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THE EUROPEAN COURT OF HUMAN RIGHTS IN A NEW REALITY: DOES IT HAVE SUFFICIENT PROCEDURAL INFRASTRUCTURE TO DEAL WITH ARMED CONFLICTS?

ABSTRACT

Over the last decades, the European Court of Human Rights had to deal with a large number of individual and interstate cases related to armed conflicts. Despite the fact that its original mandate was not designed for such type of cases, the ECtHR plays a significant role in enforcing the European Convention of Human Rights in armed conflict and, in certain cases, the international humanitarian law. The ECtHR's increased involvement in armed conflict cases is urged by the lack of special enforcement judicial forum for IHL. Leaving aside the jurisdictional, mandate-related and conceptual legal questions arising from the ECtHR's involvement in armed conflict, this article aims to demonstrate that the ECtHR is sufficiently equipped with adequate procedural infrastructure to ensure effective response to numerous applications alleging human rights violations occurred during an armed conflict.

INTRODUCTION

As of 2020, the European Court of Human Rights (hereinafter, 'the ECtHR' or 'the Court'), which was created to address human rights violations during peacetime, is flooded by cases related to armed conflicts,[1] which are *primarily* (albeit, not exclusively) regulated by international humanitarian law (hereinafter, the 'IHL')[2] and not by the European Convention on Human Rights (hereinafter 'the Convention'),[3] as such. Despite the detailed *corpus juris* of IHL, it lacks a special *judicial* enforcement mechanism on regional or international level.[4]

* The author would like to thank the Editorial Board of the Journal of Constitutional Law for their kind review of the earlier draft of this paper and for their valuable suggestions and comments.

[1] For a general overview of the relevant case law, see 'Factsheet – Armed conflicts' (March 2020), Press Unit of the European Court of Human Rights <https://www.echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf> accessed 14 April 2020.

[2] The main framework of IHL consists of so-called Hague Conventions of 1907, Geneva Conventions of 1949 with their Additional Protocols of 1977 and customary IHL.

[3] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

[4] On the necessity of such mechanism, see Jann K. Kleffner and Liesbeth Zegveld, 'Establishing an Individual Complaints Procedure for Violations of International Humanitarian Law' (2000) 3 YIHL 384. For an overview

This weakness of IHL has urged victims of armed conflicts to make recourse to international human rights mechanisms, including the ECtHR, to adjudicate alleged violations during armed conflicts.[5]

While much ink has been spilled on the relationship between IHL and international human rights law (hereinafter, the 'IHRL') during last 50 years,[6] analysing IHRL courts' actual engagement with armed conflicts and their role in enforcement of IHL through their developed machinery is drawing more attention from academics,[7] as well as from the Convention system itself.[8] Most of these debates focus on jurisdictional and methodological uncertainties these mechanisms face when they confront cases related to armed conflicts, since none of them are expressly mandated to apply IHL,[9] including the ECtHR.[10]

In 1994, Professor Kamminga raised the question whether the Convention was sufficiently equipped to deal with gross and systematic violations.[11] The conclusion, based on the failure of the Convention system to respond to the applications from Cyprus and Turkey, gave the negative answer to that question, summarizing that '[t]he more serious and widespread the violations, the less adequate has been the response.'[12] This conclusion, which may have been the plausible answer by 1994, needs re-evaluation due to the major developments under the Convention system: firstly, in 1998 Protocol 11 to the Convention[13] entered into force,

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of the initiatives to establish IHL enforcement mechanisms, see Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (CUP 2015) 318-20.

[5] The present article employs the notion of 'armed conflict' with respect to situations, which, due their intensity and organization of the parties, can be *objectively* qualified as an armed conflict under IHL, notwithstanding the views of parties to the conflict or absence of judicial assessment by national or international courts.

[6] For some of the recent scholarship on this topic, see Paul De Hert, Stefaan Smis, Mathias Holvoet (eds), *Convergences and Divergences between International Human Rights, International Humanitarian and International Criminal Law* (Intersentia 2018); Erika de Wett and Jann Kleffner (eds), *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations* (Pretoria University Law Press 2014); Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011).

[7] See Gerd Oberleitner, 'The Development of IHL by Human Rights Bodies' in Ezequiel Heffes, Marcos D. Kotlik and Manuel J. Ventura (eds), *International Humanitarian Law and Non-State Actors: Debates, Law and Practice* (TMC Asser Press 2020); Dominic Steiger, 'Enforcing International Humanitarian Law through Human Rights Bodies' in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (CUP 2015).

[8] See Report on the place of the European Convention on Human Rights in the European and international legal order, adopted by the CDDH at its 92nd meeting (26–29 November 2019) 72-80 <https://rm.coe.int/steering-committee-for-human-rights-cddh-cddh-report-on-the-place-of-t/1680994279> accessed 14 April 2020.

[9] The only exception is the Committee on the Rights of the Child, which can consider IHL under the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

[10] Although the Court's *ratione materiae* jurisdiction extends to 'all matters concerning the interpretation and application of the Convention and the Protocols thereto' (article 32 of the Convention), some provisions of the Convection, such as article 7 and article 15, indirectly authorizes the Court to refer to international law, including IHL. The Court also heavily relies on general rules of treaty interpretation and interprets the provision of the Convention 'in so far as possible in light of the general principles of international law, including the rules of international humanitarian law', *Varnava and Others v Turkey* [GC] App no 16064/90 (ECtHR, 18 September 2009) para 185.

[11] Menno T. Kamminga, 'Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations?' [1994] 2 NQHR 153.

[12] *ibid* 163.

[13] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, ETS No.155 (Protocol 11).

which transformed the entire monitoring system of the Convention; secondly, by 1994 the ECtHR had encountered the nascent case law of armed conflict cases, being in a diametrically different situation as compared to the current one; and finally, the Court adopted new procedures in its Rules of Court, which had not been discussed even in the 1990-ies.

Leaving aside mandate-related and conceptual legal questions arising from the ECtHR's approach to IHL,[14] the present article will analyse to what extent the Court has practical procedural readiness and what its options are when it confronts the applications from armed conflicts. The central assertion is that the ECtHR, which has directly applied IHL on an exceptional basis,[15] has efficient *primary* and *secondary* procedural infrastructure to ensure effective response to human rights violations committed in armed conflicts. In regard of *primary* procedures, the Convention is enforced by both individual and interstate applications.[16] As for the *secondary* procedural tools, the author argues that the Court can utilise its secondary procedural tools to ensure the effective response to armed conflict cases in a broad manner. Such tools, author submits, are the following features of the Court's judicial operation: duty of the parties to cooperate with the Court; fact-finding and investigation by the Court; interim measures; pilot judgment procedure and 'principal' judgments; coordination of individual and interstate applications related to the same situation, and the ability to award reparations through 'just satisfaction'.

1. PROCEDURE OF INDIVIDUAL APPLICATION IN ARMED CONFLICTS

One of the main weaknesses of IHL is its enforcement, particularly the absence of an individual procedure to lodge an application.[17] IHRL, on the other hand, can change this situation by engaging its judicial organs in providing redress to individual victims of an armed conflict.

The ECtHR enjoys highly developed procedural framework for individual applications. According to article 34 of the Convention, it may receive applications from any person, non-

[14] See *e.g.* Cedric De Koker, 'The European Court of Human Rights' Approach to Armed Conflict and Humanitarian Law: Ivory Tower or Pas De Deux?' in Paul De Hert (n 6). Linos-Alexandre Sicilianos, 'Les Relations entre Droits de L'homme et Droit International Humanitaire dans la Jurisprudence de la Cour Européenne des Droits de L'homme' in James Crawford and others (eds), *The International Legal Order: Current Needs and Possible Responses - Essays in Honour of Djamchid Momtaz* (Brill Nijhoff 2017).

[15] The most obvious example of direct application and enforcement of IHL by the ECtHR is its widely discussed case of *Hassan v UK* [GC] App no 29750/09 (ECtHR, 16 September 2014). For further analysis of this case see Andreas von Arnauld, 'An Exercise in Defragmentation: The Grand Chamber Judgment in Hassan v UK' in Robin Geiß and Heike Krieger, *The 'Legal Pluriverse' Surrounding Multinational Military Operations* (OUP 2020); Robin Geiß, 'Toward the Substantive Convergence of International Human Rights Law and the Laws of Armed Conflict: *The Case of Hassan v. the United Kingdom*' in Leila Nadya Sadat (ed), *Seeking Accountability for the Unlawful Use of Force* (CUP 2018).

[16] ECHR (n 3) arts 33 and 34.

[17] Although article 3 of the Hague Convention (IV) and article 91 of the Additional Protocol I to the Geneva Conventions envisage liability to 'pay compensation' for violations of laws of armed conflict, none of these provisions establish individual cause of action to seek reparations. See *e.g.* Marco Sassòli, *International Humanitarian Law: Rules, Solutions to Problems Arising in Warfare and Controversies* (Edward Elgar Publishing 2019) 92.

governmental organisation or group of individuals, who claims to be the victim of a violation of the rights set forth in the Convention. This article entitles persons to start litigation against a state at the international level.[18] Although initially this mechanism was intended as a voluntary option,[19] nowadays it is 'a key component of the machinery for protecting the rights and freedoms set forth in the Convention'[20] and 'one of the fundamental guarantees of the effectiveness of the Convention system'.[21]

1.1. 'VICTIM' REQUIREMENT IN INDIVIDUAL CASES

To enjoy 'a real right of action'[22] under individual application, two elements shall be present. An applicant shall be: 'person, nongovernmental organisation or group of individuals' and 'the victim of a violation.'[23] The first element is not problematic in practice. With regard to being 'the victim of a violation', the Court refuses to apply this criterion 'in a rigid, mechanical and inflexible way'[24] or by 'excessive formalism'.[25] This approach by the Court resulted in establishing three categories of victims: (1) direct victim - person directly affected by the act or omission;[26] (2) indirect victim – when specific and personal connection exists between the victim and applicant;[27] and (3) potential victim – in exceptional circumstances the Court may rule that applicant may become the victim of the Convention violation in future.[28] More importantly, the notion of 'victim' is subject to autonomous interpretation, interpreted by the Court irrespective of domestic concepts.[29]

Such flexible interpretation of 'victim' ensures for authors of armed conflict related applications to easily seize the Court: direct and indirect victims cover both types of applicants, those who are direct victims of military operations during armed conflict and those applicants who seize the Court on behalf of their dead relatives or family members. The latter would not be possible without the notion of 'indirect victim'. Additionally, autonomous interpretation of 'victim' further enables applicants to submit their allegations to the Court, as in armed conflict situations, due to various political or procedural obstacles, it would not often be feasible for applicants to be granted victim status pursuant to their domestic legislation, which would deprive individuals from 'a real right of action'.[30]

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[18] Alastair Mowbray, 'The European Convention on Human Rights' in Mashood A. Baderin, Manisuli Ssenyonj (eds), *International Human Rights Law: Six Decades after the UDHR and Beyond* (Ashgate Publishing 2010) 271, 288.
[19] In the original text of the Convention, article 25 stated that the Commission could receive petitions from any person, non-governmental organisation or group of individuals claiming to be the victim, provided that a State Party against which the complaint had been lodged had declared that it recognized the competence of the Commission to receive such petitions. This regime was cancelled by Protocol 11.
[20] *Mamatkulov and Abdurasulovic v Turkey* App nos 46827/99, 46951/99 (ECtHR, 6 February 2003) para 122.
[21] *ibid* para 100.
[22] *ibid* para 122.
[23] *Vallianatos and Others v Greece* [GC] App no 29381/09 (ECtHR, 7 November 2013) para 47.
[24] *Micallef v Malta* [GC] App no 17056/06 (ECtHR, 15 October 2009) para 45.
[25] *Gorraiz Lizarraga and Others v Spain* App no 62543/00 (ECtHR, 27 April 2004) para 38.
[26] *Amuur v France* App no 19776/92 (ECtHR, 25 June 1996) para 36.
[27] See *e.g. Varnava* (n 10) para 112.
[28] See *e.g. Klass and Others v Germany* (1978) Series A no 28.
[29] *Gorraiz Lizarraga* (n 25) para 35.
[30] As Weill observes, national courts are usually reluctant or unwilling to adjudicate cases relating to active

1.2. ADMISSIBILITY CRITERIA OF INDIVIDUAL APPLICATIONS: EXHAUSTION OF ALL DOMESTIC REMEDIES IN ARMED CONFLICT CASES

Article 35 of the Convention sets forth the requirements that must be met to authorize the Court to deal with the applications on merits. The Court will proceed with the applications provided that an applicant has exhausted all effective domestic remedies and an application is submitted to the Court within six months after the final domestic decision.[31] It may refuse to examine the case on other grounds as well.[32] It had been often argued that human rights mechanisms are not designed to effectively cope with massive violations of human rights in armed conflicts because it is difficult to reconcile the conditions of armed conflict with the admissibility procedures they are following, in particular exhaustion of all domestic remedies and a so called six-month rule.[33]

This argument has lost its persuasiveness in light of the Court's case law. The Court and the former European Commission have on various occasions held that requirement of exhaustion of domestic remedies should be applied in a flexible manner, without excessive formalism.[34] This requirement is subject to 'certain reservations', rendering this rule more operational, which is of significant importance in armed conflict cases.[35] Exhaustion of domestic remedies in armed conflict cases is not feasible, pushing the Court to relax this admissibility criterion for victims of military operations.[36]

In this regard, the case of *Akdivar* is of precedential value. It concerned destruction of the applicants' houses during the 'serious disturbances' in the South-East of Turkey between the security forces and the members of the Workers' Party of Kurdistan (PKK).[37] In this context, the Court held that there is no obligation to exhaust those remedies which are inadequate or ineffective, or where an administrative practice makes domestic proceedings futile or ineffective.[38] However, the Court expressly emphasised that this finding was confined to the particular circumstances of the case. Consequently, the Court, on one hand, remained loyal

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hostilities by the government armed forces. See Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (OUP 2014) 153-155. Therefore, it is conceivable that persons who are actual victims of government's military operations may not be granted victims status under national legislation by domestic courts.

[31] ECHR (n 3) art 35(1).

[32] *ibid* art 35, paras (2)-(3). Pursuant to these paragraphs, the Court will dismiss anonymous applications; applications which has already been adjudicated by the Court or is simultaneously submitted to other international body; applications which concern matters out of the material scope of the Convention or its Protocols; unsubstantiated applications; application which are abuse of such right and applications which allege non-significant damage. These grounds are less relevant for the present article and will not be discussed.

[33] Dietrich Schindler, 'Human Rights and Humanitarian Law: Interrelationship of the Laws' (1982) 31 Am.U.L.Rev. 935, 941.

[34] *Ringeisen v Austria* (1971) Series A no 13 para 89; *Lehtinen v Finland* (dec.) App no 34147/96 (ECtHR, 27 January 2004).

[35] Lutz Oette, 'Bringing Justice to Victims? Responses of Regional and International Human Rights Courts and Treaty Bodies to Mass Violations' in Carla Ferstman, Mariana Goetz and Alan Stephens (eds) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Brill Nijhoff 2009) 225-26.

[36] Christine Byron, 'A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies' (2007) 47(4) Va.J.Int'l L. 839, 884-5.

[37] *Akdivar and Others v Turkey* [GC] ECHR 1996-IV.

[38] *ibid* para 67.

to traditional application of this rule and, on the other hand, by utilising this 'new procedural approach',[39] made it possible to declare cases stemming from South-East of Turkey admissible.[40]

Relying on the requirement to exhaust all domestic remedies was the main strategic argument by Russia in the cases related to armed conflict in Chechnya. However, the Court employed a 'realistic approach'[41] and, with reference to *Akidivar*'s reasoning,[42] formed 'a reasonably clear and settled opinion that neither civil nor criminal domestic remedies have, in practice, proved capable of providing effective redress in respect of cases of egregious human rights violations committed by state agents in Chechnya.'[43]

2. INTERSTATE APPLICATIONS: MORE FLEXIBLE THAN INDIVIDUAL APPLICATIONS?

In accordance with article 33 of the Convention, any state party of the Convention may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another state party. This article guarantees the right to start interstate litigation and is another important mechanism to seek redress for human rights violation in armed conflict. Interstate proceedings, which is a less-known side of the jurisdiction of the Court,[44] is often described as a mean of 'collective enforcement' of the Convention.[45] Although the Court is known for its efficiency in deciding individual applications, at the time of entry into force of the Convention, only interstate application was mandatory in the sense that the right to start interstate litigation was the automatic result of the Convention's membership,[46] whereas the procedure of individual applications as it exists today came into effect only in 1998.[47]

Interstate cases mainly concern the situations when a state espouses the claims of individuals in the context of widespread violations of the Convention,[48] what is particularly illustrated by the applications lodged by Georgia[49] and Ukraine[50] against Russia.[51] Besides, the Court is

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[39] Onder Bakircioglu and Brice Dickson, 'The European Convention in Conflicted Societies: The Experience of Northern Ireland and Turkey' (2017) 66 ICLQ 263, 265, 280-281.
[40] Hans-Joachim Heintze, 'The European Court of Human Rights and the Implementation of Human Rights Standards during Armed Conflicts' (2002) 45 GYIL 59, 71-72.
[41] Federico Sperotto, 'Law in Times of War: The Case of Chechnya' (2008) 8(2) Global Jurist, 17-18.
[42] See *e.g. Baysayeva v Russia* App no 74237/01 (ECtHR, 5 April 2007) paras 103-09; *Isayeva, Yusupova and Bazayeva v Russia* App nos 57947/00, 57948/00, 57949/00 (ECtHR, 24 February 2005) paras 143-151.
[43] Philip Leach, 'The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights' (2008) 6 EHRLR 732, 739.
[44] Dean Spielmann, 'The European Court of Human Rights as Guarantor of a Peaceful Public Order in Europe' (7 November 2014) <https://echr.coe.int/Documents/Speech_20141107_Spielmann_GraysInn.pdf> accessed 14 April 2020.
[45] *Austria v Italy* App no 788/60 (Commission Decision, 11 January 1961) 138; *Cyprus v Turkey* App no 25781/94 (Commission Report, 4 June 1999) para 70.
[46] William A. Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 723.
[47] See, *supra*, note 19.
[48] See *e.g. Greece v UK* (dec.) App no 176/56 (Commission Decision, 2 June 1956); *Ireland v UK* (1978) Series A no 25. See also *Cyprus v Turkey* (just satisfaction) [GC] App no 25781/94 (ECtHR, 12 May 2014).
[49] *Georgia v Russia (I)* [GC] App no 13255/07 (ECtHR, 3 July 2014); *Georgia v Russia (II)* (dec.) App no 38263/08 (ECtHR, 13 December 2011); *Georgia v Russia (III)* (dec.) App no 61186/09 (ECtHR, 16 March

often involved in 'quasi-interstate' applications where sensitive political issues are at stake, urging the states to intervene in the proceedings as a third party.[52]

2.1. LESS ADMISSIBILITY REQUIREMENTS FOR INTERSTATE APPLICATIONS

Interstate applications, according to article 35 of the Convention, are subject only to two admissibility requirements: six-month rule and exhaustion of all domestic remedies.[53] However, the Court is still able to dismiss applications 'under general principles governing the exercise of jurisdiction by international tribunals' on the grounds of territorial, subject-matter, personal and temporal jurisdiction.[54]

Six-month rule is applied in the same manner in both types of applications.[55] It does not apply to a continuing situation and is calculated from the date of the act or decision which is said not to comply with the Convention, where domestic remedies do not exist.[56] The requirement of exhaustion of domestic remedies is affected by existence of *administrative practice.*

2.2. ADMINISTRATIVE PRACTICE IN INTERSTATE CASES: WHEN DOES NOT EXHAUSTION OF DOMESTIC REMEDIES APPLY?

The rule does not apply if administrative practice is present, i.e. 'where the applicant state complains of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask the Court to give a decision on each of the cases put forward as proof or illustrations of that practice'.[57] The Court has also explained the essence of administrative practice, setting out that it involves two distinct elements: a repetition of acts and official tolerance.[58]

2010); *Georgia v Russia (IV)* App no 39611/18 (22 August 2018).

[50] There are currently five *Ukraine v Russia* interstate applications before the Court: *Ukraine v Russia (re Crimea)* App no 20958/14; Ukraine v Russia (re Eastern Ukraine) App no 8019/16; Ukraine v Russia (II) App no 43800/14; *Ukraine v Russia (VII)* App no 38334/18 and *Ukraine v Russia (VIII)* App no 55855/18.

[51] In this respect, of particular interest are the cases of *Georgia v Russia (II)*, concerning 2008 august international armed conflict between Russia and Georgia and *Ukraine v Russian Federation (re Crimea)* and *Ukraine v Russian Federation (re Eastern Ukraine)*, concerning military operations by Russia and armed groups allegedly under its control in the Ukrainian territory.

[52] 'Background Paper for Seminar Opening of the Judicial Year January 2016', 18 <https://www.echr.coe.int/Documents/Seminar_background_paper_2016_part_1_ENG.pdf> accessed 14 April 2020 (Background Paper).

[53] Paragraph 1 of Article 35, which refers only to six-month rule and exhaustion of remedies, applies to both individual and interstate applications. Contrary to this, paragraphs 2 and 3 of Article 35 of the Convention, which deal with various grounds of inadmissibility, specifically regulate only individual applications under Article 34 of the Convention.

[54] 'Background Paper' (n 52) 18.

[55] Isabella Risini, *The Inter-State Application under the European Convention on Human Rights: Between Collective Enforcement of Human Rights and International Dispute Settlement* (Brill Nijhoff 2018) 50.

[56] *Georgia v Russia (II)* (n 49) para 97.

[57] *Georgia v Russia (I)* (dec.) App no 13255/07 (ECtHR, 30 June 2009) para 40; *Georgia v Russia (I)* (n 49) para 125; *Georgia v Russia (II)* (n 49) para 85.

[58] *ibid* (with further references to the previous case law).

As to 'repetition of acts', the Court describes it as 'an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected not to amount to merely isolated incidents or exceptions but to a pattern or system', while 'official tolerance' means that 'illegal acts are tolerated in that the superiors of those immediately responsible, though cognisant of such acts, take no action to punish them or to prevent their repetition; or that a higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings a fair hearing of such complaints is denied'.[59] At the admissibility stage, the required evidentiary threshold to demonstrate the existence of an administrative practice is *prima facie* evidence, which must be more than mere allegation. However, 'full proof' is not required.[60]

This approach was relied on by the Court in admissibility decision in *Georgia v Russia (II)*, where it found that Georgia's 'allegations cannot be considered as being wholly unsubstantiated or lacking the requirements of a genuine allegation for the purposes of Article 33 of the Convention.'[61] All the other questions concerning the administrative practice were reserved for merits.[62]

2.3. NO 'VICTIM' REQUIREMENT IN INTERSTATE CASES

Victim requirement does not apply to interstate applications as a matter of standing before the Court,[63] which further confirms the *erga omnes* nature of the interstate application.[64] Victim status of a state who initiates an interstate dispute before the Court may be questioned only if those allegations could be brought by individual applications as well.[65] Whereas an individual applicant shall substantiate the direct, indirect or potential affection by the alleged violations of the Convention, interstate application is admissible simply because of 'the general interest attaching to the observance of the Convention'.[66] Therefore, it need not be made on behalf of an individual, which, however, does not exclude an applicant state from seeking the just satisfaction for specific individuals.[67]

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[59] *Georgia v Russia (I)* (n 49) paras 123-124.
[60] *Georgia v Russia (I)* (dec.) (n 57) para 41.
[61] *Georgia v Russia (II)* (n 49) para 89.
[62] *ibid* para 90.
[63] Risini (n 55) 52-53.
[64] Schabas (n 46) 726.
[65] *Cyprus v Turkey* (n 45) para 77.
[66] Schabas (n 46) 726. This is clearly illustrated by those interstate cases where one of the members of the Council of Europe initiates the proceedings against another member in the absence of specific legal interests and the only interest is to respond to situation in the respondent state, see *e.g. Denmark, Norway, Sweden and the Netherlands v Greece (I)* (Commission Report, 05 November 1969); *Denmark, Norway and Sweden v Greece (II)* (Commission Decision on Admissibility, 16 July 1970).
[67] *Cyprus v* Turkey (just satisfaction) (n 48). This is also confirmed by just satisfaction judgment in *Georgia v Russia (I)* [GC] (Just satisfaction) App no 13255/07 (ECtHR, 31 January 2019). See also Concurring Opinion of Judge Pinto de Albuquerque, Joined by Judge Vučinić, para 4.

3. DUTY TO COOPERATE WITH THE EUROPEAN COURT OF HUMAN RIGHTS AND FACT-FINDING

Article 38 of the Convention stipulates that the Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the respondent states shall furnish all necessary facilities. This article covers the various elements of proceedings, including the manner of examination of the case, fact-finding and investigation, issues of evidence, duty of cooperation, estoppel and *jura novit curiae*.[68] The author elaborates on two of these elements, which enable the Court to effectively examine the armed conflict cases: (1) fact-finding and investigation and (2) parties' obligation to cooperate with the Court in terms of providing the necessary information.

3.1. FACT-FINDING AND INVESTIGATION: THE EUROPEAN COURT OF HUMAN RIGHTS AS 'THE TRIBUNAL OF FIRST INSTANCE'

Fact-finding by the Court is a process when a court attempts to clarify an unclear or disputed facts referred to by parties to litigation.[69] As a general approach, the Court often recalls its subsidiary nature and distances itself from the role of a first-instance tribunal of fact, unless it is unavoidable given the circumstances of the case.[70] Thus, when sufficient information is not furnished to the Court, under the general framework of article 38 and Rules of Court,[71] it may initiate its own fact-finding through various techniques, including but not limited to conducting fact-finding hearings of witnesses and experts and on-the-spot investigations.[72] Whereas the Court often undertakes fact-finding activities in interstate cases, this rarely happens in individual cases.[73]

3.1.1. Fact-finding in individual armed conflict cases

In individual armed conflict cases, the Court essentially relies on a body of evidence submitted by the parties. In this respect, cases of *Isayeva (I)*[74] and *Isayeva (II)*[75] should be highlighted. They concerned air bombardments and deprivations of life of civilian population by Russia's armed forces during intense military operations in Chechnya, bringing the Court in adjudicating highly disputed facts. In both cases the Court relied on various information submitted by the parties, including witness statements, interviews with the military commanders, Human Rights Watch report, documents from Russia's criminal investigation

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[68] Schabas (n 46) 807-815.
[69] Philip Leach, 'Fact-Finding: European Court of Human Rights (ECtHR)' in Max Planck Encyclopedias of International Law (OUP 2018) para 1; For detailed analysis of ECtHR's fact-finding, see Jasmina Mačkić, *Proving Discriminatory Violence at the European Court of Human Rights* (Brill Nijhoff 2018) 91-124.
[70] See *e.g. Dzhioyeva v Georgia* (dec.) App no 24964/09 (ECtHR, 20 November 2018) para 27.
[71] See Annex to the Rules (concerning investigations) to the Rules of Court (1 January 2020).
[72] Simone Vezzani, 'Fact-Finding by International Human Rights Institutions and Criminal Prosecution' in Fausto Pocar, Marco Pedrazzi and Micaela Frulli (eds), *War Crimes and the Conduct of Hostilities: Challenges to Adjudication and Investigation* (Edward Elgar Publishing 2013) 351.
[73] Schabas (n 46) 807-810.
[74] *Isayeva v Russia* App no 57950/00 (ECtHR, 27 January 2005) (*Isayeva (I)*).
[75] *Isayeva, Yusupova and Bazayeva v Russia* App nos 57947/00, 57948/00, 57949/00 (ECtHR, 24 February 2005) (*Isayeva (II)*).

file and documents related to the establishment of facts in the domestic courts.[76] More importantly, on 14 October 2004, the Court held a hearing in Strasbourg to further establish the disputed facts.[77]

The Court adopted a similar approach in cases related to Turkey's security operations against the PKK. At various occasions, the Court conducted significant fact-finding to establish the factual circumstances to hold Turkey responsible for incidental loss of civilian life or lack of proper care in planning and conduct of the military operations.[78] The Court also made efforts to reconstruct the factual background to assess the lawfulness of destruction of applicants' property.[79] Some criticize the Court's approach to establishment of facts in Chechen cases as 'the Court had to establish the facts based on the written evidence (that is, without cross-examining a single witness) and other documents provided by the parties.'[80] In contrast with the Chechen cases, the Commission did undertake fact-finding visits in several Turkish cases.[81]

Overall overview of *Chechen* and *Turkish* cases reveals that 'in situations alleging both violations of the ECHR and IHL, the ECtHR and ECommHR have resorted to fact-finding missions (a bit) more frequently than when dealing with less serious allegations.'[82] However, the Court is unwilling to undertake *in loco* investigations despite the advantages of such activities. This stance may be explained by the obstacles associated with conflict or post-conflict situations. For example, in *Özkan* the Commission's on-site investigation failed to collect crucial information to reconcile factual discrepancies in the case.[83]

As summarized by Leach, Paraskeva and Uzelac, 'the 1990s can be described as Strasbourg's fact-finding golden age, for, in a series of cases, primarily against Turkey, the former Commission and, since 1998, the new Court, conducted a considerable number of fact-finding missions in order to adjudicate on fundamental and significant factual differences between the parties.'[84] The Court's notable unwillingness to engage in *in loco* fact-finding activities is explained by its permanently increasing caseload[85] and by its intended shift in its policy as a result of its subsidiary nature.[86] However, holding witness hearings in Strasbourg remains a viable option.

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[76] *Isayeva (I)* (n 74) paras 37-115; *Isayeva (II)* (n 75) paras 43-107.
[77] *Isayeva (I)* (n 74) para 8; *Isayeva (II)* (n 75) para 9.
[78] See *e.g. Ergi v Turkey* ECHR 1998-IV; *Ahmet Özkan and Others v Turkey* App no 21689/93 (ECtHR, 6 April 2004); *Akpınar and Altun v Turkey* App no 56760/00 (ECtHR, 27 February 2007).
[79] See *e.g. Akdivar and Others v Turkey* [GC] ECHR 1996-IV; *Selçuk and Asker v Turkey* ECHR 1998-II.
[80] Kirill Koroteev, 'Legal Remedies for Human Rights Violations in the Armed Conflict in Chechnya: The Approach of the European Court of Human Rights in Context' (2010) 1 International Humanitarian Legal Studies, 275, 279-283.
[81] See *Özkan* (n 78), *Ergi* (n78), *Selçuk* (n 79) cases.
[82] Vezzani (n 72) 356.
[83] *Özkan* (n 78) paras 9, 139-150.
[84] Philip Leach, Costas Paraskeva, Gordana Uzelac, 'Human Rights Fact-Finding: The European Court of Human Rights at a Crossroads' (2010) 28(1) NQHR 41, 42, 77.
[85] *ibid*.
[86] Michael O'Boyle and Natalia Brady, 'Investigatory Powers of the European Court of Human Rights' in Olga Chernishova and Mikhail Lobov (eds), *Russia and the European Court of Human Rights: A Decade of Change - Essays in Honour of Anatoly Kovler, Judge of the European Court of Human Rights in 1999-2012* (Wolf Legal Publishers 2014) 141.

3.1.2. Fact-finding in interstate and 'quasi-interstate' cases related to armed conflict

Although the Court cannot be said to be specifically designed for fact-finding in course of large-scale human rights violations and particularly in armed conflicts, it is nevertheless urged to do so in interstate cases where matters often of exceptional importance are at stake.[87] One of the recent examples of fact-finding by the Court in interstate cases is witness hearing in the *Georgia v Russia (II)* from 6 to 17 June in 2016.[88] Besides, the Court did the same in *Georgia v Russia (I)* in Strasbourg from 31 January to 4 February 2011.[89]

In interstate cases the Court is more eager to take on the role of a first-instance tribunal of fact than in individual cases as in the former situation the requirement to exhaust domestic remedies is subject to more exceptions and the Court is usually unable to rely on facts established by the domestic authorities.[90] Nevertheless, the Commission played the role of 'a first-instance tribunal' in interstate applications, heavily invested in fact-finding, taking testimony in different locations and producing its own detailed reports of factual background of the cases.[91] As for 'quasi-interstate' cases, in *Ilaşcu* the Court conducted a fact-finding hearing, on issues of effective control and jurisdiction in relation to the region of Transdniestria.[92]

3.2. Duty to cooperate with the European Court of Human Rights and military operations

Cooperation by parties with the Court gains a whole new dimension in armed conflict cases. Despite the absence of such express obligation in the Convention, rule 44A of the Rules of Court stipulates that '[t]he parties have a duty to cooperate fully in the conduct of the proceedings and, in particular, to take such action within their power as the Court considers necessary for the proper administration of justice.'[93] This obligation is further reinforced by rules 44B and 44C. The former authorizes the President of the Court to take any necessary steps where party fails to comply with duty of cooperation, while the latter makes it possible for the Court to 'draw such inferences as it deems appropriate' where a party fails to adduce evidence or provide information requested by the Court.

To what extent is article 38 complied with in armed conflict cases where the proper cooperation by parties, in particular by the respondent state, is of critical importance? According to one research, violations of Article 38 in cases against Russia and Turkey 'are context-related' with their security operations against alleged Chechen rebels and PKK members

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[87] Background Paper (n 52) 20.
[88] 'Witness hearing in the Inter-State case of Georgia v. Russia (II)', Press Release issued by the Registrar of the Court, 17.06.2016 <https://www.coe.int/en/web/tbilisi/-/witness-hearing-in-the-inter-state-case-of-georgia-v-russia-ii-> accessed 14 April 2020. A delegation of seven Judges of the Court heard 33 witnesses in total: 16 summonsed through the Georgian Government, 11 summoned through the Government of Russia and six summonsed directly by the Court.
[89] *Georgia v Russia (I)* (n 49) annex (witness hearing summary).
[90] Risini (n 55) 150, 168.
[91] Background Paper (n 52) 20.
[92] *Ilaşcu and Others v Moldova and Russia* [GC] ECHR 2004-VII paras 12-15.
[93] Rule 44A, inserted by the Court on 13 December 2004. Rules of Court of the European Court of Human Rights. 1 January 2020.

with 85% and 96% failures, respectively.[94] These figures demonstrate that respondent states refuse to cooperate with the Court in armed conflict cases. One of the rationales behind this may be the context of non-international nature of those security operations when states perceive them as a pure internal matter and maximise their efforts to avoid external judicial control by human rights bodies such as the ECtHR. This gives rise to another question: does the Court have any possible means of leverage to make the states comply with their obligation to cooperate under the Convention?

3.2.1. Information classified as a state secret: valid grounds to refuse cooperation?

States often argue that information regarding their military operations are classified as a state secret and refuse to furnish such information with the Court by way of referring to their national legislation or Court's organizational incapacity to ensure protection of such classified materials.

It can be asserted that states parties to the Convention are under obligation to develop national law and procedures in that manner to facilitate the cooperation with the Court. At the same time, it is a general principle of international law that a state may not invoke the provisions of its national law as justification for its failure to perform a treaty.[95] The Court is not also persuaded by the explanation for a failure to produce the information on the pretext that some documents are not relevant to the case[96] as it is only for the Court to decide on the relevance of information.[97] The only scenario when the Court abstains from ruling on violation of article 38 is when the failure to produce the documents does not hinder the establishment of the facts in the proceedings.[98] Russia often appealed to the Court that disclosure of information on alleged participation of the security or military forces in the killings in Chechnya was impossible because they contained information about the location and actions of military and special units.[99] In addition to national security, on various occasions Russia relied on article 161 of its Code of Criminal Procedure (CCP), which prohibits the disclosure of information from the preliminary investigation file. However, the Court always rejected these arguments because Russia did not ask the Court to apply rule 33(2) of the Rules of Court, which permits to keep the adduced evidence confidential 'for legitimate purposes, such as the protection of national security and the private life of the parties, and the interests of justice.'[100] Russia also often argues that the absence of any sanctions against a disclosure of confidential information means that the Court is unable to protect such information.[101] Nev-

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[94] Helena De Vylder and Yves Haeck, 'The Duty of Cooperation of the Respondent State during the Proceedings before the European Court of Human Rights' in Yves Haeck and Eva Brems (eds), *Human Rights and Civil Liberties in the 21st Century* (Springer 2014) 45.
[95] Art 27, Vienna Convention on the Law of Treaties, UNTS vol. 1155, 331.
[96] *Khashiyev and Akayeva v Russia* App nos 57942/00, 57945/00 (ECtHR, 24 February 2005) para 138.
[97] *Süheyla Aydin v Turkey* App no 25660/94 (ECtHR, 24 May 2005) paras 142-143.
[98] *Karov v Bulgaria* App no 45964/99, (ECtHR, 16 November 2006) paras 96-98.
[99] See *e.g. Bitiyeva and X v Russia* App nos 57953/00, 37392/03 (ECtHR, 21 June 2007) para 124.
[100] *ibid* para 125.
[101] *Musikhanova and Others v Russia* App no 27243/03 (ECtHR, 4 December 2008) para 104; *Ayubov v Russia* App no 7654/02 (ECtHR, 12 February 2009) para 108; *Sadykov v Russia* App no 41840/02 (ECtHR, 7 October 2010) para 280.

ertheless, in Court's opinion, such arguments are not plausible explanation to justify withholding necessary information and it finds the violation of article 38.

3.2.2. 'Drawing appropriate inferences': the result of non-cooperation

If the Court finds a violation of article 38, it 'may draw such inferences as it deems appropriate',[102] such as inferences as to the well-foundedness of the applicant's allegations.[103] This response by the Court to non-cooperation is practical and effective approach, resulting in shifting the burden of proof to the respondent state if the applicant makes out a *prima facie* case.[104] This approach is to be welcomed as the Court lacks other means to compel a respondent state to provide necessary information for examination of case, which is often rejected by a state on the basis of its irrelevance to the case, its classified nature as a state secret or inability to supply information under its national law. 'Drawing appropriate inferences' can be viewed as a principal pragmatic procedural tool to deal with armed conflicts as an information related to military operations are usually protected by high degree of confidentiality.

4. THE EUROPEAN COURT OF HUMAN RIGHTS AND INTERIM MEASURES IN ARMED CONFLICT CASES

Generally, provisional measures indicated by international judicial organs in situations of armed conflict are poorly complied with by states.[105] However, the ECtHR is not hesitant to indicate interim measures in individual and interstate cases emerging from active hostilities or those related to armed conflict situations.

4.1. INTERIM MEASURES IN CONFLICT-RELATED INDIVIDUAL CASES

The Court may, under rule 39 of its Rules of Court, indicate interim measures to any State party to the Convention provided that there is a risk that serious violations of the Convention might occur while it continues examination of the case. Although interim measures are provided in the Rules of Court and not in the Convention itself, in *Mamatkulov* the Court ruled for the first time that interim measures are binding, and the states' failure to comply with them results in the breach of obligations under article 34 of the Convention, i.e. individual applicant's right of application.[106] In the Court's case law, the most typical cases when interim measures are granted are related to expulsions or extraditions.[107]

A survey of case law of 2000-2010 by Haeck and Herrera asserts that the majority of cases in which states have not complied with interim measures are specifically 'conflict-related'.[108]

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[102] Rule 44C(1), Rules of Court of the European Court of Human Rights. 9 September 2019.
[103] *Timurtaş v Turkey* ECHR 2000-VI para 66.
[104] De Vylder and Haeck (n 94) 66.
[105] See *e.g.* Gentian Zyberi, 'Provisional Measures of the International Court of Justice in Armed Conflict Situations' [2010] 23 LJIL 571.
[106] *Mamatkulov and Askarov v Turkey* [GC] ECHR 2005-I paras 103-129.
[107] For a general overview of the case law on interim measures, see 'Factsheet – Interim Measures' (March 2020), <https://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf> accessed 14 April 2020.
[108] Yves Haeck and Clara Burbano Herrera, 'The Use of Interim Measures Issued by the European Court of

The reasons of such non-compliance may be both political considerations[109] and legal perception of interim measures as a rule developed not by states under the Convention, but by the Court itself in its Rules as a 'consensual law'.[110] Thus, despite the ground-breaking finding in *Mamatkulov* on their binding nature, interim measures may lack legitimacy from states' perspective.

4.2. Interim measures in intestate cases: Georgia's and Ukraine's cases against Russia

It is argued that 'translation' of Court's argumentation on binding force of interim measures in *Mamatkulov's* individual case into the specifics of interstate applications is more than a challenging task,[111] due to the differences in terms of breadth and specificity between interstate cases and individual applications.[112] The Court can easily assess compliance with interim measures in individual cases, whereas in interstate cases the Court may find itself in a completely new reality.

Following the outbreak of the armed conflict between Russia and Georgia in August 2008, on 11 August 2008 Georgia asked the Court to indicate interim measures to Russia to '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'.[113] That request was made in the context of an application against Russia lodged with the Court on the same day by Georgia. At that time, active hostilities were still ongoing.

The Court granted Georgia's request on the following day, on 12 August 2008. The President of the Court, considering that situation could give rise to a real and continuing risk of serious violations of the Convention, called upon both Russia and Georgia to comply with their engagements under the Convention particularly in respect of articles 2 and 3 of the Convention. They were further requested to inform the Court of the measures taken to ensure that the Convention was fully complied with.[114] It should be noted that these measures are still in force.[115]

Human Rights in Times of War or Internal Conflict' in Antoine Buyse (ed), *Margins of Conflict: The ECHR and Transitions to and from Armed Conflict* (Intersentia 2011) 120-123 (citing relevant cases).

[109] *ibid* 121.

[110] Stefan Kirchner, 'Interim Measures in Inter-State Proceedings before the European Court of Human Rights: *Ukraine v Russia*' (2014) 3(1) University of Baltimore Journal of International Law, 33, 52.

[111] Risini (n 55) 139, 157.

[112] Philip Leach, 'Ukraine, Russia and Crimea in the European Court of Human Rights' (EJIL: *Talk!*, 19 March 2014) <http://www.ejiltalk.org/ukraine-russia-and-crimea-in-the-european-court-of-human-rights/> accessed 14 April 2020.

[113] 'ECHR grants request for interim measures' (Press release 581, 12 August 2008) <http://hudoc.echr.coe.int/eng-press?i=003-2458412-2647173> accessed 14 April 2020.

[114] *ibid*.

[115] Country profile, Georgia, February 2020, 7 <https://www.echr.coe.int/Documents/CP_Georgia_ENG.pdf> accessed 14 April 2020.

According to Egbert Myjer, a former judge of the Court, interim measures requested by Georgia were unprecedented in light of all interim measures requested from the Court,[116] by granting of which the Court set the new precedent through intervening in ongoing international armed conflict for the first time to protect the whole population of a country.[117] However, as noted by Myjer, those interim measures did not have a slightest effect on heads of these states who were still in middle of active military operations.[118] Therefore, the possible deterrent effect of interim measures indicated by the Court in an ongoing international armed conflict is ambiguous. Moreover, it cannot be overlooked that the Court, acting cautiously and in a non-partisan manner, indicated interim measures to both parties.[119] The Court also shied away from granting specific measures requested by Georgia, such as assisting to the remaining injured civilian population and soldiers via humanitarian corridor.[120] Furthermore, due to a broad scope of this interim measure, it will be troublesome for the Court to assess which party complied with it and to what extent.

Interim measures were also requested by Ukraine against Russia. They can be grouped as declaratory interim measures, information requesting interim measures and interim measures in favour of specific individuals.[121] The interim measures indicated in the Ukrainian case largely mirrors Court's approach in *Georgia v Russia (II)*. On 13 March 2014, Ukraine lodged an interstate application against Russia concerning alleged violations in Crimea[122] and Eastern Ukraine.[123] At the same time, Ukraine submitted a request for an interim measure indicating to Russia, among other things, to refrain from measures, which could threaten 'the life and health of the civilian population on the territory of Ukraine.'[124] On the same day, the Court granted the request and called upon both states to refrain from taking any measures, in particular *military actions*, which might entail breaches of the Convention rights of the *civilian population*.[125] Differences can be spotted in reporting obligations: in Ukraine's cases both States were asked to inform the Court *as soon as possible* of the measures taken, whereas in Georgia's case this obligation was *contingent upon Court's request*. Moreover, interim measures in Ukraine's case tries to reflect normative and practical realities of armed conflict by focusing on military actions and civilian populations and are more specific as compared to interim measures granted in *Georgia v Russia (II)*.

In both situations, the ECtHR's interim measures gained new significance as one of its procedural instruments to react on international armed conflicts. Overview of conflict-related interim measures under the Convention system shows that on many occasions they ensure

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[116] Egbert Myjer, 'The European Court of Human Rights and Armed Conflicts between High Contracting Parties: Some General Remarks' in Jean Barthélemy and others, *Mélanges en l'honneur de Jean-Paul Costa La Conscience des Droits* (Dalloz 2011), 461-62.
[117] Haeck and Herrera (n 108) 97-98.
[118] Myjer (n 116).
[119] Myjer (n 116).
[120] Philip Leach (n 112).
[121] Risini (n 55) 156-157.
[122] *Ukraine v Russia (re Crimea)*, App no 20958/14.
[123] *Ukraine v Russia (re Eastern Ukraine)* App no 8019/16.
[124] 'Interim measure granted in inter-State case brought by Ukraine against Russia' (Press Release 073(2014), 13 March 2014) <http://hudoc.echr.coe.int/eng-press?i=003-4699472-5703982> accessed 14 April 2020.
[125] *ibid* (emphasis added).

effective provisional protection in critical situations. However, they 'do not act miraculously' as 'a legal instrument *per se* is not sufficient to transform (political) reality.'[126] In ongoing conflicts, provisional measures to protect population are usually requested by a state who is in militarily disadvantageous situation.[127] Therefore, it is understandable that provisional measures requested by Georgia against Russia were viewed as a political move for help rather than actual legal request for provisional measures.[128] Besides, questions are asked whether provisional measures, as the procedural mechanism utilized under incidental proceedings, are suitable to address political controversies resulting in armed conflict between states. However, on a more optimistic note, it is argued that, in the long-term perspective, provisional measures can eventually strengthen state compliance with IHRL and IHL standards.[129] Assessment of the ultimate efficiency of provisional measures in the context of interstate cases lodged by Georgia and Ukraine is a hard task at the time of writing this article, as they are still pending and the Court has not yet delivered any decision on the compliance with these interim measures. However, it may be predicted that the Court will give some legal weight to compliance with these measures while deciding on the merits.

5. PILOT JUDGMENTS: EFFECTIVE PROCEDURE TO ADMINISTER NUMEROUS INDIVIDUAL APPLICATIONS RELATED TO ARMED CONFLICTS?

Since armed conflicts give rise to hundreds and thousands of similar individual applications,[130] - making it practically impossible for the Court deal with all of them as it generally suffers from burgeoning caseload,[131] - it is critical to ask how can the Court deal with this phenomenon and whether a pilot judgment procedure can be the solution.

Pilot judgment procedure was designed to adopt 'a pilot judgment where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications.'[132] It was developed as a technique in response to so-called 'repetitive cases' not only to find a violation of the Convention, but also to identify the structural problems under-

[126] Haeck and Herrera (n 108) 129.
[127] This is obviously illustrated by the provisional measures indicated in *Georgia v Russia (II)*.
[128] Myjer (n 116) 461, 472.
[129] Zyberi (n 105) 571–584.
[130] In addition to the *Georgia v Russia (II)* interstate case, persons allegedly affected by the hostilities in Tskhinvali Region in August 2008 had lodged more than 3,300 individual applications against Georgia. In the course of 2010, five communicated cases and 1,549 new applications belonging to that group were struck out of the Court's list. As of March 2020, there are almost 600 individual applications concerning the hostilities in 2008, against Georgia, against Russia or against both States. See Georgia, Country profile, February 2020, 7, <https://www.echr.coe.int/Documents/CP_Georgia_ENG.pdf > accessed 14 April 2020. Regarding the hostilities in eastern Ukraine and the events in Crimea, there are over 6,500 individual applications before the Court. See Ukraine, Country profile, January 2020, 11-12,
<https://www.echr.coe.int/Documents/CP_Ukraine_ENG.pdf> accessed 14 April 2020.
[131] There were 43,100 applications before the Court in 2018 and 63,350 in 2017. See Annual Report 2018, European Court of Human Rights, 2019, 167
<https://www.echr.coe.int/Documents/Annual_report_2018_ENG.pdf> accessed 14 April 2020.
[132] Rule 61(1), inserted by the Court on 21 February 2011, Rules of Court of the European Court of Human Rights. 9 September 2019.

lying them and impose an obligation on States to address those problems.[133] Under this procedure, the Court may adjourn or 'freeze' related cases for a period on the condition that the Government acts promptly to adopt the national measures.[134]

In 2004, the Grand Chamber delivered the first pilot judgment in *Broniowski*, which concerned the alleged failure to satisfy the applicant's entitlement to compensation for property.[135] According to the Polish Government, the anticipated total number of people in the similar situation was nearly 80,000 (Bug River cases). The Court found that there had been a violation of the applicant's right to property and that it was caused by a systemic problem connected to malfunctioning of Polish legislation and practice. Consequently, Poland was requested to solve this situation with effective legal and administrative means, while the Court adjourned the similar applications.[136] In 2008, the Court closed Bug River cases upon concluding that the new compensation scheme adopted by Poland was effective in practice.[137] In 2011, the pilot judgment procedure was codified in Rules of Court as a new rule 61.[138]

Drawing from the *Broniowski's* legacy, the Court applies pilot judgment procedure in the strict sense, i.e. pilot judgment are only those judgments which specify, in accordance with rule 61(3), in the operative provisions of the judgment the nature of the systemic problem and the type of remedial measures that the State concerned must adopt.[139] ECtHR may also rely on general principles of 'good administration of justice and procedural economy' to prevent needless proliferation of proceedings.[140] However, the question remains: is pilot judgment procedure suitable for repetitive applications related to armed conflict situations?

One of the *possible* exceptions when pilot judgment was applied in conflict-related situation is the case of *Xenides-Arestis*, which involved the deprivation of property rights because of the continuing occupation of Northern Cyprus by Turkey.[141] The judgment possesses characteristics of a pilot judgment, but lacks them in a strict sense. It is striking that it was retrospectively labelled as the pilot judgment by the Court itself in subsequent *Demopoulos* case.[142] Authors accentuate that *Xenides-Arestis* can be deemed to be a 'quasi-pilot' judgment, because the Court refrained from expressly applying pilot judgment procedure in this case,[143] despite the fact that the Court ruled that Turkey was under the obligation to intro-

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[133] 'Factsheet – Pilot judgments', Press Unit of the European Court of Human Rights (January 2020) 1 <https://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf> accessed 14 April 2020.
[134] *ibid*.
[135] *Broniowski v Poland* [GC] ECHR 2004-V.
[136] 'Adjournment of "Bug River" cases' (Press release, 31 August 2004) <http://hudoc.echr.coe.int/eng-press?i=003-1062015-1099568> accessed 14 April 2020.
[137] 'First "pilot judgment" procedure brought to a successful conclusion Bug River cases closed (Press release, 06 October 2008) <http://hudoc.echr.coe.int/eng-press?i=003-2510971-2712345> accessed 14 April 2020.
[138] Rule 61, inserted by the Court on 21 February 2011, Rules of Court, 1 January 2020.
[139] 'Factsheet – Pilot judgments' (n 133) fn1.
[140] Antal Berkes, 'Concurrent Applications before the European Court of Human Rights: Coordinated Settlement of Massive Litigation from Separatist Areas' (2018) 34(1) Am.U.Int'l L.Rev 1, 19-24.
[141] *Xenides-Arestis v Turkey* App no 46347/99 (ECtHR, 22 December 2005).
[142] *Demopoulos and Others v Turkey* (dec.) [GC] App nos 46113/99 and 7 others (ECtHR, 1 March 2010) para 73.
[143] Philip Leach and Others, *Responding to Systemic Human Rights Violations: An Analysis of 'Pilot Judg-*

duce a remedy, which would secure genuinely effective redress for the Convention violations identified in that judgment in relation to all similar 1,400 property cases pending before it brought primarily by Greek Cypriots against Turkey.[144] Based on meticulous empirical research in the context of the Kurdish cases, it is correctly argued that 'while pilot judgments might be effective in handling repetitive cases arising from systemic legal problems […], they should not be applied to conflict or post-conflict cases where the underlying problems are deeply rooted ethno-political disputes'.[145]

According to *Broniowski* paradigm, the whole idea of a pilot judgment procedure is to identify and solve 'a structural or systemic problem or other similar dysfunction' within a state. This approach is at odds with reality of armed conflicts cases where the main cause of repetitive applications is connected to the scale of military operations and not faulty legislation or administrative practice. Pilot judgment procedure may be applied to certain aspects related to armed conflict, for example post-conflict compensation scheme, but it would necessarily fail to address numerous applications alleging specific violations from theatre of active military operations.

6. LEADING DECISIONS: ALTERNATIVE FOR PILOT JUDGMENTS IN ARMED CONFLICT CASES

Pilot judgment procedure is neither flexible nor suitable to be applied to armed conflict related applications. Alternatively, the Court has other tools in its procedural arsenal in the form of 'leading' and/or 'principal' judgments, considered as 'individual applications for which settlement serves as a model for hundreds of similar follow-up cases'.[146] Such decisions in conflict-related situations (but not necessarily in situations of active armed hostilities) are rendered in well-known cases,[147] when the Court examines specific aspects of a case 'on a level of generality that makes it possible to apply the decision to comparable pending applications',[148] resulting in strengthening the Court's effectiveness, as it does not have to rule on the same issues of admissibility and merits in similar cases.

Author submits that leading decisions can be optimized not only in conflict-related cases, but also in situations of active armed hostilities with respect to certain aspects of armed conflict litigations before the Court. One of the recent examples is the decision in *Lisnyy and Others v Ukraine and Russia*, which concerned the question of *prima facie* evidence 'about destruction of property *in the context of armed conflict*', namely by shelling of their property and

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ments' of the European Court of Human Rights and Their Impact at National Level (Intersentia 2010) 133–169.

[144] *Xenides-Arestis* (n 141) paras 37-40.

[145] Dilek Kurban, 'Forsaking Individual Justice: The Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations' (2016) 16(4) HRLR 731, 768.

[146] Berkes (n 140) 64.

[147] *ibid* 63-73 (author refers to *Loizidou, Varnava, Demopulous, Ilaşcu, Katan, Mozer, Sargsyan* and *Chiragov* cases).

[148] Lize R Glas, 'Changes in the Procedural Practice of the European Court of Human Rights: Consequences for the Convention System and Lessons to be Drawn' (2014) 14 HRLR 671, 676.

dwelling places in eastern Ukraine.[149] The Court dismissed the applications due to insufficient *prima facie* evidence. Curiously, referring to *Lisnyy*, the Court rejected 'a further 1,170 *similarly unsubstantiated* cases' in 2016.[150] More importantly, the Court relied on *Lisnyy* when it declared similar cases inadmissible against Georgia in the context of armed conflict of 2008 between Russia and Georgia in Tskhinvali Region, noting that applicants failed to produce appropriate *prima facie* evidence in support of their complaints on attribution alleged destruction of property to Georgian armed forces.[151] Thus, *Lisnyy* can be regarded as a leading or principal judgment on the issue of sufficient evidence to substantiate the allegations of destruction or damage of property in armed conflicts. This approach enabled the Court to effectively address similar allegations in similar context without time- and resource-consuming individual deliberations.

Methodological approach of leading decisions differs from the pilot judgment mechanism, which is not practically feasible to be applied to armed conflict cases due to its strictly defined formal and procedural elements. Leading decisions, on the other hand, can be viewed as an alternative to pilot judgments and a useful adjudication technique, which capacitates the Court to rule on numerous individual armed conflict related applications based on generalized findings made in previous decision from the same or similar situation.

7. ADJOURNMENT OF INDIVIDUAL APPLICATIONS BEFORE EXAMINATION OF INTESTATE CASES

The Convention does not envisage rules on interaction between individual and interstate applications when they overlap. However, they obviously do not exclude each other.[152] Since conflict-related interstate cases are accompanied by a great number individual cases,[153] it became essential for the Court to deal with them in a coordinated manner. The decision made by the Court in 2018 in relation to individual applications on Eastern Ukraine pending the Grand Chamber judgment in related *Ukraine v Russia (re Eastern Ukraine)* interstate case is a clear illustration of Court's solution to this challenge.

The Court 'adopted a plan for its future processing of thousands of applications from individuals who had raised complaints against Ukraine or Russia or both countries in relation to the conflict in Eastern Ukraine' and '[t]o save as much time as possible, the Court has decided [..] to record an adjournment for each case, pending a judgment in the inter-State case, with a view to having the files complete and ready for decision or judgment as soon as pos-

[149] *Lisnyy and Others v Ukraine and Russia* (dec.) App nos 5355/15 and 2 others (ECtHR, 05 July 2016) paras 21, 27 (emphasis added).
[150] 'ECHR to adjourn some individual applications on Eastern Ukraine pending Grand Chamber judgment in related inter-State case' (Press release 432(2018), 17 December 2018) (emphasis added).
[151] *Naniyeva and Bagayev v Georgia* (dec.) App nos 2256/09, 2260/09 (ECtHR, 20 November 2018); *Kudukhova and Kudukhova v Georgia* (dec.) App nos 8274/09, 8275/09 (ECtHR, 20 November 2018).
[152] Risini (n 55) 208.
[153] Russia, Country profile, February 2020, 28-29 <https://www.echr.coe.int/Documents/CP_Russia_ENG.pdf> accessed 14 April 2020.

sible thereafter.'[154] It should be noted that while most of those individual applications touch upon allegations of the detention and destruction of housing during armed conflict, the Court waits for judgment in interstate case to clarify 'a key issue' of jurisdiction in under Article 1 of the Convention.[155] No such decision has been made in the context of *Georgia v Russia (II)*. The Court is definitely guided by the Copenhagen Declaration of 2018, which recognized '[t]he challenges posed to the Convention system by situations of conflict and crisis in Europe' and recommended not to decide on individual applications 'before the overarching issues stemming from the inter-State proceedings have been determined in the inter-State case.'[156] It can be further argued that, in the situations like the present one, the Court considers the judgment in interstate case as a possible *leading decision* for 'individual applications raising the same issues or deriving from the same underlying circumstances'.[157]

The decision to adjourn individual applications related to *Ukraine v Russia (re Eastern Ukraine)* is a pragmatic action by the Court in terms of judicial economy in order to sustain efficacy of the Convention system in armed conflicts in a coordinated manner. It displays the Court's willingness and gives a practical exhibition of its flexibility to acknowledge and respond to those challenges which could not have been foreseen when the Convention was adopted, when it was thought that it would be applied only during peacetime.

8. THE EUROPEAN COURT OF HUMAN RIGHTS AND REPARATIONS IN ARMED CONFLICTS: REDRESS THROUGH 'JUST SATISFACTION'

The present chapter intends to show that the Court plays a noteworthy role in filling the gap of unavailability of the procedural grounds in IHL for victims of military operations to claim individual reparations before an international court. The ECtHR, 'on the implicit application of the standards of humanitarian law, albeit cloaked in the Convention-specific categories of legitimacy, necessity, and proportionality',[158] indirectly enforces IHL through finding violations of the Convention in armed conflict cases. Notwithstanding the objections by states,[159] ECtHR's judicial review of military operations 'is a major step towards a larger role for judicial processes in the context of war […] and towards greater protection for war victims, including provision for reparation which is almost entirely lacking in international humanitarian law.'[160]

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[154] 'ECHR to adjourn some individual applications on Eastern Ukraine' (n 150).
[155] *ibid.*
[156] Copenhagen Declaration on the Reform of the European Convention on Human Rights System, para 45.
[157] *ibid.*
[158] Alexander Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' (2008) 19(1) EJIL, 161, 174.
[159] See eg Toni Pfanner, 'Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims' (2009) 91 IRRC 279, 313. Pfanner identifies several features of this opposition, such as unwillingness of states to be subject to any form of judicial supervision during armed conflicts; claims of non-justiciable character of military operations; reducing of military capabilities by parallel application of IHL and human rights law; one-sided jurisdiction of human rights mechanism which excludes non-state groups from their purview and fragmentation of law of armed conflict on regional level.
[160] *ibid.*

States are under general obligation of reparation, which does not mean *per se* that such right is enforceable for an individual. The Convention was the first international legal instrument, which enabled individuals to enforce their right to reparation against state through binding judgments on just satisfaction under article 41 of the Convention.

Article 41 of the Convention on just satisfaction establishes at the *international* level that the Court 'shall, if necessary, afford just satisfaction to the injured party' if the internal law of a state party allows only *partial reparation*.[161] 'Just satisfaction' is the term used by the Convention with the meaning of reparation or compensation and addresses 'the entire spectrum of reparations available to an injured party', such as compensation for pecuniary or non-pecuniary damage and costs and expenses.[162] In *Khashiyev and Akayeva*, for example, which concerned the killing of applicants' relatives (civilians) in Chechen conflict, the Court held that the applicants' relatives were killed by Russian servicemen and that their deaths were attributed to Russia. Consequently, under article 41, Russia was ordered to pay 15,000 euros to the first applicant and 20,000 euros to the second applicant in respect of non-pecuniary damage, and 10,907 euros in respect of costs and expenses.[163] In *Isayeva* the Court fully applied article 41 and the applicant was awarded monetary compensation of 18,710 euros having regard to its conclusions that the death of the applicant's son, which violated article 2 of the Convention, deprived the applicant of the financial support provided by his son. Furthermore, the applicant was awarded 25,000 euros as non-pecuniary damage and 12,000 euros for costs and expenses.[164]

Another interesting caveat of article 41 is its application in interstate cases, which is one of the recent developments in the Court's case law. By the time of writing, the Court has applied article 41 in two interstate cases: *Cyprus v Turkey*[165] and *Georgia v Russia (I)*.[166] In both proceedings, the respondent states argued that article 41 was applicable only to individual cases. However, the Court observed that 'the overall logic of Article 41 is not substantially different from the logic of reparations in public international law', thus, 'Article 41 of the Convention does, as such, apply to inter-State cases',[167] and held that Turkey was to pay 90 million euros in total. The Court also noted that 'it is the individual, and not the State, who is directly or indirectly harmed and primarily "injured" by a violation of one or several Convention rights. Therefore, if just satisfaction is afforded in an inter-State case, it should always be done for the benefit of individual victims.'[168] Hence, it follows that if the applicant state submits just-satisfaction claims of 'sufficiently precise and objectively identifiable groups of people', individual victims can benefit from interstate cases.[169] The Court heavily relied on these findings in *Georgia v Russia (I)* and ruled that Russia is to pay Geor-

[161] Art 41 ECHR (emphasis added).
[162] Yulia Ioffe, 'Case of Georgia v. Russia (I) (Just Satisfaction)' (2019) 113 AJIL 581, 582.
[163] *Khashiyev and Akayeva v Russia*, App nos 57942/00 and 57945/00 (ECtHR, 24 February 2005).
[164] *Isayeva (I)* (n 74) paras 231-246.
[165] *Cyprus v Turkey* (just satisfaction) (n 48).
[166] *Georgia v Russia (I)* [GC] (Just satisfaction) (n 67).
[167] *Cyprus v Turkey* (just satisfaction) (n 48) paras 41-43.
[168] *ibid* para 46.
[169] *ibid* para 47. Cyprus submitted just-satisfaction claims for 1,456 missing persons and the enclaved Greek-Cypriot residents of the Karpas peninsula.

gia 10 million euros in respect of non-pecuniary damage suffered by 'a group of at least 1,500 Georgian nationals.'[170] In both cases the Court left it to applicant states, under the supervision of the Committee of Ministers, to set up an effective mechanism to distribute monetary just satisfactions to the individual victims. It is unfortunate that both just judgments are still pending for the execution 'since both interstate cases in which the ECtHR awarded compensation are politically sensitive and involve armed conflict', thus doubts are raised as to the effectiveness of protection victims via interstate cases.[171] Nevertheless, the Court's move is to be welcomed as application of article 41 in interstate cases increases the procedural avenues for providing redress to individual victims – whereas the only option for a long time had been individual applications, now it is procedurally possible in interstate cases as well.

In light of the Court's concentration on monetary compensations for violations in armed conflict cases, it is underlined that such compensations fail to implement 'full reparations'.[172] However, the Court's efforts should not be underappreciated for it established the solid case law on compensations for human rights violations in armed conflicts or emergency situations.[173] On this basis it is more than justified to conclude that for 'victims in search of a forum'[174] '[t]here is no equivalent to the European Courts of Human Rights to which those aggrieved by breaches of international humanitarian law can turn'.[175]

CONCLUSION

The European Court of Human Rights is equipped with sufficiently developed primary and secondary procedural infrastructure to ensure tangible redress for individual victims of armed conflicts. The primary procedures of individual and intestate applications transform the unenforceable IHL rights into enforceable rights under the Convention, while the secondary procedures guarantee the Court's practical efficiency to address realities of armed conflicts after the primary procedures are invoked by applicants. The Court has got acclimated itself to the new challenging reality by utilising secondary procedures, including the duty of the parties to cooperate with the Court; fact-finding and investigation (albeit limited); indication of interim measures in ongoing armed conflicts; operationalizing pilot judgment procedure and 'principal' judgments to deal with repetitive cases related to military operations; coordination of individual and interstate applications related to the same situation; and

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[170] *Georgia v Russia (I)* [GC] (Just satisfaction) (n 67) paras 71, 74, 76.
[171] Ioffe (n 162) 585.
[172] Koroteev (n 80) 302–303. Koroteev concludes that the Court failed to fight against impunity in Chechen situation as the Court refuses to indicate complex measure for Russia as a general measure, including fresh investigations, whereas only monetary compensation is not sufficient and enables Russia to atone human rights violations.
[173] Oberleitner (n 4) 336.
[174] Jean-Marie Henckaerts, 'Concurrent Application of International Human Rights Law and International Humanitarian Law: Victims in Search of a Forum' [2007] HR&ILD 95.
[175] Jean Paul Costa and Michael O'Boyle, 'The European Court of Human Rights and International Humanitarian Law' in Dean Spielmann and others, *The European Convention on Human Rights: A Living Instrument – Essays in Honour of Christos L. Rozakis* (Bruylant 2011) 112.

the firmly established case law to award reparations through ‘just satisfaction’ (which may not be full reparation). The Court demonstrates its procedural capacity to fill enforcement gaps of IHL by incorporating human rights compliance procedures into armed conflict related litigations. It should be borne in mind that the Court was established for peacetime human rights violations and cannot be subject to strict evaluation as if it was designed as a specialized judicial forum for enforcing obligations of parties in armed conflict. The Court remains the human rights mechanism, which is seized by individuals and states for indirect enforcement of IHL, often under the disguise of the European Convention on Human Rights.