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CONSTITITIONAL COURT OF GEORGIA

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FOREWORD

The "Journal of Constitutional Law" has developed into an authoritative publication that provides Georgian scholars, legal practitioners, and young researchers with the opportunity to establish a place in the field of research through an internationally-refereed academic platform. It is gratifying that the interest in the publication from legal professional circles and novice researchers is growing, which creates new opportunities for the development of the journal.

The 2nd edition of the 2024 "Journal of Constitutional Law" brings together four academic pieces by Georgian authors. In particular, the journal combines papers on the following interesting legal issues: the scope of the extraterritorial jurisdiction of the European Convention on Human Rights in the case of "Georgia v. the Russian Federation (II)", where the Court found that the events that occurred during the active phase of the 2008 hostilities did not fall within the jurisdiction of the Russian Federation (authored by Professor Eva Gotsiridze), an analysis of Georgian legislation and practice regulating life-threatening industrial activities and their compliance with European human rights standards (authored by Professor Konstantin Korkelia), a discussion of the interrelationship between women's economic empowerment and broad human rights principles in the context of the right to substantive equality (authored by Professor Niko Tatulashvili and Mariam Kharebashvili), an analysis of the criminal issue of the burden of proof in the context of continued imprisonment in the light of human rights standards (Authored by Levan Dzneladze).

I hope that this edition of the Constitutional Law Journal will be a useful resource for professional circles and will create an interesting opportunity for research-based discussion.

Professor **Merab Turava**
President of the Constitutional Court of Georgia

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*Eva Gotsiridze**

CONCEPT OF EXTRATERRITORIAL JURISDICTION IN THE PRISM OF THE CASE GEORGIA V. RUSSIA (II)

ABSTRACT

The Article concerns the concept of extraterritorial jurisdiction in the meaning of Article 1 of the European Convention of Human Rights (ECHR/the Convention) and its application in the interstate case of *Georgia v. Russia (II)* relating to the war of August 2008. The Article provides a critical assessment of the Judgment of the Grand Chamber of the European Court of Human Rights (ECtHR/the Court), according to which the events that occurred in the active phase of hostilities (8-12 August 2008) did not fall within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention, wich resulted in declaring this part of the interstate complaint inadmissible.

The article states that the arguments based on the applicability of international humanitarian law towards international conflicts, the exclusion of spontaneous extraterritorial acts from the scope of jurisdiction, the insufficiency of causal links, and the practice of non-derogation from Article 15 of the ECHR failed to establish a coherent and convincing legal basis for the judgment concerning the active phase of the war. According to the author, the circumstances of the case readily allowed the ECtHR to recognize the extraterritorial jurisdiction of the Russian Federation based on both the spatial model ("effective control over an area") and, especially, on the personal model ("state agent authority and control over an individual"). Moreover, the Court could have expanded the substantive scope of these two concepts or established a new, third form of extraterritorial jurisdiction. According to the article, excluding the active phase of armed conflict from the scope of responsibility and accountability of a Convention-binding state grants implicit permission for such states to act beyond their borders in ways that would be prohibited under the Convention within their own territory.

The author of the article argues that the protection of human rights in Europe during armed conflicts should not remain beyond European supervision, especially when the risk of human vulnerability and the likelihood of victimization are increasing significantly due to extraterritorial military actions.

The article emphasizes the essential role that the concept of causality can play in the lawful determination of a state's extraterritorial jurisdiction. The author argues

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that a jurisdictional link between the affected individuals and the respondent state's extraterritorial actions should, in principle, be recognized if there is a causal connection between those actions and the alleged violation of the rights of individuals located beyond the state's territory, provided that this connection was reasonably foreseeable. According to the author, the foreseeability of the causal link should be recognized as a factor that gives rise to a presumption of the existence of a jurisdictional link between the state committing the act and the relevant victim; resulting in the burden of proof shifting to the respondent state.

The article, among other issues, discusses the scope within which a state's positive and negative obligations should be considered when committing an extraterritorial act concerning individuals located beyond the state's territory who may be directly or indirectly affected by that act.

I. THE JUDGMENT IN THE CASE OF "GEORGIA V. RUSSIA" (II)

On January 21, 2021, the ECtHR examined the case of *Georgia v. Russia (II)* based on an interstate complaint. By eleven votes to six, the Court judged that the events occurring during the active phase of hostilities (August 8-12, 2008) did not fall within the jurisdiction of the Russian Federation for the purposes of Article 1 of the ECHR; consequently, the interstate complaint was declared inadmissible in this part. The Court found that neither of the two possible grounds for the exercise of extraterritorial jurisdiction was present - neither "effective control over an area" nor "state agent authority and control over an individual". However, the Court ruled that the events occurring after the cessation of hostilities fell within the jurisdiction of the Russian Federation, as Russia had established "effective control" over the relevant territories. In this part, the complaint was declared admissible, and the Grand Chamber found multiple violations of the Convention. The procedural violation of Article 2 of the ECHR was also recognized due to the failure to investigate killings, including those that occurred during the active phase of the armed conflict. According to the judgment, this was because Russia established "effective control" over the relevant territories shortly thereafter, the alleged perpetrators were located in the Russian Federation or in areas under its control, while Georgia was prevented from conducting an adequate and effective investigation.

Thus, since the ECtHR found that the events occurring during the active phase of hostilities did not fall within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention, Russia's international legal responsibility under the ECHR could not be established for the loss of life and other serious harm linked to the active phase of the armed conflict. The present article analyzes whether the exclusion of the active phase of the armed conflict from the responsibility and accountability framework

of a Convention-signatory state was justified and appropriate for the purposes of the Convention. Five partly dissenting opinions were written regarding the judgment in the case of *Georgia v. Russia (II)*,[1] the authors of which, relying on different arguments and reasoning, hold that for the purposes of Article 1 of the Convention, the victims of Russian military actions during the period of August 8-12, 2008, were under the (extraterritorial) jurisdiction of this country; therefore, in this part, Georgia's interstate complaint against the Russian Federation should have been admitted.

II. "JURISDICTION" IN THE SENSE OF ARTICLE 1 OF THE ECHR

The concept of "its jurisdiction" given in Article 1 of the Convention primarily takes as its starting point the notion of state jurisdiction under international law, which is linked to territorial jurisdiction, where a state legitimately exercises public authority. However, this approach proved insufficient, leading to a modification of the concept of "its jurisdiction". In its current interpretation, "jurisdiction" under the Convention reflects the scope of public authority that is actually exercised by the state. Since, in practice, a state's legal (de jure) authority and factual (de facto) power do not always coincide, the case-law of the ECHR has established that the Convention applies only to the territories where a state effectively exercises public authority. A Contracting State may be unable to exercise effective control over part of its own territory; or, it may exercise such control over the territory of another state or part of it without any valid jurisdictional title; or, a state agent may have the ability to exercise authority and control over individuals located in the territory of another country. In such cases, the issue of a state's extraterritorial jurisdiction arises. The need to protect human rights has driven the expansion of the scope of state jurisdiction in practice and led to the development of the concept of extraterritorial jurisdiction. This ensures that situations where a Contracting State must bear responsibility under the ECHR for violations of Convention rights beyond its own territory fall within the Convention's protective framework. Over time, two forms of extraterritorial jurisdiction have been established: "effective control over an area" (spatial jurisdiction) and "state agent authority and

[1] It was established that, considering the killings of civilians, the burning and looting of homes in Georgian villages located in South Ossetia and the "buffer zone," an administrative practice inconsistent with Articles 2, 3, and 8 of the Convention, as well as Article 1 to Protocol No.1, was identified. Violations of Articles 5 and 3 of the Convention were found due to the arbitrary detention of individuals and the conditions of their imprisonment. Additionally, a violation of Article 3 was established regarding the torture of Georgian prisoners captured by South Ossetian forces. A violation of Article 2 of Protocol No.4 was recognized due to the restriction of freedom of movement of forcibly displaced persons from the conflict zone and the denial of their right to return. The violation of Article 2 of Protocol No.1 was based on the alleged looting and destruction of public schools and libraries, as well as the intimidation of ethnically Georgian students and teachers. A violation of Article 38 of the Convention was established due to the failure of the respondent government to provide the European Court with so-called war reports.

control over an individual" (personal jurisdiction). The ECtHR rejected both forms of Russia's extraterritorial jurisdiction in relation to the active phase of the August war in Georgia (August 8-12, 2008).

III. WAS THERE "EFFECTIVE CONTROL OVER AN AREA" (THE SO-CALLED SPATIAL JURISDICTION)?

According to the spatial model of extraterritorial jurisdiction, established in the case of *Loizidou v. Turkey*,[2] jurisdiction arises when a state exercises effective control over an area beyond its national territory, where the alleged victim is located.

The ECtHR defines jurisdiction through "effective control over an area" as follows: "An exception to the principle under Article 1 that jurisdiction is limited to a state's own territory arises when a Contracting State, as a result of its lawful or unlawful military operation, exercises effective control over an area outside its national territory. In such an area, the obligation to secure the rights and freedoms under the Convention derives solely from the fact of this control, regardless of whether it is exercised directly by the armed forces of the Contracting State or through a subordinate local administration." [3] In the case of *Banković*, the Court clarified that effective control over an area beyond a state's national territory constitutes the primary exception to the territorial applicability of the Convention. The ECtHR explained that extraterritorial jurisdiction arises when a state, through effective control over a foreign territory and its inhabitants, exercises all or some of the public powers that are normally exercised by a national government.[4]

According to the ECtHR' approach, the determination of whether a Contracting State exercises effective control over an area beyond its own territory is a question of fact. The ECtHR primarily considers the strength of the state's military presence in the area; while other relevant factors include the degree of military, economic, or political support provided by the Contracting State to a subordinate local administration, through which it exerts influence and control over the region.[5]

[2] See joint partly dissenting opinion of Judges Yudkivska, Pinto de Albuquerque and Chanturia; joint partly dissenting opinion of Judges Yudkivska, Wojtyczek and Chanturia; partly dissenting opinion of Judge Pinto de Albuquerque; partly dissenting opinion of Judge Chanturia; and partly dissenting opinion of Judge Lemmens. Concurring opinions were also written regarding the case Georgia v. Russia (II).

[3] Judgment of the European Court of Human Rights N15318/89 "Loizidou v. Turkey", 18 December 1996. Paragraph 188.

[4] Judgment of the European Court of Human Rights N25781/94 "Cyprus v. Turkey" [GC] 2001-IV. Paragraph 76; Judgment of the European Court of Human Rights "Banković and Others v. Belgium and Others" (dec.) [GC] 2001. 890. Paragraph 70; Judgment of the European Court of Human Rights N48787/99 "Ilaşcu and Others v. Moldova and Russia" [GC] 2004-VII. Paragraphs 314-16; Loizidou v. Turkey (merits) supra note 4, paragraphs 52 and 56; Judgment of the European Court of Human Rights N55721/07 "Al-Skeini and Others v. the United Kingdom" [GC] 2011. Paragraph 138.

[5] Banković and Others v. Belgium and Others, supra note 5, paragraph 71.

The ECtHR has previously recognized extraterritorial jurisdiction and respective state responsibility based on the notion of "effective control over an area" in multiple cases. For example, the Court acknowledged Turkey's extraterritorial jurisdiction over the occupied territory of Northern Cyprus,[6] Russia's extraterritorial jurisdiction over Transnistria in Moldova,[7] Armenia's extraterritorial jurisdiction over Nagorno-Karabakh,[8] etc.

However, in the case of the 2008 August war, as noted above, the ECtHR's Grand Chamber rejected the notion that during the active phase of hostilities (August 8-12, 2008) the Russian Federation exercised "effective control" over the combat zone and, consequently, its extraterritorial jurisdiction in the meaning of Article 1 of the Convention. Specifically, the Court explained the following:

"It should be emphasized that in its admissibility decision, the Chamber noted that "the present application concerns events that began in South Ossetia and Abkhazia on 7 August 2008" (see *Georgia v. Russia (II)* (dec.), cited above, §98). Furthermore, the question of the nature and extent of the control exercised by the Russian Federation in South Ossetia is immaterial for the present case, given that most of the fighting took place in areas that were previously under Georgian control: in South Ossetia, in the ethnically Georgian villages around Tskhinvali, and in Gori, which is located in the "buffer zone" on uncontested Georgian territory. The applicant Government itself acknowledged that Russian forces established effective control over the remaining territory of South Ossetia and the "buffer zone" during the five-day war or immediately after its conclusion." (See Paragraph 78 cited above, the Judgment, §111).

In that connection it can be considered from the outset that in the event of military operations - including, for example, armed attacks, bombing or shelling - carried out during an international armed conflict, one cannot generally speak of "effective control" over an area. The very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos means that there is no control over an area. This is also true in the present case, given that the majority of the fighting took place in areas which were previously under Georgian control" (the Judgment, §126). […] the active phase of hostilities […] is very different, as it concerns bombing and artillery shelling by Russian armed forces seeking to disrupt the Georgian army and to establish control over areas forming part of Georgia." (The Judgment, §133).

[6] Loizidou v. Turkey, supra note 4, paragraph 16; Ilaşcu and Others v. Moldova and Russia, supra note 5, paragraphs 387, 388-94; Al-Skeini and Others v. the United Kingdom, supra note 5, paragraph 139.

[7] Cyprus v. Turkey, supra note 5, paragraphs 76-80.

[8] Ilaşcu and Others v. Moldova and Russia, supra note 5; Catan and Others v. the Republic of Moldova and Russia.

The author of the article argues that the arguments presented in the referenced provisions, which were used to justify the rejection of the Russian Federation's jurisdiction, are artificial and lack credibility.

The assertion that "question of the nature and extent of the control exercised by the Russian Federation in South Ossetia was immaterial" because "most of the fighting took place in Georgian-controlled territory and the "buffer zone" is highly debatable. The analysis of the military confrontation from August 8-12, 2008, without properly considering the broader historical context or disregarding it entirely, is not only unreasonable but simply impossible. The actions of the Russian Federation's armed forces during this period were a continuation of the aggressive policy that Russia had pursued in Abkhazia and South Ossetia since the 1990s - within Georgia's internationally recognized territory - through both direct military intervention and military, economic, and financial support for separatist groups, which ultimately led to Georgia's de facto loss of control over these regions. The fact that "the present complaint concerned events that began in South Ossetia and Abkhazia on August 7, 2008," did not prevent the ECtHR from taking into account the recent historical context. It is well established that in cases of continuing violations**,** the examination of events predating a state's ratification of the ECHR is permissible if their consequences persist. What is most regrettable in this case is that the Court had access to extensive materials, including findings from EU missions and the International Criminal Court, which the ECtHR could have referred to for assessing the situation leading up to the outbreak of active hostilities.

The documentary evidence presented in the case demonstrated that the Russian Federation exercised significant military, economic, and political control over Abkhazia and South Ossetia even before the outbreak of military hostilities on August 8, 2008. This was corroborated by, among other sources, the European Parliament's Resolution of June 5, 2008, which concluded that, given the strength of Russia's military presence in the area (including the number of troops and military equipment), Russian military forces could no longer be considered neutral and impartial peacekeepers. Additionally, the EU's Fact-Finding Mission established that high-ranking Russian officials had already exercised de facto control over South Ossetian institutions - particularly over security services and forces - before the conflict began. The de facto authorities, including the so-called Ministries of Defense, Interior, Civil Defense and Emergency Situations, as well as the State Security Committee, State Border Protection Service, and Presidential Administration, were staffed either by Russian officials or by South Ossetian residents holding Russian citizenship, many of whom had previously served in equivalent positions in Russia's central government or Russia's North Ossetia region. Even if South Ossetia was not formally dependent on another state, Russia's decisive

influence on security-related decision-making was so substantial that South Ossetia's claim to independence appeared highly questionable."[9]

The ECtHR also failed to take into account the January 27, 2016 decision of the Pre-Trial Chamber I of the International Criminal Court, which authorized the Court's prosecutor to open an investigation into alleged crimes committed in Georgia's South Ossetia region between July 1 and October 10, 2008. This decision described the factual situation as follows: "At this stage, there is sufficient indication that the Russian Federation exercised overall control over South Ossetian forces, which means that the period before the direct intervention of Russian forces should also be considered as an international armed conflict." Accordingly, it was evident that the Russian Federation had exercised effective control in the region even before the outbreak of the armed conflict. However, the Court entirely disregarded this fact.

This shortcoming was precisely pointed out by ECtHR's Judge Lado Chanturia in his partly dissenting opinion on the judgment:

"[The active phase of the conflict] was not an isolated event disconnected from prior developments but rather part of a continuous situation, which included both the pre-conflict period and its aftermath." The fact that "The Russian Federation remained an occupying power in both regions even after the cessation of hostilities" clearly demonstrated that "Russia's direct military intervention during the period of August 8-12 was nothing more than an intensified form of the military support it had continuously provided for years to the de facto authorities of these two regions, even before the so-called small war began. According to the explanation provided by Judge Chanturia, "the result of the respondent state's decision to engage in a large-scale armed conflict with Georgia was the further consolidation and reinforcement of its status as an occupying power. Hence, from a passive occupying power the respondent State became a belligerent occupying power."[10]

As Judge Chanturia points out, the ECtHR, unfortunately, failed to properly take into account the conclusions of the EU's Independent International Fact-Finding Mission, which, unlike the Court, adopted a continuous and comprehensive approach in describing the August 8-12 military conflict.

The partly dissenting opinion also highlights that the third party involved in the case - the Human Rights Centre of the University of Essex,[11] advised the ECtHR that before deciding on Russia's jurisdiction over alleged crimes committed during the armed conflict, it should first have answered the question: What was the nature and extent of the

[9] Judgment of the European Court of Human Rights N13216/05 "Chiragov and Others v. Armenia" [GC] 2015. Paragraph 168.

[10] The EU Fact-Finding Mission Report, 2, 133.

[11] See partly dissenting opinion of Judge Chanturia. Paragraph 38.

control, if any, that Russia exercised over South Ossetia and Abkhazia before the armed conflict? Not to mention that the applicant government itself had also, unsurprisingly, requested the ECtHR to assess the pre-existing situation before the active phase of the conflict.

It should not be overlooked that the ECtHR separated the active phase of hostilities (August 8-12) not only from the preceding period but also from the subsequent phase, during which it was determining Russia's extraterritorial jurisdiction. Specifically, the Court distinguished between the active (August 8-12) and passive (post-August 12) phases[12] of the Georgia-Russia conflict, ostensibly on the grounds that "a distinction needs to be made" between these two periods; however, it failed to explain why such a distinction was necessary. Judge Chanturia considered this segmentation to be a "questionable methodology" adopted by the majority in a case "involving two Contracting Parties to the Convention." In Judge's view, a more logical and appropriate approach to determining jurisdiction would have been to examine issues such as 'attributability' and 'imputability'.

In this regard, even more controversial and unacceptable is the Grand Chamber's above-mentioned statement that: "The very realities accompanying the confrontation and fighting between hostile military forces, which were attempting to establish control over an area amidst chaos (emphasis added by the author), meant that there was no control over that area."

First of all, the above statement is openly contradictory. If the area in question was under Georgian control, it is inaccurate to describe it as a territory where "the sides were attempting to establish control amidst chaos." Such wording creates the false impression that the situation involved on some kind of unclaimed territory, a remote and uninhabited island, where both parties had an equally legitimate right to assert control. Furthermore, by framing events as occurring "in the context of chaos," it effectively suggests that determining right and wrong becomes impossible, making it unclear who acted lawfully and who acted unlawfully.

Secondly, as the ECtHR described, "the majority of the fighting" took place in Georgian-controlled territory. While this is true, for the sake of accuracy, it would have been more precise to state that the fighting occurred within the territory of Georgia, where Georgia was legitimately exercising its control. Moreover, the hostilities themselves should have been described as a confrontation between two subjects, one of which (the Russian Federation) was attempting to seize such control of the internationally recognized and lawfully governed territory of a foreign country (Georgia) through the unlawful use of military force, while the other (Georgia) was seeking to maintain its legitimate de facto control over this territory. Thus, the wording used by the ECtHR, which effectively

[12] See Judgment of the Human Rights Centre of the University of Essex. Paragraph 80.

served as the basis for rejecting the recognition of extraterritorial jurisdiction, does not adequately or fairly reflect the actual circumstances of the case. In reality, the situation was undeniably evident - it concerned one Contracting Party to the Convention carrying out hostile and aggressive military operations on the territory of another Contracting Party, with the aim of its occupation. In other words, it was an aggressive war waged by the Russian Federation, while Georgia was engaged in self-defense. Thirdly, the Court could and should have taken into account that even if not directly within the combat zone itself, Russia undoubtedly exercised "effective control" - in the sense of the Convention - over the adjacent territories - by having military units, weaponry, and a subordinate local administration in these areas, which it supported politically, economically, and in other ways. All of this was the direct result of Russia's prior expansionist actions. Fourthly, the ECtHR should have considered not only the situation before the outbreak of hostilities but also the subsequent developments: Specifically, Russia's military aggression led to the full occupation of the respective region, followed by the Russian Parliament's recognition of the "independence" of Georgia's two regions. This clearly demonstrates that the case involved a pre-planned act of aggression with far-reaching objectives, rather than a spontaneous or immediate extraterritorial act. All the more so, it was not a case, where "hostile military forces were attempting to establish control over an area amidst chaos," as the ECtHR's reasoning suggested.

Moreover, excluding the active phase of hostilities from Russia's jurisdiction on the grounds that the relevant territory was under Georgian control before the fighting began, and therefore Russia could not have exercised "effective control over an area," is not only unjust but also illogical and irrational in other aspects. Following this reasoning, if one Contracting State were to invade and progressively occupy the entire territory of another State, its extraterritorial jurisdiction under the Convention would still not be recognized, because at the time of each new town or village being bombed, that area would not yet be a place where the aggressor State exercised "effective control" - as such control would only be established after the military aggression had already taken place. Notably, the Court itself cited a statement by the applicant government, which confirmed that the events of August 8-12 were immediately followed by the Russian Federation establishing control over the parts of Georgian territory where the fighting had taken place (the Judgment, Paragraph 78). Thus, it appears that even the "immediate establishment of effective control" was not deemed a decisive factor by the Court for recognizing the spatial model of extraterritorial jurisdiction. Once again, projecting this perspective onto the broader and large-scale military confrontation, such as the war in Ukraine might be interesting for the reader. There, too, the Russian Federation is waging an aggressive war, continuously bombing and destroying more and more territory, causing loss of life, destruction, and devastation. It advances further, gradually establishing "effective control" over new areas. Following this logic, every newly bombed and destroyed area would remain beyond Russia's extraterritorial

jurisdiction, simply because "effective control" would only be recognized after/as a result of the use of force - bombing, destruction, and loss of human life.

If this is the case - and if it is to remain so - then it follows that the entire system of the Convention is ineffective, as it proves to be an inadequate instrument in addressing the most dramatic challenges. It fails to properly respond to the most serious and large-scale human rights violations committed by Contracting States within the Convention's legal framework.

However, it is hard to believe that if the ECtHR is ever called upon to examine Russia's violations of Convention rights during the war in Ukraine - even if only because many acts of aggression occurred while the ECHR was still in force for Russia - it would apply the same approach and once again seek to exclude Russia from responsibility. In the author's view, the large-scale nature of hostilities and the massive number of casualties - which, in the Georgian case, became one of the justifications for rejecting jurisdiction[13] - will likely lead the ECtHR in the opposite direction. It is probable that the Court will develop new criteria or approach to expand the concept of extraterritorial jurisdiction. Unfortunately, the August war and its victims were not deemed sufficient motivation for the majority of international judges to "develop the case-law" beyond the principles already established. The ECtHR's position would have been far more reasonable and just if it had used Georgia's case against Russia as a foundation for a new approach, one that would have given real substance to the concept of extraterritorial jurisdiction and ensured that the victims of Russian military aggression were not excluded from the protection of the Convention - especially considering that these victims were located within the Convention's legal space, on Georgian territory.

IV. WAS THERE "STATE AGENT AUTHORITY AND CONTROL" (THE SO-CALLED PERSONAL JURISDICTION)?

Here, first and foremost, it should be noted that, according to the ECtHR's conclusion, the armed confrontation also ruled out the second foundational element of extraterritorial jurisdiction – "state agent authority and control." Specifically, the Court explained:

"[…] The Court attaches decisive weight to the fact that the very realities accompanying the confrontation and fighting between hostile military forces, who are attempting to establish control over an area amidst chaos, exclude not only "effective control" over an area but also "state agent authority and control" over individuals." (The Judgment, §137).

However, the Court simultaneously distinguished the present case from other cases in which it had previously recognized "state agent authority and control" over an

[13] See Judgment, paragraph 83.

individual; while later based its rejection of extraterritorial jurisdiction during the active phase of hostilities on the precedent set in the case of *Banković*.

1. UNDERSTANDING PERSONAL JURISDICTION

According to the ECtHR's case-law, the concept of "state agent authority and control" means that: "In certain circumstances, the use of force by a state agent acting outside the national territory may bring the individual under the control of state authorities and, consequently, within the jurisdiction of the state as understood under Article 1 of the ECHR." Furthermore: "[…] When a state, through its agent, exercises control and authority over an individual - and thus jurisdiction - the state is bound by its obligations under Article 1 to secure the rights and freedoms set out in Section 1 of the ECHR that are relevant to the individual's situation."[14]

However, the initial references to personal jurisdiction were made by the European Commission of Human Rights, which stated that state agents bring individuals and property within the jurisdiction of the state to the extent that they exercise authority and control over them. Furthermore, to the extent that they cause harm to individuals or property, the state bears responsibility.[15]

The essential distinction between "personal jurisdiction" and the "effective control over an area" concepts is not only that state control is exercised over an individual or a group of individuals rather than a specific area, but also that this control does not extend to all of the individual's rights, but only to certain rights depending on circumstances. This approach was first confirmed by the ECtHR in *Al-Skeini* case, thereby overruling the precedent set in *Banković*, where the Court had rejected the idea that Convention rights and corresponding positive obligations could be "divided and tailored" according to the specific circumstances of an extraterritorial act.[16] However, in *Al-Skeini*, the concept of "dividing and tailoring" rights and obligations was recognized, and the ECtHR established that in cases of extraterritorial acts, the scope of a state's human rights obligations is limited and reduced. It further determined that Article 1 of the Convention imposes on states only those obligations that are "relevant to the specific circumstances in which the individual is placed."

Most of the cases in which the ECtHR recognized the respondent state's extraterritorial jurisdiction on this basis involved detention operations conducted abroad, arrest and imprisonment, targeted killings, and beatings leading to death (including in buffer zones), among others. In other words, the decisive factor in establishing "state agent authority and control" over individuals in the context of detention and imprisonment

[14] See Judgment, paragraph 141.
[15] Al-Skeini and Others v. the United Kingdom, supra note 5, paragraphs 136, 137, 142.
[16] Cyprus v. Turkey, supra note 5, paragraph 3.

outside the state's territory was "the use of physical authority and control over the person."

For example, in *Al-Skeini and Others v. the United Kingdom*, the ECtHR established personal jurisdiction over individuals who were subject to deliberate (whether lawful or unlawful) actions by the state. [17]

However, in other cases, the Court applied the "state agent authority and control" concept to individuals in scenarios beyond the use of physical force and control in the context of detention and arrest. This included cases where individuals were deliberately targeted and killed by state armed forces or police through the intentional use of gunfire.[18]

Andreou v. Turkey (cited above) can be referred to as an illustrative case, which concerned deaths that occurred in the United Nations buffer zone in Cyprus. The ECtHR confirmed that the victims fell under Turkey's jurisdiction, as they were killed by gunfire from members of the Turkish armed forces or police, or those of the Turkish Republic of Northern Cyprus (TRNC - Refers to the Turkish territorial entity unrecognized internationally, established as a result of Turkey's occupation of Northern Cyprus). The Court recognized that the victims were within Turkey's extraterritorial jurisdiction, despite the fact that the shootings took place in Cyprus, stating: "[…] even though the applicant had sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, had been such that the applicant should be regarded as "within [the] jurisdiction" of Turkey within the meaning of Article 1 of the Convention."[19]

In *Pad and Others v. Turkey* (cited above), the ECtHR established that the victims' relatives fell under Turkey's jurisdiction, as they were killed by gunfire from Turkish military helicopters. The Court relied on the fact that a Turkish helicopter opened fire on suspected smugglers at the Iraq-Turkey border. Despite the uncertainty regarding which country the victims represented and whether they were on Turkish or Iraqi territory at the time of the shooting, the ECtHR recognized Turkey's jurisdiction and responsibility for the victims.[20]

When examining the issue of personal jurisdiction, the ECtHR also concluded that Turkey exercised its jurisdiction when Kenyan officers handed over Abdullah Öcalan

[17] Banković and Others v. Belgium and Others, supra note 5, paragraph 75.

[18] Al-Skeini and Others v. the United Kingdom, supra note 5, paragraph 136.

[19] See Judgment of the European Court of Human Rights N47708/08 "Jaloud v. the Netherlands" [GC] 2014. Paragraphs 40-53; Judgment of the European Court of Human Rights N36832/97 "Solomou and Others v. Turkey", 24 June 2008. Paragraphs 41-52; Judgment of the European Court of Human Rights N45653/99 "Andreou v. Turkey" (dec.), 03 June 2008; Judgment of the European Court of Human Rights N60167/00 "Pad and Others v. Turkey" (dec.), 28 June 2007; Judgment of the European Court of Human Rights N44587/98 "Isaak and Others v. Turkey" (dec.), 28 September 2006; Judgment of the European Court of Human Rights N31821/96 "Issak and Others v. Turkey", 16 November 2004. Paragraphs 68, 71, 74.

[20] Andreou v. Turkey, supra note 20.

to Turkish officials in the international zone of Nairobi Airport.[21] The same conclusion was reached in the case, when a protester was fatally beaten by a group of people, including Turkish soldiers, in the United Nations demilitarized zone between the TRNC and the Cypriot government-controlled area;[22] or in the case, when a Greek Cypriot demonstrator was shot and killed by a Turkish or Turkish Cypriot soldier upon entering the UN-controlled buffer zone in an attempt to remove a Turkish flag from TRNC territory.[23]

In all of these cases, the key legal position was that, for the purposes of Article 1 of the ECHR, jurisdiction depends on whether the state exercises de facto authority over an individual, a group of individuals, property, or an area; irrespective of whether the state's actions were spontaneous or prolonged; whether the harm caused was intentional, premeditated, reckless, or indirect; whether the state's conduct was lawful or unlawful; or what substantive legal framework might apply to the facts of the case.

The ECtHR has also clearly identified the existence of a jurisdictional link in various extraterritorial contexts, without attempting to define them in a generalized manner.[24] There are also the precedents involving extraterritorial dimension, where the existence of a jurisdictional link is not explicitly discussed but is clearly implied.[25]

The use of physical force by a state agent outside the state's national territory, whether in the context of detention and arrest or through targeted actions aimed at killing or injuring individuals, has been regarded as the exercise of public authority and responsibility beyond the state's own territory for security purposes.[26]

[21] Pad and Others v. Turkey, supra note 20, paragraph 54.

[22] Judgment of the European Court of Human Rights N46221/99 "Öcalan v. Turkey" [GC] 2005-IV. Paragraph 91.

[23] Isaak and Others v. Turkey, supra note 20.

[24] Solomou and Others v. Turkey, supra note 20, paragraphs 48-49.

[25] See Markovic and Others, paragraph 54; Naït-Liman, paragraph 183; Güzelyurtlu and Others, paragraph 188.

[26] Here are some examples illustrating this principle: An asylum seeker who was pushed back within minutes at the border was still considered to be under the jurisdiction of the state to which they had applied for asylum. The jurisdictional link was established solely through physical contact with the state border or border officials. See, e.g., Judgment of the European Court of Human Rights N59793/17 "M.A. and Others v. Lithuania", 11 December 2018. In cases concerning the enforcement of foreign court decisions, the only jurisdictional link between the applicant and the respondent state lies in the fact that the property is located within the state from which the applicant seeks enforcement, even though the individual is not physically present in that state nor under the control of its agents. See, e.g., Judgment of the European Court of Human Rights N17502/07 "Avotiņš v. Latvia" [GC] 23 May 2016.

2. EXCLUSION OF PERSONAL JURISDICTION IN THE GEORGIAN CASE

The ECtHR referenced most of the above-mentioned precedents in the Georgian case. However, it explained that in those cases, decisive weight was given to the fact that they involved isolated and specific acts characterized by a proximity element. The Court distinguished the Georgian case by stating that, unlike those cases, "The active phase of hostilities, which the Court is required to examine in the present case in the context of an international armed conflict is fundamentally different, as it involves bombing and artillery fire by the Russian armed forces, aimed at disrupting the Georgian army and establishing control over parts of Georgian territory."[27]

To begin with, it is unclear what exactly is meant by the element of "proximity" or an "isolated act", or what specific nature or characteristics make these factors decisive for the recognition of jurisdiction. This issue has also been subject to academic criticism. For example, Petra Stoinić has pointed out that the ECtHR excluded cases involving the use of heavy weaponry and methods that caused large-scale harm from its jurisdictional scope. However, she argues that it is difficult to identify instances of the use of force that qualify as "isolated and specific acts" while simultaneously possessing a "proximity element."[28] Secondly, it is unclear where the threshold lies and what dimensions give "proximity" and "isolated acts" a different legal meaning. Thirdly, even if we fully accept the significance of "proximity" and "isolation" elements, there is no substantial difference, in terms of imputability, attribution, or jurisdiction, between causing deaths through gunfire from a helicopter and causing deaths through aerial bombings from military aircraft, as those took place on Georgian territory. Moreover, it remains unclear why the element of proximity was considered absent in the 2008 August war events, causing the direct killings and injuries of individuals.

Ultimately, this reasoning led to the following conclusions:

- A person's detention, arrest, injury, or killing during a police operation abroad establishes jurisdiction (as confirmed by the ECtHR in the above-mentioned Turkish and Cypriot cases), however, a large-scale loss of life resulting from military operations abroad does not; or
- When a state, lawfully or unlawfully, detains, arrests, injures or kills an individual abroad through its agents, it exercises state authority; however, when it conducts a military operation abroad, it does not; or

[27] Judgment of the European Court of Human Rights "Drozd and Janousek v. France and Spain", 26 June 1992. Paragraphs 91-98; Judgment of the European Court of Human Rights N48205/99 "Gentilhomme, Schaff-Benhadji and Zerouki v. France", 14 May 2002. Paragraph 20; Al-Skeini and Others v. the United Kingdom, supra note 5, paragraphs 143-50; Judgment of the European Court of Human Rights N27021/08 "Al-Jedda v. the United Kingdom", [GC] 2011. Paragraphs 75-96.

[28] See Judgment, paragraph 133.

- If a state kills one or several individuals abroad (e.g., by firing from a helicopter), it exercises extraterritorial jurisdiction and is accountable under the Convention; however, if a military aircraft bombs a larger number of individuals, causing more deaths, the state does not exercise jurisdiction and bears no responsibility under the ECHR.

It is difficult to find a rational explanation for all of this.

Clearly, this inconsistency is also addressed in the dissenting opinions. Specifically, Judge Albuquerque, in his partly dissenting opinion, states that it is very difficult to find rationality and logic in the consequences of the *Banković* ruling. According to that precedent, extraterritorial jurisdiction exists when a state agent arrests a person, but it does not exist when the agent kills or injures them. In his view, if the extraterritorial arrest, injury, or killing of an individual establishes jurisdiction, then the killing of an even greater number of people should not exclude jurisdiction - at the very least, not personal jurisdiction.[29]

The authors of the joint partly dissenting opinion (Judges Yudkivska, Wojtyczek, and Chanturia) focused on the argument that the use of the army by a state constitutes an exercise of public authority. They rightly noted the following: "It is obvious that the use of the army against insurgents in a civil war constitutes the exercise of public authority and, consequently, the exercise of jurisdiction (*ultima ratio regum*). From the perspective of state authority, the use of the army against another state's forces has the same nature as its use against insurgents. Both situations represent forms of the exercise of state sovereignty and, at the same time, the exercise of public authority over the individuals affected by it."[30] (Emphasis added by the author.) In his individual dissenting opinion, Judge Chanturia pointed out that "There was no real or substantive difference between a police operation and a large-scale military conflict, and in practice, it was impossible to draw a clear distinction between targeted actions and large-scale military operations." Judge Chanturia considered it "arbitrary and incompatible with humanitarian considerations" that potential victims of targeted police operations fall under a state's jurisdiction, while victims of large-scale military operations do not.[31] Additionally, Judge Albuquerque, in his dissenting opinion, formulated an approach that is difficult to disagree with. He explained that "the use of firearms by a state agent constitutes the ultimate form of the exercise of state control."

[29] Petra Stojnić, 'Gentlemen at home, hoodlumselsewhere': The Extraterritorial Application of the European Convention on Human Rights, 153 <https://www.law.ox.ac.uk/sites/default/files/migrated/public_law_5.pdf> [last accessed on 17 August 2024]; See also, Marko Milanovic, Georgia v. Russia No. 2: The European Court's Resurrection of Banković in the Contexts of Chaos (EJIL: Talk!, 25 January 2021) <https://www.ejiltalk.org/georgia-v-russia-no-2-theeuropean-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/> [last accessed on 17 August 2024].

[30] See partly dissenting opinion of Judge Pinto de Albuquerque. Paragraphs 5 and 27.

[31] See joint partly dissenting opinion of Judges Yudkivska, Wojtyczek and Chanturia. Paragraph 6.

In analyzing personal jurisdiction, the author of the article argues that the ECtHR should have started from the premise that a state, when engaging in a military conflict and deploying its armed forces, is exercising public authority. Accordingly, when a state's decision and its implementation determine the fate of an individual or a group of individuals, whether within or beyond its national territory, this constitutes a jurisdictional link between the state and the potential victims. The key element here is the decision itself, which, by its very nature, already implies the determination of the rights of individuals located beyond the state's borders. It is precisely this decision that brings the affected individuals under the jurisdiction of the state, as its implementation is likely to impact their rights. A second essential element is the causal link between the state's extraterritorial act and the violation of rights in the area where the act was carried out. This issue will be discussed in more detail below.

V. THE BANKOVIĆ CASE AND THE ECTHR'S POSITION THAT "INSTANTANEOUS EXTRATERRITORIAL ACTS" EXCLUDE JURISDICTION, WHILE A CAUSAL LINK IS NOT ALWAYS SUFFICIENT

1. BANKOVIĆ CASE

In the case of *Banković*, which served as the primary precedent for declaring the complaint inadmissible regarding events that occurred during the active phase of hostilities, concerned a military operation conducted by NATO forces in Belgrade. As part of this operation, NATO forces bombed the headquarters of state radio and television, resulting in deaths and injuries. The relatives of the victims filed a complaint against the NATO member states that were also Contracting Parties to the ECHR, seeking to hold them accountable under the Convention. However, the ECtHR dismissed the complaint, ruling that the respondent states acted within the framework of NATO regulations and not "within their jurisdiction" in the sense of Article 1 of the Convention.

In *Banković*, the ECtHR applied an extremely restrictive approach to the issue of jurisdiction, interpreting "extraterritorial jurisdiction" through the lens of general international law and limiting its scope to an extension of domestic jurisdiction, which it linked to a state's sovereign territorial rights (including nationality, the national flag, diplomatic and consular relations, etc.). More importantly, the ECtHR confined the applicability of the Convention to the territory of Contracting States, referring to the "European legal space" and emphasizing that, at the time, the territory of the Federal Republic of Yugoslavia did not fall within the ECHR's scope.[32] With this judgment,

[32] See partly dissenting opinion of Judge Chanturia. Paragraph 16.

the Court also established that instantaneous military actions excluded the possibility of extending extraterritorial jurisdiction and that a mere causal link (between a state's actions and their consequences outside its territory) could not serve as the basis for jurisdiction (between the state and alleged victim) - and therefore, for the state's responsibility under the Convention.

In its Judgment in *Georgia v. Russia (II)* (§134), the ECtHR reiterated the principle established in the case of *Banković*, stating that: "The wording of Article 1 of the Convention is not compatible with the theory that anyone adversely affected by an act imputable to a Contracting State, wherever that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention."[33] Thus, the Court confirmed that the existence of a causal link between a state's extraterritorial act and the harm suffered by the victim is not sufficient to establish extraterritorial jurisdiction.

Beyond the fact that the approach taken in Banković case is itself highly controversial and has been the subject of criticism, it is essential to emphasize that its circumstances differ fundamentally from those of Georgia-Russia case:

- First, in the case of *Banković,* the military operation took place outside the Convention's legal space - in Belgrade, within the territory of the former Federal Republic of Yugoslavia, a non-Contracting State at the time. The Court built its reasoning around the concept of the "European legal space", asserting that the Convention's obligations did not extend beyond this space. In contrast, in the case of the 2008 August war, both the respondent and applicant states were Contracting Parties to the Convention, and all events occurred within the Convention's legal space. Moreover, the "Convention's legal space" argument is itself debatable, as it suggests an interpretation of Article 1 that could be seen as permitting (or at least not prohibiting) actions by Contracting States beyond this space that would be unlawful within it. However, this reasoning appears to contradict the ECtHR's general approach.[34] And, yet, by excluding the active phase of hostilities from its jurisdiction in the August war case, the Court effectively endorsed this (problematic) outcome.
- Second, unlike the NATO operations in the *Banković* case, during the August war Russia did not limit its military engagement to aerial and artillery bombings only,

[33] According to Judge Pinto de Albuquerque, the ECtHR reached this conclusion by disregarding both the Preamble of the Convention and Article 56 of the Convention. Specifically, Judge argued that the Court ignored the clear intent of the Convention's founding fathers, that the Convention should be applicable worldwide, beyond the territories of the Contracting States (except in certain cases). As in the case of Preamble, the Court ignored its spirit, which does not set geographical limits on the protection of Convention rights and freedoms but instead emphasizes a "universal and effective recognition and observance of fundamental rights." Paragraph 4.

[34] Banković and Others v. Belgium and Others, supra note 5, paragraph 75.

but rather conducted a full-scale military intervention including the deployment of ground forces into Georgian territory starting from the morning of August 10, 2008. This fact was (although indirectly) acknowledged by the Grand Chamber as well .[35] The author believes that this development should have strengthened the grounds for recognizing a jurisdictional link rather than undermining it.

- Third, in the case of *Banković*, the NATO member states and NATO forces did not aim to occupy Yugoslav territory or any part of it when conducting their military operation in Belgrade. In contrast, Russia's actions in the August war resulted in the occupation of a significant portion of Georgia's sovereign territory, effectively bringing it under "effective control" in the language of Convention law.
- Fourth, in the case of *Banković*, the respondent states acted within the framework of other international treaty obligations, arising from NATO membership.[36] By contrast, Russia's military intervention led to the occupation of part of another state's territory, an act explicitly prohibited under international law.

Due to the above-mentioned differences, the *Banković* case was not an appropriate or suitable precedent for determining the responsibility of the Russian Federation; not to mention the inherent flaws in the approaches applied in the case itself.

2. SPONTANEITY

As for the exclusion of extraterritorial jurisdiction in cases of instantaneous/spontaneous extraterritorial acts, based on the argument that Article 1 of the Convention does not encompass a cause-and-effect interpretation, the Court's case-law in this regard is neither consistent nor logically explainable or convincing.

The Convention has been applied in the past to various spontaneous or instantaneous acts, such as detentions carried out by agent of a Contracting State.[37] As mentioned earlier, the ECtHR has failed to provide a clear explanation of what constitutes the "instantaneous" or "spontaneous" nature of a state's act: whether it refers to a spontaneously made decision regarding an action or the immediacy of the action itself in response to specific events; whether it encompasses all state acts that are not continuous under international law, or whether it holds an autonomous meaning within

[35] See Issa and Others v. Turkey, supra note 20, paragraph 71.

[36] This refers to the Report of the EU's Fact-Finding Mission, which is included in the case materials and confirms the fact of the intervention (II 210).

[37] The bombing of the Radio Television Broadcasting Building in Belgrade was carried out as part of NATO's military operation "Allied Force". The bombing of the former Yugoslav territory took place between March 24 and June 8, 1999, following the decision of the North Atlantic Council to launch airstrikes, which was announced by NATO Secretary-General on March 23, 1999. This decision was made after unsuccessful attempts to achieve a peaceful resolution of the Kosovo conflict, which involved military confrontations between Serbian forces and Kosovar Albanian armed groups.

the ECtHR's jurisprudence. However, the main ambiguity concerns the relationship between the instantaneous nature of an act and jurisdiction. The question is what are the specific factors of "spontaneity" that, despite the existence of a causal link, exclude a jurisdictional connection (between the respondent state and the alleged victim), and as a result, justify the state's lack of responsibility under the Convention for the alleged human rights violation.

However, it still remains unclear why a state's responsibility cannot be based on an instantaneous/spontaneous extraterritorial act, why an instantaneous decision excludes responsibility, or why the military actions waged by the Russian Federation in the active phase of the 2008 August war - lasting at least five days - should be considered "instantaneous" acts of Russia. It is difficult to justify why certain acts resulting from genuinely immediate decisions (for instance, a border guard's spontaneous decision to open fire on an individual illegally crossing the border) are not considered "instantaneous" and can give rise to state responsibility under the Convention, while each individual action carried out by Russia during the five-day war, including bombing, artillery shelling, and ground attacks, and even more so, their cumulative impact, are classified as "instantaneous extraterritorial acts", exempting the state from liability under the ECHR. The authors of the joint partly dissenting opinion rightly pointed out: "The use of military force abroad is never an "instantaneous act" in this sense; rather, it is always a complex process, from the stage of decision-making to the stage of execution. It requires the issuance of military orders, including orders to launch an operation. It should be taken into account that the army is a strictly hierarchical structure based on obedience and a chain of command."[38]

Moreover, the Grand Chamber faced an even simpler question. It could have recognized that the instantaneous (spontaneous) nature of an extraterritorial act was not a relevant argument in this case, without resorting to the above-mentioned hypothetical logical reasoning. To do so, the Court simply needed to consider the documentary evidence available in the case, namely an interview given by President Putin in August 2012, in which he explicitly stated that the military operation against Georgia in August 2008 had been carefully pre-planned: "It is no secret that a plan existed long before the conflict in August 2008... We trained the South Ossetian military precisely based on this plan... It turned out to be more than just effective."[39]

[38] Including in such a distant places as Costa Rica (Judgment of the European Court of Human Rights N8916/80 "Freda v. Italy", 07 October 1980. Paragraph 254); San Vicente (Judgment of the European Court of Human Rights N14009/88 "Reinette v. France", 02 October 1989. Paragraph 192); and Sudan (Judgment of the European Court of Human Rights N28780/95 "Sánchez Ramirez v. France", 24 June 1996. Paragraph 155).

[39] See joint partly dissenting opinion of Judges Yudkivska, Wojtyczek and Chanturia. Paragraph 11.

Regarding the casual link:

On the one hand, in the *Banković* case, the ECtHR ruled that the wording of Article 1 of the Convention was not compatible with the theory that: "Anyone adversely affected by an act imputable to a Contracting State, wherever that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention."[40] Similarly, in the case *Medvedyev and Others* (cited above), the Court explicitly reaffirmed, relying on the *Banković* case, that state responsibility could not be based on an instantaneous extraterritorial act, as Article 1 did not imply a "cause-and-effect" interpretation of jurisdiction.[41] Later, the Court applied a similar approach in the case *M.N. and Others v. Belgium* (also cited above)[42], concluding that: "The mere fact that a decision taken at the national level causes harm to individuals residing outside the state's borders is not, in itself, sufficient to establish the jurisdiction of that state over those individuals."

On the other hand, in certain cases, the ECtHR has employed formulations that effectively grounded extraterritorial jurisdiction on the existence of a causal link. For example, in *Pad and Others v. Turkey*, which concerned the killing of the applicants' relatives by Turkish military fire from helicopters, the Court held that the victims fell under Turkey's jurisdiction, despite the fact that it was unclear whether the deceased individuals were in Turkey or Iran at the time of the incident - meaning that they may have been outside Turkey's territorial jurisdiction. The ECtHR found Turkey responsible, stating: "It was not disputed by the parties that the victims of the alleged events came within the jurisdiction of Turkey. While the applicants attached great importance to the prior establishment of the exercise by Turkey of extraterritorial jurisdiction with a view to proving their allegations on the merits, the Court considers that it is not required to determine the exact location of the impugned events, given that the Government had already admitted that the fire discharged from the helicopters had caused the killing of the applicants' relatives […]." (Emphasis added by the author). Thus, the recognition of a jurisdictional link was based precisely on the fact that "the fire discharged from the helicopters had caused the killing of the applicants' relatives."[43]

Similarly, in *Andreou v. Turkey* (cited above), which concerned the killing of individuals by gunfire from members of the Turkish or TRNC's armed forces/police, the ECtHR stated: "In these circumstances, regardless of the fact that the applicants sustained injuries outside the territory where Turkey exercised control, the act of opening fire on a group of people from close range, which was the direct and immediate cause of their injuries, constitutes a basis for considering the applicants as falling within Turkey's

[40] See partly dissenting opinion of Judge Chanturia. Paragraph 48.
[41] Banković and Others v. Belgium and Others, supra note 5, paragraph 75.
[42] Judgment of the European Court of Human Rights N3394/03 "Medvedyev and Others v. France" [GC] 2010. Paragraph 64.
[43] M.N. and Others v. Belgium, paragraph 112.

jurisdiction under Article 1 of the Convention. Consequently, the respondent state's responsibility under the Convention is based on the resulting consequences." (Emphasis added by the author).

As we can see, in the above-mentioned case, the ECtHR based the victims' inclusion within the respondent state's jurisdiction precisely on the 'resulting consequences' of the state's extraterritorial act. Accordingly, it remains unclear why the significance of the 'resulting consequences' of an extraterritorial act is completely disregarded in certain other cases that are not fundamentally different.

The Court's rejection of a state's jurisdiction over individuals harmed by its extraterritorial actions during an armed conflict, despite the existence of a causal link, not only narrows the scope of Contracting States' responsibility under the Convention but also contradicts the Court's own rational and logical reasoning, which explains why a Contracting State should not be exempt from accountability for human rights violations committed outside its own territory. Specifically, in *Issa and Others v. Turkey* (cited above), the Court stated the following:

"Moreover, a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating - whether lawfully or unlawfully - in the latter State. […] Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory."[44] (Emphasis added by the author). Incidentally, it is widely recognized that the above-mentioned principle, which the Court has reiterated in several cases,[45] effectively confirms that the existence of a jurisdictional link is largely determined by the causal connection between a state's actions and the alleged human rights violations resulting from those actions beyond its own territory.[46]

The author believes that whenever a state carries out an extraterritorial act, it bears an equal obligation to uphold Convention rights for all individuals affected by its actions, whether directly or indirectly, regardless of their location. Of course, this may not extend to "any national decision" that "causes harm" to those "residing outside its territory" (referring to the ECtHR's reasoning in *M.N. and Others v. Belgium*,[47] cited above). However, when a "national decision" specifically concerns an extraterritorial act, and individuals residing outside the state's territory suffer harm as a direct result of that act, then the existence of a jurisdictional link and the Contracting State's responsibility under the Convention should not be excluded.

[44] Pad and Others v. Turkey, supra note 20, paragraph 54.
[45] Issa and Others v. Turkey, supra note 20, paragraph 71.
[46] Isaak and Others v. Turkey, supra note 20; Solomou and Others v. Turkey, supra note 20, paragraph 45.
[47] See partly dissenting opinion of Judge Pinto de Albuquerque.

According to the author, a causal link is a necessary element for establishing a jurisdictional connection, but it may indeed not be sufficient on its own. However, in such cases, excluding a state's responsibility under the Convention should likely be based only on an assessment of factors such as the foreseeability of the consequences and whether the case concerns a violation of negative or positive obligations. With regard to extraterritorial acts, the scope of negative and, in particular, positive obligations under Article 1 of the Convention may differ when applied to individuals located outside the state's territory. This issue was partially addressed in the dissenting and concurring opinions attached to the judgment.

Specifically, as Judges Yudkivska, Wojtyczek, and Chanturia noted in their joint partly dissenting opinion: "The detonation of an atomic bomb per se would not place individuals living in neighboring countries under the jurisdiction of the state where the explosion occurred, even if they were harmed by it, regardless of whether the explosion was caused by negligence."[48]

The use of this hypothetical example suggests that there is no uniform understanding of what constitutes an "extraterritorial act". The judges presented a hypothetical scenario - a state causing harm to individuals in a neighboring country through an atomic explosion - in which, in their view, the mere existence of a causal link would not be sufficient to establish state responsibility under the Convention. While some may agree on this position, a separate question arises: Does the negligent detonation of a bomb within a state's own territory even qualify as an "extraterritorial act" at all? And, does the concept of an extraterritorial act encompass any action (or omission) committed within a state's own territory that results in harm to individuals located beyond its borders?

Essentially, when the violation of the rights of persons residing outside a state's territory results from that state's negligent or careless action or omission, it would be incorrect to claim that the victims fall under the state's jurisdiction solely because they suffered harm. However, when a state makes a decision to carry out a specific extraterritorial act, plans, prepares, and executes it, and when the likelihood of causing harm to persons in the affected territory is foreseeable, then a jurisdictional link should be recognized. The state's decision to undertake an extraterritorial operation serves as the critical link that establishes jurisdiction in such cases. It is this very decision that places the potential victims under the jurisdiction of the state making it. For illustration: when a state decides to carry out artillery shelling on the territory of another state, it effectively places potential victims within its jurisdiction. In such cases, the state acts as a public authority, since the use of military force is one of the instruments of state power, and the use of force represents a form of state coercion. As the authors of the joint partly dissenting opinion rightly pointed out: "The problem does not begin when the bombs

[48] M. N. and Others v. Belgium, paragraph 112.

start falling but rather when the decision to launch the bombing has been planned and ordered."[49]

In this context, an interesting issue arises: When a causal link is established, should the recognition of extraterritorial jurisdiction depend on whether the harm inflicted on persons outside the state's territory results from a breach of the state's positive obligation to protect rights or from a violation of its negative obligation not to interfere with them? This is a legitimate question, and the only firm answer is that a violation of negative obligation provides a stronger justification for recognizing extraterritorial jurisdiction than a failure to fulfill positive obligation. Illustration: If people are killed as a result of a state bombing a certain area beyond its borders, this would constitute a violation of the state's negative obligation to respect the right to life and consequently, would present a stronger case for recognizing jurisdiction. Conversely, if a bomb explosion occurs due to the state's failure to observe safety regulations, thereby breaching its positive obligation to protect life and causing deaths outside its territory, the justification for recognizing jurisdiction would be weaker. Thus, if a causal link alone is insufficient to establish extraterritorial jurisdiction, it may still meet the threshold when combined with a violation of a negative obligation.

However, as mentioned above, this issue can also be approached from a different perspective. Specifically, could it be argued that a state's negative obligations toward persons residing beyond its borders are greater - or significantly greater - than its positive obligations to protect rights? Or perhaps a Contracting State does not incur any positive obligations at all toward individuals located outside its borders? A state may be directly required not to interfere with the exercise of rights and not to violate the rights of individuals present in the territory of another state, even though these individuals were not within its jurisdiction prior to the act of interference. At the same time, the recognition of positive obligations - such as ensuring the effective enjoyment of rights, preventing threats, or providing other safeguards - toward individuals outside the state's borders may be significantly weaker or even non-existent. The author does not share the view that a state never incurs positive obligations toward individuals abroad, nor does she believe that such obligations always arise. In different and specific circumstances, appropriate and concrete positive obligations can and should be recognized.

It is noteworthy that one of the authors of a partly concurring opinion in the present case, Judge Serghides, analyzed the issue precisely from this perspective. In his view, the applicant state missed an important opportunity to raise a crucial issue - namely, the accountability and jurisdiction of the respondent state in relation to its negative obligations - not under Article 1 of the Convention, but rather under the substantive provisions of the Convention (particularly Articles 2 and 3), as well as in relation to

[49] See joint partly dissenting opinion of Judges Yudkivska, Wojtyczek and Chanturia. Paragraph 11.

Articles 32, 19, 13, and 33, and to the inherent power of the Court. According to Judge Serghides, there is one aspect of examining whether the events that took place during the active phase of the armed conflict fell under the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention (as the complaint was presented to the ECtHR), while another aspect is considering the complaint more broadly, in light of all potentially relevant provisions of the Convention and the Court's inherent power. In Judge's view, if it is accepted that a member state's negative obligation, in terms of accountability and jurisdiction, extends beyond the scope of Article 1 of the Convention, then they are broader than its positive obligations. Consequently, the Court's jurisdiction over the protection of negative obligations would become broader than in the case of positive obligations.[50]

Accordingly, if we analyze the events of the 2008 August war within the above-mentioned contexts, the conclusions still weigh in favor of recognizing jurisdiction:

The case concerned:

- First, the military actions carried out directly on Georgian territory and the consequences that occurred there, meaning undeniably extraterritorial acts;
- Second, the deaths of individuals as a direct result of military aggression, including killings and injuries inflicted based on decisions made by the state, which constitute violations of the negative obligations to protect the right to life;
- Third, a clear causal link between Russia's actions on Georgian territory and the violations of human rights that occurred there.

For these reasons, the author argues that the Russian Federation's decision-making regarding military intervention during the active phase of hostilities, and the execution of those decisions on Georgian territory constitutes a decisive factor that should have formed the basis for recognizing a jurisdictional link between Russia and the victims whose occurrence was causally linked to the respective decisions made by Russian Federation.

VI. THE SPECIFICITY OF INTERNATIONAL ARMED CONFLICTS AND THE ABSENCE OF DEROGATION PRACTICE UNDER ARTICLE 15 OF THE ECHR

As additional arguments for excluding the events of the active phase of hostilities from Russia's jurisdiction, the Court cited the specificity of international armed conflicts and the absence of a practice of derogation from Article 15 of the Convention by Contracting Parties in such situations.

[50] ibid.

The ECtHR stated that "Unlike the latter (i.e., an isolated extraterritorial act characterized by the so-called proximity element - emphasis added by the author), the active phase of hostilities, which the Court is required to assess in the present case within the context of an international armed conflict, is fundamentally different as it involves bombing and artillery shelling by Russian armed forces, aimed at disrupting the Georgian army and establishing control over parts of Georgian territory."[51]

According to the ECtHR's reasoning: "Due to the large number of alleged victims and claimed incidents, the vast volume of evidence, the difficulty in determining the relevant circumstances, and the fact that such situations are predominantly regulated by other international legal norms (specifically, the rules of international humanitarian law or the law of armed conflict), the Court considers that there is no basis for developing its case law on the concept of 'jurisdiction' beyond what has already been established."[52] The Court further added: "If the Court is to be entrusted with the task of assessing acts committed outside the respondent state's territory during the active phase of hostilities in an international armed conflict, then Contracting States must provide an appropriate legal basis for fulfilling this task."[53]

The ECtHR also noted: "This conclusion (i.e., that the exercise of extraterritorial jurisdiction by a state is not established during military operations and that the active phase of hostilities should be assessed in the context of an international armed conflict - emphasis added by the author) is supported by the practice of High Contracting Parties. Specifically, they do not resort to derogation from Article 15 of the Convention in situations where they are engaged in international armed conflicts beyond their own territory. In the Court's view, this could be interpreted as an indication that High Contracting Parties consider that, in such circumstances, they do not exercise their jurisdiction within the meaning of Article 1 of the Convention - position also advanced by the respondent government in the present case."[54]

In response to that argument, it can be mentioned that the ECtHR had already recognized the jurisdiction of a respondent state in armed conflict situations based on the standard of state agent authority and control.

In *Hassan v. the United Kingdom*,[55] the Court found that the United Kingdom had jurisdiction during the active phase of the conflict, relying on the standard of "physical power and control" over the victim. As a result, the United Kingdom was held responsible for the alleged human rights violations. Notably, the Court did not assess whether the UK exercised "effective control" over the area, justifying this omission by

[51] See partly concurring opinion of Judge Serghides. Paragraph 3.
[52] See Judgment, paragraph 133.
[53] See Judgment, paragraph 141.
[54] See Judgment, paragraph 142.
[55] See Judgment, paragraph 139.

stating that jurisdiction had already been established based on the "physical power and control" standard.

However, the most significant point is that, in the Georgian case, the ECtHR refused to recognize Russia's jurisdiction based on the very argument it had relied upon to establish the United Kingdom's jurisdiction in the case of *Hassan* (cited above). In *Hassan,* the respondent government had raised precisely the same argument that Russia put forward in the Georgian case - namely, that this basis of jurisdiction (i.e., "state agent authority and control") should not apply to the active phase of hostilities in an international armed conflict, particularly when the agents of the Contracting State were operating in a territory where the state was not an occupying power and where it was instead subject to the requirements of international humanitarian law."[56]

However, in the above case, the ECtHR rejected this argument and ruled in favor of the applicants, whereas in the Georgian case, it took the opposite stance - siding with the respondent government. The *Al-Skeini* case (cited above) also concerned a period in which international humanitarian law could be applicable, specifically it concerned the period, when the United Kingdom and its coalition partners exercised occupation in Iraq. Despite this context, the Court judged that the United Kingdom exercised jurisdiction under Article 1 of the Convention over the applicants' relatives. When rejecting the jurisdictional argument put forward by the UK government, the Court stated: "The Court cannot follow this argument [...]. Accepting the government's argument on this matter would be incompatible with the case-law of the International Court of Justice, which has established that international human rights law and international humanitarian law must be applied concurrently. As the ECtHR has found in multiple cases, the Convention cannot be interpreted in a vacuum and must, as far as possible, be interpreted harmoniously with the principles of international law, of which it is a part."[57] This applies equally to Article 1 as well as to other provisions of the Convention."[58]

With this interpretation, the ECtHR made it clear that:

- It did not accept the approach that extraterritorial jurisdiction could not be established during the active phase of a conflict merely because "effective control" could not be determined in circumstances where states were fighting precisely for that control;
- It rejected the notion that, in the context of an international armed conflict, only international humanitarian law was applicable for regulating the situation.

[56] Judgment of the European Court of Human Rights N29750/09 "Hassan v. the United Kingdom" [GC] 2014. Paragraph 76.

[57] ibid, paragraphs 71 and 76.

[58] See Judgment of the European Court of Human Rights N35763/97 "Al-Adsani v. the United Kingdom" [GC] 2001. Paragraph 55.

The author fully agrees with this perspective. It remains unclear why the ECtHR diametrically changed its approach, without providing sufficient justification, and why it relied on arguments in the Georgian case that it had previously rejected. Judge Pinto de Albuquerque sharply criticized this new approach of the Court, according to which the ECtHR "should not delve" into "such situations [that] are predominantly regulated governed by legal norms other than those of the Convention."[59]

It is noteworthy that this issue was also highlighted by the authors of the joint partially dissenting opinion in the Georgian case. Specifically, Judge Chanturia posed the following question: If, in *Hassan* case, the Court was able to rely on the norms of international humanitarian law in conjunction with Article 5 of the Convention when assessing the actions of the United Kingdom in Iraq, why could the majority not do the same in the present case regarding Russia's actions and similarly rely on international humanitarian law norms in relation to Article 2 of the Convention?[60] The authors of the joint partially dissenting opinion noted: "Whereas in *Hassan*, the Court consciously chose to take path most in harmony with the purpose of the Convention and with the widest possible respect for and application of Convention rights, in the present judgment, without proper justification based on the law and on the facts, the majority have chosen the opposite direction."[61]

The fact that the active phase of hostilities in an international armed conflict may be assessed through the lens of international humanitarian law does not exclude the simultaneous application of the Convention. Nor does it serve as evidence that Russia was not acting within its jurisdiction under Article 1 of the Convention during the August war and that, as a result, it bears no responsibility under the Convention for violations of negative obligations regarding the protection of rights during the active phase of hostilities.

The fact that an issue brought before the ECtHR under the Convention can also be assessed under other norms of international law does not negate the Court's jurisdiction over it. The protection ensured by the ECHR is not secondary or supplementary to other international legal norms; and the Convention remains applicable to relevant facts regardless of whether those facts are also assessed under other international legal frameworks. A clear illustration of this principle can be found in the present case. The Grand Chamber examined allegations of ill-treatment of prisoners of war during the August war under Article 3 of the Convention and noted in its judgment that the treatment of prisoners fell within the scope of the Third Geneva Convention related to the Treatment of Prisoners of War (Articles 13, 129, and 130) and Article 75 of the Additional Protocol relating to the protection of victims of international armed conflicts.

[59] ibid, paragraph 77.
[60] See partly dissenting opinion of Judge Pinto de Albuquerque. Paragraph 29.
[61] See partly dissenting opinion of Judge Chanturia. Paragraph 30.

The Court further stated that there was no conflict between Article 3 of the Convention and the provisions of international law mentioned above, and based on its examination of the relevant facts concluded that a clear violation of Article 3 of the Convention had taken place.[62]

Moreover, the ECtHR was not even facing a serious dilemma in the sense that it was not required to assess Russia's territorial jurisdiction by first determining the lawfulness of its military intervention under international humanitarian law, a competence it did not possess. In reality, the Court did not even need to establish in advance whether Russia's actions violated international humanitarian law and whether they were lawful or unlawful under both in the sense of *jus ad bellum* and *jus in bello*.[63] The reason for this is that the concept of extraterritorial jurisdiction encompasses the extraterritorial acts of Contracting States regardless of their legality or illegality under international law. For the purposes of adjudicating the inter-State complaint, the ECtHR's sole focus should have been to determine whether a jurisdictional link existed between the decisions that Russia reached and executed on its military intervention into Georgia and the individuals who suffered as a result of that intervention, even without assessing the intervention through the lens of international humanitarian law. The Court should have recognized that through its extraterritorial act, Russia exercised extraterritorial jurisdiction over a person or the groups of persons whose fate was determined by its intervention. It is far more just to hold a Contracting Party accountable under the Convention when it violates Convention rights through an extraterritorial act beyond its own state territory, *a fortiori,* when those violations occur within territory that falls within the Convention's legal space, as was the case with Georgia.

Thus, in author's view, the applicability of international humanitarian law or other legal norms to certain events does not *per se* render the Convention inapplicable or turn it into an ineffective instrument.

As for the "large number of alleged victims, the vast amount of evidence, and the difficulty in establishing the relevant circumstances", the author believes these factors have no rational connection to the issue of jurisdiction, and this "argument" should not have been invoked by the Court at all. The large number of victims should have served as a basis for prioritizing the case, rather than as a reason for excluding the State's jurisdiction.

Finally, with regard to the appropriateness of referencing the practice of non-derogation from Article 15 of the Convention during armed conflicts as an argument for rejecting jurisdiction:

[62] See joint partly dissenting opinion of Judges Yudkivska, Wojtyczek and Chanturia. Paragraph 13.
[63] See Judgment, paragraphs 266 and 267.

First of all, according to the ECtHR's own statement, the present case was the first instance since *Banković* case, in which the Court had to assess the active phase of military operations within the context of an international armed conflict. If this is indeed the case, then it is inconsistent to speak of any solid practice suggesting that, as a rule, "derogation from Article 15 of the Convention does not occur." Furthermore, in *Banković*, the respondent states were acting under their NATO obligations rather than within their own jurisdiction as defined under Article 1 of the Convention, as the Court affirmed. Consequently, if their actions could not be assessed under the Convention, then logically, they were not required to derogate from Article 15 of the ECHR. What is crucial here is that, in reality, non-derogation from Article 15 does not determine the absence of jurisdiction; rather, it is the absence of jurisdiction, as understood under the Convention that should justify the lack of necessity for derogation from Article 15.

Furthermore, in substantive terms, derogation under Article 15 of the Convention is permissible only "in time of war or other public emergency threatening the life of the nation." Additionally, any derogation must be "strictly required by the exigencies of the situation" and must not be inconsistent with the other obligations of the state under international law. In *Banković*, however, none of the Convention's Contracting States involved in the NATO military operation were in a state of war, no state of emergency had been declared, and there was no threat to the life of their nations. Consequently, the conditions for invoking Article 15 did not exist in the first place, which means that these states could not have issued derogation under this provision.

Moreover, Article 15 of the Convention permits derogation from the right to life only in cases of lawful acts of war. In other words, a Contracting State may only be excused for loss of life under Article 15 if it results from lawful acts of war.[64]

The question of whether the NATO member states involved in the military operation in Belgrade conducted "lawful acts of war" (in the sense of the Article 15 of the Convention or international humanitarian law) when bombing the radio and television building lies beyond the scope of the author's interest. However, it is clear that Russia's actions during the August war cannot, by any standard, be classified as lawful acts of war. Russia's military intervention was not limited to artillery shelling of parts of Georgian territory, but also involved sending troops and military equipment into Georgia, engaging in ground combat, and occupying a significant portion of a sovereign state's territory. It is therefore evident that Russia's actions in the August war were unlawful, including under international humanitarian law, and could not have met the requirements for derogation as mentioned above.

[64] According to Judge Chanturia, the Court was not required to assess the legality of the armed conflict waged by Russia under international law (jus ad bellum). Its sole task was to determine whether Russia's actions during the active phase of the armed conflict constituted a violation of Article 2 of the Convention, either independently or, if appropriate in light of the specific circumstances of the case, within the framework of international humanitarian law (jus in bello).

Here, it is also important to emphasize that if the applicability of international humanitarian law in determining jurisdiction under Article 1 of the ECHR is a matter of debate, the situation is different in relation to Article 15. Since this article explicitly refers to "lawful acts of war", its interpretation necessarily requires the Court to assess its content through the lens of international humanitarian law. Consequently, the ECtHR is not prohibited from operating with terms and concepts derived from international humanitarian law in this context. Thus, it is through Article 15 that the meaning of "lawful acts of war" - where loss of life might be condoned under the Convention - should be determined.[65] Accordingly, instead of invoking the absence of derogation under Article 15 as an argument for lack of jurisdiction, the Court should have assessed whether Article 2 of the ECHR was violated also due to Russia's failure to invoke derogation under Article 15. It is evident that the Court could not have reached a conclusion on this matter (in the framework of international humanitarian law) without first determining whether Russia's military intervention in Georgia should be considered "lawful acts of war". It is, therefore, undeniably clear that the argument based on Article 15 is artificial and entirely inadequate. The purpose of Article 15 was never to justify the unlawful actions of an aggressor state, including the deprivation of life, but rather to provide a legal basis for derogation in cases where states engage in defensive military operations or face situations where "the life of the nation is threatened". Russia, however, did not have any conditions necessary to meet the requirements of Article 15 for derogation from the right to life. Therefore, the absence of derogation under Article 15 cannot serve as a legitimate justification for Russia's actions nor as a means of exempting it from responsibility for the violations committed.

In general, Article 15 of the Convention should not be interpreted or applied in a way that suggests that a state's failure to derogate during an armed conflict automatically implies a presumption of the lawfulness of its military actions, nor that the absence of derogation indicates that the state is not acting within its jurisdiction. Thus, the argument referring Article 15 is inappropriate, unfitting, and even carries an ironic undertone. It is difficult to assume the presumption of good faith on the part of an aggressor state and to build serious normative reasoning upon it. As Judge Pinto de Albuquerque masterfully pointed out: "The failure to derogate from Article 15 has nothing to do with jurisdiction, as the Court has previously confirmed."[66] He further emphasized that: "The Court

[65] According to Article 15, paragraph 2, no derogation from Article 2 of the Convention except in respect of deaths resulting from lawful acts of war shall be made under this provision.

[66] The author of concurring opinion, Judge Keller, points out that the Court has said little about the concept of a "lawful war" and that, under Article 15 of the Convention, military operations can be considered lawful only if they comply with the requirements of international humanitarian law, particularly the Hague Conventions. Paragraphs 24 and 25.

cannot divest itself of or renounce its own jurisdiction (Kompetenz-Kompetenz[67]) under Article 1 merely because the parties have ignored Article 15." In Judge's view, the confusion of the majority between jurisdictional issues and the question of applicable law in the present case only highlights the irrationality of majority's position, that "the graver the State military conduct, the less intensive the Strasbourg oversight."[68]

The refusal of states engaged in conflict to derogate from their obligations under Article 15 of the Convention can be interpreted as some kind of a strategy and an attempt to project an image that their planned military operations will not result in violations of Convention rights and that they do not seek to exempt themselves from human rights obligations during active hostilities. A state's decision not to invoke Article 15 may also stem from a desire to avoid external perception that its derogation signals an intent to violate human rights during military operations. The author believes that the mere fact of non-derogation does not justify a legitimate presumption that a state will not violate the Convention in the course of its military operations. The fact that the Russian Federation did not derogate from Article 15 of the ECHR during the August war is neither an indication that its military intervention constituted a "lawful act of war" within the meaning of Article 15 of the Convention, nor that it remained within the obligations imposed by the Convention, thereby making human rights violations unlikely, nor that no violations occurred. If the ECtHR truly believes that the military operations conducted during the August war constituted a situation in which Article 15 could have been invoked and that Russia had the option to rely on it, then this implicitly comes dangerously close to recognizing that Russia's military aggression and hostilities on Georgian territory - which ultimately led to the occupation of significant parts of Georgia - constituted "lawful acts of war" under Article 15 of the Convention.

The "argument" based on Article 15 is not consistent with the ECtHR's case-law either. Since, in the landmark case of *Hassan v. the United Kingdom*, the fact that the United Kingdom had not formally derogated from Article 15 did not prevent the Court from establishing the UK's extraterritorial responsibility for events in southeastern Iraq.[69]

More broadly, if during international armed conflicts, a Contracting State is only accountable under international humanitarian law, as this precedent suggests, and the Convention ceases to apply altogether, then, paradoxically, derogation under Article 15 would have been necessary to maintain credibility under the ECHR. At the same time, if the Convention does not apply during armed conflicts (in the active phase of hostilities), and states are not required to derogate from Article 15, this would imply that the very purpose of Article 15 - which only permits derogation in cases of "public emergency

[67] Kompetenz-Kompetenz is a legal doctrine according to which a judicial body, such as a court or tribunal, has the authority/jurisdiction to determine its own competence in resolving a dispute before it.

[68] See partly dissenting opinion of Judge Pinto de Albuquerque. Paragraph 28.

[69] Hassan v. the United Kingdom, supra note 57, paragraphs 101, 107, 110.

threatening the life of the nation" - is entirely illusory. This is the unfortunate conclusion to which the Court's reasoning regarding Article 15 of the Convention leads.

VII. CONCLUSION

The rejection of the Russian Federation's extraterritorial jurisdiction concerning events during the active phase of the 2008 August war, particularly on the basis of the *Banković* case, is not justified. The author fully agrees with the dissenting opinions expressed in the judgment that the ECtHR, unfortunately, relied on an outdated and irrelevant precedent (*Banković)* instead of drawing upon more recent and appropriate case-law (*Jaloud, Solomou and Others, Andreou, Pad and Others, Isaak and Others, Issa and Others*).[70] It is unfortunate that the particularly sensitive political nature of this case deprived the Court of the strength and determination to effectively address one of the most serious challenges ever faced within the European legal space since its establishment.

The invocation of international humanitarian law in the context of international conflicts, the exclusion of spontaneous extraterritorial acts from the scope of jurisdiction, the insufficiency of causality, and the reference to the practice of non-derogation from Article 15 of the Convention as "arguments" failed to provide a coherent and convincing legal basis for the judgemnet regarding the active phase of the war.

In author's view, there were grounds for recognizing both spatial and, in particular, personal jurisdiction in this case. Moreover, if the Court considered that none of the established models adequately corresponded to the realities of the August war, it could have introduced a new criterion/approach, expanded the interpretation of spatial or personal extraterritorial jurisdiction, or even established a new, third form of extraterritorial jurisdiction to ensure that cases of mass loss of life resulting from military operations would not be left beyond the scope of Convention responsibility.

In the context of spatial jurisdiction, it would have been sufficient for the notion of "effective control over an area" to encompass not only the cases where the respondent state already exercises effective control over a given area but also the instances where the state is actively seeking to establish such control and employs public authority (including military force) for this purpose. At the very least, the interpretation of spatial jurisdiction should have been expanded to cover situations where effective control over an area, while not present before the commencement of the contested state act, is immediately established upon its execution. However, a fairer approach would ensure that human rights violations committed in the process of attempting to gain such control do not remain beyond the scope of Convention responsibility.

[70] See partly dissenting opinion of Judge Chanturia. Paragraph 13.

Personal jurisdiction should encompass all individuals outside the state's borders over whom the state exercises its authority through its agents, regardless of whether such authority is exercised lawfully or unlawfully and irrespective of whether the corresponding extraterritorial act may also be assessed under other international legal norms in addition to the Convention. In such cases, state responsibility should, at the very least, extend to the rights that are directly affected by the extraterritorial act and should be determined to the extent that the act impacts those rights (in line with the concept of the divisibility and tailoring of rights and corresponding obligations).

The author argues that causal connections should be utilized more extensively in establishing jurisdictional links to prevent a situation where the Convention indirectly allows Contracting States to act beyond their borders in ways that are prohibited within their own territory. The recognition of jurisdictional links should be primarily based on causality.[71]

A jurisdictional connection between affected individuals and the respondent state's actions should, in principle, be acknowledged if the causal link was reasonably foreseeable.

At the same time, it would be fair to recognize that the existence of a causal link between a state's extraterritorial act and the alleged violation of the rights of individuals located outside its territory should give rise to a presumption of a jurisdictional link between the state responsible for the act and the affected individuals. Accordingly, where a causal link exists, the development of various legal constructs by the Court should serve to allow appropriate exceptions to the presumption of jurisdiction in justified cases. If the consequences of the state's actions were foreseeable, then the jurisdictional link - and, consequently, the state's responsibility under the Convention - should be recognized. The burden of proving the impossibility of foreseeing the consequences should rest on the respondent state. It is noteworthy that in principle, the application of interim measures by the ECtHR in similar cases based on Article 39 of the Rules of Court implicitly acknowledges the presumption of jurisdiction, at least a prima facie.[72] Therefore, it would be reasonable that, once causal link has been established, a strong presumption of jurisdiction arises for the respondent state, shifting the burden of proof to the state responsible for initiating the cause.

[71] The concept of causality already has a broad application in Convention law. In practice, the recognition of a Convention violation is always based on establishing a causal link between the state's failure to fulfill its negative or positive obligations and the infringement of a right. However, the ECtHR, unfortunately, applies this concept inconsistently and in a fragmented manner rather than relying on a unified methodological approach. Moreover, it employs varying terminology and expressions in different cases. And yet, a well-reasoned application of the causality concept, with its clear and reliable logic, would have allowed the Court to base its decisions on a solid and logical foundation and to reject inadequate and irrational arguments - something it regrettably failed to do in the present case. For a discussion on the use of causality in Convention law, see Eva Gotsiridze, Causality in European Human Rights Law (2006).

[72] On August 11, 2008, in the context of the military attack by the Russian Federation, Georgia requested an interim measure from the ECtHR. The Court granted this request.

The infliction of harm on individuals beyond national borders should, in principle, give rise to responsibility under the Convention when it results from the deliberate actions of a state. Jurisdictional link must always be recognized when a state carries out a premeditated extraterritorial act that involves the use of instruments of state power, such as the application of force - including military force - and coercion, thereby causing harm to private individuals.

The Court must explicitly affirm that the concept of "within their jurisdiction" under Article 1 of the ECHR does not exempt Contracting Parties from responsibility when they violate Convention rights through extraterritorial acts affecting individuals beyond their own territory. The Court should make it clear that Article 1 of the Convention cannot be interpreted as granting a Contracting Party the right to disregard the rights of individuals affected by its extraterritorial actions while carrying out such actions. Furthermore, this obligation should not be confined solely to the European Convention's territorial scope.

In the aforementioned context, differentiation may be justified only based on whether the harm results from a violation of a negative or a positive obligation. A state's negative obligations concerning the rights of individuals beyond its borders must always be recognized with regard to the rights affected by its extraterritorial actions. In other words, a Contracting Party must be held accountable under the Convention for violations of the rights of individuals outside its borders when such violations result from its direct intervention. As for positive obligations, their applicability in extraterritorial contexts should depend on the specific circumstances of the extraterritorial act in question.

In general, a violation of rights due to negligence, including inaction, may not always establish a jurisdictional link, depending on the specific circumstances of the case. However, it is crucial that this issue be thoroughly and comprehensively examined. A reasonable answer must be provided to the question of whether, in principle, a state bears a positive obligation under the Convention to mitigate or prevent the risk of harm to individuals located outside its territory when carrying out extraterritorial actions. If the answer to this question is negative, it follows that, at least to some extent, the approach prevails that positive obligations regarding the protection of human rights in the context of extraterritorial actions are significantly reduced or even nonexistent. This, in turn, leads to the problematic conclusion that a Contracting State may grant itself the right to engage in conduct beyond its borders that it would be prohibited from undertaking within its own territory due to its Convention obligations. Such an approach ultimately results in an unjustified differentiation in the treatment of individuals based on their location, allowing for different standards of human rights protection without adequate justification. Therefore, the author strongly believes that whenever a state carries out an extraterritorial act that involves direct interference with rights or creates a risk of endangering them - such as the detention or imprisonment of a person on foreign territory, the implementation of security measures, the planning

or participation in counterterrorism operations, the use of a specific area for purposes such as the transportation of weapons or ammunition, or any other activity that may impact the rights of individuals present in that territory - this undoubtedly gives rise to corresponding positive obligations.

In general, rejecting the extraterritorial jurisdiction of a warring state during an international conflict over the population living in the area of military operations, and excluding such actions from accountability under the Convention, is unacceptable - particularly when it occurs within the European legal space (*espace juridique*). Such an approach undermines the fundamental logic of international criminal law and could even serve as an incentive for similar conflicts.[73] The protection of human rights in Europe during armed conflicts, when the risk of vulnerability and likelihood of victimization due to extraterritorial military actions are particularly high, should not be left outside the scope of European oversight. Without an adequate response to such situations, the Convention will be unable to effectively fulfill its role as a guarantor of peace and public order in Europe.

Finally, in Paragraph 140 of its Judgment, the Court acknowledged its sensitivity to the fact that the interpretation of the notion of "jurisdiction" under Article 1 of the Convention may seem unsatisfactory to the alleged victims of the Russian Federation's military actions, who suffered harm during the active phase of the armed conflict. Judge Pinto de Albuquerque referred to this as "the crocodile tears of the European Court." In Judge's view, the ECtHR now will face a gargantuan task[74] in restoring the damage caused by its judgment to its credibility. The authors of the joint dissenting opinion captured the situation with the Latin maxim: *silent enim leges inter arma* ("laws fall silent in times of war").[75] It is hard to disagree with this assessment. One cannot help but feel that the Court sought to avoid delving deeply into the issues that were highly sensitive and politically charged. It delivered a decision that falls short of fulfilling the Convention's purpose and built an unsustainable justification for refusing to recognize Russia's jurisdiction during the active phase of hostilities, relying on artificially assembled "arguments". The author suggests that inadequacy of the approaches taken in the case of the war of August 2008 will become even more apparent in relation to the war in Ukraine. Given the strong international condemnation of Russia's actions, the ECtHR will inevitably revise its approach if it is ever called upon to adjudicate on the matter.

[73] According to Judge Chanturia, the majority's decision on extraterritorial jurisdiction during the active phase of the conflict created a legal vacuum, which contradicts the spirit of the Convention. He argues that leaving individual victims of an armed conflict within the European legal space in a legal void should be regarded as a refusal to protect the rights of those who need it the most. Paragraph 6.

[74] See partly dissenting opinion of Judge Pinto de Albuquerque. Paragraph 30.

[75] See joint dissenting opinion of Judges Yudkivska, Wojtyczek and Chanturia. Paragraph 6.

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REGULATORY LEGISLATION AND PRACTICE ON LIFE-THREATENING INDUSTRIAL ACTIVITIES IN GEORGIA AND THEIR COMPLIANCE WITH EUROPEAN HUMAN RIGHTS STANDARDS

ABSTRACT

The positive obligation to protect the right to life, as enshrined in Article 2 of the European Convention on Human Rights (ECHR/the Convention), extends to industrial activities that pose a danger to human life. In addition to the obligation to establish regulatory legislation aimed at preventing or minimizing risks arising from industrial activities that pose a threat to human life, the state is also obliged to undertake preventive and operational measures within the sphere of such hazardous industrial activities.

The aim of this paper is to analyze the compliance of the regulatory legislation and practice related to life-threatening industrial activities with European human rights standards. To achieve this, the article first reviews the European human rights standards concerning life-threatening industrial activities and defines the meaning and scope of the positive obligation to protect the right to life under Article 2 of the ECHR. It then examines the legislation and practice regulating life-threatening industrial activities in Georgia, analyzing their compliance with the relevant European standards.

Several conclusions have been drawn based on this analysis. Specifically, the analysis of the legislation regulating life-threatening industrial activities in Georgia has shown that the applicable legal (normative) framework, overall, adequately complies with the standards established by the case law of the European Court of Human Rights (ECtHR), which require states to implement preventive measures to ensure occupational safety in the workplace. In addition, the analysis of Georgian legislation revealed the need to introduce further technical standards in the country. As for the practice of conducting life-threatening industrial activities in Georgia, a troubling situation regarding industrial accidents was identified, with the highest number of fatalities occurring in the construction sector in recent years. Due to the high number of workplace fatalities

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in Georgia, it is necessary to strengthen the activities of the Labour Inspection Service by increasing the resources available to the Service. In light of the above, it is essential to implement effective measures both to further improve the legislation regulating industrial activities and to ensure its full enforcement, including by enhancing the effectiveness of the Labour Inspection Service.

I. INTRODUCTION

The positive obligation to protect the right to life, as enshrined in Article 2 of the ECHR, extends to industrial activities that pose a danger to human life. In addition to the obligation to establish regulatory legislation aimed at preventing or minimizing risks arising from industrial activities that pose a threat to human life, the state is also required to undertake preventive and operational measures within the sphere of life-threatening industrial activities.

The aim of this paper is to analyze the compliance of the regulatory legislation and practice related to life-threatening industrial activities with the European human rights standards. Based on this analysis, conclusions will be drawn and recommendations will be provided for the further improvement of Georgian legislation and practice.

II. EUROPEAN HUMAN RIGHTS STANDARDS REGARDING LIFE-THREATENING INDUSTRIAL ACTIVITIES

According to the ECtHR's case law, if industrial activity poses a threat to human life, the state bears a positive obligation not only to regulate such activity through legislation, but also to undertake preventive operational measures aimed at protecting the right to life.

One of the significant cases concerning life-threatening industrial activity is the case of *Öneryıldız v. Turkey.* This case concerned an incident at a landfill site located in the outskirts of Istanbul, which was under the management of the local authorities.[1] Due to the absence of appropriate regulatory safeguards at the landfill site and the lack of a functioning ventilation system, the accumulation of methane and other gases led to an explosion, which in turn triggered a landslide. The landslide destroyed residential homes located near the landfill, resulting in the deaths of 39 people, including nine members of the applicant's family.

One of the key issues in this case was whether the state could be held responsible under Article 2 of the ECHR for a violation of the right to life resulting from life-threatening industrial activity. Accordingly, the question was raised as to whether the state could be

[1] Judgment of the European Court of Human Rights, "Oneryildiz v. Turkey", 30 November 2004.

held responsible for failing to protect the lives of individuals who were put at risk by such industrial activity. Clearly, the case was not about an intentional taking of life by the state; rather, the central question was whether the state had taken appropriate steps to protect the right to life.[2]

The ECtHR emphasized that Article 2 of the Convention not only prohibits the taking of life resulting from the use of force by state agents, but also imposes a positive obligation on the state to take appropriate measures to protect the lives of individuals within its jurisdiction. The Court also noted that "this obligation must be incumbent on the state in respect of any activity, whether public or not, in which the right to life may be at stake, particularly in relation to industrial activities which by their very nature are dangerous, such as the operation of waste disposal sites."[3]

The ECtHR also emphasized that the Turkish authorities knew or ought to have known of the real and immediate risk to the lives of individuals living near the landfill site. Accordingly, the Court concluded that the state had a positive obligation under Article 2 of the Convention to take preventive operational measures that were "necessary and sufficient" to protect those individuals - particularly because the state itself had established the landfill and authorized its operation, which gave rise to the actual danger.[4]

The ECtHR found that the Turkish authorities were responsible for the loss of human life, as an expert report prepared two years prior to the incident had explicitly stated that the landfill did not meet the relevant technical standards and that it posed a risk to the people living in the area.

The report also highlighted that the accumulation of a sufficient amount of gas could lead to an explosion. Nevertheless, no appropriate preventive measures were taken. It is noteworthy that at the time the landfill was established, the area was uninhabited, with the nearest settlement located 3.5 kilometers away. Although the houses destroyed in the incident had been built illegally, the state generally showed a tolerant attitude toward violations of urban planning regulations; so the residents were provided with electricity and water supply, and were required to pay local taxes. Moreover, the state failed to take appropriate steps to inform the residents about the existing risks.

In the case of *Öneryıldız v. Turkey*, the ECtHR focused on the preventive measures that the state could have taken in fulfillment of its positive obligation. These measures included: a) the isolation of waste disposal sites by determining a minimum distance

[2] Dimitris Xenos, 'Asserting the Right to Life' (Article 2, ECHR) in the Context of Industry (2007) 8 (3) German Law Journal 233.

[3] See supra note 2, paragraph 71; Xenos, supra note 3, 235-236.

[4] See supra note 2, paragraph 101; Emma A. Imparato, 'The Right to Life Passes through the Right to a Healthy Environment: Jurisprudence in Comparison' (2016) 22 (1) Widener Law Review 128-129.

from any residential area; b) the prevention of landslide risks through the installation of solid fencing, the construction of trenches, and the use of protective equipment; and c) the elimination of the risks of fire and biogas explosions.[5]

Ultimately, the Grand Chamber of the ECtHR held that, since the authorities knew of the existence of a real and immediate risk to the lives of individuals, they had a positive obligation under Article 2 of the Convention to take preventive measures that were necessary and sufficient to protect those lives - particularly given that the state itself had established the landfill and authorized its operation, which gave rise to the danger.[6]

It is important that the ECtHR emphasized that the state bears a positive obligation not only in cases of death resulting from the use of force by state agents, but also in relation to any activity - including industrial activities such as the operation of waste disposal sites - which, by their very nature, are life-threatening and pose a threat to human life.[7]

In the case of *Brincat and Others v. Malta,* the ECtHR found that the Maltese government had failed to fulfill its positive obligation under Article 2 of the Convention, specifically by not establishing a legislative framework and not taking preventive measures to protect individuals who were exposed to the harmful effects of asbestos.[8] The ECtHR found that, at the very least since the early 1970s, the Maltese government knew or ought to have known that workers at the shipbuilding yard could suffer harm from exposure to asbestos. Nevertheless, the authorities failed to take positive measures to address this risk until 2003.[9] As a result, the ECtHR held that the respondent state had violated the substantive aspect of Article 2 of the Convention.[10]

III. LIFE-THREATENING INDUSTRIAL ACTIVITIES IN GEORGIA

1. LEGISLATION

As demonstrated by the ECtHR's case law, the positive obligation of the state extends to life-threatening industrial activities. Arising from this obligation, the state must, first and foremost, ensure the adoption of legislation aimed at protecting the right to life in the context of conducting such life-threatening industrial operations.

[5] See supra note 2, paragraph 58; Xenos, supra note 3, 245-246.

[6] See supra note 2, paragraph 101; Svitlana Kravchenko and John E. Bonine 'Interpretation of Human Rights for the Protection of the Environment in the European Court of Human Rights' (2012) 25 (1) Pacific McGeorge Global Business Development Law Journal 277-278.

[7] Xenos, supra note 3, 236-237.

[8] Judgment of the European Court of Human Rights "Brincat and Others v. Malta", 24 July 2014.

[9] Linos-Alexandre Sicilianos, 'Preventing Violations of the Right to Life: Positive Obligations under Article 2 of the ECHR' (2014) 3 Cyprus Human Rights Law Review 127.

[10] See supra note 9, paragraph 117.

In Georgia, one of the key normative acts governing life-threatening industrial activities is the Organic Law of Georgia on Occupational Safety. Its purpose is to define the requirements and general preventive principles related to occupational safety at the workplace, including existing and potential hazards, as well as the prevention of accidents and occupational diseases.[11] The law defines several essential legal terms, including: occupational safety, prevention, hazard, risk, heavy, harmful and hazardous work, risk factors, workplace accidents, individual and collective protective equipment, and supervisory authority.[12]

The law establishes as well the employer's obligations, including: to comply with the norms and rules set out in Georgian legislation on occupational safety; to ensure that the safety and health of employees are not harmed; to guarantee that hazardous factors do not pose a threat to the safety and health of employees; to regularly inspect the safety condition of technical equipment; to monitor the proper use of personal protective equipment and other safety tools; and to assess, measure, and evaluate the physical, chemical, and biological factors present in the enterprise environment.[13] The employer is also obligated to provide training and instruction to employees and to supply them with information necessary to ensure occupational safety. This includes the legal and other regulatory standards, principles of safe work, operational procedures and a safe use of machinery and equipment, as well as emergency situations, evacuation measures and their implementation, and the hazards and risks related to the workplace.[14]

According to the law, the employer is also obliged to provide employees with information related to occupational risks and harmful industrial factors that may affect their health in the workplace, as well as the mechanisms for protecting themselves from such risks. The employer must also inform employees about the risks they may face and the potential consequences of those risks as well as about emergency situations, evacuation plans, and the measures to be taken in the event of increased danger. Additionally, the employer must provide information on the actions and procedures to be followed in the event of an accident or fire, as well as on prohibitions concerning tasks that pose a threat to the life or health of the employee.[15]

The law also obligates the employer to conduct risk assessments and implement various measures to that end, including: taking steps to eliminate existing risks and reduce hazards, as well as eliminate their sources; developing a coherent policy on preventive measures; giving priority to collective protective equipment over individual protective means; and providing employees with appropriate training and instruction.[16]

[11] Article 1, paragraph 1, Organic Law of Georgia on Occupational Safety, 19 February 2019.
[12] ibid, Article 3.
[13] ibid, Article 5, paragraph 1.
[14] ibid, Article 5, paragraph 2.
[15] ibid, Article 5, paragraph 5.
[16] ibid, Article 6, paragraph 1.

The employer is also obligated to define in writing the duties and responsibilities of employees in the field of occupational safety.[17] According to the law, the employer must have an occupational safety specialist.[18]

The law also provides for the employer's obligation to implement necessary measures to ensure first aid, fire safety, and evacuation procedures, and to inform all employees about preventive, evacuation, and safety measures.[19]

The law defines the rights and obligations of employees, including the right to refuse to perform work that violates occupational safety standards and poses an obvious and substantial threat to life or health. It further includes the obligation to follow occupational safety instructions, legal norms, and regulations; to use personal protective equipment in accordance with instructions; to notify the employer of any defect that could endanger workplace safety or cause an accident; not to report to work under the influence of alcohol, drugs, toxic or psychotropic substances, and not to consume such substances while performing work; to comply with bans on tobacco use in the workplace, among other duties.[20]

In addition, the law establishes forms of liability in cases of violations of occupational safety standards, including the application of administrative sanctions such as warnings, fines, and the suspension of work processes. [21] The law also provides for the adoption of multiple administrative-legal acts that would regulate minimum requirements for safety and health protection across various areas.[22]

In addition, the Law on Labour Inspection is also applicable in Georgia, which defines the main principles and directions of the Labour Inspection Service's activities, its powers, the implementation of those powers, and issues related to ensuring the effective enforcement of labour standards.[23]

In general, Georgian legislation on occupational safety establishes an important legal framework for the effective protection of human life and health in the workplace.

As for the standards established by the ECtHR's case law and its reflection in the Georgian legislation, the case *Öneryıldız v. Turkey* regarding the life-threatening industrial activity is particularly noteworthy. As noted, the case involved an explosion at a landfill site that destroyed nearby residential buildings and resulted in the deaths of several dozen people.[24] The ECtHR held that the Turkish authorities were responsible for the loss of life, as an expert report prepared two years prior to the incident indicated

[17] ibid, Article 6, paragraph 3.
[18] ibid, Article 7.
[19] ibid, Article 8.
[20] ibid, Articles 10-11.
[21] ibid, Articles 17-18.
[22] ibid, Article 25.
[23] Article 1, Law of Georgia on Labour Inspection, 29 September 2020.
[24] See supra note 2.

that the landfill did not meet the relevant technical standards and that it posed a risk to the lives of the people living nearby. The ECtHR also emphasized the preventive measures that the state could have taken in order to fulfill its positive obligation.[25]

The issues raised in the *Öneryıldız* case are regulated in Georgia primarily by the Waste Management Code, which establishes general safety rules for the operation of landfill sites.[26] The Code provides that technical and other requirements for the construction of landfills must be defined, as well as technical standards and measures for their closure and post-closure maintenance, in order to prevent harm to the environment and human health.

In addition to the Code, Georgia has in force a technical regulation on the construction, operation, closure, and post-closure maintenance of landfill sites.[27] It states that its purpose is to ensure the prevention or maximum reduction of the negative impact of landfills on the environment and human health.[28]

Among various technical requirements, the regulation also defines the location criteria for landfill sites. Specifically, it provides that the distance between residential buildings and the landfill cell must be no less than 500 meters.[29] Additionally, when selecting a site for a landfill, factors such as the risk of flooding, soil subsidence, landslides or avalanches, as well as geological and hydrogeological conditions, must be taken into account.[30]

The regulation sets out rules for preventing risks associated with landfills, including provisions for landfill gas management.[31] Specifically, it requires conducting studies to detect gas emissions from waste deposited at landfill sites and, if necessary, installing a gas collection system, capturing gas through a collection mechanism, and setting up a gas drainage system.[32] According to the regulation, the collection, treatment, and utilization of landfill gas must be carried out in a manner that does not pose a threat to human health or the environment.[33]

The regulation also establishes control and monitoring procedures for both the operational phase of the landfill and the post-closure maintenance stage. Specifically, it requires that gas emissions be monitored once a month during the operational phase, and once every six months during the post-closure maintenance phase.[34]

[25] See supra note 2, paragraph 58; Xenos, supra note 3, 245-246.
[26] Law of Georgia "Waste Management Code", 26 December 2014.
[27] The Ordinance of the Government of Georgia N421, 11 August 2015 <https://matsne.gov.ge/ka/document/view/2946318?publication=3#DOCUMENT:1;> [last accessed on 08 September 2024].
[28] Article 1, paragraph 1, Technical Regulation on the Establishment, Operation, Closure, and Post-Closure Maintenance of Landfills.
[29] ibid, Article 9, paragraph 2.
[30] ibid, Article 9, paragraph 4.
[31] ibid, Article 13.
[32] ibid, Article 13, paragraphs 1-3.
[33] ibid, Article 13, paragraph 4.
[34] ibid, Article 38, paragraph 1.

A brief overview of Georgian legislation confirms that numerous technical aspects related to the operation of landfills are regulated in the country. These include the requirement for a minimum distance between landfill sites and residential buildings; consideration of risks such as flooding, soil subsidence, landslides, or avalanches during site selection; evaluation of geological and hydrogeological conditions; and the establishment of rules for preventing landfill-related hazards, including regulations on gas management. Specifically, studies are conducted to detect gas emissions from waste deposited at landfill sites, a gas collection system is installed, and a gas drainage system is set up. In addition, the legislation provides for a monitoring system covering both the operation phase and the post-closure maintenance of landfill sites.

Based on all of the above, it can be concluded that Georgian legislation adequately regulates the standards established by the ECtHR in the case of *Öneryıldız v. Turkey*.

With regard to life-threatening industrial activities, another important case is *Brincat and Others v. Malta.* As noted above, in this case, the ECtHR found that Malta had failed to fulfill its positive obligation under Article 2 of the Convention, specifically by not establishing a legislative framework and by failing to take preventive measures to protect individuals who were exposed to the effects of asbestos.[35]

In Georgia, the use of asbestos - a substance harmful to human health and life[36] - is not prohibited.[37] It is used in construction and in fireproof insulation materials, as well as for roofing buildings and structures, in electrical systems (as an insulating material), and in vehicle braking systems.[38] The use of asbestos in Georgia is regulated by several normative acts, including the Ordinance of the Government of Georgia "On the Approval of the Technical Regulation on Special Requirements for the Collection and Treatment of Hazardous Waste."[39] This regulation sets requirements for the management and treatment of asbestos waste, aimed at protecting human health and life from the harmful effects of asbestos exposure.[40]

The harmful impact of asbestos on human health is also addressed in the Organic Law of Georgia on Occupational Safety,[41] which provides that, for the purposes of occupational safety, the Government of Georgia must adopt a technical regulation on the protection of employees from risks related to exposure to asbestos, carcinogens, mutagens, and

[35] Judgment of the European Court of Human Rights, "Brincat and Others v. Malta", 24 July 2014.

[36] Prolonged exposure to asbestos can lead to the risk of developing lung cancer.

[37] The import and export of asbestos fibers containing crocidolite, amosite, anthophyllite, actinolite, and tremolite is prohibited in Georgia. See the Order of the Minister of Labour, Health and Social Affairs of Georgia N133/ნ "On the Approval of the List of Hazardous Chemical Substances Subject to Prohibition or Strictly Restricted Use, Production, and Import-Export on the Territory of Georgia, 26 March 2001.

[38] See <https://hsegroup.ge/what-harm-does-asbestos-do-to-us/> [last accessed on 08 September 2024].

[39] The Ordinance of the Government of Georgia N145, 29 March 2016.

[40] See supra note 29, Article 13.

[41] See supra note 12.

biological agents in the workplace.[42] To date, such a technical regulation has not been adopted.[43]

In addition, Georgian legislation defines a list of occupational diseases and classifies professions that carry an elevated risk of developing them. This list includes asbestosis, which results from exposure to asbestos.[44]

Legislation also defines a list of jobs involving heavy, harmful, and hazardous work, which includes occupations related to the production and/or use of asbestos. It further establishes rules mandating the use of personal protective equipment in such work environments.[45]

From a brief examination of Georgian law, one may conclude that the regulatory framework governing the use of asbestos recognizes it as a substance harmful to human health. The framework provides for the special rules on the collection and treatment of asbestos, aimed at reducing its harmful effects. In addition, the legislation sets out a list of occupational diseases and identifies professions associated with an elevated risk of developing asbestos-related illnesses. It also classifies work related to the production and use of asbestos as hazardous. This means that individuals who choose such professions and engage in asbestos-related activities are made aware of the risks it poses to human health and life. The regulatory framework further includes rules mandating the use of personal protective equipment.

Ultimately, it can be concluded that Georgian legislation meets the minimum standards established by the ECtHR in the *Brincat* case. At the same time, it is essential that the Government of Georgia adopt a technical regulation on the protection of employees from risks related to exposure to asbestos, carcinogens, mutagens, and other biological agents in the workplace, as required by the Organic Law of Georgia on Occupational Safety.

Generally, it should be noted that all, or nearly all, industrial activities involve some degree of risk to life and health (e.g., chemical production, mineral extraction, and stone processing industries). The state itself must determine which industrial activities should be considered life-threatening and to what extent, and accordingly, introduce preventive measures to be taken, based on the specific characteristics of each hazardous activity. If an industrial activity poses a high risk to human health and/or life, such activity

[42] See supra note 12, Article 16, paragraphs 2b, 2d.

[43] This document was supposed to be adopted by September 1, 2022. See supra note 29, Article 25, paragraph 1d.a.

[44] See the Order of the Minister of Labour, Health and Social Affairs of Georgia N216/ნ "On the Approval of the List of Occupational Diseases and the List of Occupational Activities Associated with an Increased Risk of Developing Occupational Diseases", 13 July 2007.

[45] See the Order of the Minister of Labour, Health and Social Affairs of Georgia N147/ნ "On the Approval of the List of Jobs Involving Heavy, Harmful, and Hazardous Working Conditions", 03 May 2007.

may be entirely prohibited (e.g., activities involving the use of asbestos). However, if the risk arising from the industrial activity is moderate or low, the state may establish a regulatory framework that ensures the minimization of the threat to human life and health.

To determine whether a particular industrial activity is life-threatening, and to what extent, the state may rely on various sources such as research studies, statistics on workplace incidents, analysis of industrial practices as well as fatalities at the workplace, complaints, etc. This will enable the state to evaluate whether a given industrial activity endangers human life and to adopt relevant preventive measures accordingly.[46]

2. PRACTICE

According to the ECtHR's case law, the state bears a positive obligation not only to adopt legislation aimed at protecting human life from life-threatening industrial activity, but also to take practical measures to ensure the effective enforcement of such legislation.

In recent years, there have been numerous incidents in Georgia in which many people have lost their lives in the course of industrial (labour-related) activities. This is evidenced both by numerous specific cases[47] and by statistical data on fatalities at the workplace. According to these statistical data, in 2023, 34 employees died and 347 were

[46] Xenos, supra note 3, 237-238.

[47] Due to the high number of workplace fatalities, the mentioned cases are provided for illustrative purposes only: "The individuals who died in the railway incident on the Didube-Avchala section were employees of Georgian Railway", 03 September 2024 <https://www.interpressnews.ge/ka/article/810870-opicialuri-inpormaciit-didube-avchalis-monakvetze-momxdari-sarkinigzo-shemtxvevis-dros-dagupulebi-sakartvelos-rkinigzis-tanamshromlebi-arian-romlebic-gegmur-samushaoebs-asrulebdnen> [last accessed on 08 September 2024]; "An employee working at a workshop in Khulo died", 24 September 2023 <https://www.interpressnews.ge/ka/article/770919-xuloshi-ert-ert-saamkroshi-dasakmebuli-daigupa> [last accessed on 08 September 2024]; "A worker died at a factory in Rustavi", 03 January 2022 <https://www.interpressnews.ge/ka/article/690825-rustavis-ert-ert-karxanashi-musha-daigupa> [last accessed on 08 September 2024]; "In Gurjaani, a young man died at the bakery, presumably due to a gas leak", 04 May 2022 <https://www.interpressnews.ge/ka/article/708973-gurjaanshi-puris-sacxobshi-axalgazrda-mamakaci-savaraudod-bunebrivi-airis-gazhonvit-gardaicvala> [last accessed on 08 September 2024]; "A man injured during dismantling work at a facility of the Zestaponi Ferroalloy Plant died in hospital." 16 October 2021 <https://www.interpressnews.ge/ka/article/679098-zestaponis-peroshenadnobta-karxnis-ert-ert-obiektze-sademontazho-samushaoebis-dros-dashavebuli-mamakaci-klinikashi-gardaicvala> [last accessed on 08 September 2024]; "Georgian Railway reports the death of two employees in a fatal accident in Kutaisi", 17 September 2020 <https://www.interpressnews.ge/ka/article/618824-sakartvelos-rkinigza-kutaisshi-ubeduri-shemtxvevis-shedegad-ori-tanamshromlis-gardacvalebis-shesaxeb-inpormacias-avrcelebs> [last accessed on 08 September 2024]; "There have been numerous deaths among miners, with many people having lost their lives over the past 10-15 years." The article titled "City of Death." 09 February 2022 <https://mtisambebi.ge/news/people/item/1440-sikvdilis qalaqi?fbclid=IwAR1OxvxRHEesrDp4gSnrPZnsnb_ixkpZtrM4qD9a4Ujh1FyvA92naiDw20E> [last accessed on 08 September 2024].

injured in the workplace. The highest number of fatalities during this period occurred in the construction sector.[48] In 2022, 35 employees died and 330 were injured in the workplace. [49] In 2021, 37 workplace fatalities were recorded.[50] In 2020, the number of deaths was 39; in 2019, 45; [51] and in 2018, 59[52] employees lost their lives at the workplace.

These statistical data confirm that the number of workplace fatalities in Georgia has been gradually decreasing. According to information provided in the Labour Inspector's report, the number of deaths resulting from industrial accidents in 2023 decreased by 42% compared to 2018.[53] The reduction in the number of fatalities may be explained both by the tightening of regulatory legislation, which imposes obligations on employers to comply with occupational safety requirements, and by the increased activity of the Labour Inspection Service. According to information provided by the Service, a total of 3,765 inspections were carried out in 2023, and the number of inspected entities continues to rise.[54] Of the total number of inspections conducted in 2023, the Labour Inspection Service imposed sanctions in 2,523 cases. These included the suspension of operations in 361 cases, the imposition of fines in 643 cases, and the issuance of warnings in 1,523 cases.[55] According to the information released, the most frequent violations identified by the Labour Inspection Service at workplaces include: failure to conduct training or instruction on site, lack of personal protective equipment for employees, absence of risk assessments at the facility, lack of collective protective

[48] Labour Inspection Service, "In the 2023 reporting period, 34 workers died and 347 were injured in workplace incidents." 21 May 2024 <https://www.interpressnews.ge/ka/article/800294-shromis-inspekciis-samsaxuri-2023-clis-saangarisho-periodshi-samushao-adgilze-gardaicvala-34-da-dashavda-347-dasakmebuli> [last accessed on 08 September 2024].

[49] "In 2022, 35 workers died and 330 were injured in workplace incidents", 07 September 2023 <https://www.interpressnews.ge/ka/article/768795-2022-cels-samushao-adgilze-gardaicvala-35-da-dashavda-330-dasakmebuli> [last accessed on 08 September 2024].

[50] National Statistics Office of Georgia (Geostat) "Workplace Accidents" <https://www.geostat.ge/ka/modules/categories/810/samushao-sivrtseshi-momkhdari-ubeduri-shemtkhvevebi> [last accessed on 08 September 2024].

[51] "In Georgia, 90 people died in the line of duty between 2019 and June 2021", 17 June 2021 <https://www.interpressnews.ge/ka/article/661354-sakartveloshi-2019-clidan-2021-clis-ivnisamde-samsaxureobrivi-movaleobis-shesrulebisas-90-adamiani-daigupa> [last accessed on 08 September 2024].

[52] ibid.

[53] Labour Inspection Service, "In 2023, the number of fatalities resulting from industrial accidents decreased by 42% compared to 2018", 21 May 2024 <https://www.interpressnews.ge/ka/article/800276-shromis-inspekciis-samsaxuri-2023-cels-sacarmoo-ubeduri-shemtxvevebis-shedegad-gardacvlilta-raodenoba-2018-celtan-shedarebit-42-itaa-shemcirebuli> [last accessed on 08 September 2024].

[54] ibid.

[55] "In 2023, the Labour Inspection Service carried out 3,765 inspections related to occupational safety and imposed sanctions in 2,527 cases", 24 February 2024 <https://www.interpressnews.ge/ka/article/788565-shromis-inspekciis-samsaxurma-2023-cels-usaprtxoebis-mimartulebit-3765-inspektireba-chaatara-2527-shemtxvevashi-ki-sankcia-gamoiqena> [last accessed on 08 September 2024].

equipment, absence of a first aid kit on site, use of uninspected technical equipment, and the absence of an occupational safety specialist.[56]

Despite the trend toward improvement, the number of workplace fatalities in Georgia remains very high, highlighting the need to further enhance the effectiveness of the state authority responsible for occupational safety, namely, the Labour Inspection Service. To achieve this, it is essential to increase the resources available to the Service, which would facilitate a gradual rise in the number of inspections and, ultimately, contribute to the reduction of workplace fatalities.

With regard to the issues addressed in the case law of the ECtHR concerning the protection of life in industrial activities such as landfill operations, media reports did not indicate any of such incidents being recorded in Georgia. Likewise, according to media reports, the protection of individuals from the harmful effects of asbestos has not become a practical concern, and no legal conflicts between employees and employers over asbestos exposure have been reported.

IV. CONCLUSION

The analysis of the regulatory framework governing life-threatening industrial activities in Georgia indicates that, overall, the existing legislative provisions adequately reflect the standards set out in the ECtHR's case law, which require states to implement preventive measures to ensure occupational safety in the workplace. At the same time, the analysis of Georgian legislation has revealed the need for additional technical standards to be introduced in the country. In particular, it is necessary for the government of Georgia to adopt a technical regulation on the protection of employees from risks related to exposure to asbestos, carcinogens, mutagens, and biological agents in the workplace, as required by the Organic Law of Georgia on Occupational Safety.

In general, it should be noted that all, or nearly all, industrial activities involve varying degrees of risk to life and health (e.g.: chemical production, mineral extraction, and stone processing industries). The state itself must determine which industrial activities should be considered life-threatening and to what extent, and accordingly, introduce preventive measures to be taken, based on the specific nature of each hazardous activity. If an industrial activity poses a high risk to human life and/or health, such activity may be completely prohibited (e.g., activities involving the use of asbestos). However, if the risk arising from the industrial activity is moderate or low, the state may establish a regulatory framework that ensures the minimization of the threat to human life and health.

[56] ibid.

To determine whether a particular industrial activity is hazardous and to what extent, the state may rely on various sources such as research studies, statistics on industrial incidents, analysis of workplace practices as well as fatalities, complaints, etc. This approach enables the state to assess whether a specific industrial activity poses a threat to human life, thereby allowing it to implement appropriate preventive measures to ensure its protection.

The study of the practice of conducting life-threatening industrial activities has revealed an alarming situation regarding industrial accidents in Georgia. In recent years, numerous incidents have occurred in the country in which many lives have been lost during industrial (labour) activities. This is evidenced both by a number of specific cases and by statistical data on workplace fatalities. During this period, the highest number of deaths was recorded in the construction sector. While these statistical data confirm that the number of workplace fatalities in Georgia has been gradually decreasing - a trend that may be attributed both to the tightening of regulatory legislation imposing strict occupational safety obligations on employers and to the increased activity of the Labour Inspection Service - there is still a great deal of work to be done to prevent industrial accidents. In light of the high incidence of workplace fatalities in the country, it is necessary to reinforce the activities of the Labour Inspection Service by allocating additional resources, which would facilitate a gradual increase in the number of inspections and, ultimately, help to lower a fatality rate in the workplace.

In light of the above, it is essential to adopt effective measures not only to improve the legislation governing industrial activities but also to ensure its strict enforcement, particularly by enhancing the effectiveness of the Labour Inspection Service.

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WOMEN'S ECONOMIC EMPOWERMENT AS AN IMPORTANT COMPONENT OF SUBSTANTIVE EQUALITY

ABSTRACT

The constitutional reform implemented in 2017 brought substantial changes and established the principle of substantive equality between men and women within the constitution. The constitutional principle of equality, encompassing the implementation of targeted state measures to combat inequality, and women's economic empowerment, as a crucial global concern, derives from its potential to advance equality.

This article delves into the principle of equality, entrenched in numerous international and national legal frameworks, and explores how the right to equality serves to eliminate the cornerstone of discriminatory practices and ensure women's access to economic resources, opportunities, and decision-making processes. Highlighting the interconnectedness of women's economic empowerment and fundamental human rights principles, underscores the necessity of embracing a comprehensive, rights-based approach.

The paper explores how the current national legislative framework addresses systematic barriers and examines the ways in which executive authorities incorporate a rights-based perspective to advance women's economic empowerment.

By acknowledging and protecting the right to equality, parliament and government play significant influence in fostering inclusive economic growth and unlocking the full potential of women.

I. INTRODUCTION

Policy makers and development partners around the world have placed women's economic empowerment at the top of the global agenda. More than two decades after the landmark 1995 World Conference on Women in Beijing and, more recently, with the consensus on the 2030 Agenda for Sustainable Development, the global commitment to women's economic empowerment has never been stronger.[2]

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Georgia is actively engaged in the development of a significant legal framework and relevant policy documents aimed at fostering women's economic empowerment, which allows women to fully realize their potential in the economic sphere.

In this article, we will explore the key achievements of Georgia regarding women's economic empowerment and assess whether they align with the essential equality principle outlined in the Constitution of Georgia. Moreover, we will examine the challenges women experience in accessing economic resources and determine whether these barriers violate the fundamental constitutional right to equality.

The primary goal of this work is to highlight the advancements made in women's economic empowerment in Georgia and simultaneously examining the present obstacles. Additionally, we will outline the relevant policy documents adopted by the state and the standards it relies on to achieve the essential equality between women and men. Furthermore, the article analyzes the practices observed in several countries.

The paper incorporates descriptive, analytical, statistical, and comparative research methods.

II. INTERNATIONAL INITIATIVES FOR WOMEN'S ECONOMIC EMPOWERMENT

The nature of equality stands as a crucial prerequisite for the realization of human potential, the struggle for the idea of equality has been a constant concern for centuries, and manifested in various philosophical definition, notably as expressed in the concept of Egalitarianism within political philosophy.[1]

An egalitarian favors an equality: People should be treated as equals, should treat one another as equals, should relate as equals, or enjoy an equality of social status of some sort.[2]

In order to ensure the equal rights and duties for both men and women in all spheres of personal and public life, numerous international legal acts provide guarantees. Signatory states ensure within their jurisdiction to develop and establish legal and policy bases that will facilitate access to these rights. Georgia is a signatory to all these significant international legal documents and shares the values aimed at empowering women.

The United Nations Universal Declaration of Human Rights adopted in 1948 affirms equality, both in economic and labor relations, in terms of equal access to opportunities for individuals.[3]

[1] Gaelle Ferrant and Annelise Thim, 'Measuring Women's Economic Empowerment: Time Use Data and Gender Inequality' (2019) 16 OECD Development Policy Papers 5.

[2] Richard Arneson, 'Egalitarianism' (2013) Stanford Encyclopedia of Philosophy <https://plato.stanford.edu/entries/egalitarianism/#EquFunHumWor> [last accessed on 07 April 2024].

[3] ibid.

In addition, the Universal declaration emphasizes that everyone, without any discrimination, has the right to equal pay for equal work.[4]

According to the international covenant on civil and political rights, the states parties to the present covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present covenant.[5]

The right of everyone to the enjoyment of just and favorable conditions of work is recognized in the International Covenant on Economic, Social and Cultural Rights.[6] All workers have the right to a fair wage. Not only should workers receive equal remuneration when they perform the same or similar jobs, but their remuneration should also be equal even when their work is completely different but nonetheless of equal value when assessed by objective criteria.[7]

The extent to which equality is being achieved requires an ongoing objective evaluation of whether the work is of equal value and whether the remuneration received is equal. It should cover a broad selection of functions. Since the focus should be on the "value" of the work, evaluation factors should include skills, responsibilities and effort required by the worker, as well as working conditions. It could be based on a comparison of rates of remuneration across organizations, enterprises and professions.[8]

It should be noted that, Convention on the Elimination of All Forms of Discrimination against Women determines that States Parties shall take measures in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women , for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.[9] Moreover, States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.[10]

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[4] Article 22, Universal Declaration of Human Rights (1948) <https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf> [last accessed on 07 April 2024].

[5] ibid, Article 23.

[6] Article 3, International Covenant on Civil and Political Rights <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> [last accessed on 07 April 2024].

[7] Article 7, paragraph 1, International Covenant on Economic, Social and Cultural Rights <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights> [last accessed on 07 April 2024].

[8] United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights, General comment N23 (2016) on the right to just and favorable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights) (2016) 4. Paragraph 11.

[9] ibid, Paragraph 12.

[10] Article 3, Convention on the Elimination of All Forms of Discrimination against Women <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women> [last accessed on 07 April 2024].

This Convention is particularly important because it further specifies the circumstances in which women are more vulnerable. In addition to promote gender equality in labor rights, the convention addresses women's economic empowerment in terms of access to resources and specifies and emphasizes the need to empower women living in rural areas. States parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right to organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment, also to have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes.[11]

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular the right to family benefits and the right to bank loans, mortgages and other forms of financial credit.[12] Committee recommends that the State should support, as far as practicable, the creation of implementation machinery and encourage the efforts of the parties to collective agreements, where they apply, to ensure the application of the principle of equal remuneration for work of equal value.[13]

The Convention on the Protection of Human Rights and Fundamental Freedoms obliges states to protect the right to property, and the enjoyment of any right established by law must be ensured without any discrimination.[14]

The Beijing Platform for Action highlights the importance of advancing women's economic independence, including employment, and guaranteeing equal access for women to resources, opportunities and public services. The Millennium Development Goals on gender equality and women's empowerment adopted an increase in women's share of non-agricultural employment as one of its indicators of women's empowerment. Full and productive employment and decent work for all, including for women and young people became a target linked to the overarching MDG on halving extreme poverty. While neither of these documents attempted to define women's economic empowerment, their formulation paved the way for a greater equation between women's economic empowerment and their access to productive resources, including paid work.[15]

[11] ibid, Article 11, paragraphs a, d.

[12] ibid, Article 14.

[13] ibid, Article 13.

[14] Committee on the Elimination of Discrimination Against Women, General Recommendation N13: Equal Remuneration for Work of Equal Value, Eighth session (1989).

[15] Additional Protocols N1, N12, The Convention on the Protection of Human Rights and Fundamental Freedoms <https://www.echr.coe.int/documents/d/echr/Convention_ENG> [last accessed on 07 April 2024].

Besides aforementioned international legal acts, the Sustainable Development Goals (SDGs), particularly Goal 5 (Gender Equality)[16] and Goal 8 (Decent Work and Economic Growth)[17], call for measures to eliminate gender disparities in economic opportunities and ensure equal participation in the workforce.

It should be noted that, Georgia is also a part of the Equal Remuneration Convention which is adopted by International Labor Organization and the convention focuses on gender discrimination in employment and outlines principles for the equal remuneration for work of equal value regardless of the sex of an employee.

By ratifying and implementing of above-mentioned international instruments, Georgia has already demonstrated its willingness to promote women's rights including economic empowerment on the international stage. And at the same time, by establishing both a legal and a policy base, the number of women in the economic sector has greatly increased in Georgia, which has a significant impact in terms of achieving substantive equality.

III. EQUALITY IN NATIONAL LEGISLATION

The 1921 Constitution of Georgia was based on the approach to strengthening the idea of equality at the constitutional level. According to the 1921 Constitution of Georgia, all citizens are equal before the law. Furthermore, it underscores that equality between citizens of either sex is equal in terms of political, as well as civil, economic, and family rights.[18]

The spirit of the principle of equality of 1921 Constitution is reiterated in the preamble of the modern constitution of Georgia.[19]

The constitutional amendments of 2017 introduced higher standards of guarantees to ensure the protection of specific basic rights and independence of constitutional bodies. The constitutional amendments, added the norm on essential gender equality between sexes, which establishes in a tangible form the state's obligation to ensure essential

[16] Naila Kabeer, 'Women's Economic Empowerment and Inclusive Growth: Labour Markets and Enterprise Development' (2012) 7 <https://www.womenindisplacement.org/sites/g/files/tmzbdl1471/files/2020-10/Womens%20Economic%20Empowerment%20and%20Inclusive%20Growth.pdf> [last accessed on 07 April 2024].

[17] Sustainable Development Goal 5, 'Achieve gender equality and empower all women and girls' <https://sdgs.un.org/goals/goal5> [last accessed on 09 April 2024].

[18] Sustainable Development Goal 8, 'Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all' <https://sdgs.un.org/goals/goal8> [last accessed on 09 April 2024].

[19] Article 16, Article 36, Constitution of Georgia, 21 February 1921 <https://matsne.gov.ge/en/document/view/4801430?publication=0> [last accessed on 11 April 2024].

equality and eliminate inequality.[20] Moreover, the State is required to implement special measures for ensuring the substantive equality between men and women and eliminating gender inequality.[21]

The constitutional principle of equality before the law implies the equal recognition and protection of the rights of all people who are in the same conditions and have the same attitude to a certain issue.[22]

Since the adoption of the Constitution of Georgia, it strengthened the general norm-principle of equality and prohibited any discriminatory treatment. The Constitutional Court has interpreted the provision of establishing equality before the law as follows: "Equality does not mean treating all people in the same conditions, regardless of nature and abilities. From it comes only the obligation to create such a legislative space, which for each specific relationship will essentially create equal opportunities for equals, and the opposite for unequal."[23]

The purpose of the right to equality before the law is to provide equal opportunities to individuals, to ensure equal realization of their skills, equal access to public goods. However, the realization of human potential is influenced by many social aspects beyond the legal environment. Equal treatment by law in various fields, in some cases, cannot ensure the equal realization of human potential. Law operates in a specific peculiarity of the society, which implies that the conditions of completely equal legal regulations may not realize their opportunities equally with others due to the artificial barriers.[24]

The concept of equality provided by the constitution is even more concrete and explains that equality between men and women must be real, essential, which will give both women and men the opportunity to fully realize their potential. However, historically women have been more deprived of the opportunity to realize themselves on par with men. One significant challenge in this regard is the lack of economic opportunities available to women.[25]

The positive obligation of the state enshrined in the Article 11, Clause 3 of the Constitution of Georgia, emphasizes the socio-political inequality existing outside the

[20] Preamble, Constitution of Georgia <https://matsne.gov.ge/en/document/view/30346?publication=36> [last accessed on 11 April 2024].

[21] Article 11, Explanatory card on the Draft Constitutional Law of Georgia "On Amending the Constitution of Georgia" (2017) <https://info.parliament.ge/file/1/BillReviewContent/149115> [last accessed on 07 April 2024].

[22] Article 11, Constitution of Georgia <https://matsne.gov.ge/en/document/view/30346?publication=36> [last accessed on 07 April 2024].

[23] Judgment of the Constitutional Court on the case N1/2/213, 243 "Uta Lipartia, Giorgi Khmelidze, Eliso Janashia and Gocha Ghadua v. the Parliament of Georgia", 16 February 2005. Paragraph 22.

[24] Judgment of the Constitutional Court on the case N3/3/1526 "Political Union of (NNLE) Citizens "New Political Center", Herman Sabo, Zurab Girchi Japaridze and Ana Chikovani v. the Parliament of Georgia", 25 September 2020. Paragraphs 19 and 20.

[25] ibid, Paragraph 24.

law and promotes the equal realization of opportunities. In general women and men have the same skills to achieve success and to be successful. Ensuring the real equality, is a challenge for the whole world and Georgia is not an exception.[26]

In fact, the achievement of equality cannot be guaranteed without strengthening the economic opportunities for women, especially when the Constitution of Georgia emphasizes the goal of achieving essential equality, which is why the women's economic empowerment is directly related to the principle of equality.

The idea of essential equality between men and women deriving from the Constitution of Georgia is incorporated in the national legislation.

The Parliament of Georgia adopted the Law on Gender Equality in 2010, with the purpose of preventing the discrimination in any aspect of public life, in order to create proper conditions for realization of equal rights, freedoms and opportunities for men and women.[27]

In May 2014, the Parliament of Georgia adopted the Law on the Elimination of All Forms of Discrimination, prohibiting discrimination based on sex, among other grounds. It further explicitly banned any support or encouragement of the discriminatory actions.[28]

IV. POLICY DOCUMENTS ON WOMEN'S ECONOMIC EMPOWERMENT

The amended legislations on equality, paved the way for the adoption of the new policy documents, for instance: a new State Concept of Gender Equality was adopted in December 2022 by the Parliament of Georgia.[29] The concept is based on the principle of essential equality guaranteed by the Constitution of Georgia and international human rights instruments and aims to implement this principle in all spheres of Georgian legislation, state policy, practice, and public life. For the purposes of the concept, gender equality means equal rights, duties, responsibilities and equal participation of men and women in all spheres of personal and public life.[30]

The State Concept reinforces the guarantees of economic empowerment and the protection of labor rights. It also emphasizes the crucial role of economic empowerment

[26] ibid, Paragraph 25.

[27] ibid.

[28] Article 2, Law of Georgia on Gender Equality, Chapter I – General Provisions <https://matsne.gov.ge/en/document/view/91624?publication=9> [last accessed on 14 April 2024].

[29] Committee on the Elimination of Discrimination against Women, 'Sixth Periodic Report Submitted by Georgia under Article 18 of the Convention' (2018) UN Doc CEDAW/C/GEO/6. Paragraph 38.

[30] Committee on the Elimination of Discrimination against Women, 'Replies of Georgia to the List of Issues and Questions in Relation to Its Sixth Periodic Report' (2023) UN Doc CEDAW/C/GEO/RQ/6. Paragraph 16.

of women in achieving gender equality and economic development of the country. The state policy is aimed at achieving substantial gender equality in the economic sphere, which also means taking special measures to increase equal access to the economic resources, including financial resources, real estate, inheritance, property registration and property rights. [31]

The concept recognizes that women with different socio-economic status have different needs in terms of economic empowerment. The state should promote the existence of gender-separated socio-economic indicators which varies in different regions and municipalities.[32]

In March 2023 the concept for women's economic empowerment was adopted by the Parliament. The concept is the first holistic document in the region that reviews the state's positive commitment to women's economic empowerment in a long-term perspective and the required necessary steps. Georgia has taken important, positive steps to ensure women's equal economic empowerment, challenges remain, for example: there are inequalities in terms of the access to the resources, unequal distribution of unpaid and care work and stereotypical attitudes. Existing barriers especially affect the socio-economic well-being of low-income women. It's noteworthy, that the State concept of women's economic empowerment, is based on UN High-Level Recommendations. The steps for enforcing the State Concept involves equal access to resources, strengthening legal frameworks, improving public and private sector employment practices, addressing unpaid care work, formalizing informal economic activity, and challenging social norms.[33]

In 2022 the Government approved and in 2023 the Parliament adopted the second National Strategy for the Protection of Human Rights in Georgia for 2022-2030.

Strategy indicates the progress made in addressing gender equality, protecting women's rights, and combating domestic violence through enhancements in the legal framework as well as the response mechanisms, and the establishment of protection and rehabilitation services. The strategy emphasizes the need for the implementation of effective measures at both central and local levels. Furthermore, it advocates for the economic empowerment of women, fostering their active participation.[34]

Strategy indicates, that strengthening gender equality principle, ensuring equality in accordance with legal guarantees and promotion of equal opportunities and de facto

[31] Article 1, Resolution of the Parliament of Georgia on a State Concept of Georgia on Gender Equality <https://matsne.gov.ge/ka/document/view/5664358?publication=0> [last accessed on 19 April 2024].
[32] ibid.
[33] ibid, Article 5.
[34] Resolution of the Parliament of Georgia on Women's Economic Empowerment <https://matsne.gov.ge/ka/document/view/5755428?publication=0> [last accessed on 19 April 2024].

equality, to empower women and girls, women's economic empowerment is achieved by strengthening an equitable environment.[35]

On December 28th, the Government adopted the 2024-2026 Action Plan for the implementation of the Human Rights Strategy.[36]

The action plan outlines various activities aimed at ensuring women's economic empowerment. The main activities include: increasing women's participation in state employment promotion programs and active labor market policies, supporting networking opportunities for women entrepreneurs in the private sector through information meetings, providing information and support to women managers to access new international markets via the Export Manager Certification Course, promoting women's entrepreneurship by offering training in project management skills, organizing a week of technological entrepreneurship for local girls, implementing a mentoring program for women innovators, hosting a forum for women innovators to advance women's economic empowerment.[37]

These activities collectively contribute to enhancing women's participation and success in economic endeavors.

V. ACCESS TO ENTREPRENEURSHIP

According to the World Bank, the exclusion of women from the labor market and low economic activity in Georgia, results in the loss of 11% of GDP every year. Statistics indicate that society in general will benefit from women's economic empowerment.[38]

Georgia pursues to adhere to the best practices prevalent on the world stage, in terms of gender equality and women's economic empowerment. One of the leaders in these fields is Canada. According to the Ministry of Small Business of Canada,[39] increasing women entrepreneurship could add billions to the GDP. Yet gender stereotypes and other barriers still prevent many women from reaching their business goals. Only 16.8% of Canadian small and medium-sized businesses are owned by women, representing a huge, missed opportunity.

[35] Human Rights Strategy of Georgia for 2022-2030, 26 <https://matsne.gov.ge/ka/document/view/5757268?publication=0> [last accessed on 16 April 2024].
[36] ibid, 26-27.
[37] Ordinance of the Government of Georgia N528, (28/12/2023) on adoption of Human Rights Action Plan for 2024-2026 <https://matsne.gov.ge/ka/document/view/6053557?publication=0> [last accessed on 18 April 2024].
[38] Human Rights Action Plan of Georgia for 2024-2026 <https://myrights.gov.ge/ka/documents/action%20plans/> [last accessed on 18 April 2024].
[39] Group of authors, Decade of Women's Empowerment, Major achievements and challenges of 2012-2022 (Georgian Parliamentary Research Center 2023) 105 <http://genderequality.ge/ge/libraries> [last accessed on 13 April 2024].

Women's employment and financial independence affects not only their role in the family and distribution of family activities, but also contributes significantly to the creation of the country's economic power, overcoming poverty and improving the economic situation.[40]

The Government of Canada is advancing women's economic empowerment with the first ever Women Entrepreneurship Strategy, representing nearly $7 billion in investments and commitments. The WES aims to increase women-owned businesses access to the financing, networks, and expertise they need to start up, scale up and access new markets.[41]

The Women Entrepreneurship Strategy encompasses the programs and services of multiple federal departments, crown corporations and agencies dedicated to supporting women entrepreneurs. In 2021–22, WES initiatives delivered almost 9,000 affordable loans to women entrepreneurs; more than 22,000 women participated in learning and networking events through the Women Entrepreneurship Knowledge Hub; and the WES Ecosystem Fund helped more than 10,000 women start or grow their businesses.[42]

Sweden has implemented advanced approach towards gender equality and women's economic empowerment. However, even in Sweden women are still underrepresented as entrepreneurs. Savings and ownership are unevenly distributed between men and women. This, in combination with wage differences, means that men and women have different personal finances and thus different amounts of influence over their life choices.

In this regard, the Swedish government pays special attention to raising awareness in order to increase the involvement of women in entrepreneurship.[43]

The Swedish Agency for Economic and Regional Growth – Tillväxtverket, provides grants for several entrepreneurs to support their programs, including targeting women. One of the main tasks of the Swedish Agency for Economic and Regional Growth is to strengthen Sweden's economy and competitiveness, with this in mind, the government is actively improving conditions for women, to run and develop business.[44]

To strengthen women's position as entrepreneurs and at the same time contribute to increased investments in Swedish companies, the government implements

[40] Rechie Valdez, Minister of Small Business of Canada, 'Statement of the Minister of Small Business of Canada' <https://ised-isde.canada.ca/site/women-entrepreneurship-strategy/en> [last accessed on 26 April 2024].

[41] Group of authors, supra note 39, 106.

[42] Government of Canada, 'Women Entrepreneurship Strategy: Progress Report 2022' <https://ised-isde.canada.ca/site/women-entrepreneurship-strategy/en> [last accessed on 26 April 2024].

[43] Group of authors, supra note 39, 106.

[44] Regeringen, 'Uppdrag om kvinnors företagande och ägande' <https://www.regeringen.se/contentassets/d1990cc2aeb5455f92b9f782173845b6/uppdrag-om-kvinnors-foretagande-och-agande.pdf> [last accessed on 25 April 2024].

initiatives that will contribute to better conditions for women in business. The efforts contribute to increasing awareness, interest, and competence among women regarding entrepreneurship and investments as well as ownership of companies.[45]

Within the framework of the entrepreneurship promotion policy, supporting women entrepreneurs and their economic empowerment is one of the most important directions in Georgia.[46]

Women's entrepreneurship became one of the seven priority directions of the "2021-2025 Strategy for the Development of Small and Medium Enterprises of Georgia". It should be emphasized that even though the 2016-2020 strategy covered above mentioned issue, it was decided to establish promotion of women's entrepreneurship as a separate priority in the new strategy, with corresponding goals and objectives.[47]

Enterprise Georgia, under the Ministry of Economy and Sustainable Development of Georgia has been operating Micro and Small Business Support Program since 2015, offering micro grants up to 30,000 GEL to promote the growth of small businesses, foster a modern entrepreneurial culture, and create job opportunities in Georgia. Since 2020, women are given priority and receive an additional point at the stage of evaluating business ideas, within the framework of the program. It should be noted that in 2022-2023, the share of female beneficiaries already exceeded 50%.[48]

In 2022-2023, LEPL "Georgia's Innovation and Technologies Agency" under the Ministry of Economy and Sustainable Development of Georgia, undertook several initiatives focused on promoting and advancing opportunities for women. The agency implemented a range of activities that included organizing training, workshops, and capacity-building programs, encouraging access to finance and resources, and facilitating mentorship opportunities that focused on empowering and inspiring women to pursue careers in technology and innovation.[49]

One of the criteria for evaluating the grant application is the participation of women in startups. The startups, with female majority participation are given an additional 2 points. The rule aims to encourage the involvement of women in entrepreneurial activities.[50]

At the regional level, women's economic empowerment is vital to eliminate gender inequality and overcome population decline in aging rural settlements. The statistics

[45] ibid.
[46] ibid.
[47] Group of authors, supra note 39, 108.
[48] ibid, 106.
[49] ibid.
[50] In particular: "Promotion of women's entrepreneurship - creativity, how to create an innovative product"; "Women in Technology"; "Ms. Tech - UI/UX Design for Girls"; "Wix Development Course for Girls"; "Training with female entrepreneurs"; "Tech Bootcamp for High School Girls" and "Technovation Girls Sakartvelo 2023". Totally, over 386 females benefited from the events.

clearly indicate a clear decline in rural population, which has further decreased by 8% since 2012.[51]

Women and girls living in regions are more likely to suffer from gender inequality due to local culture, perceptions, and stereotypes, as well as relatively low access to economic and social services. These further increase the risks of poverty and economic inequality for women and girls. The economic improvement of girls and women in rural areas, is also mentioned in the recommendations prepared for Georgia within the framework of international cooperation.[52]

One of the goals of the Ministry of Agriculture is to strengthen the entrepreneurial abilities of women and to ensure the maximum involvement of various groups of women. The Rural Development Agency, under the Ministry of Environmental Protection and Agriculture, adopted the "Gender Strategy and Action Plan 2022-2024".[53]

It's noteworthy, that the 2021-2027 strategy of agriculture and rural development envisages diversification/development of economic opportunities in rural areas, improvement of social conditions and living standards, based on the principles of sustainable development.[54]

In 2022, the Agency implemented a "Pilot Program for Women" in two municipalities of Georgia - Lagodekhi and Marneuli. The goal of the Program is to integrate economically inactive women into society within the pilot municipalities, by improving their socio-economic status and stimulating women's involvement in agricultural activities.[55]

VI. WOMEN IN THE LABOR MARKET

Ensuring equal access to fair wages, protection of discrimination and employment opportunities are main aspects of women's economic empowerment.

Sweden has huge experience regarding the protection of gender equality in the workplace. Legislation prohibits discrimination based on gender and with the purpose of discovering, rectifying, and preventing unwarranted pay differentials and other terms of employment between women and men, the employer shall annually survey and analyses regulations and practice concerning pay and other terms of employment that are applied with the employer and pay differentials between women and men who perform work which is regarded as equal or of equal value.[56]

[51] Group of authors, supra note 39, 110.
[52] ibid, 113.
[53] ibid.
[54] ibid.
[55] ibid.
[56] The budget of the mentioned program is 300,000 USD: UN Women - 240,000 USD, the Agency - 60,000 USD.

Sweden's Gender Equality Policy,[57] is prescribed in six priority areas and one of the main areas is economic gender equality. In this regard, specialized policy documents are adopted, to ensure, that the same opportunities and conditions for paid work are achieved in practice.[58]

In order to eliminate gender discrimination and barriers in the labor market, Georgia undertook the commitment within the framework of the sustainable development goals of the United Nations. [59] Sustainable Development Goal 10 on reducing inequalities calls on states to "ensure equal opportunities and reduce inequalities in work outcomes, including by eliminating discriminatory laws, policies or practices and promoting appropriate laws, policies or activities in this regard".[60]

The amendments implemented in the Labor Code of Georgia in 2020 ensured full compliance of the Code with the standards of the European Union and the International Labor Organization. It is worth noting that the European Parliament and Council Directive defines the principle of equal pay for equal work or work of equal value, and prohibits discrimination based on different criteria when determining pay. The said obligation was undertaken by Georgia within the framework of the Association Agreement.[61]

In response to the fulfillment of this obligation, amendments to the Labor Code of Georgia included the concept of "remuneration" and the principle of equal pay for equal work. In particular, the code established equal remuneration between female and male employees, for the same job performed, which is an important step forward in the process of reducing the gender wage gap.[62]

In September 2021, Georgia also joined the "International Equal Pay Coalition"203 (EPIC), whose goal is to reduce wage differences worldwide and ensure equal pay for men and women for performing activities of equal value. To achieve this goal, the coalition supports states in building capacity, improving legislation and monitoring enforcement.[63]

The amendments to the Labor Code introduced increased standards of parental leave, increasing the paid parental leave days to 183 calendar days or 200 calendar days in

[57] Act on Equality between Women and Men The Equal Opportunities Act (SFS 1991:433) Section 10 <https://www.wcwonline.org/pdf/lawcompilation/Sweden-genderequality.pdf> [last accessed on 25 April 2024].

[58] Government Office of Sweden, Ministry of Employment, 'Gender Equality Policy in Sweden, A Government for Gender Equality' <https://government.se/contentassets/efcc5a15ef154522a872d8e46ad69148/gender-equality-policy-in-sweden-240229.pdf> [last accessed on 25 April 2024].

[59] ibid.

[60] Group of authors, supra note 39, 4.

[61] ibid, 115.

[62] ibid.

[63] ibid, 116.

case of complicated childbirth or twin birth. Childcare leave, which can be used fully or partially for 604, was also introduced. This period may be distributed between the pregnancy and postnatal periods.[64] The Code also provides for additional unpaid parental leave, in particular, "employee may, upon his/her request, be granted, in whole or in parts, but not less than 2 weeks a year, additional unpaid parental leave of 12 weeks until the child turns 5."[65] Employees who are breastfeeding infants under the age of 12 months are entitled to request an additional break of at least 1 hour a day. A break for breastfeeding shall be included in working time and shall be remunerated.[66]

The Labor Code of Georgia also incorporated new provisions regulating the rights of a pregnant woman, a woman who has recently given birth or is breastfeeding, including the prohibition of their employment for night work,[67]providing them with reasonable accommodation, to request the performance of work in the same establishment that corresponds with her health condition,[68]releasing her from the performance of the duties under the employment agreement, which shall not be considered as a period of temporary incapacity for work.[69]

Regarding the legal framework for individuals employed in public service, the Law on Public Service provides for 183 calendar days of paid leave for pregnancy, childbirth, and childcare. In cases of childbirth complications or the birth of twins, the leave period extends to 200 calendar days.[70]

In addition, amended legislation establishes, that a pregnant woman, a woman who has recently given birth or is breastfeeding, a person with a disability, a minor, a legal representative or supporter of a person with a disability, and/or a person who has a child under the age of 3 years, shall not work overtime without his/her written consent.[71] Employees have the right to part-time work for health reasons, or for raising a child of less than one year old and during pregnancy.[72] The state-provided compensation is attributed to women employers. This benefit amounted to GEL 1,000 before 2023, afterwards it was increased to GEL 2,000.[73]

[64] ibid.
[65] Article 37, paragraph 3, Labor Code <https://www.matsne.gov.ge/document/view/1155567?publication=21> [last accessed on 15 April 2024].
[66] ibid, Article 40.
[67] ibid, Article 24, paragraph 6.
[68] ibid, Article 28, paragraph 3.
[69] ibid, Article 20, paragraph 6.
[70] ibid, Article 28.
[71] Group of authors, supra note 39, 117.
[72] Article 61, paragraph 11, Law on Public Service of Georgia.
[73] ibid, Paragraph 5.

VII. UNPAID WORK

Women bear a disproportionate burden of unpaid care work, resulting in negative social and economic outcomes for women. Unpaid care work significantly contributes to a country's economic and societal well-being. However, such work remains mostly invisible and unrecognized. In no country in the world do men and women equally share unpaid care work.[74]

Unpaid care work is the main contributor to women's time poverty and is an obstacle to women's economic participation. Globally women perform more than 3 times of unpaid care work than men.[75]

Unpaid household work is also challenging in Sweden. Women and men spend different amounts of time on unpaid household work. This is evident from Statistics time use survey of Swedes.

Women who provide a lot of care also experience poorer well-being as it affects their social life, finances, and health and it has impact on women's economic condition. The tax deduction on household services has increased both women's and men's participation in the labor market by reducing the time spent on cleaning and other household chores. However, the effects of the tax deduction on household services on the distribution of unpaid household and caregiving work and economic equality are still unclear.[76]

The goal of achieving an equal distribution of unpaid household and care work has long been a neglected area in terms of political actions, and progress has almost come to a standstill. The National Board of Health and Welfare is currently developing a national strategy for relatives who are caregivers or who support elderly relatives.[77]

Georgia also has the same policies as well as Sweden. However, Georgia also has the challenges like Sweden, both countries have their goals to develop several areas to reduce the women's care work and support their development.

In Georgia, the division of household labor is starkly segregated by gender, with women doing nearly all household chores. There is no significant discrepancy between women's and men's perceptions on this matter.[78]

[74] Article 1, Resolution of the Government of Georgia "On determination of the amount of monetary assistance to be given for the period of paid leave due to pregnancy and childbirth and paid leave due to child care, as well as paid leave due to the adoption of a newborn, and some measures to be taken." <https://matsne.gov.ge/document/view/5699771?publication=0> [last accessed on 21 April 2024].

[75] UN Women, Issue Brief, 'Unpaid care work in Georgia' 1 <https://georgia.unwomen.org/sites/default/files/2022-09/Unpaid-Care-Work%20V2%20eng.pdf> [last accessed on 21 April 2024].

[76] ibid.

[77] Swedish Gender Equality Agency, 'Sub-Goal 4: Even Distribution of Unpaid Housework and Care Work' <https://swedishgenderequalityagency.se/gender-equality-in-sweden/sub-goal-4-even-distribution-of-unpaid-housework-and-provision-of-care/> [last accessed on 26 April 2024].

[78] ibid.

Most importantly, women's unpaid care-work creates barriers, which prevents women from keeping a paid job. Unpaid care responsibilities are one of the factors prompting women to join more precarious jobs, be self-employed or work in the informal economy, which in turn leaves them without adequate social security. While care work can also be rewarding, a systemic, unequal division of labor leads to overwork and time poverty, limiting women's economic opportunities, power and control over their lives and diminishing their overall enjoyment of dignified work and life.[79]

VIII. CONCLUSION

An economically realized woman makes an important contribution to the economic development of the country.

Examples of Georgia, Sweden and Canada have shown the appropriate efforts made by the states in the direction of women's economic empowerment. Despite the legal and policy similarities of Georgia, it should be noted that the context of traditional, religious and cultural differences matter. Hence, the policies developed within an international legal framework should take the country's context into account.

Georgia has achieved significant development in the direction of women's economic empowerment by its authentic approaches, which directly translate into gender equality.

In Georgian context, the main objective of equality before the law is to equip people with equal opportunities and to promote the equitable utilization of their abilities. However, it's important to recognize that the realization of women potential is impacted negatively by many factors.

Georgia has a sophisticated legal framework in terms of gender equality harmonized with international standards. However, improving legislation and policy is a continuous process, it is appropriate to further bring the national legal framework closer to the best international standards, and learn from the international experience regarding policy making process on women's economic empowerment. Georgia should consider the possibility of ratifying appropriate thematic conventions of the International Labor Organization.

Although the participation of women in entrepreneurship support programs has increased significantly, it is important to increase this rate further by improving the gender sensitivity of economic support programs implemented by the state at the central and local levels.

Unpaid labor plays an important role in the creation of the economic state of the country. It is also important that the said burden is mostly carried out by women. Therefore, it is

[79] UN Women, supra note 75.

important for the state to have an appropriate care economy framework, which should include the principles of gender equality in social and educational services.

Moreover, an essential factor for women's economic empowerment is access to quality education, that will contribute to the elimination of social norms and stereotypes related to the role of women, as well as discriminatory attitudes established in society.

All the above, will contribute to the economic empowerment of women, that directly affects the essential equality of men and women, which is a fundamental principle of the Constitution of Georgia.

*Levan Dzneladze**

THE PROBLEM OF THE BURDEN OF PROOF IN CASES OF PROLONGED DETENTION

ABSTRACT

The article addresses one of the pressing issues in criminal proceedings. The right to liberty is among the fundamental human rights protected under both national and international legal instruments. Interference with fundamental rights and freedoms in the course of criminal proceedings is justified only under exceptional circumstances. Detention represents the most severe form of preventive measure as it constitutes an extreme intervention against an individual and is directly associated with the deprivation of one of their most essential values: liberty. Prolonged detention and the burden of proof related to its justification remain significant challenges for the Georgian justice system. The aim of this research is to identify the problems surrounding the burden of proof in cases of prolonged detention and to outline the necessary measures to address them effectively.

I. INTRODUCTION

Liberty is protected by the highest constitutional standard, which implies that, in accordance with the presumption of innocence, an accused person must remain at liberty until a final conviction is rendered.

At the initial stage of criminal proceedings, the use of detention as a preventive measure may be justified by the risks of absconding, destruction of evidence, and/or committing a new offense. However, as time passes, such risks tend to diminish, and the continued deprivation of liberty must be supported by qualitatively stronger and more substantial arguments.

In this context, the issue of the allocation of the burden of proof becomes particularly problematic in cases involving bail with custodial enforcement. This situation constitutes a mixed (hybrid) model that combines the elements of detention and bail. In practice, the majority of judges, when applying bail as a preventive measure, impose detention to accused individuals (being already under arrest) using it as a means to

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secure enforcement of bail. In such cases, the sole basis for imposing detention is the procedural coercive measure previously applied - namely, arrest.

The sole legitimate purpose of custodial bail should be to ensure the timely provision of the bail amount, whether in cash or through equivalent immovable property. Moreover, if the accused is unable to secure the bail amount within the time limit set by the court, there is a high likelihood that they will remain in detention for up to 60 days, as prescribed by the Criminal Procedure Code, until the court reconsiders the issue of extending the detention.[1] The current mechanism of custodial bail allows for an unjustifiably prolonged pre-trial detention, leaving individuals deprived of liberty without sufficient legal justification.[2]

The aim of the research is to examine whether the common courts exercise due diligence in providing relevant and sufficient reasoning when applying detention and custodial bail - both at the accused's first appearance during the hearing on the application of a preventive measure, and, in particular, when extending the term of detention during the investigation or the trial stage.

II. THE RIGHT TO LIBERTY

1. THE RIGHT TO LIBERTY IN THE JUDICIAL PRACTICE OF THE CONSTITUTIONAL COURT OF GEORGIA

It is appropriate to begin any discussion on the right to liberty with the country's fundamental law. According to the Constitution of Georgia, "human liberty is protected."[3] In a state governed by the rule of law, public authority is subject to an unconditional obligation: interference with a person's liberty (or any of their rights) is permissible only when it is absolutely necessary and to the extent that such interference is objectively required. This is the foundation of the constitutional order of any legal state.[4]

"Although Article 13 of the Constitution explicitly refers to an "accused person" only in Paragraph 5, in the context of pre-trial detention, this does not mean that the rights

[1] Article 219, paragraph 4, Criminal Procedure Code of Georgia: The safeguard mechanism for reviewing the necessity of detention every two months was introduced in 2015 by the Law of Georgia N3976, 8 July 2015.

[2] On 1 August 2018, the Tetritskaro District Court submitted a constitutional referral to the Constitutional Court of Georgia concerning custodial bail. See Tetritskaro District Court ruling N10/d-27-2018.

[3] Article 13, Constitution of Georgia.

[4] Judgment of the Constitutional Court of Georgia on the case N1/4/557, 571, 576 "Citizens of Georgia Valerian Gelbakhiani, Mamuka Nikolaishvili, and Aleksandre Silagadze v. the Parliament of Georgia", 13 November 2014. Paragraph II-62.

and guarantees of a detained person are limited to that provision alone."[5] "The purpose of this constitutional norm is to protect an individual's physical liberty and to prevent any unlawful, unfounded, or arbitrary deprivation of liberty."[6]

The right to liberty does not fall under the category of absolute rights; however, it protects individuals from unlawful or artificial interference by the state. "This right is so fundamental that a person cannot waive it, even in cases where they voluntarily surrender to state authorities for the purpose of arrest or detention."[7] A person may not be detained without a lawful basis and a court decision. "The restriction of liberty must be regarded as an exception, permissible only when there is convincing justification."[8]

Interference with the right to liberty is admissible only in accordance with the law and by a person duly authorized to act. However, "such interference must comply with strict constitutional and legal standards designed to protect individuals from arbitrary state action. The intensity of constitutional scrutiny increases significantly when it comes to the deprivation of physical liberty - particularly its most severe form, imprisonment - as this impairs, and sometimes completely excludes, the individual's ability to exercise other rights and freedoms."[9]

Lawful and procedurally compliant deprivation of liberty "requires four conditions to be met:

- The existence of a legal basis for its application;
- A statutory framework for conducting the relevant procedure; Adherence to domestic procedural rules;
- Respect for the prohibition of arbitrariness, which in most cases necessitates a proportionality assessment."[10]

Another constitutional safeguard of the right to liberty lies in the requirement that interference with this right must primarily be based on a court decision. This reflects "the principle of the inviolability of personal liberty and implies that deprivation of liberty or any other restriction of personal freedom is permissible only on the basis of a judicial act. This guarantee forms the foundation of key principles in criminal

[5] Besik Loladze and Ana Pirtskhalaishvili, Basic Rights - commentary (EWMI 2023) 239.

[6] Judgment of the Constitutional Court of Georgia on the case N1/4/557, 571, 576 "Citizens of Georgia Valerian Gelbakhiani, Mamuka Nikolaishvili, and Aleksandre Silagadze v. the Parliament of Georgia", 13 November 2014. Paragraph II-62.

[7] Maia Kopaleishvili (ed.), Human Rights and the Judicial Practice of the Constitutional Court of Georgia (Sezani Publishing 2013) 105.

[8] Judgment of the Constitutional Court of Georgia on the case N1/3/393, 397 "Citizens of Georgia Vakhtang Masurashvili and Onise Mebonia v. the Parliament of Georgia", 15 December 2006. Paragraph II-4.

[9] Judgment of the Constitutional Court of Georgia on the case N2/1/415 "the Public Defender of Georgia v. the Parliament of Georgia", 06 April 2009. Paragraph II-6.

[10] Avtandil Demetrashvili, Commentary on the Constitution of Georgia (Chapter II) (GIZT 2013) 136.

procedure, such as the inviolability of the person and the protection of human dignity and honor."[11]

The Constitution of Georgia treats deprivation of liberty not only as a measure of *ultima ratio*,[12] but also as a right that must be strictly limited in time to prevent its violation. The relevant constitutional norms provide "four key guarantees: (1) The right of a detained or otherwise restricted person to be brought before a judge within 48 hours; (2) The substantive right of a detained person to remain in pre-trial detention for a reasonable period, not exceeding 9 months, which aims to prevent the unreasonable prolongation of this time limit; (3) The procedural right to mandatory judicial review of this detention period; and (4) The right to release from detention if continued deprivation of liberty is no longer justified."[13]

2. THE RIGHT TO LIBERTY IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

The European Convention on Human Rights (ECHR), like the Constitution of Georgia, establishes an equivalent standard for the protection of the right to liberty. According to the ECHR, "everyone has the right to liberty and security of person",[14] thereby emphasizing the fundamental nature of the rights to liberty and personal security.[15] "European standards make it clear that liberty may not be restricted arbitrarily or without proper justification."[16] "The possibility of detention must not be used as a tool of moral pressure on the accused."[17] Until a final determination of guilt by the court, "the presumption must always be in favor of release."[18]

"The right protected under Article 5 of the ECHR constitutes a foundational value and a prerequisite for the full enjoyment of many other rights and freedoms in a democratic society."[19] This implies that the restriction on liberty must follow a strictly regulated

[11] Revaz Gogshelidze (ed.) Criminal Procedure (Selected Institutions of the General Part) (Meridiani Publishing 2009) 85.

[12] Judgment of the Constitutional Court of Georgia on the case N2/1/415 "the Public Defender of Georgia v. the Parliament of Georgia", 06 April 2009. Paragraph II-15.

[13] Demetrashvili, supra note 10, 148.

[14] Article 5, Convention for the Protection of Human Rights and Fundamental Freedoms.

[15] Pim Albers, Protection of Human Rights in Georgia in the Context of Criminal Justice (Meridiani Publishing 2019) 119.

[16] Irina Akubardia, Rights of the Accused and European Standards (Meridiani Publishing 2019) 297.

[17] Judgment of the European Court of Human Rights N23755/07 "Merabishvili v. Georgia", 05 July 2016. Paragraph 106.

[18] Judgment of the European Court of Human Rights N23755/07 "Buzadji v. Moldova", 05 July 2016. Paragraph 89.

[19] Konstantine Korkelia, Nana Mchedlidze and Aleksander Nalbandov, Compatibility of Georgian Legislation with the Standards of the European Convention on Human Rights and its Protocols (Bakur Sulakauri Publishing 2005) 79.

procedure and that the imposition of detention (regardless of its duration) must be supported by relevant and sufficient reasoning.

In one of its judgments against Georgia, the European Court of Human Rights (ECtHR) stated that "The grounds for detention were not "relevant and sufficient," leading to a violation of Article 5, paragraph 3 of the ECHR."[20] The coercive power of the state must be balanced by adequate safeguards for the protection of human rights. "The purpose of human rights instruments is to restrain prosecutorial authorities and to ensure that measures such as arrest, phone tapping, search, and seizure are based on proper legal grounds and that any interference with individual rights remains within the "limits of necessity". [21]

In addition to declaring the right to liberty, Article 5 of the ECHR provides "an exhaustive list of six grounds on which a person may lawfully be deprived of liberty."[22] Detention must be justified in such a way that it is clear the court has diligently examined all relevant factual circumstances pointing to the existence or absence of a legitimate public interest sufficient to override the norm of individual liberty."[23]

While it is within the prerogative of national legislatures to define procedural rules, the exhaustive list under Article 5 of the ECHR serves as a guide to explain any reasonable interference with liberty. Any such interference "smust satisfy three conditions: first, it must be lawful or prescribed by law; second, it must pursue a legitimate aim; and third, it must be necessary in a democratic society."[24]

Article 5 of the ECHR considers reasonable suspicion of having committed an offense, as well as risks of absconding or committing a new offense, as lawful grounds for arrest or detention. However, "if reasonable suspicion no longer exists or other grounds are absent, continued detention shall be incompatible with the ECHR." [25] These grounds are not cumulative[26] - meaning the presence of any one of them may be sufficient to justify the initial arrest or detention. The "reasonable suspicion" standard, for its part, requires credible information that would convince an objective observer that the individual in question may have committed the offense." [27]

[20] Judgment of the European Court of Human Rights N30779/04 "Patsuria v. Georgia", 06 November 2007. Paragraph 77.
[21] Stefan Trechsel, Human Rights in Criminal Proceedings (Oxford University Press 2009) 422.
[22] ibid, 436-437.
[23] Judgment of the European Court of Human Rights N12369/86 "Letellier v. France", 26 June 1991. Paragraph 35; Judgment of the European Court of Human Rights N12993/05 "Aleksandr Dmitriyev v. Russia", 07 May 2015. Paragraph 55.
[24] Trechsel, supra note 21, 437.
[25] Korkelia, Mchedlidze and Nalbandov, supra note 19, 87.
[26] ibid, 88.
[27] Trechsel, supra note 21, 442.

Article 5, paragraph 3 of the ECHR requires that a detained person be brought promptly before a judge or other officer authorized by law, who must assess both the legality and the necessity of the deprivation of liberty. If such necessity no longer exists, the person must be released, possibly subject to appropriate guarantees. This is one of the essential and effective mechanisms for "protecting individuals from arbitrary interference with their liberty by the state."[28]

"The guarantee under Article 5, paragraph 3 of the ECHR does not imply compensation for damage but is aims at securing the appearance of the accused before the court. The amount of financial guarantee must correspond to the financial situation of the accused or of third parties willing to post bail on their behalf. The amount set by the court must have a deterrent effect in relation to the risk of absconding."[29]

3. THE RIGHT TO LIBERTY IN THE JUDICIAL PRACTICE OF THE COMMON COURTS OF GEORGIA

According to the Criminal Procedure Code of Georgia, "a person shall remain at liberty unless the necessity of their detention is duly established."[30] In adjudicating matters related to the right to liberty, the common courts consistently emphasize that when considering the imposition of a preventive measure, priority must always be given to the least restrictive form of interference with fundamental rights and freedoms.

The imposition of detention, as the most severe form of preventive measure, must be subject to a particularly careful and stringent assessment. The specific measure applied must be proportionate to the alleged act. The purpose of a preventive measure is not to prove the accused's guilt; rather, it is a means of preventing interference with the proper administration of justice.

When reviewing preventive measures against a detained individual, the court must give primary consideration to the appropriateness of the person's immediate release. The presumption operates in favor of liberty. The accused must remain free unless the state can present "relevant" and "sufficient" grounds to justify continued detention. The court is obliged to thoroughly examine the grounds for applying any preventive measure. Such measures must be applied only in the presence of clearly defined legal grounds, and detention, as an extreme measure, must be imposed only when properly substantiated and deemed strictly necessary.

[28] Korkelia, Mchedlidze and Nalbandov, supra note 98.

[29] Judgment of the European Court of Human Rights N1936/63 "Neumeister v. Austria", 27 June 1968. Paragraph 14.

[30] Article 5, Criminal Procedure Code of Georgia.

Despite the courts' acknowledgment of these standards, in practice, with only one exception, the Georgian common courts have used detention as a tool to secure the payment of bail. In the vast majority of cases, defendants remained in custody until the full amount of bail was paid (with only one case where release was granted after 70% payment).[31]

Based on the foregoing, the vision of the Constitution of Georgia and the Constitutional Court is explicit and unequivocal regarding the presumption and primacy of the right to liberty. Any interference must be reasonable, well-justified, and substantiated. The ECHR views deprivation of liberty as an exceptional measure, requiring the state to justify the necessity and proportionality of any interference, even for a short duration, which is consistently supported by the ECtHR judgments. Although the standards for the protection of the right to liberty as set forth in the Criminal Procedure Code and the case law of the common courts formally correspond to the Constitution of Georgia and the ECHR, in practice, common courts tend to use detention predominantly as a means to secure bail.

III. DEPRIVATION OF LIBERTY

1. THE ARREST OF THE ACCUSED AND THE GROUNDS FOR DETENTION

For the purposes of this article, in the context of deprivation of liberty, the discussion will focus on the concept of arrest of the person and its legal grounds. According to the Criminal Procedure Code of Georgia, "Detention is a short-term restriction of a person's liberty. A person shall be considered detained from the moment when their freedom of movement is restricted; from that moment, they shall also be regarded as an accused."[32] The acquisition of the status of an accused automatically entails the enjoyment of all the rights guaranteed both by international law and domestic legislation. The period of detention shall be calculated from the moment "a person authorized to carry out the arrest informs the individual that they are being detained in connection with a specific criminal offense."[33]

[31] The Tbilisi City Court ruling on the case N10a/1011, 27 February 2020; the Kutaisi City Court ruling on the case N10/a-29, 08 February 2020; the Batumi City Court ruling on the case N10/d-77/20, 06 February 2020; the Akhaltsikhe District Court ruling on the case N10/a-057-19, 26 December 2019; the Telavi District Court ruling on the case N10/d-314-19, 20 September 2019; the Tetritskaro District Court ruling on the case N10/a-75-18, 11 October 2019.

[32] Article 170, Criminal Procedure Code of Georgia.

[33] Giorgi Giorgadze (ed.) Commentary on the Criminal Procedure Code of Georgia (Meridiani Publishing 2015) 499.

Detention must have a legitimate purpose, which may include, on the one hand, verifying whether the person has committed a criminal offense or addressing a specific risk of a criminal act being committed, and on the other hand, ensuring the person is brought before a judicial authority in accordance with the procedure established by law for the application of a preventive measure. "Detention carried out with the aim of gaining an additional leverage in a criminal case runs contrary to Article 5 of the ECHR."[34]

According to the interpretation of the Constitutional Court of Georgia, detention is unlawful if, "despite its formal legality, it unjustifiably violates the rights and freedoms protected by the Constitution."[35] The procedure established by law must be strictly followed when a person is detained. "No interference with fundamental human rights is permissible unless it is in accordance with the law."[36] "Although detention constitutes a less severe interference with personal liberty than, for instance, pre-trail detention – applied as a preventive measure under the Criminal Procedure Code of Georgia, - there must still exist a firm constitutional and legal boundary that must not be crossed when interfering with fundamental rights. However, it should also be noted that this threshold is lower than in cases of more severe interferences with fundamental rights."[37]

The Criminal Procedure Code of Georgia provides several safeguards against arbitrary detention of an individual: (1) the existence of a reasonable suspicion that the person has committed a crime; (2) the crime in question must be punishable by deprivation of liberty; (3) there must be a risk of absconding, destruction of evidence, or commission of a new offense. These prerequisites are fully in line with the Constitution of Georgia and the ECHR. "The existence of a suspicion that the detained person has committed an offense is a necessary condition for the initial deprivation of liberty to be lawful; however, as time passes, it is no longer a sufficient ground to justify the person's continued detention."[38]

The Criminal Procedure Code considers detention to be lawful primarily when it is carried out on the basis of a court warrant, thereby ensuring that the right to liberty "is fully protected from unlawful, unfounded, and arbitrary restrictions." Given the significance of the right to personal liberty, its restriction is permissible only with the consent of the court, based on its judgment. According to the Constitution, the court serves, on the one hand, as a guarantor of protection of an individual's physical

[34] Judgment of the European Court of Human Rights N37048/04 "Nikolaishvili v. Georgia", 13 January 2009. Paragraph 57.

[35] Judgment of the Constitutional Court of Georgia on the case N1/4/1464 "Mikheil Khaindrava v. the Parliament of Georgia", 17 June 2022. Paragraph II-34.

[36] Trechsel, supra note 21, 437.

[37] Judgment of the Constitutional Court of Georgia on the case N2/1/415 "the Public Defender of Georgia v. the Parliament of Georgia", 06 April 2009. Paragraph II-16.

[38] Judgment of the European Court of Human Rights N1602/62 "Stögmüller v. Austria", 10 November 1969. Paragraph 4.

liberty and, on the other hand, as the legitimate authority empowered to impose such a restriction."[39]

An exception to this rule is detention in cases of urgent necessity, which must be carried out in strict compliance with legislative regulations and by an authorized official. When a person is detained without a court warrant, there must be sufficient information indicating the existence of specific circumstances provided for in Article 171, paragraph 2 of the Criminal Procedure Code. Additionally, it must be ensured that "the arrested or otherwise detained person is brought before a court within 48 hours. This exceptional power is intended for situations where there is an immediate and urgent necessity to restrict a person's physical liberty in order to prevent or stop a criminal offense (or other breach of law)."[40]

In cases of detention due to urgent necessity, the court is obligated, immediately upon the person's appearance before the court, to examine and assess the legality of the detention carried out without a court warrant. The court must be convinced that the case materials "indicate a lack of sufficient time to obtain a judge's order prior to restricting the individual's liberty and that immediate action was required."[41]

Although detention on the basis of urgent necessity is considered an exception to the general rule, the practice of detaining individuals under urgent grounds is widespread. "In most cases, even when it would have been possible to obtain a court warrant in advance, the investigation sought to justify the detention only after it had already been carried out."[42] In the context of applying custodial bail, a review of common courts' practice regarding the legality of arrests carried out under urgent procedure revealed that courts, in the majority of cases, uniformly stated that no essential procedural violations occurred during the arrest, the recognition of the person as an accused, or the conduct of other procedural actions. In all examined cases, the court imposed bail and, until the full amount was paid, the measure of detention remained in effect as a means of securing the payment. There was only one case in which the court, based on the specific circumstances of the case, found that the grounds for arrest under urgent necessity were present and that the detention was lawful.[43]

[39] Judgment of the Constitutional Court of Georgia on the case N1/2/503, 513 "Citizens of Georgia Levan Izoria and David-Mikheili Shubladze v. the Parliament of Georgia", 11 April 2013. Paragraph II-02.
[40] ibid, II-13.
[41] ibid, II-65.
[42] Besarion Bokhashvili, George Mshvenieradze and Irakli Kandashvili, Procedural Rights of Suspects in Georgia (Open Society Georgia Foundation 2016) 18.
[43] The Tbilisi City Court ruling on the case N10a/6521, 28 December 2019; the Kutaisi City Court ruling on the case N10/a-29, 08 February 2020; the Batumi City Court ruling on the case N10/a-56, 07 February 2020; the Akhaltsikhe District Court ruling on the case N10/a-012-19, 27 January 2020; the Telavi District Court ruling on the case N10a/292-19, 07 September 2019; the Tetritskaro District Court ruling on the case N10/a-8-2019, 25 February 2019.

With regard to custodial bail, the Constitutional Court's judgment[44] reflected this prevailing practice, based on which the Court invalidated the normative content of the first sentence of Article 200, paragraph 6 of the Criminal Procedure Code, which excluded the possibility for a judge to release the accused prior to the payment of bail.

2. THE PURPOSES AND GROUNDS FOR THE APPLICATION OF DETENTION, BAIL, AND CUSTODIAL BAIL

The Criminal Procedure Code of Georgia provides the exhaustive and precise list of the types of preventive measures. For the purposes and scope of this study, only detention, bail, and the so-called custodial bail will be analyzed.[45]

Detention, as the most severe form of preventive measure, "entails the strict isolation of the accused from the outside world for a period determined by a court warrant."[46]

As a result of the amendments made to the Criminal Procedure Code of Georgia in 2015, regardless of whether a party files a motion to replace or revoke detention, the court is obligated, on its own initiative, to review at least once every two months the necessity of maintaining the detention in force (Law of Georgia N3976 of July 8, 2015).

"The purpose of detention is to ensure the uninterrupted administration of justice and protect public safety as well as the safety of specific individuals. Preventing the accused from absconding, exerting influence over witnesses, destroying evidence, or committing a new offense is directly related to achieving the legitimate aims of safeguarding public security and order, and ensuring the proper conduct of justice. For this reason, a democratic society recognizes three primary grounds for the application of detention: the risk of absconding; the risk of evidence being destroyed or witnesses being influenced; and the risk of committing a new offense.[47] This robust safeguard serves to limit the potential for interference with an individual's fundamental rights.[48]

In its case law, the ECtHR has developed four main grounds that must be substantiated when applying detention as a preventive measure against a person accused of committing a crime: the risk of absconding; the risk of destruction of evidence and/or interference with the administration of justice; the risk of committing a new offense; and the risk of violating public order. The risk of absconding must be assessed in light of the

[44] Judgment of the Plenum of the Constitutional Court of Georgia on the case N3/5/1341, 1660 Constitutional Submissions of the Tetritskaro District Court concerning the constitutionality of the first sentence of paragaph 6 of Article 200 of the Criminal Procedure Code of Georgia, 24 June 2022.

[45] Article 199, Criminal Procedure Code of Georgia.

[46] Giorgadze, supra note 33, 590.

[47] Judgment of the Constitutional Court of Georgia on the case N3/2/646 "Citizen of Georgia Giorgi Ugulava v. the Parliament of Georgia", 05 September 2015. Paragraph II-53.

[48] Trechsel, supra note 21, 422.

factors associated with the accused's personality, moral character, place of residence, occupation, property and family ties, as well as all other circumstances linking the individual to the country conducting the criminal prosecution.[49]

Each ground for detention must be examined with the highest degree of precision and appropriate diligence. "This includes both the circumstances that would justify the application of detention as a preventive measure and those that would not justify its application."[50]

The risk of absconding must not be assessed in a formalistic manner but rather on the basis of a thorough assessment of the combined effect of multiple factors. On the one hand, the mere formal declaration of a person as wanted is not sufficient to substantiate the risk of absconding.[51] On the other hand, in combination with other circumstances, frequent travel abroad, international ties, and significant financial means may constitute a sufficient basis for establishing a risk of absconding.[52]

Professional influence may serve as one of the arguments for substantiating the risk that the accused could obstruct the administration of justice - so long as the person retains their official position and control over subordinates. However, once the accused is suspended from office, continued detention based solely on their professional authority, without specific evidence of influence on witnesses and/or destruction of evidence, loses its relevance.[53] The risk of obstruction of justice by the accused cannot be excluded when the majority of key witnesses are close associates or friends of the accused, and there exists a real risk of pressure being exerted on those witnesses while the accused remains at liberty.[54]

The ECtHR also considers the risk of obstruction of justice by the accused to be justified in the context of organized crime. For this reason, measures involving control and coercion may carry substantial weight in preventing the accused from absconding, destroying or fabricating evidence, and, most importantly, exerting pressure on witnesses. Accordingly, in such cases, comparatively prolonged detention may be well-

[49] Judgment of the European Court of Human Rights N9190/03 "Becciev v. Moldova", 04 October 2005. Paragraphs 57-58.

[50] Khatia Tandilashvili, The Influence of the European Court of Human Rights on Georgia's Criminal Procedure Legislation (Collected Articles) (Meridiani Publishing 2019) 139.

[51] Judgment of the European Court of Human Rights N28018/05 "Strelets v. Russia", 06 November 2012. Paragraph 93.

[52] Judgment of the European Court of Human Rights N57319/10 "Sopin v. Russia", 18 December 2012. Paragraph 42.

[53] Judgment of the European Court of Human Rights N15217/07 "Aleksandr Makarov v. Russia", 12 March 2009. Paragraph 129-130.

[54] Judgment of the European Court of Human Rights N18996/06 "Mikiashvili v. Georgia", 09 October 2012. Paragraph 102.

founded.[55] Referring to the risk of committing a new offense carries only secondary weight when the individual has no prior criminal convictions.[56]

From the standpoint of the ECtHR, the commission of a similar offense in the past, particularly, if not expunged or if the individual is currently serving a probationary term, may serve as grounds for establishing the risk of a new offence. However, reference to one's past conduct alone is not sufficient to justify the refusal of release.[57]

Bail is considered one of the effective alternatives to detention and may serve as a basis for releasing the accused. According to the Criminal Procedure Code of Georgia, "bail is a monetary sum or immovable property."[58]

Bail is one of the effective and appropriate means of ensuring the accused's proper conduct and timely appearance before the investigator, prosecutor, or court. In addition to a monetary sum, bail may also be secured by immovable property equivalent to the set sum. Accordingly, "The ECtHR's case law recognizes bail as one of the primary instruments for release."[59] Compared to detention, bail is a less severe preventive measure; however, "it is still classified as a strict measure, as it restricts the accused's property rights. The purpose of bail is to ensure the accused's proper behavior, typically through the limitation of their right to property."[60] The Criminal Procedure Code establishes a minimum amount of bail (GEL 1,000); no upper limit is defined. The amount of bail must correspond to the accused's personal characteristics, financial situation, the seriousness of the alleged offense, etc. If the accused fails to pay the bail within the prescribed time limit, the prosecutor, under Article 200, paragraph 5 of the Criminal Procedure Code, may file a motion with the court requesting the imposition of detention. When determining the amount of bail, there must be no presumption that the accused will be unable to pay it, as such an approach would render the use of bail artificial and merely formal. Conversely, the accused must provide law enforcement authorities with accurate and sufficient information about their financial status. Based on the verification of this information, the amount of bail should be determined in a manner that ensures the accused's appearance before the court.[61]

[55] Judgment of the European Court of Human Rights N15612/13 "Mierzejewski v. Poland", 24 February 2015. Paragraph 42.
[56] Judgment of the European Court of Human Rights N28213/95 "I.A. v. France", 23 September 1998. Paragraph 107.
[57] Judgment of the European Court of Human Rights N21802/93 "Muller v. France", 17 March 1997. Paragraph 44.
[58] Article 200, Criminal Procedure Code of Georgia.
[59] Badri Niparishvili, 'Detention as a Means of Securing the Application of Bail' (2016) 2 (50) Justice and Law 42.
[60] Giorgadze, supra note 33, 575.
[61] Judgment of the European Court of Human Rights N25196/94 "Iwanczuk v. Poland", 15 November 2001. Paragraph 66.

Therefore, when considering the issue of bail, particular importance is attached to the proper determination of the bail amount. "Bail serves to ensure the accused's attendance at the hearing, and its amount must correspond to that purpose." [62] "When determining the amount, it is important that: 1) The bail amount is realistic - that is, the accused, based on their financial situation, is actually capable of paying it; and 2) The amount has a real deterrent effect - meaning the potential loss of the property must constitute a significant and tangible financial loss for the accused, thereby motivating them to comply with the terms of bail."[63]

The guarantee set out in Article 5, paragraph 3 of the ECHR does not imply compensation for harm but aims to ensure the accused's appearance before the court. The bail amount must correspond to the financial situation of the accused, as well as the capacity of those individuals who are willing to post bail on behalf of the accused. The amount of bail set by the court must have a deterrent character with respect to the risk of absconding.[64] In the context of mitigating the risk of absconding, one of the procedural coercive measures is the so-called custodial bail.

According to the Criminal Procedure Code of Georgia, the court, either upon the prosecutor's motion or on its own initiative, may impose detention on an accused person who has been arrested as a procedural coercive measure, for the purpose of securing the enforcement of bail.[65] "This does not constitute an independent form of preventive measure. It is rather implemented through the simultaneous application of both bail and detention."[66]

The Criminal Procedure Code prohibits the simultaneous application of bail and detention. At the same time, the exhaustive list of preventive measures does not include custodial bail as an independent form of preventive measure. Instead, there are additional obligations that may be imposed to support the aims of preventive measures, though they do not, in themselves, amount to preventive measures.[67]

Professor Lali Papiashvili expresses the view that "the Criminal Procedure Code provides for two types of bail - the so-called custodial and non-custodial bail."[68] This view is not acceptable. The so-called custodial bail is not a type of bail, but rather a mixed (hybrid) form of applying both detention and bail, whereby the person is subjected to detention, and bail becomes effective only once the accused ensures the

[62] Korkelia, supra note 19, 100.
[63] Giorgadze, supra note 33, 577.
[64] Judgment of the European Court of Human Rights N1936/63 "Neumeister v. Austria", 27 June 1968. Paragraph 14.
[65] Article 200, part 6, Criminal Procedure Code of Georgia.
[66] Niparishvili, supra note 59, 48.
[67] Article 199, Criminal Procedure Code of Georgia.
[68] Giorgadze, supra note 33, 581.

payment of the bail amount set by the court, in accordance with the procedures and timeframes established by the Criminal Procedure Code.

"The Criminal Procedure Code of Georgia provides only one rule that implies the mandatory application of detention, and this rule - effectively amounting to an automatic refusal of release - is applied only in relation to one specific preventive measure. That preventive measure is bail, and the mandatory criterion is the fact that the person is in detention."[69] "If the judge does not have the discretion to assess the proportionality between the committed act and the preventive measure to be applied, and the use of custodial bail depends solely on a specific fact (the person's detention), this cannot be regarded as a justified necessity."[70]

In conclusion, the analysis of the grounds for deprivation of liberty and the rulings of the common courts reveals that, upon the accused's first appearance before the court and during the hearing on the application of a preventive measure, the court begins its deliberations by examining the grounds and legality of the detention. In most cases, the court's assessment of the lawfulness of the accused's detention under urgent procedure was formulaic and lacked reference to any examination of the case-specific circumstances that would justify the necessity of such detention by way of exception in an urgent situation.

IV. PROLONGED DETENTION

1. DETENTION AT THE FIRST APPEARANCE OF THE ACCUSED AND DURING THE HEARING ON THE APPLICATION OF A PREVENTIVE MEASURE

The imposition of detention on a person means that the strictest form of preventive measure has been applied to the accused. The total duration of such detention must not exceed nine months, and the period before the preliminary hearing must not exceed 60 days from the moment of arrest.[71] This provision is unequivocal and has a mandatory character.[72] "The application of detention places the burden of proof entirely on the prosecution, and it is impermissible to transfer this burden to the accused in any form."[73]

[69] Niparishvili, supra note 59, 50.
[70] George Latsabidze, 'Specifics of Bail Secured by Detention as a Preventive Measure in Criminal Proceedings' (2018) 10 Law and the World 50.
[71] Article 205, parts 2 and 3, Criminal Procedure Code of Georgia.
[72] Judgment of the Constitutional Court of Georgia on the case N1/5/193 "the Public Defender of Georgia v. the Parliament of Georgia", 16 December 2003. Paragraph 1.
[73] Judgment of the European Court of Human Rights N33977/96 "Ilijkov v. Bulgaria", 26 July 2001. Paragraph 85.

"It is the authority making the decision on deprivation of liberty that must prove that: 1) The coercive measure was applied on the basis of and in accordance with one of the provisions precisely defined by law; 2) The imposition of detention was absolutely necessary; and 3) Timely appearance of the accused before investigative and judicial bodies would not have been possible through the use of alternative coercive measures."[74] In doing so, "the court applies a standard of proof such that a reasonable person would be led to believe that there is a real likelihood of the accused absconding, destroying evidence, or committing a new offense. Any alternative interpretation of the norm creates the risk that the right to liberty could be restricted even in cases where there is only a minimal probability that the accused might abscond, commit a new offense, and/or destroy evidence - something that neither a judge nor any reasonable person could definitively rule out."[75]

The assessment of the reasonableness of the duration of detention cannot be made through abstract judgment. The question of whether the detention of the accused is reasonable must be evaluated based on the specific circumstances of each case. Prolonged detention may be justified only if the particular circumstances of the case indicate a genuine public interest that, despite the presumption of innocence, outweighs the norm of respect for individual liberty as protected by Article 5 of the ECHR.[76]

The presumption of innocence, as one of the most important procedural safeguards, is based on the principle of the rule of law.[77] It is clear that "under the principle of the presumption of innocence, it is prohibited to impose punishment on an accused person without proof of guilt, meaning that the existence of guilt is an indispensable precondition for any punishment."[78]

Thus, the primacy of the right to liberty "aims to ensure the immediate restoration of liberty, even in cases where deprivation of liberty has been an absolute necessity." [79] As a mechanism for restoring the right to liberty, the court can apply bail, which, in its purpose and underlying grounds, closely resembles detention and serves as a kind of alternative, exclusively in cases where detention is justified by the risk of the suspect's absconding."[80]

[74] Nino Khaindrava, Besarion Bokhashvili and Tinatin Khidasheli, Analysis of the Human Rights Law concerning Pre-Trial Detention (Civil Society Foundation 2010) 7-8.

[75] Judgment of the Constitutional Court of Georgia on the case N3/2/646 "Citizen of Georgia Giorgi Ugulava v. the Parliament of Georgia", 15 September 2015. Paragraph II-73.

[76] Judgment of the European Court of Human Rights N30210/96 "Kudla v. Poland", 26 October 2000. Paragraph 110.

[77] Giorgi Tumanishvili, 'Informing the Public about Ongoing Criminal Cases and the Procedural Guarantees of the Accused' (2022) 2 Journal of Constitutional Law 39.

[78] Konstantine Kublashvili, Fundamental Human Rights and Freedoms (World of Lawyers Publishing 2019) 19.

[79] Lali Papiashvili, Legal Grounds for the Application of Detention and Arrest in Criminal Proceedings (Collected Articles) (Meridiani Publishing 2010) 165.

[80] Trechsel, supra note 21, 554.

Both international and domestic standards for the protection of individual liberty oblige the court to give priority consideration to the possibility of releasing a detained accused person, based on adequate guarantees that are proportionate to the alleged criminal conduct. "There is no absolute right under the Convention to be released on bail in lieu of detention. However, a detainee does have the right to have their request at least considered by the court."[81] The court judgment, whether on the imposition of detention or the application of bail, must be substantiated with appropriate diligence. "It would be incorrect to interpret this matter as being subject solely to the judge's discretion as to which measure to apply, merely on the basis that at least one of the risks listed above is present."[82]

On 5 October 2018, at the first court appearance and during the hearing on the application of a preventive measure concerning the accused M.Z., who was charged for a particularly serious offence under Article 108 of the Criminal Code of Georgia, the Kutaisi City Court imposed detention as a preventive measure - in the absence of the accused. In substantiating the preventive measure, the court relied on the standards of reasoning established by the Constitution, the ECHR, and the Criminal Procedure Code. The court fully accepted the arguments of prosecution, citing not only the gravity of the charge but also the risks of absconding, destruction of evidence, potential pressure on witnesses, and the commission of a new offense.[83]

Likewise, on 5 December 2018, the Akhaltsikhe District Court imposed detention at the first appearance and during the hearing on the application of a preventive measure concerning the accused G.M., who was charged under Article 108 and Article 236, part 4 ('particularly serious crime') of the Criminal Code of Georgia. In substantiating the preventive measure, the court applied the reasoning standards established by the Criminal Procedure Code. The court fully accepted the arguments of prosecution, citing - along with the gravity of the charge - the risks of absconding, destruction of evidence, potential pressure on witnesses, and the commission of a new offense.[84] Similar reasoning has been employed in numerous criminal cases before courts of first instance, at the first appearance of the accused and during the hearing on the application of preventive measure.[85]

Furthermore, on 28 February, 2019, the Tetritskaro District Court imposed detention at the first appearance and during the hearing on the application of a preventive measure concerning the accused I.T., who was charged under Article 17, paragraphs 2a, 4g

[81] ibid, 555.

[82] Niparishvili, supra note 59, 47.

[83] Ruling of the Kutaisi City Court on the case N10/a-294, 05 October 2018.

[84] Ruling of the Akhaltsikhe District Court on the case N10/a-277-18, 05 December 2018.

[85] Ruling of the Tbilisi City Court on the case N10a/1170, 14 March 2017; Ruling of the Tbilisi City Court on the case N10a/4013, 01 September 2018; Ruling of the Batumi City Court on the case N10/a-176/17, 22 August 2017.

('particularly serious crime') of the Criminal Code of Georgia. In substantiating the preventive measure, the court relied on the standards of reasoning established by the Constitution, the ECHR, and the Criminal Procedure Code. The court accepted the arguments of prosecution with regard to the risk of the commission of a new offense (as the accused had previously committed multiple thefts and robberies); however, with respect to the risks of absconding and exerting pressure on witnesses, the court noted that the reasoning was based on the abstract judgment and was not supported by relevant evidence.[86]

2. EXTENSION OF THE TERM OF DETENTION DURING PRELIMINARY INVESTIGATION

The detention of the accused may initially be justified by the risks of absconding, exerting pressure on witnesses, and committing a new offense. However, once the principal evidence has been collected, the continued detention of the accused at all subsequent stages must be supported by a significantly higher standard of "relevant" and "sufficient" objective circumstances.

Following the 2015 amendments to the Criminal Procedure Code of Georgia, if detention has been applied as a preventive measure and the court grants a motion to extend the time limit for holding a preliminary hearing, it must summon the parties within 72 hours (from the moment of granting the motion) to determine whether continued detention remains necessary. In deciding upon this issue, the court follows the procedure and standard established under Article 206 of the Criminal Procedure Code.[87] With this legislative development, which introduced the regular review of the necessity of detention, the criminal procedure law has been brought into alignment with both the constitutional requirements of Georgia and the international standards.

"It is noteworthy that part 8 of Article 206 of the Criminal Procedure Code requires the existence of a new substantive circumstance for a motion requesting the modification or revocation of a preventive measure to be deemed admissible. However, in practice, Article 219, paragraph 4b provides for the possibility of reviewing a detention order within the same level of court by a different panel of judges."[88]

The ECtHR has repeatedly emphasized in numerous cases that continued detention can only be justified when there is a clear and genuine public interest that, despite the presumption of innocence, outweighs the principle of respect for individual liberty. Any legal system that provides for mandatory detention is, by its nature, incompatible with Article 5, paragraph 3 of the ECHR.[89]

[86] Ruling of the Tetritskaro District Court on the case N10a/9-19, 28 February 2019.
[87] Article 208, part 4, Criminal Procedure Code of Georgia.
[88] Giorgadze, supra note 33, 657.
[89] Judgment of the European Court of Human Rights N33977/96 "Ilijkov v. Bulgaria", 26 July 2001. Paragraph 84.

In general, the ECtHR accepts that the seriousness of the alleged offense and the severity of the potential sentence may be taken into account when assessing the risks of absconding and committing a new offense. However, over time, the gravity and violent nature of the act alone are no longer sufficient to justify continued detention on these grounds. At the same time, the court accepts as valid reasoning those arguments related to the accused's employment position, connections with law enforcement bodies or the criminal world, when assessing the risks of absconding, influencing witnesses, or committing a new offense.[90]

In one of its cases, the ECtHR noted that "at no stage of the proceedings did the national authorities consider whether the applicant's detention exceeded a 'reasonable time.' Such an analysis should have played a particularly important role in the decisions of the national authorities, especially after the applicant had spent several months in prison. However, the reasonable time test was never applied."[91] At each stage of extending the detention period, "the court must demonstrate how it reached the conclusion that the reason justifying the extension still exists. The reason for the extension must be proportionate to the objective being pursued."[92]

On 15 January 2019, the Akhaltsikhe District Court upheld the detention of the accused G.M., who was charged with a particularly serious offense under Article 108 and Article 236, part 4 of the Criminal Code of Georgia, and whose preliminary hearing deadline had been extended. In justifying the necessity of continued detention, the court applied the reasoning standards established by the ECHR and the Criminal Procedure Code. Once again, the court fully accepted the arguments of the prosecution, citing the seriousness of charges as well as the risks of absconding, destruction of evidence, potential pressure on witnesses, and the commission of a new offense. Hence, the court concluded that a less severe preventive measure would not ensure the achievement of the objectives pursued by detention.[93]

On 1 August 2018, the Tetritskaro District Court upheld the detention of the accused P.F., who was charged with a serious offense under Article 177, second part, subparagraph 'a', third part, subparagraph 'c' and forth part, subparagraph 'c' of the Criminal Code of Georgia. The preliminary hearing deadline in the case had been extended. Once again, the court fully accepted the prosecution's arguments concerning the risks of absconding and the commission of a new offense (the accused had previously committed multiple thefts and was serving a probationary sentence at the time), and concluded that a less

[90] Judgment of the European Court of Human Rights N51857/13 "Amirov v. Russia", 27 November 2014. Paragraphs 105, 107.

[91] Judgment of the European Court of Human Rights N7064/05 "Mamedova v. Russia", 07 June 2006. Paragraph 82; Joseph McBride, Human Rights and Criminal Procedure (2012) 103.

[92] Papiashvili, supra note 79, 190.

[93] Ruling of Akhaltsikhe District Court on the case N2799660-2-19, 15 January 2019.

severe preventive measure would not suffice to achieve the objectives of detention.[94] Similar reasoning has been applied by courts of first instance in numerous criminal cases during hearings on the review of continued detention as a preventive measure.[95]

3. EXTENSION OF THE TERM OF DETENTION DURING COURT PROCEEDINGS

The trial of a case must be completed within a reasonable time as prescribed by law. Pursuant to the ECHR, the accused is "entitled to have their case heard within a reasonable time or to be released pending trial."[96] It is essential that "the entire duration of the proceedings be subject to oversight, and that all necessary measures be taken to expedite them."[97] This universal principle takes on particular significance when the individual is held in detention. The court is obligated to give priority to criminal cases in which detention has been applied as a preventive measure.[98]

Since 2015, following the amendments to the criminal procedure legislation, the court is required, on its own initiative and at least once every two months prior to delivering a verdict involving the detained person - to review the necessity of maintaining detention as a preventive measure towards the latter.[99] "In considering this issue, the judge is guided by the procedure and standard established under Article 206, which requires hearing the parties' positions regarding the revocation, modification, or continuation of the preventive measure, and rendering a decision on that basis."[100] The court's decision to keep a person in detention must be properly reasoned, and it must clearly state the grounds for refusing release.[101]

In one of its judgments against Georgia, the ECtHR held that the national court, in extending detention, issued a standard, formulaic decision that lacked reasoning. The court used a pre-printed form and relied on abstract concepts, thereby violating Article 5, paragraph 3 of the ECHR.[102]

[94] Ruling of Tetritskaro District Court on the case N1/28-18, 01 August 2018.
[95] The Tbilisi City Court ruling on the case N146/1937-17, 24 April 2017; the Tbilisi City Court ruling on the case N371/4744-18, 10 October 2018; the Kutaisi City Court ruling on the case N10/160-218, 22 November 2018; the Telavi District Court ruling on the case N443-17, 21 November 2017.
[96] Article 5, Convention for the Protection of Human Rights and Fundamental Freedoms.
[97] Khaindrava, Bokhashvili and Khidasheli, supra note 74, 29.
[98] Article 8, part 3, Criminal Procedure Code of Georgia.
[99] Article 2301, Criminal Procedure Code of Georgia.
[100] Giorgadze, supra note 33, 681.
[101] Trechsel, supra note 21, 544.
[102] Judgment of the European Court of Human Rights N21571/05 "Mindadze and Nemsitsveridze v. Georgia", 01 September 2017. Paragraphs 125, 127.

When assessing the necessity of continued detention, the court must, at every stage of the proceedings, including the final stage, examine all circumstances that confirm the existence of a public interest which, taking into account the presumption of innocence, justifies a departure from the general rule of respect for personal liberty."[103]

The law must define the court's discretion and grant the judge the ability to take into account the individual characteristics of the case when applying a preventive measure or imposing a sentence.[104] "Although Georgian legislation on the review of detention complies with international standards, in practice, the rate of continued detention remains high."[105]

On 11 April 2019, during the substantive hearing of the case, the court once again addressed the issue of the necessity of continued detention for G.G., Z.M., and others, and ruled to keep them in detention. The court found that the risks that had originally justified their detention had not changed.[106] On 27 May 2019, the Tbilisi City Court delivered a guilty verdict and sentenced G.G. to 9 years and 6 months of imprisonment, and Z.M. to 6 years and 6 months (they had been in pre-trial detention since 29 August 2018).[107] On 9 January 2020, during the substantive hearing of the case, the court once again examined the necessity of continued detention for M.Z. and decided to keep him in custody. The court held that the risks, which had initially served as the grounds for his detention remained unchanged.[108] On 7 February 2020, the Kutaisi City Court delivered a guilty verdict and sentenced M.Z. to 11 years of imprisonment (M.Z. had been in pre-trial detention since 16 December 2019).[109] In addition to the above, in the course of working on this article, numerous judgments, decisions, and hearing transcripts from Georgia's common courts were examined, the analysis of which underscores the notably high rate of continued (prolonged) detention.[110]

[103] Lavrenti Maghlakelidze, Substantive Hearing of a Criminal Case in Court (Collected Articles) (2019) 417.

[104] Khatia Shekiladze, 'Sentencing in Cases of Recidivism' (Analysis of Court Practice) (2023) 7 Methods of Law 61.

[105] Tamar Bochorishvili, Beka Takalandze and Aleksandre Prezanti, Standards for the Application of Preventive Measures (Georgian Bar Association Research) (Meridiani Publishing 2020) 28.

[106] The Minutes of the Tbilisi City Court Hearing on the case N1-5655-18, 11 April 2019.

[107] The Verdict of the Tbilisi Court of Appeals on the case N1b/1127-19, 16 December 2019.

[108] The Minutes of the Kutaisi City Court Hearing on the case N1/88-19, 09 January 2020.

[109] The Verdict of the Kutaisi City Court on the case N1/88-19, 07 February 2020.

[110] The Minutes of the Tbilisi City Court Hearing on the case N1/2331-17, 20 November 2017; the Tbilisi Appellate Court Verdict on the case N1b/107-18, 14 May 2018; the Minutes of the Batumi City Court Hearing on the case N1-981/17, 13 March 2018; the Batumi City Court Verdict on the case N1-981/17, 17 May 2018; the Akhaltsikhe District Court Procedural Ruling on the case N2967395-1/103-19, 09 July 2019; the Akhaltsikhe District Court Verdict on the case N2967395-1/103-19, 25 July 2019; the Minutes of the Telavi District Court Hearing on the case N1-22-18, 20 March 2018; the Telavi District Court Verdict on the case N1-22-18, 23 April 2018.

In can be concluded that the practice of the common courts is clear and consistent with respect to the necessity of properly safeguarding one of the most fundamental human rights - the right to liberty. The courts view detention, as a preventive measure, as one of the most severe forms of interference with this right. Judges approach the issue of imposing detention, as the strictest form of preventive measure, with due diligence, which is undoubtedly commendable. Within the framework of the presumption of liberty, the introduction of the mechanism for reviewing the necessity of detention every two months must be regarded as a step forward.[111]

The analysis of rulings and hearing transcripts from the common courts shows that, both during the extension of the time limit for holding a preliminary hearing in the pre-trial investigation stage and during the trial proceedings, the courts review the necessity and reasonableness of prolonged detention every two months as a mandatory procedure. During the pre-trial investigation, the ruling to keep a person in detention is issued in written form. However, during the trial stage, the court's procedural rulings are recorded electronically using the court session documentation system.

A trend has emerged indicating, on the one hand, a consistent pattern of courts maintaining detention orders unchanged. On the other hand, in cases of prolonged detention, the reasoning provided by the common courts largely relies on the framework of justification initially presented during the accused's first appearance on the hearing on the application of the preventive measure. However, when ruling in favour of continued detention, courts - both during the pre-trial investigation and trial proceedings – must, over time, provide increasingly robust and well-reasoned justifications for their decisions.

V. CONCLUSION

There is a growing tendency among the common courts of Georgia to apply the standards and case law established by the European Convention on Human Rights and the European Court of Human Rights. Unfortunately, the same cannot be said for the application of the Constitution of Georgia and the jurisprudence of the Constitutional Court. Although individual ECtHR judgments are occasionally cited in court rulings, the practice of aligning the specific circumstances of each case with the corresponding European standards remains limited. Moreover, the recommended citation format is frequently disregarded - namely, the inclusion of the full case title, application number, and relevant paragraph. Adhering to this practice would significantly enhance the accurate and purposeful application of ECtHR jurisprudence.

[111] Articles 208, 219 and 2301, Criminal Procedure Code of Georgia. The safeguard mechanism for reviewing the necessity of detention every two months has been in effect since 2015, pursuant to the Law of Georgia N3976, 08 July 2015.

The analysis of rulings by common courts also reveals that, in most cases, they lack the well-structured format characteristic of judgments from the Constitutional Court of Georgia and the ECtHR, which creates room for inconsistent judicial practice.

On the one hand, common courts provide detailed reasoning when justifying the application of detention as an extreme preventive measure. On the other hand, courts often fail to sufficieltly justify the necessity of urgent detention or continued custody of the accused person pending payment of bail. This increases the risk of individuals remaining in detention for unjustifiably long periods (many of them are held solely because they are unable to pay the bail amount imposed as custodial bail).

As an effective mechanism for limiting unjustifiably lengthy pre-trial detention, the legislator introduced in 2015 a mandatory rule requiring the review of the necessity of detention every two months. The analysis of judicial practice shows that, while common courts consistently adhere to this formal requirement, the substantive content of both pre-trial rulings and procedural judmgents issued during trial proceedings often lacks solid reasoning.

The above may be attributed to the high volume of cases, including detention-related cases, or to the fact that, over time, the number of available arguments justifying continued detention tends to diminish. As a result, courts often resort to standard references to the absence of new substantive circumstances. However, as time passes, continued detention must be supported by increasingly robust, specific, and fact-based evidence that is both “relevant” and “sufficient.”

Therefore, the procedural coercive measure of imposing detention for the purpose of securing bail following an arrest should be abolished. During trial proceedings, the thorough examination of the necessity of continued detention would be significantly enhanced by introducing a mandatory requirement for procedural detention rulings to be issued in written form, containing reasoned justification for each ground deemed necessary to keep the accused in custody.