Georgia v. Russia (II): A Cautionary Tale

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3d illustration conflictThe January 2021 ruling by the European Court of Human Rights in the *Georgia v. Russia (II)* case has prompted critical comment by human rights lawyers (see here, here, and in this Journal here). There is particular concern about the finding that the Court did not have jurisdiction over the five day "active phase of hostilities" during the 2008 war between those two countries. The dissents by Judges Lemmens (para. 2) and Chanturia (para. 14) claimed the majority "resuscitated" the 2001 *Bankovi?* case, which had limited the extraterritorial jurisdiction of the *European Convention on Human Rights* in the context of an international armed conflict against a non-member State. Judge Keller (paras. 3 and 4) noted the *Georgia* case establishes that the contribution by the *Convention* system to peace in Europe has its limits.

This case does not simply bookend a twenty-year period of incremental spatial and interpretive expansion of the *European Convention*. When focusing on the regional nature of the *Convention*, the *Bankovi?* judgment noted (para. 80) that in a desire to avoid a vacuum in human rights protection, it had relied on being "in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention." Yet in a surprising turn of events, the Court held in *Georgia v. Russia* that the regional human rights treaty did not apply to a critical aspect of an armed conflict between member States on the territory of one of those States. Unlike the *Bankovi?* judgment, this decision is viewed as having created a vacuum in human rights law protection within Europe itself (Judge Chanturia dissent, paras. 5, and 54-55). Many human rights advocates will lament this finding.

To understand the controversies surrounding the tensions that arise in the *Georgia v. Russia* case it is helpful to look more broadly at the post-Cold War period within which the international human rights community sought to expand the role played by human rights law during armed conflict. This also requires addressing the interface between international human rights and humanitarian law, an issue that figures prominently in this analysis of the *Georgia* decision. The 1990s saw that community largely turn away from its 1970s and 1980s efforts to infuse humanitarian law with human rights norms (e.g. the two *Additional Protocols to the 1949 Geneva Conventions*, *AP I* and *AP II*). Instead, it focused on international criminal law, sought to increase the accountability of State actors, endeavoured to regulate particularly destructive weapons systems (e.g. the *Ottawa Landmines Convention*), and worked to establish a prominent role for human rights law in regulating armed

conflict. The view that human rights law itself had a greater role to play during hostilities even extended to the point of suggesting it displaced humanitarian law during internal armed conflicts. The application of human rights law during armed conflicts was viewed as a means by which to reduce violence, limit civilian casualties, and increase international accountability. This occurred in a security environment experiencing an increase in complex internal and internationalized armed conflicts, as well as the conduct of complicated peace support missions (e.g. Bosnia, Somalia, Rwanda, Kosovo, East Timor) and counterterrorism operations. States themselves sometimes doctrinally categorized these operations as "Military Operations Other Than War".

The 1990s also saw the creation of international criminal tribunals (e.g. ICTY and ICTR), and ultimately the 1998 *Rome Statute* and the International Criminal Court. Further, it witnessed the exercise of universal jurisdiction by national courts, particularly those based in civil law jurisdictions, in respect of crimes such as genocide, crimes against humanity and torture. European countries have been at the forefront of this human rights-based effort to extend accountability to leaders of regimes who otherwise were seen to escape justice.

Importantly, the interface between international human rights and humanitarian law was dealt with in the 1996 *Nuclear Weapons* case. The International Court of Justice found (para. 25) that the *International Covenant on Civil and Political Rights* (ICCPR) continued to apply during armed conflict, but that:

"whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."

The effect of this approach was later stated in the 2004 *Wall* case (para. 106) to mean "some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law."

This link between the two legal frameworks was to set off a firestorm of debate amongst international lawyers during the post 9/11 period. At its extremes, the *Nuclear Weapons* case was suggested by some States to mean humanitarian law was the *lex specialis* during armed conflict to the point of leaving no room for the operation of human rights law, an interpretation at odds with the opinion of the Court. Problematically, those supporting this *lex specialis* position often ignored the reality that military forces are obliged to maintain law and order during armed conflict, a law enforcement function based on human rights norms.

In contrast, some human rights advocates argued human rights was the special law governing non-international conflict, or that human rights was to be applied to low intensity conflict and humanitarian law to high intensity ones. In addition, for human rights lawyers, there was the concern that humanitarian law contained less restrictive rules governing the use of force. There was also unease that the law governing armed conflict has a comparatively less robust system of accountability.

Problematically, human rights law advocates did not address the vital question of how that highly restrictive body of law could effectively regulate the elevated levels and scale of violence which can occur even during internal conflicts.

These extreme positions frequently failed to acknowledge important aspects of the legal frameworks applicable in armed conflict; for example, that international humanitarian law itself contains significant human rights provisions (e.g. *AP I, Article 75; AP II*, Article 4; and Common Article 3). Recognition of this reality is something that this author has argued for elsewhere; and the acknowledgement of the relevance of *AP I*, Article 75 in the *Georgia v. Russia* case (see paras. 234, and 266) represents a positive, if underdeveloped, step in this direction. Further, the judgment only discussed customary international humanitarian law. While not often recognised, customary human rights law has universal application even when treaty-based law is limited by restrictive jurisdictional interpretations. For many human rights lawyers, a particular weakness of customary human rights law is its lack of enforcement mechanisms. However, focusing on establishing such accountability through the extension of treaty jurisdiction can come at the cost of failing to reinforce the normative effect that reliance on universal customary human rights law would bring about.

References in the 2021 *Georgia v. Russia* case (paras. 89-91) to the *Nuclear Weapons* decision and the subsequent 2004 *Wall* and 2006 *Congo* (para. 216) cases highlight their continuing relevance to the European Court's jurisprudence. This is not only in terms of general applicability. There is also potentially a problematic interpretation to the extent human rights law is argued to provide an "overarching interpretive rule" as suggested by Judges Yudkivska, Pinto de Albuquerque and Chanturia (dissent, para. 8). They indicate that (para. 15) even with the invocation of an Article 15 derogation, the wording "to the extent strictly required by the exigencies of the situation" means there is an allowance "for some accommodation of the needs of military action, while at the same time imposing a less permissive normative framework governing the use of force than in international humanitarian law and, most importantly, ensuring the indispensable Strasbourg oversight over military action during armed conflicts." Similarly, in the 2014 *Hassan* decision (para. 104) the Court found that human rights provisions should be accommodated "as far as possible" when interpreting the impact of humanitarian law.

This introduces the issue of whether international human rights law occupies a "superior" or "oversight" position in respect of humanitarian law. If so, on what basis, to what degree? How could a human rights court effectively re-purpose human rights law, a legal framework traditionally associated with a peacetime application and frequently with policing matters internal to a State, in order to oversee the application of humanitarian law? Unlike human rights law, humanitarian law is specifically designed to deal with armed conflict and its significantly elevated levels of violence. Attributing such a role to human rights law appears inconsistent with the *Nuclear Weapons* decision (para. 25) that indicates an arbitrary deprivation of life "can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself." However, it was not just humanitarian law that might be changed. As will be discussed, when dealing with complex internal

armed conflicts, the European Court of Human Rights has incorporated a number of humanitarian law principles into its application of human rights law thereby broadening the latter framework's acceptance of casualties.

With the ICTY Prosecutor having determined in 2000 that she would not investigate NATO bombing during the Kosovo conflict, questions continued about how European States were to be held accountable for extraterritorial military operations. Further, as the 1990s came to a close, the spectre of large-scale transnational terrorism was also looming on the horizon. It was a phenomenon that was to shake the international community just months before the ruling in *Bankovi?*. Added to this was frustration over European involvement in the 2003 invasion and the subsequent occupation of Iraq. This military operation was viewed in many quarters as illegitimate. In addition, transnational terrorism presented yet another "away game" in which European States were getting involved, including through the use of drones.

The fallout from 9/11 exposed further tensions between the human rights and humanitarian law communities. Some countries such as the United States primarily addressed transnational terrorism as an armed conflict. Others, predominately European States, preferred to look through a human rights-based law enforcement lens. As is noted in the Georgia v. Russia case, the European Court had already adopted the latter approach towards counterterrorism (e.g. 1998 *Ergi* case) in what it called "difficult security conditions" (Merits para. 164, and dissenting Judges Yudkivska, Pinto de Albuquerque and Chanturia, para. 2).
States may, and often do, choose to apply a human rights law enforcement approach (i.e. the United Kingdom and the Northern Ireland Troubles) in situations that objectively qualify as armed conflicts. States may also seek to avoid the issue altogether by trying not to categorize the hostilities. From a governance perspective, a preferred policy approach should be, where possible, to apply a policing framework, and from a legal perspective the level of violence may permit the ordinary application of human rights law even if it may stress its boundaries (e.g. the "shoot to kill" controversy). But this policy/legal blended solution has its limits when what is really occurring is a large-scale armed conflict, such as occurred during the Russian-Chechen hostilities (e.g. the battle for Grozny).

As the 21st Century unfolded, the European Court was called upon to address internal conflicts in the context of the Russian-Chechen conflict. This included the use by Russian forces of aerial bombardment, as well as ground-based missiles and artillery. Here the Court blended human rights concepts of strict necessity with humanitarian law precautionary principles (e.g. 2005 *Isayeva* case, paras. 173-76). It even opined in another case (see 2011 *Kerimova*, paras. 253-54) that the use of missiles rather than aerial bombs by Russian authorities might have been more appropriate. Providing guidance on selecting armaments is certainly a non-traditional role for a human rights court. The 2002 Moscow theatre and 2004 Beslan School hostage tragedies also saw the Court willing to incorporate humanitarian law concepts (see the 2011 *Finogenov* and 2017 *Tagayeva* cases) into its human rights analysis. Overall, this attempt to regulate armed conflict reflected a "militarization" of human rights law. This general trend was observed by dissenting judges in the *Georgia v. Russia* case as

compromising the universal and effective recognition and observance of human rights (Judges Yudkivska, Pinto de Albuquerque and Chanturia, para. 13).

Interestingly, the rationale for exclusively applying a human rights based law enforcement framework to internal hostilities, albeit one that was altered, was that Russia had failed to declare an emergency, or make a derogation under Article 15 of the Convention (*Kerimova*, para 253). Given that the Court in Georgia v. Russia (para. 139) interpreted non-derogation regarding that international armed conflict as an indication Russia considered it did not fall under Article 1 of the Convention, the same inaction seems to have brought about quite different outcomes depending upon whether the conflict was internal or not. Further, as Judge Chanturia notes in his dissent (para. 19) the *Georgia* judgment appears inconsistent with its position in the 2015 Hassan case where non-derogation had not hindered the application of humanitarian law. This fluidity in approach seems to point to a certain willingness by the Court to situate its interpretation in a manner that provides a desired outcome.

Of particular relevance is the *Georgia v. Russia* Court's reference to the incremental expansion of extra-territorial jurisdiction following the *Bankovi?* decision. This expansion was based on the principles of "effective control" and "State agent authority and control". Many of the "control over an individual" cases involved policing and counterterrorism missions (e.g. the *Isaak*, *Issa*, *Solomou*, *Pad*, and *Andreou* cases). As the Court noted in the *Georgia* decision (paras. 131-32), to the extent such cases involved fire aimed by security forces, they "concerned isolated and specific acts involving an element of proximity." In terms of the more spatially directed "effective control" test, the 2003 invasion of Iraq provided the European Court opportunities to consider that principle in the context of belligerent occupation (e.g. 2011 *Al Skeini*, 2014 *Hassan*, and 2014 *Jaloud* cases), although the Court declined to make such a determination, relying instead on the "control of the person" test. However, resolving the reach of the European Convention during armed conflict is not just important in situations of occupation. It also arises in respect of other contemporary external operations. In this regard "both Germany and Belgium justified their involvement in counter-ISIS action in Syria in public letters to the UN Security Council by stressing that the Syrian government does not exercise effective control over the areas ISIS occupies."

In the *Georgia v. Russia* decision, the restrictive effect of these "control" based principles was compounded by the linkage made between them. "[D]ecisive weight" was placed on the armed confrontation and fighting between enemy military forces seeking to establish control "in a context of chaos" meaning there was not only no "effective control", but also no form of "State agent authority and control" over individuals" (para. 137). Having long committed itself to applying these principles when assessing the jurisdiction of the *Convention*, the Court appears to apply them in a formalistic, almost mechanical fashion that privileged finding jurisdiction when it is more individual or personal in nature: what Marko Milanovi? notes as being "proximate" or "specific". The result was there was no jurisdiction during the traditional hostilities phase even within the territory of a member State.

Here lies the cautionary tale. Efforts to extend human rights law in order to control the use of force in armed conflict, particularly when humanitarian law is specifically developed to perform that role,

carries considerable risk. Notwithstanding the aspiration to attain a universal application and enforcement of human rights law, neither regional nor national human rights bodies, nor their treaties, are designed or intended to regulate hostilities during armed conflict. This is evident with the degree of "hybridization" the European Court adopted as it struggled to apply human rights law during the Russia-Chechen hostilities. Canada has had its own experience with the territorial limits of human rights law. The Federal Court of Appeal ruled (para. 36) in 2008 litigation that the *Canadian Charter of Rights and Freedoms* did not apply to the transfer of detainees in Afghanistan, and there was "no legal vacuum, considering the applicable law is international humanitarian law." Canada reinforced this position in 2014 Comments to the Human Rights Committee indicating that "international humanitarian law is the *lex specialis* in factual situations of armed conflict and therefore the controlling body of law in armed conflict." Further, in 2017, Canada indicated that Article 2(1) of the ICCPR "reflects the principle that the jurisdictional competence of a State is primarily territorial" with exceptions generally being defined and limited by the sovereign territorial rights. However, notwithstanding these statements, human rights norms would continue to apply to Canadian Forces operations through the application of humanitarian law and customary international human rights law.

The European Court did not have to put itself in the position of creating a jurisdictional vacuum. As suggested by Judge Chanturia in his dissent (para.31), it was open to the Court to consider violations of Article 2 of the *Convention* "while having regard to other rules of international law, including humanitarian law". This reasoning is entirely consistent with the International Court of Justice jurisprudence. Notably, the Inter-American Court of Human Rights (e.g. *Ba?maca-Vela?squez v. Guatemala*, paras. 208-209, *The Santo Domingo Massacre* case, *Cruz Sa?nchez v. Peru*) applies international humanitarian law in this way even in respect of internal conflicts. However, human rights law does not operate in a controlling fashion such that it can be used to substantively alter or displace the norms of international humanitarian law.

While it is true that the main bodies of law impacting on armed conflict: international human rights law, humanitarian law, and the law governing self-defence (*jus ad bellum*) share common roots and use much of the same terminology (e.g. necessity, proportionality), they are discrete bodies of law with no "ranking" of legal frameworks (*The Santo Domingo Massacre* case, para 24). This is important since the *Georgia v. Russia* case highlights yet another looming struggle in applying the international law applicable to armed conflict. Judge Keller (para. 28) notes the United Nations Human Rights Committee has asserted the competence to address jus ad bellum issues in its 2018 General Comment No. 36, and he suggests it might be appropriate for the European Court to do so as well. The idea that a prohibition against the arbitrary loss of life under the ICCPR or the *European Convention on Human Rights* would empower a human rights court or tribunal to consider whether there was an act of aggression is unlikely to find support amongst most States. It engenders the comment that the *Georgia v. Russia* case suggests such ambition might best be tempered by sober consideration of the limits inherent in human rights treaties and their adjudicative bodies.

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