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The recent war in the South Caucasus and extra-territorial jurisdiction under the ECHR

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Last year's armed conflict in the South Caucasus has led to allegations of large-scale human rights violations by both sides. Soon after the cessation of hostilities, Georgia filed an interstate complaint with the ECtHR against the Russian Federation. On the other hand, more than 3,300 applications have been lodged by South Ossetians against Georgia¹; and it is likely that in the

near future even more individuals (Georgians as well as Ossetians) will bring cases against Russia or Georgia.

These applications raise the issue of extra-territorial jurisdiction and will certainly be challenged on this ground by the respondent states. This article, therefore, endeavours to give some insight into this complex legal issue and will outline the relevant ECHR jurisprudence for the upcoming cases.

Art. 1 defines the personal scope of the substantive part of the ECHR. It stipulates that: "*The High Con-*

tracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

Responsibility of Georgia

As the meaning of jurisdiction is primarily territorial, Georgia has to observe the full range of rights and freedoms in respect of everyone on its entire territory. However, as significant parts of Abkhazia and South Ossetia have been (or are now) under the control of secessionist authorities

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and Russian forces, Georgia has been prevented from exercising authority over these areas.²

In *Ilaşcu v Moldova & Russia* (No. 48787/99) 8/7/04, involving human rights violations in the Moldovan breakaway region of Transnistria, the Court held that in such a “*constraining de facto situation*” the state does not cease to have jurisdiction; however, the scope of obligations has to be adapted to the situation.³

As regards its negative obligations in areas controlled by rebel forces, Georgia’s responsibility may be engaged by acts of its own forces, such as the shelling of Tskhinvali and other military operations. Concomitantly, Georgia has a positive obligation to take all diplomatic, economic, judicial or other measures available to secure the rights of those subject to the control of the secessionist authorities and/or Russian forces.⁴

Responsibility of the Russian Federation

Since the armed conflict took place outside Russian territory, the question of jurisdiction with regard to Russia is particularly challenging. However, the term jurisdiction is not solely confined to the state party’s territory.

Responsibility under the ECHR may also arise when a state exercises effective control of an area situated outside its national territory (e.g. as a consequence of military occupation), either directly through its armed forces or indirectly through a local administration attributable to the state.⁵ The standard of attribution is relatively low; in *Ilaşcu* the ECtHR was satisfied with the finding that Transnistria had been under the “*decisive influence*” of Russia as a consequence of the latter’s crucial military, economic, financial

and political support.⁶

Given the Russian policy towards Abkhazia and South Ossetia, the acts and omissions of these breakaway regimes can easily be attributed to the Russian Federation. Thus, the ECtHR may find that Russia had been exercising effective control of those areas held by the secessionist forces before the outbreak of hostilities. Furthermore, effective control may also extend to those areas that were occupied by Russian and allied forces in the course of the conflict, including the buffer zone, which was held until mid-October. In areas under effective control, Russia has both negative and positive obligations. It is therefore not only obliged to refrain from certain acts but must also take steps to prevent individuals (looters, for example) from interfering with the rights of other persons.

In areas affected by the armed conflict but not under the effective control of Russia, possible victims can rely on a more relaxed control standard: it is submitted that a state exercises jurisdiction over a person under its ‘authority and control’, even if he/she is on the territory of another state.⁷ Certainly, this may be the case in situations when a person is arrested or detained by state agents operating abroad, for example the taking of POWs or civilian detainees.

It is, however, not fully clear whether the ‘authority and control’ concept also extends to combat situations, such as the battle in and around the town of Gori. Can a state bring a person within its jurisdiction by merely firing at them? Or is its jurisdiction only engaged in the event of capture? If the latter were true, it would lead to an absurd result: the state could escape responsibility under the ECHR by simply shooting a person rather than detaining them, while the acts of the other state, on whose territory

the battle is taking place, are subject to human rights scrutiny. For this reason, a better approach would seem to be that a state brings a person within its jurisdiction to the extent that the person’s rights and freedoms are negatively affected by the acts of that state.

In its controversial decision in *Banković v Belgium & Others* (No. 52207/99) dec. 12/12/01, the ECtHR was unwilling to apply this progressive concept of jurisdiction.⁸ However, recent case-law shows a clear shift: in the case of *Isaak v Turkey* (No. 44587/98) dec. 28/9/06, involving the beating to death of a Greek-Cypriot demonstrator in the neutral UN buffer zone in Cyprus, the ECtHR found that the victim (although not arrested) was within Turkish jurisdiction. Given this ruling, it may be easier for potential applicants to argue that they fell under Russian jurisdiction.

Conclusion

It is to be hoped that the ECtHR will not consider the issue of jurisdiction a major obstacle to assessing the lawfulness of Russian and Georgian acts during the recent armed conflict. Moreover, it can be expected that the upcoming cases will shape the way the ECtHR deals with future cases involving military operations abroad.

¹ Press release of the Registrar of the European Court of Human Rights, 14 January 2009. *Seven applications against Georgia concerning hostilities in South Ossetia*.

² See by way of contrast: *Asanidze v Georgia* (No. 71503/01) 8/4/04, para. 150.

³ Para. 333.

⁴ See by way of analogy, *ibid*.

⁵ *Loizidou v Turkey* (No. 15318/89) dec. 23/5/95, para. 62.

⁶ Paras. 392-94.

⁷ *Isa v Turkey* (No. 31821/96) 16/11/04, para. 71.

⁸ Para. 75. However, the situation during the war in Georgia can be distinguished from *Banković*, as Russian air campaigns and artillery shelling were accompanied by ground troops and both belligerent states are ECHR contracting parties.