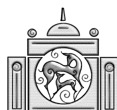
Ivane Javakhishvili Tbilisi State University
Faculty of Law

Journal of Law

№1, 2020



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Georgia v. Russia (II) and International Humanitarian Law: Challenge and Opportunity for the European Court of Human Rights

Following the international armed conflict ('IAC') between the Russian Federation and Georgia in August 2008, Georgia lodged an interstate application against Russian Federation before the European Court of Human Rights ('the Court'), alleging violations of the European Convention on Human Rights ('the Convention') by the Russian armed forces and/or by the separatist forces of Tskhinvali Region/South Ossetia, Georgia, and Abkhazia, Georgia, placed under the control of Russian Federation. The application gave rise to the case Georgia v. Russia (II), declared admissible in 2011 and currently pending before the Grand Chamber of the Court after a hearing on the merits in 2018.

Since IACs are primarily regulated by international humanitarian law (IHL), in Georgia v. Russia (II) the Court is to examine the applicability of the Convention and IHL. While the Court has traditionally distanced itself from applying IHL, over the recent decades the Court's gradual openness to IHL can be observed. However, the approach of the Court to IHL remains incoherent or contradictory. In this respect, the present article intends to demonstrate that Georgia v. Russia (II) is both a challenge and an opportunity for the Court in terms of its approach to IHL. On the one hand, the Court will have to come out of its comfort zone to deal with the interrelation between the Convention and IHL. On the other hand, Georgia v. Russia (II) enables the Court to develop its working methodology towards IHL within its original mandate.

Key words*: Georgia v. Russia (II), international humanitarian law, European Court of Human Rights, European Convention on Human Rights, international armed conflict, lex specialis, derogation, right to life, internment, forcible transfer and right of return, destruction of property.*

1. Introduction

On 23 May 2018, 10 years later from "a little war that shook the world",[1] a hearing on the merits was held before the Grand Chamber of the European Court of Human Rights ('the Court') in Strasbourg in the case of *Georgia v. Russia (II)*.[2] The case concerns alleged violations of the

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[1] *Asmus R.,* A Little War That Shook the World: Georgia, Russia, and the Future of the West, St. Martin's Press, 2010.

[2] *Georgia v. Russia (II)*, [2008], ECHR, App no 38263/08.

Convention by the Russian Federation during the international armed conflict between Russian Federation ('Russia') and Georgia in August 2008. One of the central legal issues the Court has to address in this case is the relationship between the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention') and international humanitarian law ('IHL'). By the time of writing, the judgment on merits is pending before the Grand Chamber.

This article intends to demonstrate that *Georgia v. Russia (II)* is a challenge and an opportunity at the same time for the Court in the context of its fragmented and inconsistent approach to IHL. As a challenge, *Georgia v. Russia (II)* is a precedential case with far-reaching implications since the clarifying the relationship between the Convention and IHL seems to be unavoidable for the Court as the case involves active military operations in international armed conflict. Therefore, it is highly unlikely that the Court will on purpose shy away from examination of the issue in question. As to the opportunity, this case has every necessary feature to enable the Court to clarify its incoherent or contradictory approach to IHL and to develop its views in a clear and consistent manner.

2. The European Court of Human Rights and International Humanitarian Law: A Complicated Relationship

IHL[3] regulates armed conflicts, namely the situations "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[4] This definition encompasses the both international[5] and non-international armed conflicts.[6] As for the Convention, it was always intended to protect human rights during peacetime.[7] In defiance of this, the Court often confronts the applications which, as a central claim, allege the lawfulness of military operations conducted by armed forces of contracting parties to the Convention during armed conflicts.[8] Examination of applications emerged from armed conflicts by applying solely the human rights provisions of the Convention, which are of

[3] The main legal instruments of IHL are Hague Conventions of 1907, Four Geneva Conventions of 1949 (GC I-IV) and their Additional Protocols of 1977 (AP I-II).

[4] *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY, IT-94-1-A, 2 October 1995, §70.

[5] According to Common Article 2 of the Geneva Conventions, international armed conflict is "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." In addition, "all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."

[6] Non-international armed conflicts are defined in a negative manner and pertains to situations, which meets the armed conflict threshold and is not of international character.

[7] *De Koker C.*, The European Court of Human Rights' Approach to Armed Conflict and Humanitarian Law: Ivory Tower or Pas De Deux?, Convergences and Divergences between International Human Rights, International Humanitarian and International Criminal Law, *De Hert P., et al. (eds.)*, Intersentia, Cambridge, 2018, 195.

[8] For a general overview, see Factsheet – Armed Conflicts, Press Unit of the European Court of Human Rights (March, 2020), <https://www.echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf> [08.05. 2020].

general and peacetime-oriented nature, in most cases proves to be an insufficient normative framework to fully consider the context of armed conflicts.[9]

Insomuch as the Court is *expressly* mandated to interpret and apply only the Convention,[10] it traditionally refrained from considering IHL. For the most part, the Court's attitude towards IHL, due to its inconsistent nature, is considered as "its own approach".[11] Some authors, taking into accounting the Court's practice, suggest the emergence of 'a European human rights law of armed conflict."[12] The reason behind such views is the fact that, save the exceptional occasions, the Court assess the claims from armed conflict situations exclusively through the prism of the Convention, resulting in total avoidance of direct interaction with IHL, which is, however, still detectable in some judgments.[13]

The Court's "own approach" increases the risk of fragmentation of law of armed conflict on a regional level. In this regard, in 2015 the Steering Committee for Human Rights of the Council of Europe (CDDH) adopted the Report on the Longer-term Future of the System of the European Convention on Human Rights,[14] which *inter alia* concerned interaction between human rights law and other fields of international law. The Report noted that "an interpretation of the Convention which is at odds with other instruments of public international law (such as *international humanitarian law* [emphasis added]) could have a detrimental effect on the authority of the Court's case law and the effectiveness of the Convention system as a whole."[15] Thus, in the context of one of the challenges for the Court, it was decided to examine whether "the Court always achieves an interpretation of the Convention which is in harmony with the general principles of international law."[16] Provided that the Convention is interpreted at variance with the states' obligation under other international treaties or international customary law, the credibility of the Court may be weakened.[17]

In response to this challenge, in 2019 the CDDH adopted the new Report on the Place of the European Convention on Human Rights in the European and International Legal Order, concerning, among other things, the relationship between the Convention and IHL.[18] According to this Report,

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9 *Kleffner J. K., Zegveld, L.*, Establishing an Individual Complaints Procedure for Violations of International Humanitarian Law (2000) Yearbook of International Humanitarian Law, Vol. 3, 2000, 387-388.

10 According to Article 32 of the Convention, the Court's jurisdiction extends to interpretation and application of the Convention and its Protocols.

11 *Forowicz M.*, The Reception of International Law in the European Court of Human Rights, Oxford University Press, 2010, 313-318.

12 *Oberleitner G.,* Human Rights in Armed Conflict: Law, Practice, Policy, Cambridge University Press, 2015, 309-311.

13 *Uriarte J. A.*, The Problems the European Court of Human Rights Faces in Applying International Humanitarian Law, The Humanitarian Challenge: 20 Years European Network on Humanitarian Action (NOHA), *Gibbons P., Heintze H. J. (eds.)*, Springer, Cham, 2015, 201-202.

14 Report of the Steering Committee for Human Rights (CDDH). The Longer-term Future of the System of the European Convention on Human Rights. Council of Europe, 11 December 2015, <https://rm.coe.int/the-longer-term-future-of-the-system-of-the-european-convention-on-hum/1680695ad4> [08.05.2020].

15 Ibid, §186.

16 Ibid, §187(iv).

17 Ibid.

18 Report on the Place of the European Convention on Human Rights in the European and International Legal Order, adopted by the CDDH at its 92nd meeting (26–29 November 2019) 72-80, <https://rm.

over the last few years the openness of the Court towards IHL is increasing. Moreover, following the overview of the case law of the Court, the Report identified the stages of the "evolution" of the Court in this respect: 1) cases where IHL is fully ignored; 2) cases with secondary references to IHL; 3) cases which examine IHL without the substantive impact on the outcome of judgments, and 4) cases where the Court directly applies IHL.[19]

The climax of such "revolution" is considered the case of *Hassan*, which remains the clear-cut example of direct application of IHL by the Court. *Hassan* was the first case when the respondent state asked the Court not to apply Article 5 of the Convention in respect of detentions or to interpret this article in light of powers authorised under IHL,[20] which were in direct normative conflict with Article 5 of the Convention.[21] The Court held that notwithstanding that detention of persons with the aim of interment under IHL was against the Article 5 of the Convention, it did not violate that provision. However, the Court observed that such detention shall be "lawful", i.e. internment under IHL must be consistent with IHL itself and "most importantly, that it should be in keeping with the fundamental purpose of Article 5 § 1, which is to protect the individual from *arbitrariness*" (emphasis added).[22] *Hassan* has not expanded the exhaustive list of exceptions to restrict Article 5 by way of incorporating additional ground of deprivation of liberty in the form of internment in armed conflict. The Court in *Hassan* merely acknowledged that paragraphs (a)-(f) of Article 5(1) of the Convention cannot be considered to be of exhaustive nature when the Convention continues to apply to armed conflicts as those exceptions are designed for peacetime.[23] In this case, the Court relied on harmonious interpretation to solve the problem of incompatibility of the Convention with IHL and accommodated Article 5 of the Convention with Geneva Conventions.[24]

Despite the diverse views on *Hassan*,[25] it remains undisputable that *Hassan* is the first case when the judges of the Court examined IHL in detail, which attests to the willingness of the Court to

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coe.int/steering-committee-for-human-rights-cddh-cddh-report-on-the-place-of-t/1680994279> [08.05.2020].

19 Ibid, 75-79. The Report also briefly refers to case law under Article 7 of the Convention, where the Court considers IHL in the context of conviction for war crimes and the principle of *nullum crimen sine lege* (§§78-79), which are discussed in legal scholarship as incidental or *incidenter tantum* application of IHL by the Court. See e.g. *Sicilianos L-A.,* Les Relations entre Droits de L'homme et Droit International Humanitaire dans la Jurisprudence de la Cour Européenne des Droits de L'homme, The International Legal Order: Current Needs and Possible Responses - Essays in Honour of Djamchid Momtaz, *Crawford J., et al. (eds),* Brill Nijhoff, Leiden, 2017, 618-620.

20 *Hassan v United Kingdom* [GC], [2014], ECHR, App no 29750/09, §99.

21 Normative conflict between the Convention and IHL exist when "two rules or principles suggest different ways of dealing with a problem". See *Koskenniemi M.,* Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (International Law Commission 2006), Geneva, 2006, §25.

22 *Hassan* (n 20) §105.

23 *Serdar Mohammed v Ministry of Defence* [2017] UKSC 2, §68(2).

24 *Hassan* (n 20) §§102, 104.

25 See eg *von Arnauld A.*, An Exercise in Defragmentation: The Grand Chamber Judgment in *Hassan v UK*, The 'Legal Pluriverse' Surrounding Multinational Military Operations, *Geiß R., Krieger H. (eds.)*, Oxford University Press, 2020, 179-197; *Geiß R.*, Toward the Substantive Convergence of International Human Rights Law and the Laws of Armed Conflict: *The Case of Hassan v. the United Kingdom*, Seeking

engage with IHL to assess and consider its impact on the scope of the Convention in international armed conflict. However, it should be emphasised that *Hassan* does not address every aspect of the relationship between the Convention and IHL, as the judges acted in strictly defined factual circumstances of the case in question and developed their reasoning solely in the context of internment during international armed conflict. *Georgia v. Russia (II),* on the other hand, due to its widespread nature, enables the Court to establish its approach to IHL on a more general level.

3. *Georgia v. Russia (II)* and the Decision on Admissibility of the Application of 2011

On 11 August 2008, in response to international armed conflict between Russia and Georgia, Georgia lodged an application against Russia before the Court, alleging numerous violations of the Convention. As noted in the introduction, by the time of writing, the Court has not delivered its judgment on merits. Thus, the only publicly available document which can be analysed in the present article is the decision on admissibility of 13 December 2011 (the Decision), where the Court declared Georgia's application as admissible, without prejudging the merits of the case.[26]

According to Georgia's major claim, Russia, by its armed forces and/or the separatist forces of Tskhinvali Region (also known as South Ossetia), Georgia, and Abkhazia, Georgia, placed under its control, permitted/facilitated unlawful actions in the form of administrative practice, including *indiscriminate* and *disproportion* attacks against civilian population and their property in Tskhinvali Region/South Ossetia, Georgia, and Abkhazia, Georgia. From the beginning, Russian forces occupied the Georgian territories. Despite ceasefire, Russia remained the occupying power and exercised effective control over the occupied territories both directly, through its armed forces, and indirectly, through control of its agents – *de facto* organs of Tskhinvali Region/South Ossetia, Georgia, and Abkhazia, Georgia. Georgia asserted that "in the course of indiscriminate and disproportionate attacks by Russian forces and/or by the separatist forces under their control, hundreds of civilians were injured, killed, detained or went missing, thousands of civilians had their property and homes destroyed and over 300,000 people were forced to leave Abkhazia and Tskhinvali Region/South Ossetia."[27]

Therefore, Georgia argued that these acts by Russia and its subsequent inaction to investigate those allegations violate Article 2 (right to life), Article 3 (prohibition of torture), Article 5 (right to liberty and security), Article 8 (right to respect for private and family life) and Article 13 (right to an effective remedy) of the Convention, as well as Articles 1 (right to property) and 2 (right to education) of Protocol No. 1 and Article 2 (freedom of movement) of Protocol No. 4 to the Convention.[28] Insomuch as *Georgia v. Russia (II)* concerns active military operations during international armed conflict, the Court is to examine the relationship between the Convention and IHL in the context of admissibility due to alleged *ratione materiae* incompatibility of the application with the Convention, as argued by Russia.

Accountability for the Unlawful Use of Force, *Sadat L.N. (ed.),* Cambridge University Press, 2018, 252-272.

[26] *Georgia v. Russia (II)* (dec.) [2011], ECHR, App no 38263/08 (hereinafter - *Georgia v. Russia (II)* (dec.)).

[27] Ibid, §21.

[28] Ibid §§10, 26-38.

Due to the fact that active conduct of hostilities from war theatre are the central facts of the case, the Court is expected to overcome its apparent reluctance to consider the provisions of IHL, because addressing the issue of interaction between the Convention and IHL in this case appears unavoidable.[29] It is also hoped that in this case the Court will clarify its own approach to IHL[30] and will further elaborate on findings of *Hassan*.[31] It can be asserted that in this case the Court has not only an opportunity, but also an obligation to discuss the relationship between the Convention and IHL and to develop systematic and consistent approach to IHL to establish normative paradigm for applications arising out of armed conflicts.

The Decision addressed the following objections raised by Russia to the jurisdiction of the Court to entertain the claims filed by Georgia: 1) extraterritorial application of the Convention and "jurisdiction" of Russia in the meaning of Article 1 of the Convention (objection of incompatibility *ratione loci* of Georgia's application with the Convention); 2) applicability of the provisions of the Convention and the rules of IHL (objection of incompatibility *ratione materiae* with the Convention); 3) objections based on failure of Georgia to comply with the six-month time-limit and failure to comply with the rule on exhaustion of domestic remedies; and finally, 4) objection based on the similarity of Georgia's application with the application lodged with the International Court of Justice (ICJ). Whereas the Court dismissed Russia's objections regarding six-month time-limit and the similarity of applications, the rest of them were joined to the merits. Among these objections, the central issue of interest for this article is the Court's preliminary pronouncements on Russia's objection of incompatibility of Georgia's application *ratione materiae* with the Convention, that is, applicability of the provisions of the Convention and the rules of IHL, as addressed in detail herein.

4. Applicability of the Provisions of the Convention and the Rules of International Humanitarian Law

Georgia v. Russia (II) concerns international armed conflict, as the type of the conflict is also legally acknowledged.[32] The significance of international character of the armed conflict guarantees

29 *Hampson F. J.,* The Relationship between International Humanitarian Law and International Human Rights Law, Routledge Handbook of International Human Rights Law, *Sheeran S., Rodley N. (eds)*, Routledge, London and New York, 2013, 209.

30 *Cathcart B.,* The Legal Advisor in the Canadian Armed Forces Addressing International Humanitarian Law and International Human Rights Law in Military Operations, Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations, *de Wet E., Kleffner J. (eds.),* Pretoria University Law Press, 2014, 285-286.

31 *Hailbronner M.,* Laws in Conflict: The Relationship between Human Rights and International Humaniarian Law under the African Charter on Human and Peoples' Rights, African Human Rights Law Journal, Vol. 16, 2016, 354-355; *Hampson F.J.,* Article 2 of the Convention and Military Operations during Armed Conflict, 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, *Early L., Austin A. (eds.)*, Wolf Legal Publishing, Paris, 2016, 211.

32 In 2016, the International Criminal Court (ICC) determined that armed conflict during August 2008 was of an international character. See *Situation in Georgia*, Decision on the Prosecutor's Request for Authorization of an Investigation. Pre-Trial Chamber I, ICC, ICC-01/15-12, 27 January 2016, §27.

that the Court will not face the difficulties which are related to qualification a situation as a non-international armed conflict.[33] Therefore, it is highly likely that the Court will endeavour to develop consistent approach to relationship between the Convention and IHL. Moreover, as it is underscored "[t]aking into account IHL in such cases is not only crucial in order to maintain the credibility of the European system of protection of human rights but also to ensure the consistency of the international legal system as a whole."[34]

4.1. IHL as lex specialis: Russia's Arguments

Russia argues that as the alleged violations are related to the international armed conflict, Georgia's application is incompatible *ratione materiae* with the Convention and it shall be examined only under IHL, as *lex specialis* body of law.[35] This logic excludes the applicability of the Convention, leading to absence of the entire jurisdiction of the Court. According to Russia:

"[…] international human rights law was of extremely limited application in periods of armed conflict and of no application at all in a situation of international armed conflict. Accordingly, the Convention was of limited application to cases of internal disturbances amounting to less than armed conflict, as could be inferred from Article 2 which permitted the use of force for the purpose of quelling a riot or insurrection. Where internal disturbances reached the level of non-international armed conflict, a State Party could be permitted to derogate from its obligation to extend Convention rights throughout its territory under Article 15, but only in so far as was strictly necessary. Lastly, the Convention did not apply to a situation of international armed conflict where a State Party's forces were engaged in national defence, including in respect of any required operations abroad. In such circumstances the conduct of the State Party's forces was governed exclusively by international humanitarian law."[36]

Russia accentuates that since Georgia claims violations of the right to life, the proportionality of attacks and the internment of prisoners of war and civilians, IHL, as *lex specialis*, replaces the Convention under the principle of *lex specialis derogat generali.* It is noticeable that Russia, among

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33 The Court is usually reluctant to qualify situations as non-international armed conflict, as it is demonstrated in Turkish and Chechen cases. The former concerned the conflict between Turkish security forces and the Workers' Party of Kurdistan (PKK) in South-East Turkey in 1990s, whereas the latter cases concerned the conflict between Russian armed forces and Chechen fighters in the Chechen Republic of the Russian Federation at the end of the 1990s. Notwithstanding that both situations objectively met the threshold of an armed conflict, the Court held that since Respondent States had not formally derogated from the Convention, the situation must have been adjudged "against normal legal background." It is understandable that the Court is more at ease with qualifying the situation as international armed conflict since it does not have to prove the particular threshold and with reference to common Article 2 of the 1949 Geneva Conventions, citing the cases of "declared war" or "any other armed conflict [...] between two or more" states, is sufficient.

34 *Gowlland-Debbas V., Gaggioli G.,* The Relationship between International Human Rights and Humanitarian Law: An Overview, Research Handbook on Human Rights and Humanitarian Law, *Kolb R., Gaggioli G. (eds.)*, Edward Elgar Publishing, Cheltenham, UK and Northampton, USA, 92.

35 *Georgia v. Russia (II)* (dec.) (n 26) §69.

36 Ibid.

others, relies on the case law of the ICJ, in particular specific paragraphs of *Nuclear Weapons*[37] and *Wall* advisory opinions,[38] in fact not supporting Russia's arguments. In this respect, Georgia argues that:

"[Russia] misinterpreted the judgments of the ICJ on the relationship between international humanitarian law and international human rights law in situations of armed conflict. In their view, in the advisory opinions referred to by the respondent Government, and in a subsequent judgment [*Case concerning armed activities on the territory of the Congo" (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, ICJ, § 216], the ICJ had stated, on the contrary, that international human rights law continued to apply during an armed conflict. That had also been confirmed by the United Nations Human Rights Committee. In fact international humanitarian law and international human rights law applied in parallel."[39]

4.2. IHL, as a Guiding Law for the Interpretation of the Convention: Georgia's Arguments

Georgia submits that the alleged violations shall be examined exclusively under the Convention as none of the international bodies had ever implied, let alone held, that IHL replaces international human rights law. On the contrary, all the international judicial or quasi-judicial bodies always applied the human rights treaties to the armed forces of a state engaged in an armed conflict.[40] Moreover, with reference to *Varnava* case,[41] in which the Court considered the principles of IHL solely for the purposes to ascertain the scope of the rights under the Convention, Georgia contends that in the present case "regard should be had to international humanitarian law principles because they provided guidelines for interpreting specific human rights standards [in armed conflicts]."[42]

In light of these arguments, Georgia asserts that Russia's objection of incompatibility *ratione materiae* of the application with the Convention is unfounded.

4.3. The Court's Assessment

The Court held that the issue of interaction between IHL and the Convention is to be decided when the case is examined on the merits and joined this question with merits stage of the proceedings. However, the Court made some preliminary observations in light of its previous case law regarding Article 2, as it stood by 2011, and noted that:

"[…] the procedural obligation under Article 2 of the Convention continued to apply even where the security conditions were difficult, including in the context of armed conflict. Furthermore, Article 2 must be interpreted in so far as possible in the light of the general principles of international

[37] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ, Reports 1996, § 25
[38] *Legal Consequences of the Construction of a Wall in Occupied Palestin*e, Advisory Opinion, ICJ, 9 July 2004, §106.
[39] *Georgia v. Russia (II)* (dec.) (n 26) §70.
[40] Ibid.
[41] *Varnava and Others v. Turkey* [GC], [2009], ECHR, App nos 16064/90 *et al.*, §185.
[42] *Georgia v. Russia (II)* (dec.) (n 26) §70.

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. In a zone of international conflict Contracting States are under an obligation to protect the lives of those not, or no longer, engaged in hostilities. Generally speaking, the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part."[43]

Despite the joining this issue with the merits, it would be safe to assume that the cited paragraph of the Decision is a starting point for the Court, that it has prepared legal foundation to address the question of the relationship between the Convention and IHL. It is therefore expected that the Court will support harmonious interpretation of the Convention in light of IHL and will dismiss the claim of IHL being a *lex specialis*.

5. The Possible Effect of Absence of Derogations: Closed Road Towards IHL?

Official derogation from the Convention by a state under Article 15 is considered to be the case when the Court is indirectly authorized to consider IHL.[44] The Court's approach on the legal effects of formal derogations seems to be contradictory: according to *Isayeava* case, the existence of a formal derogation under Article 15 of the Convention is a prerequisite for the Court to consider and examine IHL rules in a particular case (constitutive approach). This approach was developed in the context of non-international armed conflict whereas the absence of formal derogation urges the Court to apply solely the Convention, i.e. to decide the cases "against normal legal background". In contrast, according to *Hassan* case, the formal notice of derogation is not required (declaratory approach).[45] In this case, opposed to the approach in *Isayeava* case, the Court did not consider it necessary to find a formal derogation to directly apply IHL in the context of occupation, which is a specific regime governed by the law of international armed conflict.[46]

During an armed conflict, on 10 August 2008 Georgia informed the Secretary General of the Council of Europe that on 9 August 2008 a state of war was declared in the whole territory of Georgia for fifteen days. However, and more importantly, Georgia underlined that it had not derogated from the Convention under Article 15.[47] Russia also abstained from derogation. As the Court noted:

"[…] neither Party requested a derogation under Article 15 of the Convention, which provides that in time of war or other public emergency a Contracting Party may take measures derogating from

[43] Ibid, §72 (references omitted).

[44] *Oellers-Frahm K.,* A Regional Perspective on the Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations: The European Court of Human Rights, *de Wet E., Kleffner J. (eds.),* (n 30) 342. *O'Boyle M., Costa J. P.,* The European Court of Human Rights and International Humanitarian Law, The European Convention on Human Rights: A Living Instrument, *Rozakis C. (ed.)*, Bruylant Press, Brussels, 2011, 115.

[45] *Oellers-Frahm K.,* (n 44) 341-342.

[46] Under IHL, occupation as a legal notion cannot be established in non-international armed conflicts.

[47] *Georgia v. Russia (II)* (dec.) (n 26) §1. See also Council of Europe: Commissioner for Human Rights, *Human Rights in Areas Affected by the South Ossetia Conflict. Special Mission to Georgia and Russia, by Thomas Hammarberg, Council of Europe Commissioner for Human Rights (Vladikavkaz, Tskhinvali, Gori, Tbilisi and Moscow, 22-29 August 2008)*, CommDH(2008)22, 8 September 2008, §12.

its obligations under the 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."[48]

The cited paragraph does not answer what may be the effects of absence of making derogations from the Convention in the present case. However, some extrapolations may still be made following the *Hassan* case. In *Hassan,* the Court did not consider it necessary for a formal derogation to be lodged for the provisions of Article 5 to be interpreted and applied in the light of IHL "where this is specifically pleaded by the respondent State."[49] Some argue that this finding is problematic as it involves the threat of expanding the Court's *ratione materiae* jurisdiction based solely on a state's request.[50] Unlike the UK in *Hassan,* Russia does not plead with the Court to solve the possible normative conflict between the specific provisions of the Convention and concrete rules of IHL, rather it denies the Court's jurisdiction *in toto* over the Georgia's application in blanket terms, by trying to establish the status of IHL as *lex specialis*.

In *Hassan,* the Court agreed with the UK and stated 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."[51] However, drawing generalized conclusions from *Hassan* is not justified as the Court's "revocation" of the requirement of formal derogation is strictly confined to the factual circumstances of *Hassan*, that is, internment during an extraterritorial international armed conflict. Hence, in all other situations it is assumed that, as stated in *Isayeava* case, the formal derogation remains relevant, absence of which will lead the Court to adjudicate a case "against normal legal background".[52]

In light of this, one difficulty can be observed: the Court applies *Isayeava's* approach in non-international armed conflict, whereas *Georgia v. Russia (II)* concerns international armed conflict. Therefore, it is not plausible to anticipate that the Court will strictly follow *Isayeava's* approach and will not consider IHL in examining alleged violations during Russia/Georgia (II) international armed conflict simply because of lack of formal derogation from the Convention. However, IHL is to play only the role of guiding interpreting law and not a function of *lex specialis* replacing the Convention.

6. Interpreting Specific Provisions of the Convention in International Armed Conflict in Light of IHL: What Approach will the Court Choose in *Georgia v. Russia (II)*?

While it is recognized that ultimately it is up to the individual judges as to what extent the Court will rely on IHL, it is argued that the Court should consider IHL in examining *Georgia v Russia (II)* to prevent anomalies when the specific conduct is a violation of the Convention, but is lawful under IHL.[53] At the outset it should be noted that the applicability of IHL to a situation is not a reason for an

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48 *Georgia v. Russia (II)* (dec.) (n 26) §73.
49 *Hassan* (n 20) §107.
50 *Oellers-Frahm K.,* (n 44) 343.
51 *Hassan* (n 20) §103.
52 *Isayeva v Russia*, [2005], ECHR, App no 57950/00, §191.
53 For the detailed analysis of the necessity to consider IHL by the ECtHR in light of Russian-Georgian armed conflict of August 2008, see *Japaridze S*., The Necessity to Apply International Humanitarian Law by

international human rights court to decline its own jurisdiction.[54] However, it is often emphasized that applying IHL will result in reducing a high degree of protection ensured by human rights law.[55] *Amicus curiae* in *Georgia v Russia (II)* case argues that on the one hand, there will only be a violation of the Convention if there is a violation of IHL. On the other hand, the only law applicable will be the Convention, but the situation of conflict may be relevant for context. In the middle, the two bodies of rules may both be relevant.[56] Since in practice both body of law often complement and overlaps each other, there is less likely to be a direct normative conflict between them.[57] The challenge are only those situations when "status-based" conduct (the distinguishing feature of IHL) and active hostilities are to be assessed.

Hence, the author is of the view that the Court should develop common, but differentiated approaches when choosing applicable law in light of specifics of the provisions of the Convention and the factual circumstances of a case, as making findings on general relationship between the Convention and IHL will not be sufficient to decide specific cases.

Georgia claims the violations of several provisions of the Convention and Protocols thereto.[58] For the purposes of the present article, alleged violations of Articles 2 (right to life), 5 (right to liberty and security), Articles 1 of Protocol No. 1 (protection of property) and Article 2 of Protocol No. 4 (freedom of movement) are of particular interest, as their scope may be significantly modified by taking into account factual realities of international armed conflict and/or by applying relevant IHL rules for the purpose of harmonious interpretation.

6.1. Right to Life and "Deaths Resulting from Lawful Acts of War": Which Paradigm?

International law recognizes two different paradigms of use of lethal force against a person: law enforcement paradigm, which is regulated solely by international human rights law and armed conflict paradigm, which is governed by IHL alongside with international human rights law.[59] Whereas the former aims to ensure protection of *all* persons, the latter focuses on the status of a person

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Human Rights Monitoring Mechanisms – Case Study of the Russian-Georgian Armed Conflict of August 2008, Protection of Human Rights: Achievements and Challenges, *Korkelia K. (ed.),* GIZ, Tbilisi, 2012, 190-228 (in Georgian).

54 *Amicus Curiae* Brief Submitted by Professor Francoise Hampson and Professor Noam Lubell of the Human Rights Centre, University of Essex, *Georgia v. Russia (II)*, 38263/08, §22 <http://repository.essex.ac.uk/9689/1/hampson-lubell-georgia-russia-amicus-01062014.pdf> [09.05.2020].

55 *Ulfstein G., Risini I.,* Inter-State Applications under the European Convention on Human Rights: Strengths and Challenges. *EJIL*: Talk!, January 24, 2020, <https://www.ejiltalk.org/inter-state-applications-under-the-european-convention-on-human-rights-strengths-and-challenges/> [09.05.2020].

56 Amicus Curiae (n 54) §22.

57 Ibid, §§22-23.

58 Articles 2 (right to life), 3 (prohibition of torture), 5 (right to liberty and security), 8 (right to respect for private and family life) and 13 (right to an effective remedy) of the Convention, and of Articles 1 (protection of property) and 2 (right to education) of Protocol No. 1 and of Article 2 (freedom of movement) of Protocol No. 4.

59 *Yeini S. A.,* The Law Enforcement Paradigm under the Laws of Armed Conflict: Conceptualizing *Yesh Din v. IDF Chief of Staff*. Harvard National Security Journal, Vol. 10, Issue 2, 2019, 469-470.

(combatant/civilian) under IHL to decide whether the use of force against a person would be permissible. Therefore, the right to life in these paradigms is protected by "different legal constructions."[60]

The European Convention is the only exception among the international human rights treaties which expressly authorizes the derogation from the right to life in time of "war".[61] Paragraph 2 of Article 15 of the Convention envisages derogation from the right to life "in respect of deaths resulting from lawful acts of war." As the Court has never pronounced on this issue since no state has derogated from Article 2 of the Convention so far, the content of this exception remains ambiguous.[62] It is suggested that the drafters of the Convention purposely inserted the possibility of derogation from the right to life during war, since "status-based targeting could not on its face fit any of the Article 2(2) exceptions".[63] The underlying rationale is that Article 2, unlike other international human rights treaties, sets forth exhaustive exceptions to intervene instead of "arbitrariness" standard[64] and does not provide enough legal space to interpret Article 2 of the Convention in line of IHL.[65] Therefore, direct reference to "in respect of deaths resulting from lawful acts of war" was made to facilitate the application of the Convention in the context of armed conflicts and to easily ascertain the lawfulness of deprivation of life during the circumstances of derogation, particularly in case of "war".[66] It remains to be seen whether the Court will address this issue in the present case in the absence of formal derogations by Georgia and Russia.[67]

Georgia claims that Russia violated substantive and procedural obligations of Article 2 "during the armed conflict and subsequent occupation" by killing a total of 228 civilians and wounding 547.[68] It is interesting that Georgia's claims regarding the violations of the Convention are formulated with IHL terminology:

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[60] For details, see *Gaggioli G., Kolb R.,* A Right to Life in Armed Conflicts? The Contribution of the European Court of Human Rights, Israel Yearbook on Human Rights, Vol. 37, 2007, 127-134.

[61] *Oberleitner G.,* (n 12) 133.

[62] *Schabas W.A.*, The European Convention on Human Rights: A Commentary, Oxford University Press, 2015, 156; Milanovic M., Extraterritorial Derogations from Human Rights Treaties in Armed Conflict, The Frontiers of Human Rights, *Bhuta N. (ed.),* Oxford University Press, 2016, 61; *Gowlland-Debbas V.,* The Right to Life and the Relationship between Human Rights and Humanitarian Law, The Right to Life, *Tomuschat C., Lagrange E., Oeter S. (eds.)*, Martinus Nijhoff Publishers, 2010, 129.

[63] *Milanovic M.* (n 62), 62. See also *Bethlehem D.,* When Is an Act of War Lawful?, *Early L., Austin A. (eds.),* (n 31) 235.

[64] E.g. Article 6 of the International Covenant on Civil and Political Rights and Article 4 of the American Convention on Human Rights in identical terms state that "no one shall be *arbitrarily* deprived of his life" (emphasis added). Against this background, Article 2 of the European Convention guarantees that "no one shall be deprived of his life intentionally" and enunciates the specific exceptions in an exhaustive manner. The latter is much stricter and less flexible standard than prohibition of "arbitrariness".

[65] *Milanovic M.* (n 62), 62.

[66] As early as the 1970s, Draper argued that "under article 15 of the European Convention, the whole of the Law of War as to killing has been incorporated by reference. That Law may therefore have to be considered by the European Commission and the Court". See *Draper G.I.A.D.,* Human Rights and the Law of War, Virginia Journal of International Law, Vol. 12, Issue 3, 1972, 338.

[67] See *supra* section 0.

[68] *Georgia v. Russia (II)* (dec.) (n 26) §26.

"[...] during the attacks carried out by the Russian forces and/or South Ossetian or Abkhaz militias acting under their orders, *no distinction had been made between combatants and civilians*; by *indiscriminately* bombing and shelling areas which were not *legitimate military targets*, and by using means of warfare such as landmines and cluster bombs, the respondent Government had failed to take sufficient precautions to protect the lives of the *civilian population*" (emphasis added).[69]

Case law relating to armed conflicts in the South-East Turkey and Chechnya[70] made it clear that despite avoiding to apply IHL, the Court has struggled to adopt its Convention-based law enforcement paradigm of use of force, established in *McCann* case, with those military operations which fall outside of traditional police operations and fall under the paradigm of armed conflict.[71] Consequently, the previous case law does not make it clear what effect the context of armed conflict may have on the scope of Article 2 while interpreting that article in armed conflict. It is noticeable that in armed conflict cases the Court interprets Article 2 of the Convention flexibly, but inconsistently.[72] In the Decision, the Court noted that Article 2 should be interpreted in light of and in harmony with IHL rules. This approach was inspired by the judgment in *Varnava* case, decided two years earlier.[73] In *Varnava*, the Court for the first time expressly referred to IHL, which was viewed as "a turning point", as the Court tried to accommodate the standards of the Convention with IHL by way of harmonious interpretation.[74] Moreover, the Court did not consider IHL as *lex specialis* and relied on it solely for the purpose of systematic interpretation,[75] modifying the scope of the provision of the Convention which was initially thought to be applied during only peacetime.[76]

Besides, the Court singled out situations in "a zone of international conflict" and imposed the obligation on a state "to protect the lives of those not, or no longer, *engaged in hostilities*" (emphasis added).[77] Nevertheless, it is still difficult to draw a clear-cut conclusion to what extent the Court will consider IHL as the cited considerations concern the procedural obligations under Article 2 and not substantive scope of right to life in armed conflict under the Convention.

It is noteworthy that by the time the Court delivered the Decision, the judgment in *Hassan* had not been yet delivered, which is fairly labelled as the first case when not only the European Court, but, generally, any international court "set out a detailed model of the interaction between humanitarian law and human rights in the context of an international armed conflict and applied it in a concrete

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69 Ibid, §27.

70 See *supra* n 33.

71 *De Koker C.* (n 7) 214; *Moir L.,* The European Court of Human Rights and International Humanitarian Law, *Kolb, R., Gaggioli G. (eds.)*, (n 34) 483; *Oberleitner G.,* (n 12) 299. See also *McCann and Others v. The United Kingdom* [GC], [1995], ECHR, App no 18984/91.

72 *Hampson F.J.,* (n 31) 193-195.

73 *Varnava* (n 41).

74 *Uriarte J.A.*, (n 13) 208.

75 *Borelli S.,* The (Mis)-Use of General Principles of Law: *Lex Specialis* and the Relationship between International Human Rights Law and the Laws of Armed Conflict, General Principles of Law - The Role of the Judiciary, *Pineschi L. (ed.),* Springer, Cham, 2015, 281.

76 *De Koker C.* (n 7) 209.

77 *Georgia v. Russia (II)* (dec.) (n 26) §72.

case."[78] Some authors, Bethlehem, for example, argue that in *Georgia v. Russia (II)* in regard of Article 2 the "the methodological approach it [the Court] adopted in *Hassan* is the right one". According to Bethlehem, therefore, the Court should interpret Article 2 of the Convention in the same manner as it interpreted Article 5 of the Convention in *Hassan*.[79] Bethlehem's logic appears to be plausible with respect to the specific provisions of the Convention. In the present case, however, it would be unwise for the Court to assess the alleged *ratione materiae* incompatibility of Georgia's application with the Convention by the same methodology it applied in *Hassan,* since the latter concerned assessing the scope of the specific provision in armed conflict rather than examining the admissibility of the entire application, as Russia contends.

It must be further observed that while Court in *Varnava* has affirmed armed conflict related context-based interpretation of Article 2 of the Convention, that is, interpretation in harmony with relevant rules of IHL,[80] *Varnava* is hard to be conceived as the general pronouncement by the Court on the substantive scope of Article 2 in armed conflict. However, in *Georgia v. Russia (II)* the Court is in a position to develop practical approach to what extent and in what manner Article 2 of the Convention is to be applied in international armed conflict. What is more, it is interesting whether the Court modifies the logic of *Bankovic*, when the Court refused to consider law of international armed conflict on the ground that air operations conducted by NATO was not sufficient to bring the territory of the former Yugoslavia within the "legal space" of the Convention and the application was dismissed.[81] In contrast to air military operations in *Bankovic*, in *Georgia v. Russia (II)* Russian armed forces "penetrated deep into Georgia",[82] thus, it follows that, unlike *Bankovic*, the Court will consider IHL.[83]

6.2. Internment and Detention: Facing the Hassan Legacy

Under Article 5 of the Convention, Georgia submitted that "approximately 160 civilians, including 40 women, had been illegally captured by the Russian armed forces and/or separatist militia under their control and held for up to fifteen days in some cases",[84] asserting that "[t]hose detentions were clearly illegal in so far as the detainees, who were mainly old people and women, *had posed no security threat whatsoever*" (emphasis added).[85]

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[78] *Ovey C.,* The Right to Life in Situations of Armed Conflict, *Early L., Austin A. (eds.)* (n 31) 269.

[79] *Bethlehem D.,* (n 63) 239-240.

[80] Some judges argue that findings in *Varnava* equally applies to all the provisions of the Convention. See Dissenting Opinion of Judge Pinto De Albuquerque, *Sargsyan v. Azerbaijan* [GC], [2015], ECHR, App no. 40167/06, 120, fn. 25.

[81] The facts of *Bankovic* concerned international armed conflict in the former Yugoslavia. Thus, the Court could have examined IHL had the application not been declared inadmissible. Therefore, it is ambiguous whether or not the judges purportedly ignored IHL. See *De Koker C.* (n 7), 207.

[82] *Georgia v. Russia (II)* (dec.) (n 26) §19.

[83] *Margalit A.*, Recent Trends in the Application of Human Rights and Humanitarian Law: Are States Losing Patience?, Journal of International Humanitarian Legal Studies, Vol. 7, 2016, 161-162.

[84] *Georgia v. Russia (II)* (dec.) (n 26) §30.

[85] Ibid.

Interestingly, Georgia's arguments of illegality of detentions are based on the claim that detainees "*had posed no security threat whatsoever*", which mirrors the standards of internment under IHL. Article 42 of GCIV stipulates that the internment or placing in assigned residence of protected persons may be ordered "*only if the security of the Detaining Power makes it absolutely necessary*" (emphasis added). Furthermore, Article 78 of GCIV permits the internment in occupied territories only if the Occupying Power considers it necessary "*for imperative reasons of security*" (emphasis added). In both occasions, the conduct of civilians must pose a threat for public order.[86]

For the Court, as a human rights mechanism, it may be advantageous to use two-step approach: firstly, lawfulness of detention should be judged against the Article 5 of the Convention and secondly, the Court should examine the specific case under both the Convention and IHL by "a contextual analysis."[87] It should be stressed that Georgia's reliance on internment standards under IHL does not mean *lex specialis* application of IHL. It merely develops the alternative arguments for alleged violations of Article 5 of the Convention from IHL perspective.

To put it another way, Article 5 of the Convention does not envisage the detention of persons for security reasons, that is, *absolute security necessity* and/or *for imperative reasons of security*, which results in *a priori* incompatibility of Article 5 of the Convention with internment under IHL.[88] Internment is viewed as "anathema" for Article 5 of the Convention.[89] Therefore, if the Court applies solely the Convention, it will definitely find a violation. Provided that the Court follows *Hassan* and adopts the scope of Article 5 with armed conflict in *Georgia v. Russia (II)*, Georgia submits, *arguendo*, that detentions were unlawful under IHL as well. In *Hassan*, the Court held that deprivation of liberty pursuant to powers under IHL (internment) must be lawful not only under IHL, but "most importantly, that it should be in keeping with the fundamental purpose of Article 5 § 1, which is to protect the individual from arbitrariness".[90] Hence, in case the Court finds that in *Georgia v. Russia (II)* Article 5 should be interpreted in light of IHL, it will have to assess whether each of the detainees actually posed a threat to security of Russia in the armed conflict.

6.3. Freedom of Movement of Civilian Population during an Armed Conflict

Under Article 2 of Protocol No. 4 (freedom of movement), Georgia alleged that Russia, together with the separatist forces acting under their control, had imposed illegal restrictions on civilians' freedom of movement and right to choose their residence during the recent *armed conflict* and *subsequent occupation,* by restricting civilians' freedom of movement in the vicinity of occupation

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86 *cf. Serdar Mohammed v Ministry of Defence* [2017] UKSC 2, §58. According to the Supreme Court of the United Kingdom, the difference between the wordings of Articles 42 and 48 of GCIV implies that while there are no substantial differences in terms of necessity under those two articles, "internment in an occupied territory may be necessary for the security of those interned".

87 *Amicus Curiae* (n 54) §30.

88 *Favuzza F.,* 'It was the Best of Times, it was the Worst of Times': A Tale of Detention in Time of Emergency, *De Hert P., et al. (eds.)* (n 7) 171.

89 *Shany Y.,* A Human Rights Perspective to Global Battlefield Detention: Time to Reconsider Indefinite Detention. International Law Studies, Vol. 93, 2017, 128.

90 *Hassan* (n 20) §105.

lines of Abkhazia, [Georgia], and Tskhinvali Region/South Ossetia, [Georgia], which resulted in displacement of over 23,000 civilians (internally displaced persons) and their prevention from returning home.[91]

Pursuant to Article 2 of Protocol No. 4, "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." Notwithstanding that Abkhazia and Tskhinvali Region/South Ossetia are occupied by Russia, these regions still fall within the internationally recognized borders of Georgia. Therefore, the right of internally displaced persons to return to the occupied territories and freely choose their residence is a guaranteed right under Article 2 of Protocol No. 4.

The provision, protecting freedom of movement, is closely related to Article 5, ensuring right to liberty and security. However, they are not interchangeable. The Court has explained that while Article 5 relates to the physical freedom of the person, the latter concerns restrictions on the freedom of movement.[92] The difference concerns "a difference in degree or intensity, not of nature or essence."[93] In order to differentiate between them, "the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question."[94] In *Georgia v. Russia (II)*, due to duration, effects and manner of the measure, the Court is likely to apply Article 2 of Protocol No. 4 to widespread forcible displacement and prevention from return of Georgian civilian population to their houses.

IHL prohibits the deportation or transfer of civilians in both types of armed conflict unless the security of the civilians involved or imperative military reasons require the evacuation.[95] In international armed conflict such protection is provided for the population residing in occupied territories.[96] It shall also be noted that IHL indirectly affirms the right of IDPs to return to their homes as soon as hostilities in the area in question have ceased.[97] Even though freedom of movement under the Convention is not an absolute right and is subject to restrictions,[98] such restrictions are designed to be applied during peacetime. Thus, it is expected that the Court may make recourse to IHL standards or to accommodate this right with those standards.

In light of Georgia's submission that Article 2 of Protocol No. 4 was violated *during the armed conflict and subsequent occupation*, the Court will likely endeavor to interpret Article 2 of Protocol

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91 *Georgia v. Russia (II)* (dec.) (n 26) §§36-37.

92 *Villa v. Italy,* [2010], ECHR, App no 19675/06, §41.

93 Ibid.

94 *Guzzardi v. Italy*, 6 November 1980, Series A no. 39, §92.

95 GCIV, Article 49; API, Article 85(4)(a); APII, Article 17; CIHL Rule 129. See also API, Articles 51(7) and 78(1) and APII, Article 4(3)(e).

96 GCIV, Article 49: "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."

97 Ibid. See also *Sargsyan* (n 80), §232.

98 According to paragraph 3 of Article 2 of Protocol No. 4: "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."

No. 4 in harmony with IHL principles to fully take into account intricacies of normative and factual dimensions of armed conflict and establish the relevant standard.

6.4. Destruction of Property in Armed Conflict: the Necessity to Consider IHL

Under Article 8 of the Convention and Article 1 of Protocol No. 1, Georgia submitted that Russian armed forces and/or separatist forces operating under their control violated those provisions by systematically looting and burning property in entire civilian villages for several weeks after the formal cessation of hostilities, resulting in considerable damage caused by the deliberate burning of property and by the indiscriminate bombing and shelling in the areas invaded by them.[99]

Destruction of property and forcible transfer of population are, unfortunately, integral part of armed conflicts. With regard to destruction of property, two types of situation must be distinguished for the purposes of the present article: destruction of property during an occupation and destruction of property in active hostilities. The applicable legal regimes are contingent upon those factual circumstances.[100] The Court to some extent has rendered the case law relating to destruction of property in armed conflict, finding the violations of Article 8 of the Convention and/or Article 1 of Protocol No. 1.[101] However, those cases are related to non-intentional armed conflicts only, when the Court usually does not refer to IHL.

The challenge for the Court is that is has never examined the lawfulness of destruction of property on merits in the course of active hostilities during an international armed conflict.[102] Assessing destruction of property in this context increases the relevance of IHL as these questions are primarily regulated by IHL principles by taking into account the nature of destroyed property,[103] precautions,[104] indiscriminate attacks and collateral damage,[105] whereas such legal notions are

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99 *Georgia v. Russia (II)* (dec.) (n 26) §§31-33.

100 *Gioia A.,* The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict, International Humanitarian Law and International Human Rights Law, *Ben-Naftali O. (ed.),* Oxford University Press, 2011, 242-245.

101 See e.g. *Akdivar and Others v. Turkey,* 16 September 1996, Reports of Judgments and Decisions 1996-IV; *Ahmet Ozkan and Others v Turkey*, [2004], ECHR, App no 21689/93; *Isayeva, Yusupova, and Bazayeva v. Russia*, [2005], ECHR, App nos 57947/00, 57948/00, and 57949/00.

102 It should be noted that on 20 November 2018, the Court decided three cases against Georgia related to international armed conflict of 2008: *Dzhioyeva v. Georgia* (dec.) [2018], ECHR, App nos. 24964/09, 20548/09, 22469/09; *Naniyeva and Bagayev v. Georgia* (dec.), [2018], ECHR, App nos. 2256/09, 2260/09; *Kudukhova and Kudukhova v. Georgia* (dec.), [2018], ECHR, App nos. 8274/09, 8275/09. They concerned the applications lodged by the residents of Tskhinvali Region, alleging that Georgia risked their lives and damaged and destroyed their property. However, the Court examined the question of proof only and did not address the issue of substantive standards of how the relevant provisions of the Convention applied to armed conflict. Thus, there was no need for the Court to consider IHL.

103 Civilian objects are all objects which are not military objectives, i.e. they are not those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. See API, art 52.

104 In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects (API, art 57(1)).

unknown to the Convention. The right of property is deemed to the "paradigmatic example" of the situation when the solely Convention-based law is insufficient for the correct assessment of alleged violation of the right to property in active hostilities.[106] The main reason is that the basis of such determination is civilian or military status of the attacked property and the analysis of principle of proportionality under IHL, which are usually eschewed by the Court in an unpersuasive manner.[107]

It follows that *Georgia v. Russia (II)* gives rise to necessity for the Court to substantively consider the possible role of IHL while interpreting Article 8 of the Convention and Article 1 of Protocol No. 1 in the context of assessing the lawfulness of destruction of property in armed conflict. This is due to the fact that the Convention itself does not have sufficient normative capacity to deal with the notions of IHL by distinguishing between the civilian and military objectives.

Cases regarding the right to property of forcibly displaced persons in the context of international or non-international armed conflicts are not new to the Court. This issue was raised before the Court in light of the occupation of the North Cyprus by Turkey, security operations by Turkey and Russia and other conflict situations.[108] In *Cyprus v Turkey,* in which the former European Commission abstained from applying IHL rules, one of the members of the Commission noted that there existed relevant IHL instruments outside the Convention, which would strengthen the conclusions reached by the Commission.[109]

The shift, albeit limited, in the Court's reluctance can be observed in judgments of *Sargsyan* and *Chiragov* cases,[110] decided by the Grand Chamber in 2015. The Court for the first time examined the applications of those persons who were displaced from their homes and abandoned their property due to Nagorno-Karabakh armed conflict between Armenia and Azerbaijan. These cases once again gave rise to relationship between the Convention and IHL which the majority of the Court avoided to deal with.[111] However, the Court in both cases referred to relevant IHL rules in the context of the relevant international law, including Article 49 of the Fourth Geneva Convention. The Court noted that despite the absence of rules of IHL which explicitly address the issue of preventing access to homes or property, it observed that:

"Article 49 of the Fourth Geneva Convention applies in occupied territory, while there are no specific rules regarding forced displacement on the territory of a party to the conflict. Nonetheless the right of displaced persons "to voluntary return in safety to their homes or places of habitual residence

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105 Indiscriminate attacks, that is, an 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, are prohibited (API 51).

106 *Molango M.M.,* The Right of Property in Situations of Armed Conflict: The Application of IHL Principles by the European Court of Human Rights, 2008, ILSP Law Journal, 37-38.

107 Ibid.

108 See e.g. *Cyprus v. Turkey,* Commission Report (1976); *Kerimova and Others v. Russia,* [2011], ECHR, App nos 17170/04, *et al.*; *Doğan and Others v. Turkey*, [2004], ECHR, App nos. 8803/02 *et al*.

109 *Cyprus v Turkey,* no 8007/77, EComHR (1983), Separate Opinion by Mr G. Tenekides.

110 *Sargsyan v. Azerbaijan* [GC], [2015], ECHR, App no 40167/06; *Chiragov and Others v. Armenia* [GC], [2018], ECHR, App no 13216/05.

111 Dissenting Opinion of Judge Pinto De Albuquerque, *Sargsyan* (n 110) 108-109.

as soon as the reasons for their displacement cease to exist" is regarded as a rule of customary international law that applies to any kind of territory."[112]

Interpretation of the scope of Article 49 of GCIV by the Court is progressive: whilst the initial reach of this Article is only the occupied territories, the Court expanded its scope "to any kind of territory" by way of labelling it as a rule of customary international law. The Court relied on this interpretation when it examined Article 1 of Protocol No. 1 in *Sargsyan*, in which Azerbaijan submitted that the refusal to grant any civilian access to Gulistan was justified by the security situation pertaining in and around the village. While referring briefly to their obligations under IHL, the Government did not submit any detailed argument in respect of their claim that their refusal to grant civilians access to Gulistan was grounded in IHL.[113] The Court observed that:

"[…] international humanitarian law contains rules on forced displacement in occupied territory but does not explicitly address the question of displaced persons' access to their home or other property. Article 49 of the Fourth Geneva Convention prohibits individual or mass forcible transfers or deportations in or from occupied territory, allowing for the evacuation of a given area only if the security of the population or imperative military reasons so require; in that case, displaced persons have a right to return as soon as hostilities in the area have ceased."[114]

However, the Court considered that Article 49 was not applicable in that context as "they only applied in occupied territory, whereas Gulistan was situated on the Government's own internationally recognised territory."[115] Instead, the Court emphasized the right of displaced persons to return voluntarily to their homes as soon as the reasons for their displacement cease to exist, as this right applied to all kinds of territories:

"the right of displaced persons to return voluntarily and in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist, which is regarded as a rule of customary international humanitarian law applying to all territory whether "occupied" or "own". However, it may be open to debate whether the reasons for the applicant's displacement have ceased to exist. In sum, the Court observes that international humanitarian law does not appear to provide a conclusive answer to the question whether the Government are justified in refusing the applicant access to Gulistan."[116]

The Court eventually held that, amongst others, there had been a continuing violation of Article 8 of the Convention and Article 1 of Protocol No. 1. The Court acknowledged the relevance of IHL,

112 *Sargsyan* (n 110) §95*; Chiragov* (n 110) §97 (references omitted).

113 *Sargsyan* (n 110) §§230-231

114 Ibid, §231 (references omitted).

115 Ibid.

116 *Sargsyan* (n 110) §232. See also the dissenting opinion of Judge Albuquerque, who argued that the Court should have examined the case "in conjunction with the international humanitarian law obligations", since such *renvoi* would render Article 1 of Protocol No. 1 contingent upon the *incidenter tantum* application of IHL by the Court, which follows from the principle of harmonious interpretation from *Varnava*. According to this dissenting opinion, considering Article 1 of Protocol No. 1 in line with IHL would contribute to the prevention of fragmentation. See Dissenting Opinion of Judge Pinto De Albuquerque, *Sargsyan* (n 110) 120, §20 and fn. 25.

but concluded that it did not provide "a conclusive answer". Despite that in *Sargsyan* and *Chiragov* cases IHL did not play substantial role in finding violations of Article 8 of the Convention and Article 1 of Protocol No. 1 by the Court, for the present article it is sufficient to conclude that the Court showed openness towards conventional and customary IHL, changing its attitude in previous case law.

7. Conclusion

Georgia v. Russia (II) is both a challenge and an opportunity for the Court. It is to be a seminal case, which will outline the future relationship between the Court and IHL. It seems unavoidable for the Court to consider IHL, as the case concerns active hostilities in international armed conflict, for which IHL was developed. The Court also has an opportunity to pronounce on its role as the monitoring mechanism of IHL.

On the one hand, the Court will have to come out of its comfort zone to deal with the relationship between the Convention and IHL, which it more or less successfully managed to avoid on many occasions, resulting in its inconsistent, fragmented and ambiguous approach to IHL. On the other hand, addressing this challenge in *Georgia v. Russia (II)* enables the Court to shed more light and further interpret the findings of *Hassan*, when the Court for the first time applied IHL directly and in detail. Consequently, the Court will have an opportunity to establish both general and article-specific model of the relationship between the Convention and IHL. This expectation, in the author's view, is based on the several aspects of *Georgia v. Russia (II)*.

Firstly, Russia argues that alleged violations submitted by Georgia exclusively fall under the ambit of IHL, therefore, the only applicable law is IHL as *lex speciaslis* and they are *ratione materiae* incompatible with the Convention, which means that the Court does not have jurisdiction. The Court postponed the examination of this issue for merits stage.

Secondly, *Georgia v. Russia (II)* concerns armed conflict of international character. Thus, the Court is unlikely to turn a blind eye to IHL as it has done in cases regarding non-international armed conflicts. To this end, it can be asserted that the Court made a kind of foundation in the Admissibility Decision in 2011 where it noted that the Convention should be interpreted in harmony with international law, including the rules IHL, in particular in *a zone of international conflict*.

Thirdly, neither Georgia nor Russia made formal derogation from the Convention during armed conflict in 2008. Despite the fact that in such cases the Court examines the cases "against normal legal background" i.e. in the light of the Convention only, in the author's opinion, the Court is unlikely to follow *Isayeva* and will consider IHL due to the obvious international nature of armed conflict.

Furthermore, one cannot escape the impression that claims submitted by Georgia are formulated with IHL terminology. Thus, Georgia urges the Court to a certain extent to consider IHL, but solely for the purpose of interpretation and determining scope of the specific provisions of the Convention in armed conflict. In Georgia's view, IHL and the Convention are to be applied in a complementary and not exclusionary manner. Such regime ensures that the Convention applies directly and IHL indirectly, playing the role of authoritative guidance for interpreting the Convention.

In this regard, right to life (indiscriminate attacks), internment of civilians (right to liberty and security) and destruction of property (right to respect for private and family life and right to property) are of particular significance for the Court. This is because applying those rights in the context of an international armed conflict solely under the Convention, without considering IHL, is not sufficient.

The Convention is unable to legally make distinction between civilians and combatants, assess indiscriminate attacks, legitimate military objectives and collateral damage, precautions and principle of proportionality in hostilities. Therefore, for the correct legal assessment the Court should apply not only peacetime regime of the Conventional protection, but also the regime of armed conflict paradigm, as the underlying idea of IHL is to regulate conduct of hostilities based on statuses of persons and objects, where such statuses are unknown to the Convention.

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