people when two explosions took place. He lost consciousness, but shortly thereafter got up and tried to help others. He took Ms Nino Romelashvili, who was already dead, and 7-8 severely injured people to hospital (which was 10-15 kilometres away). He then returned to Eredvi and took some other people to hospital. All of them were in civilian clothes. According to this witness, there were no soldiers in Eredvi at that time; there were only peacekeepers in the eastern outskirts of Eredvi (1-2 kilometres from the village church) in a former kolkhoz called MTS. All in all, two people, including Ms Nino Romelashvili, died and 15 people were severely injured as a result of the explosions in front of the village church, according to this witness. The witness was told that, while he was on his way to hospital, an aerial bombing of Eredvi had taken place, but he did not see that. At the end of the day, Eredvi was almost razed to the ground[2]. On 9 August 2008 he left Eredvi, but continued to work for the Eredvi Municipal Government until 2013[3].

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1 According to the Georgian Government, Eredvi was shelled by South Ossetian forces in the late afternoon of 6 August 2008 and again on 7 August 2008 (see the application filed in the Court by the Georgian Government on 6 February 2009, footnote 60 and paragraph 78).

2 According to the report *High-Resolution Satellite Imagery and the Conflict in South Ossetia* made in October 2008 by the American Association for the Advancement of Science (p. 9), in Eredvi, there were only 9 damaged buildings observed in the morning of 10 August 2008 and 63 on 19 August 2008 (see statement no. 33 below).

3 According to an official document of 26 January 2017, submitted to the Court by the Georgian Government, the witness worked for the Eredvi Municipal Government from November 2006 until March 2014.

2. W2, eyewitness to the military operation in Eredvi, born in 1980

He stated that in Eredvi they could hear sounds of shelling on the evening of 7 August 2008. On 8 August at 4 or 5 p.m. he was standing in front of the village church together with many other people when a bomb fell, killing one lady and injuring 6-7 persons (the witness himself was injured in the neck). The bomb completely destroyed all the houses around. Shortly before the bomb fell, he had seen a green plane with a red star on the underside flying very low over their heads. A second bomb then fell in the centre of Eredvi. Eventually, the witness was taken to Tkviavi Hospital. According to this witness, there were no soldiers in Eredvi at that time.

3. W3, eyewitness to the military operation in Karbi, born in 1940

He stated that the village of Karbi was struck on 9 August 2008 at about 6 a.m. and again at about 11 a.m. When the first attack occurred, the witness was at home, but he immediately went to the place of the attack. One person, Ms Dodo Unapkoshvili, was fatally injured (she died on the way to hospital). Seven persons were killed in the second attack and the witness was himself injured. When describing the attacks, he used the term "bombs", although he expressly said that he had not seen planes. He added that those "bombs" had been different from other bombs as they had burst in the air, without leaving craters. They had discharged fragments which had hit him in the hand and in the foot. According to this witness, there were neither soldiers nor military equipment at the place of the attacks (not a single military vehicle). He stated that 5-6 houses had been totally destroyed as a result of the attacks[4]. On the same day, the witness was taken to hospital: first in Gori, then in Tbilisi. He returned to Karbi approximately one month later. Karbi was not much different from the time when he had left it. He even found almost all his pigs and cattle. Finally, he stated that the population of Karbi would have left the village before 9 August 2008 had they been warned of possible attacks.

4. W4, eyewitness to the military operation in Karbi, born in 1979

He said that Karbi was hit on 9 August 2008 at about 6 a.m. and again at about 10 a.m. When the first attack occurred, the witness was at his cousin's

4 According to the report *High-Resolution Satellite Imagery and the Conflict in South Ossetia* made in October 2008 by the American Association for the Advancement of Science (p. 9), in Karbi, no damaged buildings were observed in the morning of 10 August 2008 and 4 damaged buildings were observed on 19 August 2008 (see statement no. 33 below).

home, but he immediately went to the place of the attack. He said that Ms Dodo Unapkoshvili had been fatally injured (she had died on the way to hospital) and that around 15 houses had been totally destroyed[5]. He said that people had panicked since a bridge at the entrance to the village had been destroyed earlier by Russian planes (he later said that the bridge had in fact been bombed after that attack and that it had survived the bombing). Eight persons were allegedly killed in the 10 a.m. attack. When describing the 6 a.m. and 10 a.m. attacks, he used the term "bombs" although he expressly said that he had not seen planes. He added that those "bombs", unlike other bombs, had not left craters. He also said that the "bombs" had wings and cables 1 to 1.5 metres long. According to this witness, there were neither soldiers nor military equipment at the place of the attacks. The witness left Karbi on 11 August 2008. He returned about one month later. On 8 September 2008 he allegedly took many photos of the post-war Karbi. He showed two photos at the witness hearing. He stated that one of them was a photo of a Russian bomb which had fallen on Karbi on 9 August at 6 a.m. and that the other one was a photo of houses damaged in the attack at 10 a.m. When asked how he could know that it was a Russian bomb when he had not seen the plane dropping it, he answered: "Could the Georgian side possibly have bombed us?" Lastly, the witness explained that the Georgian Government had provided compensation to villages, including Karbi, for reconstruction of houses. He had led that process for Karbi. He assessed the damage, together with experts, and distributed the Government funds as follows: if a house had been totally destroyed, he gave some money to its owner; if a house could be rebuilt, he paid local people to rebuild it. He also stated that some residents of Karbi had not been satisfied with the manner in which he had distributed the Government funds, which had led to tensions.

5. W5, eyewitness to the military operation in Tortiza, born in 1962

He stated that three Russian planes, with five-pointed stars on the underside, had bombed the village of Tortiza on 12 August 2008[6] at 9.15 a.m. According to this witness, five people were killed and five were injured; in addition, practically all buildings in the village were damaged (notably, the roofs and the windows). While he did not know whether bombs or rockets had been used, he was confident that this had been an aerial attack and not a shelling attack. He added that there had been no

5 See footnote no. 4 above.

6 According to another resident of Tortiza, the attack had occurred on 10 August (see her victim testimonial of 22 August 2008; Annex 306 to the Observations of the Georgian Government of December 2014).

Georgian soldiers in the village on that day. Russian troops entered Tortiza on 15 August 2008, from the direction of Gori.

6. W6, eyewitness to the military operation in Tortiza, born in 1976

She stated that her son had been hit in front of their family house in Tortiza on 12 August 2008. She said that something had fallen from the air, but she did not know which munition had been used (a bomb, a rocket, a missile or a shell). She took her son first to Gori and then, since the bombing of Gori Hospital had started, to Tbilisi. Her son died on the way to hospital. She added that there had been other similar attacks on Tortiza on the same day, killing two more persons, but she did not know the total number of houses damaged in the attacks. Lastly, she said that there had been no Georgian soldiers in the village on 12 August 2008.

7. W16, Russian Armed Forces, born in 1969

According to this witness, his regiment entered the territory of South Ossetia on the night of 9 to 10 August 2008 in order to drive out the Georgian forces from Tskhinvali; on the way to Tskhinvali (via Java and Tamarasheni) they were under continuous fire from Georgian artillery; they reached the outskirts of Tskhinvali on the morning of 10 August and took control of the centre of Tskhinvali by 3 p.m.; in the evening they took positions on the nearby heights so as to prevent Georgian troops from taking back Tskhinvali; from those heights, he observed the village of Eredvi, which was about 1 kilometre away, and saw no destruction whatsoever; on the night of 10 to 11 August, his regiment was under persistent fire from Georgian artillery and suffered losses (10 killed and over 70 injured); as the Georgian artillery was not in Eredvi, his regiment did not need to fire at the village; however, Georgian shells fell on the village as a result of artillery errors (due to the fact that Georgian forces were shelling from unprepared positions, the Georgian positions were lower than the Russian positions and Georgian forces used imprecise artillery); on 11 August his regiment descended from the heights and passed through the village of Eredvi without any resistance; he saw dead bodies, fires, shell craters, but no traces of aerial bombardment; his regiment did not stay long in Eredvi, but continued progressing towards Tbilisi with a view to expelling Georgian forces from the conflict zone.

During his cross-examination, the witness emphasised on several occasions that the village of Eredvi had looked untouched on 10 August

2008[7] and that it had been shelled for the first time on the night of 10 to 11 August 2008, by Georgian artillery. Those speaking of an attack on 8 August 2008 must be mixing up dates.

8. W17, Russian Armed Forces, born in 1973

He was based in Java from 10 to 11 August 2008 and then in Tskhinvali from 11 to 15 August 2008.

He described the Iskander missile system produced and deployed by the Russian Federation (NATO reporting name SS-26 Stone) as follows: the angle at which the missile descends is 90 degrees; the cluster version of the missile releases submunitions and then its tail (about 400 kilograms) and head (about 225 kilograms) fall down at the speed of hundreds of metres per second; the submunitions explode at a height of 6-10 metres above the ground or another hard surface (such as a building); in August 2008 there were two modifications to the cluster version of the missile carrying 45 or 54 submunitions; the area affected by the submunitions was 7-11 hectares. He stated that he had seen photos purportedly showing fragments of an Iskander missile found in Gori (the head of such a missile found in the main square in Gori as well as the tail of such a missile found lying on a sofa in a flat in Gori). In his view, the photos were questionable for the simple reason that a fragment of such mass and such velocity would have penetrated much deeper. Notably, the tail of such a missile could not have been stopped by a sofa, but would have been found somewhere in the basement of the building, had it really fallen on that building, as it was claimed. Another reason why it was improbable that an Iskander missile had been used in Gori on 12 August 2008 was its price (123,000,000 roubles at that time[8]) – it would be unreasonable to use such a missile in an area from which enemy soldiers had already withdrawn[9]. The witness also said that such type of weapon had never been tested in military conflicts, but only in training fields.

9. W18, Russian Armed Forces, born in 1966

7 See footnote no. 2 above.
8 Approximately 3,000,000 euros.
9 The Government of the Russian Federation claimed in their observations of December 2014 that the strike had been carried out at that specific place and time because a large number of Georgian soldiers and reservists had assembled there the day before; it had been thought that the same place would be used as a gathering point on the day of the strike.

He stated that Russian air forces had started performing their combat task on 8 August 2008 at around 10 a.m. Moscow Daylight Time[10]. They made around 24 sorties on that day, but did not hit Eredvi. The mission of Russian forces was to expel Georgian forces from the conflict zone with as little harm to the civilian population as possible. Therefore, they strictly observed the 2-2.5 kilometre distance between the edge of populated localities and their targets. The closest to a populated locality they struck were parts of a Georgian military base in Gori (2.7 kilometres from the closest houses). The official flight log provided by Georgian authorities, purporting to prove a bombing of Eredvi on 8 August 2008 at about 6.30 a.m. Georgia Standard Time[11], was questionable given the timing of the alleged attack (which had allegedly taken place before the actual start of the Russian air campaign) and its duration (according to the log, a Russian plane had spent 5-6 minutes over the target and normally it was up to 1.5 minutes). In the witness's opinion, the flight log in question must have been falsified.

The witness also made comments on the photos provided by W4 purporting to prove two bombings of Karbi on 9 August 2008. As concerns the photo of debris, he said that the debris was made of duraluminium, which was not used in aviation munitions. Moreover, when a bomb explodes, it disintegrates into smaller pieces than those seen on the photo. As concerns the other photo, he stated that there were no craters, which were typical of aviation bombs and, more generally, that damage would have been different had a bomb fallen on the houses seen on the photo, or between them (notably, the walls of the houses would have fallen). However, he later said that the damage seen on the photo could have been caused by an aviation bomb which had fallen a few streets away.

As regards the photo published in the report *August Ruins*, p. 59, claiming to prove an aerial attack on Tortiza on 12 August 2008, he stated that the object seen on the photo was not an aerial missile, but rather a surface-to-surface rocket (more precisely, a rocket launched from a Grad multiple rocket launcher system).

As concerns satellite images purporting to show four bomb craters in and around Eredvi, he said that Russian military planes carried at least four bombs and they never flew out alone. Accordingly, if this were indeed a Russian aerial attack, there would have been more craters; they would also have been closer to each other (the distance between the craters seen on the images is 200-300 metres).

10 10 a.m. Georgia Standard Time or 8 a.m. Central European Summer Time.
11 6.30 a.m. Moscow Daylight Time or 4.30 a.m. Central European Summer Time.

Lastly, the witness stated that Russian military planes flew at different levels, depending on their task and the terrain: if the terrain was flat, attack aviation flew at 1-1.2 kilometres, but if the terrain was mountainous, this could go up to 5 kilometres.

10. W22, Russian Armed Forces, born in 1972

He said that his regiment had entered South Ossetia on 10 August 2008. Shortly thereafter, they had crossed into the "buffer zone" and occupied Meghvrekisi on 11 August, Karaleti on 12 August and Gori on 13 August at about 10 a.m. As Gori had been totally abandoned by then, they moved around freely and set up checkpoints in order to prevent looting. On the same day, the witness visited the main square in Gori; he stated that he had not seen any damage except for a couple of damaged cars. As to other parts of Gori, he said that he had seen only one building on fire (more precisely, the last two floors of a five-storey residential building in the south-eastern outskirts of Gori). As there was also a destroyed tank in the vicinity of the building (300-400 metres away), the witness suggested that the fire could have been caused by an exploding munitions cache inside the tank. The witness left Gori on 17 August and the conflict zone on 22 August 2008. According to him, there were no Russian airstrikes on Gori in the period of 11 to 13 August 2008 when he was moving towards Gori from the direction of South Ossetia. He did not know how Stan Storimans and others had been killed in Gori on 12 August 2008, as he had only entered Gori the day after.

11. W20, Russian official, born in 1959

From September 2004 to October 2008 he was Commander of Joint Peacekeeping Forces in South Ossetia. In 2009 he left the Russian Armed Forces. He has been working as an adviser to the Minister of Foreign Affairs of the Russian Federation ever since.

He said that he had visited Eredvi, Karbi and Tortiza after the alleged bombing of the villages by Russian forces and that he had not seen any signs of recent bombing. He later clarified that it had been very dark when he had arrived in Eredvi, so he had not really paid attention to buildings. He had also accompanied Human Rights Watch during their fact-finding mission in Karbi. Inhabitants of Karbi had shown Human Rights Watch a building that had been damaged years before, but claimed that the building had been bombed in 2008. When some villagers said that bombs had been falling on them, the witness asked them to show Human Rights Watch where exactly they had fallen, but allegedly they could not do that. Some

villagers said to Human Rights Watch that they had seen stars on the underside of planes. The witness said that this was impossible, given the height and the speed at which they flew. Some of those alleged villagers were, in his view, in fact Georgian intelligence officers. The witness concluded that the statements given to Human Rights Watch had clearly been staged.

When asked to comment on the report *Human Rights in the War-Affected Areas Following the Conflict in Georgia*, published by the OSCE in November 2008, according to which Eredvi was one of the worst hit villages, the witness said that the OSCE had not been able to visit Eredvi either during or after the August 2008 conflict.

When asked to comment on a public statement made by President Putin on 8 August 2012 that the Russian Federation had started to train South Ossetian militia long before the 2008 conflict, the witness said that he was not aware of any such military training. He added that if such training had indeed taken place, the OSCE would certainly have mentioned it in their contemporaneous reports on the situation in South Ossetia.

He further stated that, as Commander of Joint Peacekeeping Forces in South Ossetia, he had been answerable to the Joint Control Commission set up by the Sochi Agreement and not to the Russian Armed Forces. While it is true that, during his mandate, he was in contact with, among others, the Chief of the General Staff of the Russian Armed Forces (General Baluyevsky), he did not receive any orders from him.

Lastly, the witness explained why he thought that the Georgian side had provoked the conflict.

12. W28, former Ambassador of the Netherlands

He stated that the Dutch authorities had wished to establish the circumstances surrounding the death of a Dutch cameraman, Stan Storimans, in Gori on 12 August 2008. After fruitless requests to the Georgian and the Russian authorities for information, they decided to set up an investigative mission and asked him to head it, together with W29. They were assisted by a military expert, Colonel Stampers, and a secretary from the Ministry of Foreign Affairs. Before leaving for Georgia, they met Mr Akkermans, an eyewitness to the killing of Mr Storimans, who told them the following: he and Mr Storimans had been in Tbilisi on 11 August; having heard that the Georgian troops and almost all the inhabitants of Gori had left the town, they went there by taxi, together with an Israeli

journalist[12], on 12 August; first, they went to see residential buildings, close to military barracks, which had been hit before; when they arrived at the central square, they had seen a car accident and a number of onlookers, including some foreign journalists; Mr Storimans then went to take pictures of a statue of Stalin, which was in the centre of the square; at that moment, they had heard many explosions and Mr Storimans had fallen to the ground; Mr Akkermans himself, the Israeli journalist and the taxi driver were only injured.

The witness and his team arrived in Gori on 31 August 2008. At the central square, they saw a crater in the asphalt where the head of a missile had allegedly fallen, some smaller craters in the asphalt and many small holes in the walls all over the square and in the street leading to the square. The bullets found in the walls were only 5x5 millimetres wide and contained wolfram. Dutch experts examined them in the Netherlands and determined that they were similar to the bullet found in the body of Mr Storimans[13]. The witness and his team were also shown a flat into which the tail of the missile had allegedly fallen (the flat was ruined and there was a hole in the ceiling). The witness explained that, despite their requests, they had not been shown either the head or the tail of the missile; he later heard that the parts in issue had been taken by intelligence services of the United States[14]. The witness and his team saw, however, photos of those parts which had been provided by the Georgian authorities, CNN, Sky News and the HALO Trust, a non-governmental organisation. During his evidence, the witness was shown a photo of a part of a missile lying on a sofa, taken by a United States Navy photographer. He confirmed that similar photos had been given to them by the Georgian authorities and the HALO Trust, but he did not know the origin of their photos. He said that different photographers could have taken similar photos.

The witness and his team also interviewed a number of eyewitnesses and watched videos of the incident captured by Reuters and recorded by security cameras located on the square. All that evidence led them to conclude that Mr Storimans had been killed in a cluster attack, but they would not have been able to conclude that the Russian Federation was responsible, had they not had photos of the head of the missile showing a serial number

12 Mr Zadok Yehezkeli.

13 It would appear from an autopsy report, made by the Dutch authorities and submitted to the Court by the Russian Government, that the body of Mr Storimans had arrived in the Netherlands on 18 August 2008. In the meantime, it had been kept and embalmed by unknown persons.

14 According to a diplomatic note of the United States of 2 May 2018 submitted by the Georgian Government, parts of the missile had indeed been taken to the United States in several shipments beginning in August 2008.

characteristic of Iskander missiles (the photos were provided to them by the Georgian authorities, CNN and Sky News). The witness further stated that at least four other civilians had been killed in that attack and that there had been no military objectives on the central square itself (the closest military objective was military barracks, approximately 500-1,000 metres away, which had already been bombed before).

After Georgia, the witness and his team met with Russian officials in Moscow who told them that they knew nothing about the attack in issue, but they confirmed that only the Russian Federation had Iskander missiles.

Lastly, he added that he had also seen residential buildings, close to military barracks, which had been severely damaged in an earlier attack on Gori.

13. W29, former Commander of the Royal Netherlands Military Constabulary

The testimony of this witness overlaps to a large extent with the testimony of W28. He added that Dutch experts had examined three bullets and found them to be identical (the bullet found in the body of Mr Storimans, a bullet taken from a taxi in Gori by Mr Akkermans on the day of the attack and a bullet taken from a wall in the central square in Gori by the witness and his team). He also stated that he and his team had talked to Mr Marc Garlasco of Human Rights Watch. During his examination, the witness confirmed that they had not verified the authenticity of the photos provided to them by the Georgian authorities, CNN and Sky News, although they were important evidence (they would not have been able to conclude that the Russian Federation was responsible, had they not had photos of the head of the missile showing a serial number characteristic of Iskander missiles, available to Russian forces only). Lastly, the witness said that he did not find it suspicious that the Georgian side had not been able to show them the parts of the impugned missile, rather than the photos.

B. Treatment of prisoners of war and detention and treatment of civilian detainees

14. W7, former prisoner of war, born in 1972

In August 2008 he was a corporal in the Georgian Armed Forces. On 8 August 2008 he was deployed in the Shanghai settlement, Tskhinvali.

The witness said that he had been wounded in the shoulder during a Russian bombardment of the Shanghai settlement on 8 August 2008. Shortly thereafter, he was captured by South Ossetian forces. He described his treatment as follows. He was first held in the basement of one of the residential buildings at the Shanghai settlement. He was beaten there by, among others, Russian peacekeepers (they had the sign "MC"[15] on their uniforms, they spoke Russian and looked Russian). On 10 August he was moved to School No. 6 in Tskhinvali where he was again beaten by, among others, "Russians" (the witness was not certain as to whether they were Russian soldiers or simply fighters from the Russian Federation). On the way to the school, he was first made to walk and then taken by a vehicle from one location to another and beaten by local people. During his stay in the school, two prisoners of war were killed – Sopromadze, because he had been a tank driver, and Khubuluri, because he was an ethnic Ossetian. The witness did not see the actual killing of Sopromadze, but he heard a shot and was made to remove his body. As to Khubuluri, he was taken out one day and never came back. On 12 August 2008, the witness was taken to Tskhinvali Police Station. There, he was not only beaten as before, but also interrogated and tortured by, among others, the Federal Security Service of the Russian Federation (they tied his hands behind his back with wire for a period of time without giving him water and then untied his hands and poured very cold water into his throat; they also used bayonets and hammers and burnt his hands with lighted cigarettes). On 17 August 2008 he was transferred to a Russian military base. He was finally released on 19 August 2008. He received medical treatment for the first time after his release.

15. W8, former prisoner of war, born in 1976

In August 2008 he was a corporal in the Georgian Armed Forces. On 9 August 2008 he was deployed in the Shanghai settlement, Tskhinvali.

The witness said that he had been shot in the knee and captured by South Ossetian forces in the Shanghai settlement on 9 August. He described his treatment as follows. He was first held in the basement of one of the residential buildings at the Shanghai settlement. He was beaten there by South Ossetians. Whilst Russian soldiers were present at the premises, they did not beat him. On 10 August he was moved to School No. 6 in Tskhinvali. As he could not walk (because of his wounded knee), he was carried by other Georgian prisoners of war. On the way to the school as well as in the school, he was beaten by, among others, Russian soldiers. In the

15 Миротворческие силы – peacekeeping forces in Russian.

school, he was also beaten by officials of the Federal Security Service of the Russian Federation in order to force him to declare that he had seen many dead civilians in Tskhinvali and that United States soldiers had been fighting on the Georgian side. During his stay in the school, a Georgian prisoner of war called Sopromadze had been taken out of the room and killed because he was a tank driver. The witness did not see the actual killing, but he heard a shot. On 13 August he was moved first to a Russian military hospital in Tskhinvali and then to a hospital in Vladikavkaz, the Russian Federation, for medical treatment. Whilst in the Russian military hospital in Tskhinvali, he was again beaten by officials of the Federal Security Service of the Russian Federation. He was finally released on 19 August 2008.

Lastly, the witness stated that he had seen Russian planes flying not too high and bombing Georgian positions on 8 August 2008. They dropped general-purpose and cluster bombs.

16. W9, former prisoner of war, born in 1983

In August 2008 he was a lieutenant in the Georgian Armed Forces. He was deployed in the Georgian port of Poti on 18 August 2008.

On 18 August he and 21 other soldiers were captured by Russian forces in Poti and taken to Senaki. Ten of them were released already the next day. After four days in Senaki, he and the remaining 11 soldiers were relocated to a Russian peacekeepers' base in Chuburkhindji, in the Gali region of Abkhazia. Upon their arrival, they were interrogated and subjected to various forms of ill-treatment by Russian soldiers, including punching, kicking, beating of the soles of the feet and electric shocks. All twelve of them were then placed in a small toilet for four days. There was no light, they could not move, they had to take turns to sit down and, for the first two days, they were given neither food nor water. In addition, during the night, drunken Russian soldiers kicked the door of the toilet, threatening to kill them and verbally assaulting them, but their guards did not let those soldiers enter the toilet.

During his cross-examination, the witness stated that he did not know why this story did not feature in any of the reports of non-governmental organisations on the conflict.

17. W10, former civilian detainee, born in 1977

At the beginning of the 2008 conflict the witness was in his village of Tamarasheni. On 8 and 9 August the village was bombarded. On 10 August, after the bombardment was over, he, his mother and an 85-year-old neighbour left for Achabeti. On the way, they saw Russian soldiers who were looting and burning Georgian houses. Upon arrival in Achabeti, they were taken by South Ossetian fighters to Tskhinvali and put in the basement of the "Ministry of Internal Affairs of South Ossetia". There were nine cells in the basement, all of them dark, dirty and hot. His cell measured some six square metres and he had to share it with thirteen other persons. There were all together around 200 civilians detained in that basement: mostly elderly people, but also a small number of young people and children. Initially, men and women were kept separately; but very soon, since the cells were small, dirty and hot, the doors of the cells were opened and they were all mixed. The witness stated that he had been beaten up by both Russian and South Ossetian soldiers on the first day because he had not obeyed an order of Mr Mikhail Mindzayev, the "Minister of Internal Affairs of South Ossetia", to urinate on a Georgian flag. On the second day, whilst he was cleaning the detention facility, W25, in charge of civilians detained at the basement of the "Ministry"[16], had kicked him in the nose and broken it. The witness further said that he had been interrogated by Russian officers on the second floor of the building, first around 16 August and again later. The Russian officers had made him put on a Georgian uniform and read something in front of a camera. They had threatened to kill him if he refused to do so. However, his statement has never been broadcast. Lastly, the witness said that he had been forced to move 17 bodies of dead Georgians from the streets of Tskhinvali to the Shanghai settlement. While moving around Tskhinvali, he noted that there were no women and children in the town and South Ossetians in uniforms were looting and burning houses. He was finally released on 27 August.

During his cross-examination, the witness said that there was no contradiction between his claim that his nose had been broken whilst in detention and his medical report of 29 August 2008, since the report mentioned "a scar with rough edges in the right area of the forehead and crown". He further specified that Russian forces had not been present in the building of the "Ministry" before 16 August, but that they had been around the building, guarding it.

16 See his statement no. 34 below.

18. W11, former civilian detainee, born in 1977

At the beginning of the 2008 conflict, the witness was in his village of Zemo Achabeti. After Russian and South Ossetian forces had taken his village, and looting and burning had begun, he went to Tskhinvali. On 11 August he was captured there by South Ossetian forces and put in the basement of the "Ministry of Internal Affairs of South Ossetia". There were about 160 people in that basement. He was amongst the last ones taken there. They were guarded by South Ossetian forces, which were in the building of the "Ministry" itself, and by Russian forces, outside the building. Throughout his detention, he was taken out to clear up destroyed buildings and to collect bodies of dead soldiers from the streets of Tskhinvali and the nearby village of Khetagurovo. He collected about 45 bodies, including one in School No. 6[17], and dumped them somewhere in the Shanghai settlement. The witness said that he had preferred doing this to staying in the filthy basement. Moreover, he received better food when he was outside (canned meat and Lavash bread instead of only brown bread and tea). He was often verbally assaulted by South Ossetians whilst working, but he was beaten only once (someone hit him in the leg with the butt of a gun). However, some other people were beaten up: David Dzadzamia (the witness did not give any details); a young boy was hit in the shoulder with the butt of a gun; and an 85-year old man was beaten in the face with the butt of a gun. The witness also stated that at the outset they had been given water from the nearby river, but later on the Red Cross had provided them with mineral water. He was finally released on 27 August.

During his examination, the witness said that it was possible that they had been detained in the building of the "Ministry" for their own safety, but it was more likely, in his opinion, that they had been held there in order to clean the town and then to be exchanged.

19. W12, former civilian detainee, born in 1960

At the beginning of the 2008 conflict, the witness was in her village, Tamarasheni. Having first bombed it, in the morning of 10 August Russian forces entered the village and started pillaging and burning. They told South Ossetian fighters to take the witness, her mother and some other villagers to Tskhinvali. On arrival in Tskhinvali, they were placed in the basement of the "Ministry of Internal Affairs of South Ossetia". Initially, there were ten of them; but in three days their number grew to 160 (including a 12- or

17 According to statements nos. 14 and 15 above, Georgian prisoners of war were held in School No. 6 from 10-12 August 2008 and two of them were killed there.

14-year-old boy with his father). The witness had to share a 15-square-metre cell with around 40 women. At the outset, men and women were kept separately; but later the doors of all the cells were opened and they were all mixed. For the first two days, they were provided only with water from the nearby river and no food. She said that young male detainees had been tortured, but she did not provide any details. She also said that a 95-year-old man had been beaten up by a soldier before being brought to the detention facility and that a 23-year-old woman, called Shorena, had been repeatedly raped by South Ossetian and Russian soldiers[18]. Lastly, the witness added that she had been forced to clean offices and sleeping quarters on the second floor of the building of the "Ministry". Whilst doing this, she came across both Russian and South Ossetian soldiers. She had been released after twelve days.

20. W19, official of the *de facto* authorities of South Ossetia, born in 1976

In August 2008 he was the "Human Rights Ombudsman of South Ossetia" and participated in the armed conflict as part of the South Ossetian forces. Between 2012 and 2015 he was the "Minister of Foreign Affairs of South Ossetia". He is currently an adviser to the "President of South Ossetia" and a member of the delegation of the *de facto* authorities of South Ossetia at the Geneva International Discussions[19].

He stated that the Georgian attack on Tskhinvali from the villages around Tskhinvali (such as Tamarasheni, Kekhvi, Kurta and Eredvi) in August 2008 had caused animosity towards ethnic Georgians from those villages and the collapse of law and order (as police officers had either been killed or had been busy with protecting their own families). In order to ensure their

18 In her victim testimonial of 25 August 2008 (Annex 460 to the Observations of the Georgian Government of December 2014), Ms Shorena B. said that she had been raped by Ossetian men on the road between Gori and Tskhinvali on 13 August 2008. She was placed in the basement of the "Ministry of Internal Affairs of South Ossetia" on 14 August 2008. She did not claim that she had been raped again in the building of the "Ministry". See also the report *Up in Flames: Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, published by Human Rights Watch in 2009 (pp. 159-61), referring most likely to the same incident – a rape of a young Georgian woman by Ossetian men on the road between Gori and Tskhinvali on 13 August 2008 and her subsequent transfer to the "Ministry of Internal Affairs of South Ossetia" (in the report, the victim was referred to as "Mariam" in order to protect her identity).

19 The Geneva International Discussions are international talks, launched in October 2008, to address the consequences of the 2008 conflict in Georgia. Co-chaired by the Organisation for Security and Co-operation in Europe, the European Union and the United Nations, the Geneva process brings together representatives of the participants of the conflict – Georgia, the Russian Federation and the *de facto* authorities of Abkhazia and South Ossetia – as well as the United States.

safety, the *de facto* authorities of South Ossetia provisionally had to put ethnic Georgians from those villages in the building of the "Ministry of Internal Affairs of South Ossetia". As the detention facility was overcrowded (between 160 and 180 detainees), some detainees volunteered to carry out outdoor work, such as collecting bodies and cleaning the streets of Tskhinvali. In his view, no one was forced to do that. As regards the involvement of Russian forces, the witness said that they had provided humanitarian assistance but they had not been involved in the setting up and the administration of the detention facility. He did not know whether detainees had been informed of the official reason for their detention (that is, their own safety), but they must have understood it, given the overall situation in South Ossetia at that time. Lastly, the witness acknowledged that the staff of the detention facility had never received training in international humanitarian law.

In response to a question about why detainees had been allowed to go out of the detention facility in order to work, if it was indeed dangerous for them to move around Tskhinvali, he said that the detainees had always been guarded. In response to a question about whether it was true that Mr Mindzayev, the "Minister of Internal Affairs of South Ossetia" during the armed conflict in August 2008, was actually an officer in the Russian Armed Forces, the witness said that he did not know.

21. W20, Russian official, born in 1959[20]

The witness stated that the Georgian attack on Tskhinvali in August 2008 had caused strong animosity towards ethnic Georgians. On 8 August 2008 Mr Mindzayev, the then "Minister of Internal Affairs of South Ossetia", came to his office and said that it had been decided to put the ethnic Georgians from Tskhinvali and the neighbouring villages in the basement of the "Ministry of Internal Affairs of South Ossetia" to prevent their victimisation. Between 21 and 28 August 2008 all those civilians were transferred to the territory under the control of the Georgian Government. The witness was present during the first transfer on 21 August when around 60 persons, mostly 20-65 year-old men, were transferred[21]. He did not inspect the detention facility, as it was not his responsibility, but the detainees who were released that day did not seek medical help. The witness

20 This is the second statement of this witness (see also his statement no. 11 above).

21 According to the report *Up in Flames: Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, published by Human Rights Watch in 2009 (p. 181), South Ossetian forces released one group of 61 detainees, including most of the elderly and all of the women, on 21 August. Other civilians were released on subsequent days, including a final group of 81 civilians on 27 August.

could not recall whether Mr Hammarberg[22], who was also present during that transfer, had made any complaints. The witness ruled out the possibility that Russian peacekeepers had participated in ill-treatment of Georgian civilians or prisoners of war: first, they all received training in international humanitarian law and, moreover, they were not in contact with any such captives. Had they indeed committed any crimes, the witness would have been informed and they would have been prosecuted. The witness acknowledged that some crimes could have been committed by people in Russian uniforms, but such uniforms had been available in shops in South Ossetia and many people had worn them. He also acknowledged that Russian investigators had interviewed detainees in the building of the "Ministry of Internal Affairs of South Ossetia", in order to verify whether any Russian officials had committed war crimes, but they had not been under his command. The witness emphasised that the interviews had not been carried out in the detention facility itself, which was in the basement of the "Ministry", but in a different part of that building. The witness added that he had enquired whether civilian detainees could be put in a better facility, but Mr Mindzayev, mentioned above, had replied that all other public buildings had been either damaged or occupied by displaced persons. As concerns the work performed by civilian detainees, such as cleaning the streets of Tskhinvali, the witness said that he did not know whether any of the detainees had been forced to do that.

When asked to comment on the report *Up in Flames: Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, published by Human Rights Watch in 2009, according to which the Russian Federation exercised effective control over Tskhinvali from 9 August 2008, the witness said that Russian troops had in fact arrived in Tskhinvali on 10 August and that they had not exercised effective control over South Ossetian forces even after their arrival, let alone before.

Lastly, he said that the Russian peacekeeping forces had been reinforced after the Georgian attack on Tskhinvali (450-480 troops passed the Roki tunnel on 8 August at about 0.30 a.m. and arrived in Tskhinvali on 10 August 2008). Their mandate continued until 8 October 2008.

22 The Council of Europe Commissioner for Human Rights from 1 April 2006 to 31 March 2012.

C. Post-war situation after the cessation of hostilities

22. W13, eyewitness to the killing of Ivane Lalashvili, born in 1958

During the armed conflict in August 2008, the witness remained in his village of Tirdznisi. He said that bombardment had begun on 9 August and that ground troops had taken control of the village on 10 August. Shortly thereafter, looting and burning began. He could not tell whether the marauders were Russians or Ossetians, but he presumed that they acted under Russian control and referred to them as "Russians". He further said that on 14 August, two people in uniforms got out of a Niva car and started shouting and shooting at Ivane Lalashvili and himself. He managed to run away, but Ivane Lalashvili was killed. Ivane Lalashvili had been shot so many times from a Kalashnikov rifle that his body was practically dismembered. The witness could not tell whether their attackers were Ossetians or Russians.

During his examination, the witness was asked about Georgian cluster munitions that fell on Tirdznisi (a reference was made to the report *A Dying Practice: Use of Cluster Munitions by Russia and Georgia in August 2008*, published by Human Rights Watch in April 2009, p. 57). He said that many cluster munitions had indeed fallen on Tirdznisi. When asked if Ivane Lalashvili had actually been killed by Georgian cluster munitions and if he had been instructed now to blame Ossetians or Russians, he replied "no".

23. W14, eyewitness to the killing of Natela Kaidarashvili, born in 1968

He said that the bombardment of his village, Tirdznisi, had begun around 8 August. He had immediately taken his wife and children to a safe place and returned to Tirdznisi to take care of his mother. Shortly thereafter, Russian forces had taken control of Tirdznisi. They encircled it and did not let anyone in; they could also be seen inside the village. In mid-August the witness had left Tirdznisi and went to Mtshketa[23]. As soon as he had learned that his house had been looted and burnt, he returned to Tirdznisi. He sneaked into the village, avoiding Russian forces, and arrived at the village church. At 50-60 metres from the church, in the direction of the village school, he saw a group of Russian soldiers and Ossetian militias (wearing white arm bands) beating Natela Kaidarashvili, who was 60-70 years old and deaf. She died shortly thereafter. The witness then continued to his house, which was still smouldering. Nothing was left of it. His mother and

23 Mtshketa is a city close to Tbilisi, around 80 kilometres from Tirdznisi.

other villagers told him that Russians and Ossetians had looted and burnt it, as they had done with many other houses in the village. The witness added that his house has not yet been repaired.

When asked to comment on a statement made by Tamar Razmadze (see the report *August ruins*, published by Georgian NGOs in 2009, p. 75), according to which Natela Kaidarashvili had been beaten up by eight Ossetians, the witness stuck to his version that Russian soldiers had also taken part in the beating of Natela Kaidarashvili. He did not see Tamar Razmadze at the scene of the incident, although she claimed in that statement that she had intervened to try to stop the beating of Natela Kaidarashvili.

When asked whether he knew the war-time village administrator of Tirdznisi, who had said to Human Rights Watch: "it was Ossetians, not Russians, who set houses on fire" (*Up in Flames: Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, p. 165), he answered that he did, and that his first name was Temur. According to the report, the war-time village administrator of Tirdznisi was in fact a woman and her name was Zaira Tetunashvili[24].

When asked about victims of Georgian cluster munitions in Tirdznisi, he replied that Mikheil Kaidarashvili had stepped on unexploded ordnance and died as a result. The witness did not know if he was a relative of Natela Kaidarashvili, but they had lived in the same house.

When asked if he knew Alexander Zerekhidze, who had been seriously injured by Georgian cluster munitions in Tirdznisi on 9 August 2008 according to Human Rights Watch (*Up in Flames: Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, p. 67), he said that he did not.

24. W15, eyewitness to looting and burning of houses in Vanati, born in 1965

He said that his village of Vanati had been bombed from an adjacent Ossetian village on or around 7 August 2008. According to him, there were no Georgian forces in the village at that time. Between 7 and 9 August, Ossetian militias came to the village on several occasions and burnt altogether about five buildings, including some public buildings. The

24 However, according to an official document of 26 January 2017, submitted to the Court by the Georgian Government, the war-time village administrator of Tirdznisi was Mr Temur Tetunashvili.

witness said that they also killed a certain Valiko Jojishvili, a school teacher. The witness's father went missing during that period. The witness therefore decided to stay, although many other villagers had left. However, as it was unsafe to stay in the village itself, he hid in the nearby forest, around 150 metres from the village, and observed the village with military binoculars. On 9 or 10 August Russian forces took control of Vanati, by closing all the entrances to the village. Looting and burning on a massive scale then began. According to the witness, every morning Russian forces would let Ossetian militias into the village, who would loot and then burn 10-15 houses and leave. Since they were not allowed into the village during the night, the witness went to the village every night to search for his father until he found him 4-5 days later; they managed to leave the area on 21 August with the help of the Georgian Church. By that date, all the houses in the village had been looted and then burnt by Ossetian militias. One house, belonging to a certain Emzar Jojishvili, was looted and then burnt by Russian soldiers. Only the houses with white markings, belonging to relatives of Ossetian militias, were left intact. His house was looted and then burnt on or around 15 August. According to the witness, there had not been a single day without looting and burning until his departure on 21 August. He added that houses belonging to ethnic Ossetians had also been looted and burnt, if they did not have white markings (Ossetian militias were probably adding the markings themselves, but only on the houses belonging to their relatives).

When asked how he could differentiate between Russians, Ossetians and North Caucasians, he said that Ossetians and North Caucasians had worn white bands on their sleeves (one for the Ossetians and two for North Caucasians).

Lastly, he was asked to comment on his statement to Georgian authorities of 24 July 2009, in which he had said, unlike today, that Russian soldiers had looted and burned four houses, belonging to Nodar and Gogia Jojishvili, Emzar Jojishvili, Shota Jojishvili and Viktor Jojishvili; that he had been going to the village also during the day, whenever a house had been set on fire; and that one day, probably on 15 August, Russian forces had not let Ossetian militias into the village. The witness replied that he had not said anything like that. When asked whether he had signed that statement and whether he had read it before signing, he said "yes".

25. W30, former member of the Parliamentary Assembly of the CoE

As a co-rapporteur of the Monitoring Committee of the Parliamentary Assembly for Georgia, he participated in fact-finding visits to Georgia and

Russia in the immediate aftermath of the hostilities: among other places, he visited Gori in the period of 18-21 August as well as South Ossetia and the "buffer zone" adjacent to South Ossetia on 25 September 2008. In addition, he took part in the drafting of the following reports: *The consequences of the war between Georgia and Russia* (Doc. 11724, October 2008); *Implementation of Resolution 1633 (2008) on the consequences of the war between Georgia and Russia* (Doc. 11800, January 2009); *Follow-up given by Georgia and Russia to Resolution 1647 (2009)* (Doc. 11876, April 2009).

He said that at the time of his visit to Gori in August 2008, the town had still been controlled by Russian forces. Therefore, he had to cross a Russian checkpoint on the way from Tbilisi to Gori. In the main square in Gori, he saw several looted banks and many damaged buildings. He also tried to go to Tskhinvali during that visit, but he was not permitted. He thus visited Tskhinvali only on 25 September 2008. What he found there was a ghost city. As regards the liability of the Russian Federation, he said that the ethnic cleansing of Georgian villages had clearly been committed by Ossetian militias and gangs; whilst Russian forces had not taken part in those crimes, being the occupying power, they had a duty to prevent them and had failed in their duty. He arrived at that conclusion on the basis of many elements, but he underlined his meeting with a Russian General, whose name was perhaps Popov, who had acknowledged that Russian forces had managed to prevent such crimes for 24 hours, but had then decided to stop doing so for political reasons. The witness also stated that he agreed with Carl Bildt[25] that the Russian activities in relation to South Ossetia were comparable to the annexation of Sudetenland by Nazi Germany, given that Russia had first distributed its passports to South Ossetians and had then invoked the protection of its citizens as a pretext for its intervention in Georgia. Lastly, he did not think that the return of ethnic Georgians to South Ossetia was possible without a political solution, but in his view the responsibility of the Russian Federation for the inability of ethnic Georgians to return to South Ossetia was greater than that of Georgia.

During his examination, he said that he had visited several other villages in the "buffer zone" adjacent to South Ossetia, but he could not remember which ones.

26. W31, former member of the Parliamentary Assembly of the CoE

As a co-rapporteur of the Monitoring Committee of the Parliamentary Assembly for Russia, he participated in fact-finding visits to Georgia and

25 Minister for Foreign Affairs of Sweden at that time (from 2006 until 2014).

Russia in the immediate aftermath of the hostilities. Among other places he visited South Ossetia, and the "buffer zone" adjacent to South Ossetia, on 25 September 2008. In addition, he took part in the drafting of the following reports: *The consequences of the war between Georgia and Russia* (Doc. 11724, October 2008); *Implementation of Resolution 1633 (2008) on the consequences of the war between Georgia and Russia* (Doc. 11800, January 2009); *Follow-up given by Georgia and Russia to Resolution 1647 (2009)* (Doc. 11876, April 2009).

He said that he had visited Tbilisi, Tskhinvali and 6-7 villages in South Ossetia in September 2008. The situation in South Ossetia was terrible: burnt houses, people in a state of shock, much pillaging and hostage-taking by South Ossetian militias and gangs. In his view, the fact that many ethnic Georgians were expelled from South Ossetia and have not been allowed to go back amounted to ethnic cleansing. Whilst there is no proof that Russian forces took part in ethnic cleansing, being the occupying power they had a duty to prevent it, and failed in their duty. He also confirmed that he had been told by the Office of the Prosecutor General of the Russian Federation in March 2009 that crimes allegedly committed by Russian forces or civilians against Georgians would not be investigated. Lastly, he said that there had been tensions in the area since the 1990s and that the best solution was a political one, a global one, which should take into consideration also the persons displaced in the 1990s. However, any solution must be based on certain standards, such as the principle of sovereignty, and there should be no preconditions for negotiations, such as the request that Georgia renounce the use of force against South Ossetia.

27. W23, Russian Armed Forces, born in 1978

He said that his unit of 520 soldiers had been engaged in active fighting in the period of 10-12 August. They were then ordered to search for remaining Georgian troops and equipment throughout the "buffer zone" in the period of 12-22 August. Every day at 6 or 7 a.m. they would go to another locality and would return to their military base near Tskhinvali at 8 p.m. On 13 August they thus went to Tkviavi and on 14 August to Tirdznisi. He said that during their visits they had always been received favourably by the few civilians who had remained in those villages, and that they had provided them with bread baked in a military bakery in Tskhinvali. He further said that during their visits he had never seen or heard of any cases of looting and burning. While it is true that they found some burnt houses in Tirdznisi, they had burnt down before, possibly during the period of active fighting, and were no longer on fire. When asked to comment on allegations that a resident of Tirdznisi had been killed there by Ossetian

militias on 14 August, he replied that this was impossible as they had controlled the area at that time and their specific task had been to prevent such incidents and protect the local population. The witness had returned to the Russian Federation on 26 August 2008.

During his examination, the witness said that Chechens in his unit had worn white bands on their uniforms, precisely on the left arm, to show that they belonged to Russian forces. He also said that South Ossetian militias had been fighting alongside Russian forces in and around Tskhinvali, but that they had not been deployed in the "buffer zone". Lastly, he underlined that orders to prevent looting, burning and other crimes against the local population in the "buffer zone" had been issued to him every day in writing during the period of 12-15 August and that a copy of those orders could still be obtained. Accordingly, had he seen or heard of any such case, he would have stopped it and punished the perpetrators severely.

28. W21, Russian Armed Forces, born in 1960

He said that in the night of 7 to 8 August 2008 Georgian forces attacked Khetagurovo and then Tskhinvali. The Headquarters of the Joint Peacekeeping Forces in Tskhinvali were hit on several occasions on 8 August. As a result, eight or nine peacekeepers were killed and many, including the witness himself, were injured. The peacekeeping post in Tamarasheni, north of Tskhinvali, was also struck on 8 August and burnt down; the personnel were evacuated to a nearby reserve post. The peacekeeping post in Kekhvi, in that same area, was abandoned as it had come under fire from Russian forces in the north and Georgian forces in the south. All other peacekeeping posts continued to operate. Shortly after the cessation of hostilities, the peacekeeping posts on the "border" between South Ossetia and the "buffer zone" were strengthened and new peacekeeping posts were set up in the "buffer zone". About 300 peacekeepers altogether were stationed at those posts. Their principal task was to ensure that there was no movement of troops across that "border" and in the "buffer zone" (neither South Ossetian nor Georgian forces were allowed into that zone). In addition, 10 teams of 7-8 peacekeepers were patrolling the "buffer zone". Their main task was to ensure the safety of the remaining local population. However, given the size of that zone, they were not able to prevent every incident. As to the witness himself, his main task was to ensure that all the peacekeepers, those patrolling and those stationed at the peacekeeping posts, had everything they needed to do their job. He thus travelled all over the "buffer zone". In the course of his missions, he did not come across any cases of looting, but he saw some burning houses. Peacekeepers assisted the remaining ethnic Georgians in the "buffer zone"

in different ways: they brought them food, water and glass for windows; helped them to put out fires; and helped them to reach an area controlled by the Georgian Government. As to the peacekeepers' uniforms, the witness described them as follows: an inscription "Peacekeeping Forces" and the blood type above the left pocket; an inscription "Peacekeeping Forces" on the left arm; and green helmets with a blue stripe and an inscription "MC" in yellow. The witness also underlined on several occasions that peacekeepers should be distinguished from regular Russian forces.

29. W22, Russian Armed Forces, born in 1972[26]

He said that his regiment of 800 soldiers (two battalions) had been posted in Gori during the period of 13-17 August 2008. Its key task was to prevent looting and burning. Marauders from both ethnic communities tried to get into Gori, but they were arrested and handed over to the authorities of Georgia (ethnic Georgians) or South Ossetia (ethnic Ossetians). On 17 August one of the battalions was posted at the front line to prevent the incursion of Georgian forces (notably, the unit that had returned from a mission to Iraq) into the "buffer zone". The witness stated that he had not had enough men to protect the many villages in the "buffer zone". He could not have obtained reinforcements, as all of the Russian forces in the conflict zone had been busy with other tasks. On 22 August 2008 the entire regiment moved to the "border" between the "buffer zone" and South Ossetia (close to the villages of Ditsi and Kordi). It returned to the Russian Federation on 26 August 2008.

When asked to comment on reports of ethnic cleansing in the "buffer zone", he replied that there was no ethnic cleansing in his area of responsibility (that is, the town of Gori). While he could not guarantee this for other areas, he considered that Russian forces, in general, had done everything possible in order to prevent crimes against the local population.

30. W20, Russian official, born in 1959[27]

He said that after the cessation of hostilities on 12 August 2008 the peacekeeping forces had no longer been responsible for South Ossetia, but only for the "buffer zone" adjacent to that region; law and order in the Georgian villages in South Ossetia had been the responsibility of regular Russian forces after 12 August. He went on to say that there were, all in all,

26 This is the second statement of this witness (see also his statement no. 10 above).
27 This is the third statement of this witness (see also his statements nos. 11 and 21 above).

about 460-480 peacekeepers in the "buffer zone". About 380 of them were stationed at the peacekeeping posts on the "border" between South Ossetia and the "buffer zone" and all over that zone. Their main task was to ensure that neither South Ossetian nor Georgian forces entered the "buffer zone". The remaining peacekeepers were divided into about 10 patrolling teams and 2 or 3 technical teams. The main task of the patrolling teams was to ensure the safety of the remaining local population. They patrolled different areas every day, depending on the general situation and individual complaints – they acted upon each and every individual complaint within half an hour. Peacekeepers caught over 140 marauders in the "buffer zone" and handed them over to the authorities of Georgia (ethnic Georgians) or South Ossetia (ethnic Ossetians). As the area under the responsibility of the peacekeeping forces was large and contained 200 or so settlements, it was simply impossible to prevent all acts of looting and burning. However, the peacekeeping forces did all they could to protect the local population, even putting their own lives at risk. For example, on 3 October a peacekeeper died while acting to prevent the theft of a car in the village of Ditsi, in the "buffer zone", because a bomb had been planted under the car. The witness said that it was not an option to transfer other Russian forces to peacekeeping tasks as they had been busy with other military tasks and, in any event, they would have needed special training which would have taken months. While it is true that regular Russian forces sometimes acted to protect the local population if they came across marauders, this was not their principal task; they did not patrol villages. As to the technical teams of the peacekeeping forces, they dealt with unexploded ordnances. He acknowledged that munitions from cluster weapons had been found in the "buffer zone", but he could not tell to which party they belonged. The mandate of peacekeeping forces had ended on 8 October 2008.

When asked to comment on the report *Up in Flames: Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, published by Human Rights Watch in 2009, according to which on 12 August Human Rights Watch researchers had witnessed looting and burning of Georgian villages in South Ossetia by South Ossetian militias in the presence of Russian forces (p. 132), the witness replied that Human Rights Watch could not possibly have been there on that date.

The witness was also asked to comment on the passage from that report (p. 124), according to which on 13 August, Russian forces had set up checkpoints at both ends of a road connecting the town of Java to Tskhinvali, thus significantly reducing looting and burning in the Georgian villages along that road (Tamarasheni, Zemo Achabeti, Kvemo Achabeti, Kurta, and Kekhvi), but about a week later, without any explanation, they had removed the checkpoints and the pillaging and destruction had resumed.

He replied that Russian forces had gradually withdrawn from the conflict zone pursuant to the ceasefire agreement. He further reiterated that Human Rights Watch could not possibly have been there on those dates.

When asked to comment on the report *Human Rights in the War-Affected Areas Following the Conflict in Georgia*, published by the OSCE in November 2008, and the report of the EU-backed Independent International Fact-Finding Mission on the Conflict in Georgia, published in September 2009, according to which there was ample evidence of systematic looting and burning of ethnic Georgian villages in South Ossetia and the "buffer zone" adjacent to South Ossetia, the witness said that those organisations had visited South Ossetia and the "buffer zone" only after the withdrawal of the Russian forces (that is, after 8 October). He said again that there had been no systematic campaign of looting and burning; only individual cases with which they had dealt to the best of their ability.

Lastly, when asked about the participation of Cossacks in the conflict in Georgia, he said that he had never seen any Cossacks there. In his opinion, the whole story about Cossacks during that conflict was a fairy tale.

31. W26, Ossetian whose house was allegedly destroyed by unknown perpetrators during or immediately after the cessation of hostilities, born in 1956

She said that she had lived with her husband in the village of Ksuisi, in South Ossetia, from 1976 until 1991. In 1991 her husband was killed and all ethnic Ossetians were expelled from that village. An ethnic Georgian family lived in their house in Ksuisi from 1991 until 2008. In 2008 the house was burnt down by unknown perpetrators. The witness also said that she had not yet received her husband's mortal remains.

32. W27, Ossetian whose house was allegedly destroyed by unknown perpetrators during or immediately after the cessation of hostilities, born in 1965

He said that his father had lived in the village of Disevi, in South Ossetia, until 7 August 2008. On that date he had left the village, together with all ethnic Ossetians. Only ethnic Georgians stayed in Disevi. In the period of 7-12 August 2008, practically all the houses in Disevi burnt down (about 300 houses), including his father's house. The village has not been reconstructed yet.

When asked to comment on reports that only 7 houses in the village of Disevi had been left, all of them belonging to ethnic Ossetians, and that Ms Nato Okropiridze had burnt to death in one of the houses, he replied that those were lies.

33. W32, American Association for the Advancement of Science[28]

The witness was employed at the American Association for the Advancement of Science which produced the report *High-Resolution Satellite Imagery and the Conflict in South Ossetia* in October 2008. The Oak Foundation financed the project. At the request of Amnesty International, she and her team carried out a damage assessment of the region of Tskhinvali during the August 2008 conflict. Since all commercial satellites had been fully booked, preventing the American Association for the Advancement of Science from ordering new satellite imagery over their area of interest for the entire duration of the conflict, they were forced to rely upon imagery ordered by other entities (such as the United States Government). The available dates were 10 and 19 August 2008. She emphasised that this had not had any impact on the outcome of their research, as they had purchased raw imagery which they had then processed themselves. The satellites utilised were: Ikonos, run by GeoEye[29], for 10 August; WorldView, run by DigitalGlobe[30], and EROS-B, run by ImageSat[31], for 19 August. They also purchased from DigitalGlobe, as "before images", imagery for July 2005 and July 2007 (the satellite utilised was QuickBird). All of the satellite imagery that they used was high-resolution imagery (the spatial resolution of all of the images was less than one metre). She explained that if a satellite had a resolution of, for example, 40 centimetres, something would have to be 40 centimetres by 40 centimetres in order for the satellite to see it.

The witness said that the most helpful graphic was probably the one on page 28 of the report which clearly showed that the town of Tskhinvali had sustained the most damage up to the morning of 10 August, whereas the nearby villages had sustained the most damage between the morning of 10 August and the morning of 19 August. However, it is impossible to determine the exact dates on which the damage was sustained, as no satellite imagery is available for other dates. The report also demonstrated that most

28 At the end of July 2016 the witness left the American Association for the Advancement of Science to take up a position at the US State Department.
29 GeoEye is a commercial company incorporated in the United States.
30 DigitalGlobe is a commercial company incorporated in the United States. In 2013 it purchased GeoEye.
31 ImageSat is a commercial company incorporated in Israel.

of the pre-10 August damage had been caused by shelling and bombing, whereas most of the post-10 August damage had been caused by burning. The witness explained that a burnt house looked very different to a bombed house on satellite images: while fire would usually not knock down its exterior and interior walls, a shell or a bomb would. As to shelled and bombed buildings, she added that because of the nature of satellite imagery (generally looking straight down), damage to the sides of a building was not necessarily shown.

The witness further referred to the table on page 9 of the report which showed the number of damaged buildings on 10 August and on 19 August in Tskhinvali and 23 nearby villages. In the village of Eredvi, for example, there were 9 damaged buildings on the former date and a further 54 (that is, 63 in total) on the latter date. Another example was in the village of Karbi, no damaged buildings on the former date and 4 damaged buildings on the latter date.

During her examination, the witness confirmed that neither she nor her staff had a military background, but in her opinion such a background was not necessary for a trained satellite imagery analyst to determine whether a building had been damaged. When asked whether the American Association for the Advancement of Science had analysed satellite imagery in relation to any other conflict, she mentioned Syria, Iraq, Sudan and South Sudan. Lastly, she stated that the American Association for the Advancement of Science was a non-governmental organisation and that none of its employees was paid by the United States Government. While the US Government had funded in the past some projects run by the American Association for the Advancement of Science, the project regarding South Ossetia was not one of them.

34. W25, official of the *de facto* authorities of South Ossetia, born in 1976 (**heard in relation to detention and treatment of civilian detainees**)

As the head of the detention centre at the "Ministry of Internal Affairs of South Ossetia", he was in charge of all Georgian civilians held there in August 2008. The centre was, and still is, located in the basement of the "Ministry".

He stated that Georgian civilians had been placed there, at the request of the then "Minister of Internal Affairs of South Ossetia" – Mr Mikhail Mindzayev – for their own safety. The first civilians arrived on 11 or 12 August and the last ones left on 26 August 2008. Less than a third of the detainees were women. The youngest one was between 12 and 14 years old.

He was with his father. As he was afraid, the witness and others did all they could to calm him down. The witness denied that a female detainee had been ordered to clean his room at the "Ministry"; that a female detainee by the name of Shorena had been raped at the centre; and that he had kicked W10 in the nose[32]. As to the role of Russian forces, he said that they had never entered the detention centre. While it is true that Russian forces questioned detainees in the building of the "Ministry", this did not take place in the centre itself. Russian forces also supplied water and food (such as tinned meat, porridge and soup) for the detainees, but deliveries took place outside the building. The witness acknowledged that the "Prosecutor of South Ossetia" had ordered that the streets of Tskhinvali be cleaned by Georgian detainees. However, there was no need to force anyone to do it. The detention facility was so overcrowded that there were always 10-20 volunteers. As to the conditions of detention, he confirmed that the detention centre had not been designed for so many people. There were seven cells of different sizes, two toilets and some common premises for more than 160 detainees; there were enough beds for half of the detainees only. However, there had simply not been any better place to keep them (for example, the prison had been destroyed and the schools would have been difficult to guard).

During his examination, the witness confirmed that the detainees had always been guarded and had not been allowed to leave the detention centre, but he repeated that this had been done to protect them from Ossetians. He added that Georgians who had stayed in the area of Tskhinvali had not had any other choice but to come to the detention centre, pending a transfer to the area controlled by the Georgian Government. The witness also said that the detainees had been told why they had been detained. As regards uniforms, he said that the guards in the detention centre had worn camouflage uniforms of various types, but always with white armbands in order to be distinguishable from Russian forces. Whilst there were only three guards in the detention centre at any moment, the detention centre was in the building of the "Ministry of Internal Affairs" with many other people working there. All in all, one doctor, three nurses, eight guards and ten other officials were working at the detention centre at the relevant time.

32 See his statement no. 17 above.

35. W33, former member of the British Armed Forces, former Deputy Chief of UNOMIG[33] and former British defence attaché in Russia and the South Caucasus

He was one of the military experts of the Independent International Fact-Finding Mission on the Conflict in Georgia set up by the European Union in December 2008. The Mission issued its report in September 2009.

He said that South Ossetia's geographic position, unlike Abkhazia's, was such that it was not able to survive on its own. After the 1991/92 conflict it only survived because of the Ergneti Market. However, when the Georgian Government closed it in 2005, it had no other choice but to rely almost entirely on the Russian Federation for economic support, which then led to Russian effective control of South Ossetia. He also said that long before the 2008 conflict, the Russian Federation had equipped and trained the South Ossetian (and Abkhazian) forces to enable them to defend what they regarded as their territory in case of a Georgian attack. At the start of the 2008 conflict, there had been few Russian forces in the conflict zone, but their number swelled during the conflict. The witness could not tell their exact number, but the figure indicated in the Mission's report (that is, 25,000-30,000) was, in his view, far too high. He explained that while experts (including himself) had contributed their observations, a so-called core team had compiled the report; he thus did not necessarily agree with each and every conclusion in that report. In any event, in view of the size of the enemy forces and the fact that the best-trained brigade had just returned from a mission to Iraq, the Georgian Armed Forces were in no fit state to counter-attack effectively.

The witness said that Russian forces had not exercised effective control of the local forces in South Ossetia and Abkhazia (therefore, they had not let Abkhazian forces enter the "buffer zone" and the Kodori Gorge). Russian forces had their own objectives in mind. They did not attempt to leave forces that they needed in the front line behind to control local forces and, in the opinion of the witness, they did not really care what was going on behind them. He therefore agreed with the conclusion of the Mission that the Russian and the South Ossetian authorities failed overwhelmingly to take measures to maintain law and order and ensure the protection of the

33. UNOMIG was established in August 1993 to verify compliance with the ceasefire agreement between the Government of Georgia and the *de facto* authorities of Abkhazia. UNOMIG's mandate was expanded following the signing by the parties of the 1994 Agreement on a Ceasefire and Separation of Forces. UNOMIG came to an end in June 2009 due to a lack of consensus among UN Security Council members on mandate extension.

civilian population as required under international humanitarian law as well as human rights law.

As to the alleged use of cluster munitions by Russian forces, the witness said that he had not seen any forensic evidence in this connection, but he added that cluster munitions had been available to Russian forces. The witness emphasised that one should be careful with regard to that issue, as there were various types of cluster munitions and they could be mixed with other munitions in order to achieve a specific tactical objective. He mentioned in this regard that neither Georgia nor Russia were parties to the Convention on Cluster Munitions[34].

Lastly, he stated that he did not deal with the allegations of burning and looting of houses and ill-treatment of civilians and prisoners of war, but that he would not be surprised if these things had indeed happened, in view of the ill-disciplined nature of the local forces that the Russian Federation had failed to control, and their thirst for revenge.

D. Freedom of movement of displaced persons

36. W24, official of the *de facto* authorities of South Ossetia

The witness was the "Minister of Foreign Affairs of South Ossetia" from 1998 to 2012. He is now a member of the delegation of the *de facto* authorities of South Ossetia at the Geneva International Discussions.

He said that South Ossetia had been independent since 20 September 1990: it is recognised by a number of States and, most importantly, by its own people. While South Ossetia certainly has very friendly relations with the Russian Federation, it is not under Russian control. Until the 1991/92 conflict, all of the villages in South Ossetia had been mixed; during that conflict, the Georgian Government had taken control of many villages around Tskhinvali and ethnically cleansed them. He added that the number of terrorist attacks in South Ossetia, orchestrated by Georgia, had increased after the election of Mr Saakashvili as President of Georgia in 2004. During the 2008 conflict, many ethnic Georgians had fled South Ossetia and many houses, both Georgian and Ossetian, had been ruined. The witness emphasised, however, that there had never been any official policy of ethnic cleansing of Georgians from South Ossetia; many ethnic Georgians indeed

34. The Convention on Cluster Munitions is an international treaty of more than 100 States that addresses the humanitarian consequences of cluster munitions through a categorical prohibition and a framework for action.

still lived in South Ossetia, according to this witness. For example, in the Leningori district[35], 6 out of 11 secondary schools (117 pupils in total) used Georgian as the teaching language at the end of the 2015/16 academic year. The witness was aware that South Ossetian officials had made hostile statements directly after the conflict (notably, that ethnic Georgians would not be allowed to return to their homes), but he said that they had simply been sentimental and euphoric. As to reports of ethnic cleansing of Georgians by South Ossetian forces, he said that Western organisations had always been biased against South Ossetia. He restated that while there had, of course, been incidents against ethnic Georgians, there had never been any official policy of ethnic cleansing.

The following forces took part on the South Ossetian side in the 2008 conflict: armed forces under the "Ministry of Defence of South Ossetia"; police forces, such as OMON[36], under the "Ministry of Internal Affairs of South Ossetia"; and "defenders" or militias formed from the general population in time of war. The witness said that their forces, unlike Georgian forces which had been trained by the United States and NATO, had not been trained by any foreign power.

As to the question of return, he said that about 3,000 ethnic Georgians had already returned to the Leningori district. This did not pose any problems because there were no hostilities in that area in 2008 and, according to the witness, not a single house was destroyed there. The situation is completely different with regard to the villages around Tskhinvali. The witness said that ethnic Georgians from those villages had been hostile towards ethnic Ossetians for many years prior to the 2008 conflict (when those villages had been under the control of the Georgian Government). He added that Tskhinvali had been shelled from those villages in the night of 7 to 8 August 2008. During the conflict, intense fighting had taken place there causing a lot of destruction and casualties. Therefore, the *de facto* authorities of South Ossetia are not able to ensure their safe return, unless a global solution to the issue of displaced persons, including over 100,000 ethnic Ossetians who fled their homes in the 1990s, is found. The Georgian authorities have thus far refused to engage in negotiations with the authorities of South Ossetia in this connection, according to this witness. He added that ethnic Georgians had left those

35. The Georgians call it Akhalgori.

36. OMON (Отряд мобильный особого назначения) was a system of special police units within the Russian, and previously Soviet, Ministry of Internal Affairs. It was created in 1988 and then played a major role in several armed conflicts during and following the dissolution of the Soviet Union. OMON units continue to exist in some post-Soviet states. As concerns the Russian Federation, the functions of OMON have recently been taken over by the newly established National Guard of Russia.

villages in August 2008 either voluntarily or pursuant to instructions received from the Georgian Government; moreover, all the men in those villages had been armed by the Georgian Government.

The witness said that the ethnic Georgians who had returned to the Leningori district and a small number of other villages (such as Sinaguri and Karzmani in the west of South Ossetia), were able to choose whether they wished to obtain South Ossetian nationality or to keep their Georgian nationality (double nationality is not an option for Georgian nationals). Those who have decided to keep their Georgian nationality, which is the majority, have received special passes allowing them to enter and leave South Ossetia every day (7 a.m. to 8 p.m.). Georgian nationals who live in undisputed Georgian territory cannot enter South Ossetia; the authorities of South Ossetia insist that a "bilateral treaty" first be signed with Georgia in this regard, which Georgia refuses as it considers South Ossetia to be part of its territory. Nevertheless, some entries are allowed exceptionally in respect of those attending funerals or weddings, minors visiting their grandparents during summer holidays, shepherds coming for summer pastures, school teachers commuting to the Leningori district, and so on.

The witness further stated that double nationality was accepted in respect of Russian nationals and that about 90% of South Ossetians were Russian citizens. As to the official languages, he said that while Ossetian and Russian are the only official languages at the "State" level, the Georgian language is the official language in the ethnic Georgian villages.

Lastly, he confirmed that the "border" between South Ossetia and undisputed Georgian territory had been reinforced, sometimes with razor wire, in order to stop terrorist attacks and illegal crossings. That "border" is guarded jointly by the Federal Security Service of the Russian Federation and local forces under the "Agreement between the Russian Federation and the Republic of South Ossetia on joint efforts in protection of the state border of the Republic of South Ossetia" of 30 April 2009. He did not know the size of the local forces which guarded the "border" between South Ossetia and undisputed Georgian territory together with the Russian forces. He added that another "Agreement" (namely, the "Agreement between the Russian Federation and the Republic of South Ossetia on alliance and integration" of 18 March 2015) applied to the border between South Ossetia and the Russian Federation.

37. W19, official of the *de facto* authorities of South Ossetia, born in 1976 [37]

The witness stated that ethnic Georgians from the Leningori district had the right to return to their homes; about 3,000 have indeed returned. They are, nonetheless, still considered as displaced persons by the Georgian Government and still receive all the social benefits provided to displaced persons. The ethnic Georgians who live in that district, as well as those who live in several villages in the west of South Ossetia (such as Sinaguri), have received special passes allowing them to enter and leave South Ossetia every day (7 a.m. to 8 p.m.).

As concerns around 20,000 ethnic Georgians who had lived in the villages around Tskhinvali until the 2008 conflict, he said that their situation was different. According to this witness, there is a long history of inter-ethnic violence in that area. The killing of 33 ethnic Ossetians by ethnic Georgians from the villages of Kekhvi and Kurta on 20 May 1992, when the villages were under the control of the Georgian Government, is still remembered. Therefore, their return is not only a humanitarian issue, as portrayed by the Georgian Government, but also a political one. He added that the *de facto* authorities of South Ossetia were simply not able to ensure their safe return, unless a global solution was found for all of the displaced persons, including over 100,000 ethnic Ossetians who had fled their homes in the 1990s. In any event, not a single ethnic Georgian from the villages around Tskhinvali has so far requested the *de facto* authorities of South Ossetia to allow their return to South Ossetia. The witness acknowledged, however, that no procedure for return to those villages existed.

As concerns the "border" between South Ossetia and undisputed Georgian territory, the witness said that it had been reinforced in order to stop terrorist attacks and illegal crossings. That "border" is guarded jointly by Russian forces (from the military base no. 4) and local forces as envisaged by the "Agreement between the Russian Federation and the Republic of South Ossetia on joint efforts in protection of the state border of the Republic of South Ossetia" of 30 April 2009. The witness did not know the size of the border forces, either Russian or local, but he said that their number was sufficient to protect the "border". In the case of illegal crossings, the sanction is administrative (a fine and expulsion) and only in the case of multiple illegal crossings is a criminal sanction imposed. The witness confirmed that Russian legislation applied in that field, as in many other fields, pursuant to a 1992 law of the "Supreme Council of South Ossetia" providing for the application of Russian legislation pending the

37. This is the second statement of this witness (see also his statement no. 20 above).

enactment of local legislation. He also said that the *de facto* authorities of South Ossetia were not able to ease the border regime until Georgia had undertaken in a legally binding document that it would not use force against South Ossetia. In his opinion, political statements by the Georgian authorities are not sufficient as they are not legally binding and they are regularly followed by bellicose statements about the need to ensure the territorial integrity of Georgia. What is more, the President of Georgia, Mr Saakashvili, publicly gave assurances that South Ossetia would not be attacked on 7 August 2008, but nevertheless attacked it on the same evening.

Lastly, the witness underlined that South Ossetia was an independent State, despite the fact that it had a number of "bilateral treaties" with the Russian Federation in the military, social and other areas.