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

Information Note on the Court's case-law 247

January 2021

Georgia v. Russia (II) [GC] - 38263/08

Judgment 21.1.2021 [GC]

Article 1

Jurisdiction of States

Jurisdiction of Russia over Abkhazia and South Ossetia during the active phase of hostilities and after their cessation

Article 2

Article 2-1

Effective investigation

Russia's failure to comply with procedural obligation to investigate effectively the events that occurred both during the active phase of the hostilities and after their cessation: *violation*

Article 2 of Protocol No. 4

Article 2 para. 1 of Protocol No. 4

Freedom of movement

Administrative practice as regards the inability of Georgian nationals to return to their respective homes in Abkhazia and South Ossetia: *violation*

Facts – As in the case of *Georgia v. Russia (I)*, the application was lodged in the context of the armed conflict between Georgia and the Russian Federation in August 2008 following an extended period of ever-mounting tensions, provocations and incidents that opposed the two countries.

The applicant Government submitted 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 South Ossetia. In their submission, these consequences and the subsequent lack of any investigation engaged Russia's responsibility under 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.

Law – Article 1 (Jurisdiction):

The Court made a distinction between the military operations carried out during the active phase of hostilities and the other events which require examining in the context of the present international armed conflict, including those that 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.

(a) *Active phase of hostilities during the five-day war (from 8 to 12 August 2008)* – The present case marked the first time since the decision in *Banković and Others* (concerning the NATO bombing of the Radio-Television Serbia headquarters in Belgrade) that the Court had 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. However, the Court's case-law on the concept of extraterritorial jurisdiction had evolved since that decision, in that the Court had, *inter alia*, established a number of criteria for the exercise of extraterritorial jurisdiction by a State, which had to remain exceptional, the two main criteria being 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). Subsequently, in *Medvedyev and Others* the Court had explicitly reiterated, with reference to the *Banković and Others* decision, 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 a 'cause and effect' notion of 'jurisdiction'" (see also also *M.N. and Others v. Belgium* (dec.) [GC]).

In that connection it could 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 could not 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 meant that there was no control over an area. It also excluded any form of "State agent authority and control" over individuals. This was also true in the present case, given that the majority of the fighting had taken place in areas that had previously been under Georgian control. This conclusion was confirmed by the practice of the High Contracting Parties in not derogating under Article 15 of the Convention in situations where they had engaged in an international armed conflict outside their own territory. In the Court's view, this might be interpreted as the High Contracting Parties considering that, in such situations, they did not exercise jurisdiction within the meaning of Article 1.

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 were predominantly regulated by legal norms other than those of the Convention (specifically, international humanitarian law or the law of armed conflict), the Court was not in a position to develop its case-law beyond the understanding of the notion of "jurisdiction" as established to date. If, as in the present case, the Court was 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 had to be for the Contracting Parties to provide the necessary legal basis for such a task. This did not mean that States could act outside any legal framework; they were obliged to comply with the very detailed rules of international humanitarian law in such a context.

Conclusion: The events that had occurred during the active phase of the hostilities did not fall within the jurisdiction of the Russian Federation for the purposes of Article 1; inadmissible (eleven votes to six).

(b) *Occupation phase after the cessation of hostilities (ceasefire agreement of 12 August 2008)* – In their observations the respondent Government had acknowledged a substantial Russian military presence after hostilities had ceased, and 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. The EU's Fact-Finding Mission had also pointed to the relationship of dependency not only in economic and financial terms, but also in military and political ones; the information provided by it was also revealing as to the pre-existing relationship of subordination between the separatist entities and the Russian Federation, which had lasted throughout the active phase of the hostilities and after their cessation. In its report, the EU Fact-Finding Mission had referred to "creeping annexation" of South Ossetia and Abkhazia by the Russian Federation.

The Russian Federation had therefore 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 depended, as was shown particularly by the cooperation and assistance agreements signed with the latter, indicated that there had been continued "effective control" over South Ossetia and Abkhazia.

Conclusion: The events that had occurred after the cessation of hostilities fell within the jurisdiction of the Russian Federation for the purposes of Article 1 (sixteen votes to one).

(c) *Interrelation between the provisions of the Convention and the rules of international humanitarian law (IHL)* – The Court examined the interrelation between the two legal regimes with regard to each aspect of the case and each Convention Article alleged to have been breached. In doing so, it ascertained each time whether there was a conflict between the two legal regimes.

(d) *Definition of the concept of "administrative practice"* – While the criteria set out in *Georgia v. Russia (I)* [GC] defined a general framework, they did not indicate the number of incidents required to establish the existence of an administrative practice: that was a question left for the Court to assess having regard to the particular circumstances of each case.

Articles 2, 3 and 8 of the Convention and Article 1 of Protocol No. 1:

Generally speaking, IHL applied in a situation of "occupation". In the Court's view, the concept of "occupation" for the purposes of IHL included a requirement of "effective control". If there was "occupation" for the purposes of IHL there would also be "effective control" within the meaning of the Court's case-law, although the term "effective control" was broader and covered situations that did not necessarily amount to a situation of "occupation" for the purposes of IHL. Having regard to the complaints raised in the present case, there was no conflict between Articles 2, 3 and 8 of the Convention and Article 1 of Protocol No. 1 and the rules of IHL applicable in a situation of occupation.

From the time when the Russian Federation had 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, including an array of irregular militias, in those territories, without it being necessary to provide proof of "detailed control" of each of those actions. The Court had sufficient evidence in its possession to enable it to conclude beyond reasonable doubt that there had been 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 could be classified as "inhuman and degrading treatment" owing to the feelings of anguish and distress suffered by the

victims, who, furthermore, had been targeted as an ethnic group, this administrative practice was also contrary to Article 3.

Conclusion: violation (sixteen votes to one).

Articles 3 and 5 (treatment of civilian detainees and lawfulness of their detention):

There was no conflict between Article 3 and the provisions of IHL, which provided in a general way that detainees were to be treated humanely and detained in decent conditions. As for Article 5, there might be such a conflict (see *Hassan v. the United Kingdom* [GC], §§ 97-98); however, there was none in the present case since the justification for detaining civilians put forward by the respondent Government was not permitted under either set of rules.

Some 160 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. There had been an administrative practice contrary to Article 3 as regards their conditions of detention and the humiliating acts to which they had been exposed, which had to be regarded as inhuman and degrading treatment. There had also been an administrative practice contrary to Article 5 as regards their arbitrary detention.

Conclusion: violation (unanimously).

Article 3 (treatment of prisoners of war):

There was no conflict between Article 3 and the provisions of IHL, which provided that prisoners of war had to be treated humanely and held in decent conditions.

The Georgian prisoners of war who had been 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. There had been an administrative practice contrary to Article 3 as regards the acts of torture of which they had been victims.

Conclusion: violation (sixteen votes to one).

Article 2 of Protocol No. 4 (freedom of movement of displaced persons):

There was no conflict between Article 2 of Protocol No. 4 and the relevant provisions of IHL concerning a situation of occupation.

A large number of Georgian nationals who had fled the conflict no longer resided in South Ossetia, but in undisputed Georgian territory. However, in the Court's view, the fact that their respective homes, to which they had been 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, were sufficient to establish a jurisdictional link for the purposes of Article 1 between the Russian Federation and the Georgian nationals in question. There had been an administrative practice contrary to Article 2 of Protocol No. 4 as regards the inability of Georgian nationals to return to their respective homes.

Conclusion: violation (sixteen votes to one).

Article 2 of Protocol No. 1 (alleged looting and destruction of public schools and libraries and intimidation of ethnic Georgian pupils and teachers):

There was no conflict between Article 2 of Protocol No. 1 and the relevant provisions of IHL concerning a situation of occupation.

The Court did not have sufficient evidence in its possession to conclude beyond reasonable doubt that there had been incidents contrary to Article 2 of Protocol No. 1.

Conclusion: violation (unanimously).

Article 2 (obligation to investigate):

In general, the obligation to carry out an effective investigation under Article 2 was broader than the corresponding obligation in IHL. Otherwise, there was no conflict between the applicable standards in this regard under Article 2 and the relevant provisions of IHL.

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 IHL and domestic law. Indeed, the prosecuting authorities of the Russian Federation had taken steps to investigate those allegations. Furthermore, although the events that had occurred during the active phase of the hostilities did not fall within the jurisdiction of the Russian Federation, it had established "effective control" over the territories in question shortly afterwards. 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 had been prevented from carrying out an adequate and effective investigation into the allegations. Accordingly, having regard to the "special features" of the case, the Russian Federation's jurisdiction within the meaning of Article 1 was established in respect of this complaint (see, *mutatis mutandis*, *Güzelyurtlu and Others* [GC]).

The Russian Federation had therefore a procedural obligation under Article 2 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. 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 investigations carried out by the Russian authorities had been neither prompt nor effective nor independent, and accordingly had not satisfied the requirements of Article 2.

Conclusion: violation (sixteen votes to one).

Article 38:

The respondent Government had refused 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 had they submitted 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.

Conclusion: violation (sixteen votes to one).

The Court also held, unanimously, that there was no need to examine separately the applicant Government's complaint under Article 13 in conjunction with Articles 3, 5 and 8 and with Articles 1 and 2 of Protocol No. 1 and Article 2 of Protocol No. 4.

Article 41: just satisfaction reserved.

(See also *Georgia v. Russia (I)* [GC], no. 13255/07, ECHR 2014 (extracts), Legal summary; *Hassan v. the United Kingdom* [GC], no. 29750/09, ECHR 2014, Legal summary; *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, 29 January 2019, Legal summary; *Medvedyev and Others v. France* [GC], no. 3394/03, ECHR 2010, Legal summary*; Banković and Others* (dec), no. 52207/99, 12 December 2001*,* Legal summary*; M.N. and Others v. Belgium* (dec.) [GC], no. 3599/18, 5 May 2020*,* Legal summary)

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