



JUDGMENT OF THE
EUROPEAN COURT OF
HUMAN RIGHTS
IN THE CASE OF **2008 WAR**
GEORGIA v. RUSSIA



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Introduction

On January 21, 2021, the European Court of Human Rights¹ (ECtHR) announced the judgment in the case - **Georgia v. the Russian Federation**², assessing the issue of responsibility of the Russian Federation for the practice of human rights violations during and after August 2008 War.

Georgia lodged an application against the Russian Federation with the ECtHR on August 11, 2008. On the same day, Georgia requested the Court to indicate to the Government of the Russian Federation interim measures to the effect that the Russian Government should "refrain from taking any measures which may threaten the life or state of health of the civilian population and to allow the Georgian emergency forces to carry out all the necessary measures in order to provide assistance to the remaining injured civilian population and soldiers via humanitarian corridor."³ The ECtHR granted the request by Georgia the very next day, on August 12, 2008. On February 6, 2009, the State filed a complete application against the Russian Federation in the ECtHR.

In the application filed in the ECtHR, Georgia argued that Russia violated the following articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms during the war and subsequent occupation⁴: Right to life (Article 2); Prohibition of torture, inhuman or degrading treatment or punishment (Article 3); Right to liberty and security (Article 5); Right to respect for private and family life (Article 8); Right to an effective remedy (Article 13); Protection of property (Article 1 of Protocol No. 1); Right to education (Article 2 of Protocol No. 1); Freedom of movement (Article 2 of Protocol No. 4).

This case was also a landmark case for the ECtHR, as it was the first time the Court heard such a large-scale case involving active combats during the international armed conflict and on this background the mutual relationship between international humanitarian law and international human rights law by all means affecting the judgment rendered by the Court on January 21, 2021. In particular, the ECtHR held that it did not find the effective control of the Russian Federation during the active phase of the 2008 conflict (August 8-

¹ Hereinafter the ECtHR - .

² see.: CASE OF GEORGIA v. RUSSIA (II), GRAND CHAMBER, (Application no. 38263/08) JUDGMENT. <https://hudoc.echr.coe.int/fre#%7B%22documentcollectionid%22%3A%22GRANDCHAMBER%22%22%22CHAMBER%22%22%22itemid%22%3A%22001-207757%22%22%7D>.

³ see.: ECHR Grants Request for Interim Measures, Press release 581 (12.08.2008). <http://hudoc.echr.coe.int/eng-press?i=003-2458412-2647173>.

⁴ see.: European Convention on Human Rights. https://www.echr.coe.int/documents/convention_eng.pdf.

12) and, consequently, the exercise by Russia of extraterritorial jurisdiction (ETJ) on the territory of Georgia. Therefore, the ECtHR did not adjudicate the issue of liability for human rights violations committed by the Russian Federation in the active phase of the conflict and left it beyond the assessment.

Finally, the ECtHR in the case **Georgia versus the Russian Federation** mostly granted the application and held that after **the active phase of the conflict** in subsequent developments, Russia violated almost all the key articles of the European Convention. The judgment rendered with regard to the interstate dispute is also crucial in terms of being the first legal assessment by the international court of 2008 Russian-Georgian War, establishing the liability of the Russian Federation with regard to the occupied territories.

What did the ECtHR hold?!

The European Court of Human Rights has been examining large-scale, complex and large volume documents / evidence from various sources since October 8, 2013, in order to adjudicate an interstate dispute following the hearings on the merits. As a result of assessing the quality of evidence, up to 700 pieces of evidence were selected and submitted to the European Court by Georgia at different times. Further, on June 6-17, 2016, the ECtHR heard a total of 33 witnesses. The witnesses in the case were called by both Georgian and Russian sides, as well as by the Court. The ECtHR took into account the reports submitted by international governmental and non-governmental organizations and the statements of the experts involved in the case. **In view of all the above, the ECtHR:**

- **Held by sixteen votes to one**, that following the ceasefire agreement of 12 August 2008, on the territories of the former South Ossetia and other territories occupied by Russia the jurisdiction of the Russian State was operable within the meaning of the Convention and therefore Russia shall be liable under the international law.
- **Held by sixteen votes to one**, that there was an administrative practice on the part of Russia and the forces under the control of Russia contrary to Articles 2 (Right to life), 3 (Prohibition of torture, inhuman and degrading treatment) and 8 (Respect for private and family life) of the Convention and Article 1 of Additional Protocol No. 1 (Right to property).
- **The Grand Chamber held unanimously** that Georgian civilians detained by South Ossetian forces in Tskhinvali between August 10 and 27, 2008, were under the

jurisdiction of the Russian Federation for the purposes of Article 1 of the European Convention.

- **The Grand Chamber held unanimously** that there was an administrative practice contrary to Article 3 (Prohibition of torture) regarding the conditions of detention of 160 Georgian civilians. In particular, they were exposed to humiliating acts which caused them undeniable suffering and the Court regarded these acts as inhuman and degrading treatment.
- **The Grand Chamber held unanimously** that the arbitrary detention of Georgian citizens in August 2008 constituted an administrative practice contrary to Article 5 of the Convention (Right to liberty and security).
- **The Grand Chamber held unanimously** that the Georgian prisoners of war who were 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 of the Convention.
- **Held by sixteen votes to one** that Georgian prisoners of war were exposed to torture and that they were victims of torture. Accordingly, there was an administrative practice on the part of Russia contrary to Article 3 of the Convention (Prohibition of torture).
- **Held by sixteen votes to one** that the Georgian nationals who were prevented from returning to South Ossetia and Abkhazia fell within the jurisdiction of the Russian Federation.
- **Held by sixteen votes to one** that there was an administrative practice on the part of the Russian Federation contrary to Article 2 of Additional Protocol No. 4 to the Convention (Freedom of movement) as regards the inability of Georgian nationals to return to their respective homes. In particular, the Grand Chamber of the ECtHR noted that according to the information obtained by the Court it was confirmed that the *de facto* authorities of South Ossetia and Abkhazia did not allow ethnic Georgians to return to their homes. The ECtHR noted that the *de facto* authorities of these territories and the Russian Federation, as the State exercising effective control over these territories, were obliged by the European Convention to allow the population to return to their respective homes.
- **Held by sixteen votes to one**, that the Russian Federation has not conducted an effective and adequate investigation in breach of the requirement of the procedural obligations under Article 2 of the European Convention. The above refers to the failure to conduct an effective investigation in terms of the right to life where the Court noted that Russia had to investigate not only into the events which occurred after the cessation of hostilities but also into the events which

occurred during the active phase of the hostilities.

- **Right to education (Article 2 of Additional Protocol No. 1)** : the Grand Chamber noted that it did not have sufficient evidence to establish a violation of the right to education. Therefore, the Court did not consider it necessary to examine separately the violation of Article 13 of the Convention.
- **The issue of just satisfaction (Article 41 of the Convention)** : the ECtHR postponed the consideration of this issue for a period of one year and within this period allowed the parties - Georgia and the Russian Federation to reach an agreement on the issue of compensation.
- **Violation of Article 38 of the European Convention by Russia**: the Grand Chamber finds that the Russian Federation, as a respondent Government, has not submitted to the Court important evidence, including “combat reports”, due to which the respondent failed to fulfill its obligation in terms of providing the Court with all necessary means to establish the facts of the case⁵.
- **Held, by eleven votes to six**, in the period of August 8-12, 2008, when active hostilities were taking place, the Court did not find the effective jurisdiction of the Russian Federation. The Court held that the Russian Federation had no effective control and therefore had no jurisdiction for the purposes of Article 1 of the European Convention on Human Rights and no international liability was imposed on Russia for that period.

Influence of the judgment (so-called “overarching decision”) rendered with regard to the inter-state dispute on individual applications

The ECtHR has a well-developed procedural framework for individual applications. Pursuant to Article 34 of the European Convention, any natural person, non-governmental organization or group of individuals who claim that their rights under the Convention have been violated may apply to the Court.⁶ Article 34 of the Convention provide for the right to bring application before the Court and gives the applicants a real opportunity to sue against the state at the international level.⁷

First of all, it should be noted that under the European Convention on Human Rights and Fundamental Freedoms it is not possible to determine what kind of mutual relationship

⁵ see.: Judgment in the case concerning the armed conflict between Georgia and the Russian Federation in August 2008 and its consequences, ECHR 028 (2021) 21.01.2021.

⁶ see.: European Convention on Human Rights. https://www.echr.coe.int/documents/convention_eng.pdf.

⁷ see.: Alastair Mowbray, ‘The European Convention on Human Rights’, Mashood A. Baderin, Manisuli Ssenyonj (eds), International Human Rights Law: Six Decades after the UDHR and Beyond (Ashgate Publishing 2010) 271, 288.

exists between interstate and individual applications when they both deal with the same issue. However, it can be said that they do not exclude each other. Due to the fact that interstate disputes are accompanied by a large number of individual applications, a reality has emerged when the European Court has to tackle all of them in a coordinated manner, which is associated with incredibly large resources. One of the important arguments for this need is the adoption by the Committee of Ministers of the Council of Europe of **the Copenhagen Declaration** in 2018 recognizing the "challenges posed to the Convention system by situations of conflict and crisis in Europe " and recommending refraining from deciding on individual applications, "*before the overarching issues stemming from the inter-State proceedings have been determined in the inter-State case.*"⁸

One could say that in such a manner as provided for by the **"Copenhagen Declaration"** the judgment to be rendered in the interstate dispute will be considered by the court "as an overarching decision". And the general findings contained in the judgment will make it easier for the Court to decide on individual cases related to **"the same issues" or "deriving from the same underlying circumstances."**

Hundreds of individual applications have been lodged with the ECtHR in connection with August 2008 War. Accordingly, by all means, the judgment in the interstate dispute from January 21, 2021 will have a direct impact on individual applications. This is evidenced by the fact that the ECtHR waited for the judgment in the interstate case and precisely after that would start considering individual applications.

HRC is defending the rights of 137 individuals affected by August 2008 War before the ECtHR 137 . HRC lodged in total, 3 applications with the Court concerning the violations of various rights under the European Convention by the Russian Federation during the August War. The hearings of the applications filed by HRC will begin in the nearest future.

Impact of the judgment by the ECtHR on the hearings of the case of 2008 August War⁹ in ICC and ICJ¹⁰

⁸ see.: Copenhagen Declaration on the Reform of the European Convention on Human Rights System, §45. [*The challenges posed to the Convention system by situations of conflict and crisis in Europe must also be acknowledged. In this regard, it is the Court's present practice, where an inter-State case is pending, that individual applications raising the same issues or deriving from the same underlying circumstances are, in principle and in so far as practicable, not decided before the overarching issues stemming from the inter-State proceedings have been determined in the inter-State case*].

⁹ International Criminal Court.

¹⁰ International Court of Justice.

The International Criminal Court is an international court in which, formally, there is no dispute between states, i.e. it does not hear the disputes between the countries, but establishes individual liabilities for crimes committed during conflicts / wars. Unlike the European Court, ICC investigates the crimes committed by certain individuals¹¹ and not the crimes committed by the states. These may be: Members of the armed forces, politicians¹², civilians - anyone who may have taken part in a specific crime during a conflict / war, and especially those who issued orders / instructions that resulted in subsequent crimes¹³.

In connection with August 2008 War, the ICC is investigating a number of crimes, including: Murder, forced displacement of the population, persecution, sexual violence, torture, detention of civilians. These crimes are crimes against humanity¹⁴. The ICC also investigates crimes such as: Attacking civilians, premeditated murder, deliberate attack on civilians, destruction of property and looting, the offenses are called war crimes. The parties to the conflict are identified by the ICC: Georgian, Russian and Ossetian armed forces.

The ICJ is one of the main bodies of the UN having its own Statute. The ICJ Statute was signed together with the UN Charter and constitutes an integral part to the UN Charter. The ICJ hears only the cases where UN member states stand as parties to the dispute. The Court shall provide advisory opinions where requested to do so by the UN General Assembly or the UN Security Council, or by any other body, with the permission of the former.

Georgia lodged a case against the Russian government with the UN International Court of Justice on August 12, 2008, accusing the Russian authorities of discriminations and racism against ethnic Georgians in Abkhazia and the Tskhinvali region with the help of local separatist authorities. The memorial included not only the facts of the 2008 conflict, but also cases from 1990 to 2008. Russia has violated international humanitarian law. Russia invaded Georgia and occupied Georgian territories and carried out armed intervention constituting a violation of the international law.

The ICJ **ruled on April 1, 2011** that "it has no authority to hear the claim of Georgia of

¹¹ see.: Article 25 of the Statute of Rome. <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>.

¹² Ibid: Article 28

¹³ Ibid: Article 27

¹⁴ Ibid: Article 7.

12 August 2008" in which Georgia stated that when invading Abkhazia and South Ossetia between 1990 and August 2008 Russia had breached at three different instances the obligations under the 1965 International Convention **on the Elimination of All Forms of Racial Discrimination** (CERD) ¹⁵. The ICJ ruled in favor of Russia after having considered the arguments by Russia justified that Georgia did not seek to specifically discuss CERD issues with Russia and did not seek to use other dispute resolution mechanisms under Article 22 of the Convention before referring it directly to the International Court of Justice.

Newly discovered facts are necessary for the resumption of the case and where Georgia succeeds in proving that the negotiations with Russia would have been in vain this could be considered as a newly discovered fact. Georgia still has time to submit relevant evidence, new facts, by April 1, 2021, within 10 years of making the decision by the ICJ. While, where the facts are submitted after this date, the ICJ would not resume the case.

In the judgment from 21 January 2021, the ECtHR held that the evidence in the case proved the existence of an administrative practice contrary to Articles 2 and 8 of the Convention and Article 1 of Additional Protocol N 1 to the Convention. In particular, according to the ECtHR, the killing of civilians, the burning and looting of houses in Georgian villages was an administrative practice, which meant the repetition of similar acts and official tolerance by Russia for these acts.

The ECtHR further clarified that the acts committed against the victims, given their seriousness, qualify as inhuman and degrading treatment and that the said persons were subjected to these acts because of their ethnicity. In view of the above, the court held that the violations of the right to life, the prohibition of torture, the protection of private and family life, and the right to property actually took place. Accordingly, although the judgment of the European Court does not use the term "**ethnic cleansing**", since the ECtHR is not an international court examining the issues of ethnic cleansing, the above violations can be considered as ethnic cleansing, including due to the administrative practice of these violations.

The ICC has the jurisdiction to establish ethnic cleansing as an international crime. Consequently, the judgment by the ECtHR may have an impact on the ongoing investigation in the ICC and subsequently on the outcome of the trial, as the findings and assessments by the ECtHR that are based on the evidence and facts established

¹⁵ see.: International Convention on the Elimination of All Forms of Racial Discrimination.
<https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>.

beyond a reasonable doubt are one of the most important and credible legal documents bearing an evidentiary value. As for the ICJ, as mentioned above, Georgia had filed a case of ethnic cleansing, but the ICJ did not accept the case due to non-compliance with the relevant procedures. Therefore, it is questionable whether the ICJ would accept the findings and assessments made in the judgment by ECtHR as a newly discovered circumstances/facts. Moreover, it has to be mentioned that by the judgment from January 21, the ECtHR held that it did not find the effective control of the Russian Federation during the active phase of the 2008 conflict (August 8-12) and, consequently, the exercise of extraterritorial jurisdiction by Russia on the territory of Georgia.

Conclusion

The judgment of the Grand Chamber of the ECtHR of January 21, 2021 is the most significant legal document. From a legal point of view, for the first time since 2008 War, the occupation by Russia of the regions of Georgia (former South Ossetia and Abkhazia) and the ethnic cleansing carried out in the regions was proved in terms of international law, which may affect the outcomes of the applications of Georgia to other international courts against Russia and also of the individual applications to the ECtHR as the so-called "overarching decision".

The ECtHR held that from August 12, 2008, Russia carried out continued "effective control" of the occupied territories. The ECtHR found, using various standards, that the Russian Federation has effective control over Abkhazia and the former South Ossetia and exercises extraterritorial jurisdiction, meaning that the Russian Federation is fully responsible for human rights violations under the European Convention in the territories.

The ECtHR held that human rights violations in the occupied territories were systematically recurring and that the Armed Forces of the Russian Federation had a clearly defined policy of formal tolerance for these violations. Further, the administrative practice of systematic human rights violations against civilians was based on their ethnicity. Accordingly, the ethnic cleansing of Georgian population after 2008 War was legally proved.

Finally, for the first time, Georgia has a legal document that confirms the occupation of Georgian territories by Russia. It can be said that the judgment of January 21, 2021 is the most significant 'leverage' for Georgia to resolve conflicts and restore territorial integrity by using international legal mechanisms.