



In partnership with Memorial Human Rights Centre (MHRC), the Georgian Young Lawyers' Association (GYLA) and Article 42 of the Constitution

Human rights protection in breakaway regions of Georgia

Vakhtang Vakhtangidze, LLM Student, University of Essex; Article 42 of the Constitution

For more than a decade, Georgia, as a result of ethnic conflict, has ceased exercising *de facto* jurisdiction over the autonomous republic of Abkhazia. In this region, secessionist movements have attempted to found independent states, however these attempts have been unsuccessful because they do not fulfil the legal criterion of statehood set by the Montevideo Convention on the Rights and Duties of States and failed to be recognised as such internationally.

This article aims to discuss the problem of addressing human rights issues in this breakaway region of Georgia in the context of a case currently pending before the ECtHR.

The case of Mamasakhlisi

On 7 August 2001, while on holiday in Abkhazia, a hand-made grenade exploded in the hands of Levan Mamasakhlisi, a Georgian national, causing the loss of his right hand and three fingers on his left hand. He was taken to hospital, semi-conscious and bleeding, and interrogated by *de facto* security officials who obtained a confession that he had attempted to commit a terrorist attack. After seven days of detention, he was transferred to jail in a critical condition, denied legal assistance and later sentenced to 14 years' imprisonment by the Military Tribunal of the secessionist government.

In 2004 a number of Georgian lawyers filed a complaint with the ECtHR on behalf of the applicant. On 14 February 2007, at the request of Thomas Hammerberg, the Council of Europe
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(CoE) Commissioner for Human Rights, the applicant who, by then, had been imprisoned for six years was released. His health had deteriorated.

The case raises complex issues of extraterritorial jurisdiction and involves the respondent states of Georgia and the Russian Federation (RF).

Responsibility of Georgia

Georgia is a signatory to the ECHR. As the state responsible for the international relations of Abkhazia, Georgia automatically undertook obligations to secure ECHR rights within its jurisdiction.

Pursuant to Art. 1: *“the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.”* Under ECtHR jurisprudence *“within their jurisdiction”* must be interpreted in light of the rules set out in the Vienna Convention on the Law of Treaties 1969.

From the perspective of public international law, the jurisdictional competence of a state is primarily territorial.¹ The state's obligations remain even where the exercise of its authority is limited in part of its territory, so that it has a duty to take all appropriate measures within its power. In *Ilaşcu and Others v Moldova and Russia* (No. 48787/99) 8/7/04, the ECtHR held that: *“even in the absence of effective control over the Transnistrian region, Moldova still has a positive obligation under Art. 1 of the Convention to take diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure the applicants’*

*rights guaranteed by the Convention.”*²

Further, it is mentioned that where a Contracting State is prevented from exercising its authority over the whole of its territory, for example, in the case of a separatist regime, whether or not this is accompanied by military occupation by another state, it does not cease to have jurisdiction within the meaning of Art. 1 over that part of its territory temporarily subject to a local authority sustained by rebel forces or by another state.³

Therefore a state is accountable even if the territory is run by a local administration. This is so whether or not the local administration is illegal.

Responsibility of RF

In *Drozd and Janousek v France and Spain* (No. 12747/87) 26/6/92, the ECtHR reiterated that ‘jurisdiction’ within the meaning of Art. 1 is not necessarily restricted to the national territory of the high contracting party. Contracting parties are involved through the acts of their authorities, whether performed within or outside their own territory.⁴ The obligation to secure ECHR rights and freedoms in such an area derives from the facts of such control whether it is exercised directly, through its armed forces or through a subordinate administration.⁵ It is not necessary to determine whether the Contracting Party actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory, since even overall control of the area may engage the responsibility of the Contracting Party concerned.⁶

The International Criminal Tribunal on the former Yugoslavia developed a ‘Test of Overall Control’,⁷ which widened the guarantees for victims’ protection during armed conflicts and decreased the requirement of the ‘Test of Effective

Control’ developed by the International Court of Justice in the Nicaragua case.⁸

The RF has been given the role of ‘peaceful facilitator’ but, according to the numerous facts documented by the Georgian government, during military activities and after the completion of hostilities Russia supported the secessionists and provided them with military, political, economic and cultural assistance. The facts of active cooperation are widely acknowledged by the representatives of the secessionist government, certain Russian politicians representing the Kremlin⁹ and other sources which they influence.¹⁰ Russian involvement in post-conflict Abkhazia was assessed on a number of occasions by international organisations to be an interference and attempt at annexation of Georgian territories.¹¹

Under the jurisprudence of the ECtHR, individuals, who have borne the politics and activities of a particular state, regardless of the legality of the same, are factually under the jurisdiction of this state within the meaning of Art. 1. The principle stated in *Cyprus v Turkey* (No. 25781/94) 10/5/01 is of great importance: *“where a Contracting State exercises overall control over an area outside its national territory its responsibility is not confined to the acts of its soldiers or officials in that area but also extends to acts of the local administration which survives there by virtue of its military and other support.”*¹²

Conclusion

On a number of occasions the ECtHR has examined the problem of jurisdiction. However, the case of Mamasakhlisi is quite distinctive and has its own unique issues. Despite the legal complexity, the ECtHR faces the problem of how to deal with people who are left in legal limbo without legal protection from any state.

1 Bankovic v Belgium (No. 52207/99) dec. 21/12/01 para. 57.

2 Para. 331.

3 Ibid. paras. 59-61; *Gentilhomme and Others v France* (Nos. 48205/99, 48207/99 and 48209/99) 14/5/02, para. 20; *Assanidze v Georgia* (No. 71503/01) 8/4/04, para. 146.

4 Para. 91.

5 *Loizidou v Turkey* (No. 15318/89) 18/12/96, para. 52.

6 *Issa and Others v Turkey* (No. 31821/96) 16/11/04, para. 56.

7 *Prosecutor v Delalic et al., Appeals Judgment*, (No. IT-96-21-A) 20/2/01, para. 26.

8 *Jurisdiction and Admissibility*, 1984 ICJ REP. 392 27/6/86.

9 Especially active in this regard is the Mayor of Moscow,

Yuri Luzhkov.

10 See: www.apsny.ru.

11 In its resolution of 18/1/01 the European Parliament held that the one-sided visa regime established by the RF on 5 December 2000 was interference within the sovereignty of Georgia and an infringement of the territorial integrity of the State.

12 Para. 77.