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2. NARAYAN AND OTHERS V AZERBAIJAN: BETWEEN SAAC JURISDICTION AND THE RELATIONSHIP BETWEEN IHL AND CONVENTIONAL LAW

1. *Introduction*

On December 19, 2023 the Fifth Chamber of the European Court of Human Rights (hereinafter the Court, or ECtHR) adopted the judgment in Narayan and Others v. Azerbaijan (application no. 54363/17, 54364/17 and 54365/17), contributing to the ECtHR case law concerning the interpretation of personal jurisdiction under Article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR or the Convention, or the European Convention on Human Rights). The judgement, which considers Article 2 (Right to life), Article 13 (Right to an effective remedy) and Article 14 (Prohibition of discrimination) of the Convention, became final on June 24, 2024, following the Grand Chamber's rejection of the Azerbaijani Government's request for referral under Article 43 ECHR. The purpose of this article is to examine the State Agent Authority and Control jurisdiction (hereinafter SAAC jurisdiction), taking the Narayan case as a starting point (M. MILANOVIC, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford, 2011, pp. 173-209; R. SAPIENZA, A. COSSIRI, *Art 1: obbligo di rispettare i diritti dell'uomo,* in *Commentario breve alla Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali*, in S. BARTOLE, P. DE SENA, V. ZAGREBELSKY (a cura di), Padova, 2012, p. 13 ss.; I. PARK, T*he Right to Life in Armed Conflict,* Oxford, 2018, pp. 65-100). Furthermore, it will focus on analysing other possible interpretations concerning the links between international humanitarian law (IHL) and Conventional rules, considering the absence of IHL in the present case. The ECtHR, according to Article 32 of the Convention, has jurisdiction «[t]o all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47». However, as established in case law, «[t]he Convention should so far as possible be interpreted in harmony with other rules of international law, of which it forms part» (*Al-Adsani v. United Kingdom*, ECtHR, [GC], App. No. 35763/97 (2001), par. 57). More specifically «Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflict» (*Varnava and Others v. Turkey*, ECtHR, [GC], App. No. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (2009), par. 187). For this reason, other possible interpretation regarding the possibility to interpret

Article 2 in harmony with the right to life as protected in IHL may be considered, in particular analysing possible similarities between the present case and the discipline of *hors de combat*.

2. *The morning of December 29, 2016. The border clashes and the facts of the judgement*

The applicants are Armenian citizens who are family members of three soldiers – Mr. Narayan, Mr. Abovyan and Mr. Melikyan – of the Armenian Armed Forces who died on duty on December 29, 2016, at the Bilits military post, near the village of Chinari, in the Tavush region of Armenia. According to the Armenian authorities' investigation, the three members of armed forces were killed by an Azerbaijani's soldier, Mr. Gubanov, who later also died later in the same battle. According to the testimonies of five Armenian soldiers present during the fighting, at around 8.30 a.m. Mr. Narayan and Mr. Abovyan left the shelter to go, respectively, to the toilet and to a water tank (par. 11). Both soldiers were unarmed and wore neither their uniform jacket nor boots. After few minutes, gunshots were heard at the shelter. For this reason, Mr. Melikyan, head of the military post, accompanied by two other soldiers, came out of the shelter and walked towards the direction of the gunshots. Visibility was so weak that Mr. Melikyan fired a few shots blindly. Following this, a shot was fired from a «close distance» (par.19) which hit Mr. Melikyan causing his death. Witnesses also pointed out that a man in a non-Armenian uniform was seen walking around the military post. After Melikyan's death, a firefight began and at the end of the crossfire, the bodies of the three Armenian soldiers and Gurbanov were found (par. 13).

The Chief Military Investigation Department of the Investigative Committee of Armenian started an investigation on December 29. Two autopsies were conducted on the body of the Azerbaijani soldier, and both confirmed the absence of torture or ill-treatment on his body. The second examination was conducted in the presence of the coordinator of forensic medical issues of the International Committee of the Red Cross (hereinafter ICRC). The cause of Gurbanov's death was found to be wounds sustained in the shooting, same as what happened to the Armenian soldiers (parr. 15-16). Furthermore, Armenian investigators also conducted ballistic examinations, which confirmed that the wounds found on the bodies matched the location, trajectories and tracks found on them (par. 17).

The Azerbaijani Ministry of Defence issued a press note on December 29 stating that Armenian forces were ambushed that morning while breaching the border. At the end of the battle, Gurbanov was declared missing. On the same day, an examination of the battle scene was ordered, but no reports or other documents were submitted as evidence. On January 18, the Azerbaijani military prosecutor's office began an investigation into Gurbanov's murder. The evidence provided by the Azerbaijani government included testimonies which, in an identical manner, reported the presence of a minefield in the neutral zone, and the poor visibility that characterised the morning of December 29. For this reason, it is possible, according to the interviewees, that during an attack by the «enemy sabotage group» (par. 23) Gurbanov identified the Armenian militaries and fought to repel the assault, falling into enemy hands. The conclusion of the Azerbaijani investigation reports such a firefight and, finally, as there were no traces of blood in the trench from which the Azerbaijani soldier fired, the Government raises the possibility that he was killed on Armenian territory following his capture (parr. 19-27). A criminal procedure was initiated in order to prosecute the individuals responsible for Gurbanov's killing, but it was suspended on April 13, 2017, because it was not possible to determine the identity of the person or persons responsible

for the death.

The Court, considering the different view of the facts proposed by the parties, had to determine the factual basis on which will issue the judgement. In its opinion « ... there is no apparent reason to doubt the quality of the domestic investigation conducted by the Armenian authorities...», adding that «...the conclusions of the Armenian authorities' investigation should be considered reliable and therefore admitted in evidence, although, like any other evidence, they may be refuted by solid and convincing evidence put forward by the opposing party» (par. 95). The evidence provided (or not provided) by the Baku government to the Court to support the represented scenario – the testimonies of the Azerbaijani soldiers that present merely assertive or assumptive elements and the absence of an analysis of the site where the fighting allegedly took place – is not considered sufficient for the Court to reject the Armenian reconstruction.

The burden of proof required by the Court is determined by three factors: specificity of the facts, nature of the allegations, and the right taken into consideration. In cases of contested violation of the right to life, the standard to be met is 'beyond reasonable doubt' (See: *Carter v. Russia*, ECtHR, App. No. 20914/07, (2021), par. 151; *Narayan*, par. 89). Specifically, the Court emphasises how the Azerbaijani reconstruction «... falls short of the requirement of plausibility» (par. 98). Therefore, the Court considers the results of the Armenian investigation as the factual basis on which it will decide its judgment. The ECtHR believes that the three Armenian soldiers were killed by shots fired from the weapon possessed and used by Gubanov. The latter was found next to his body, while he was inside the Armenian borders in the exercise of his functions as an Azerbaijani soldier. Considering this, Gubanov is believed to have fired the shots which killed the Armenian soldiers. In addition, Narayan and Abovyan were taken by surprise and killed while unarmed; on the other hand, Melikyan was killed while attempting to identify the enemy to repel the attack (par. 105).

3. *Questions of Law: the application of SAAC jurisdiction and the violation of Article 2 ECHR*

Moving to questions of law, the Court has analysed preliminary issues. The first one is, according to Article 35 ECHR, the exhaustion of domestic remedies. The Azerbaijani Government, in submitting its objection, claims that this requirement has not been respected, because no proceedings have been instituted by the relatives of the Armenian soldiers before the domestic authorities. The applicants, *a contrario*, underlines the unavailability of an effective remedy, considering that «... the unresolved conflict concerning Nagorno-Karabakh, there were obstacles of a diplomatic and practical nature» (par. 70). The Court accepts the applicants' position, recalling the principle established in the Sargsyan case (*Sargsyan v Azerbaijan*, ECtHR [GC], App. No. 4167/06 (2015), par. 117), where it pointed out the practical difficulties for Armenian or Azerbaijani nationals to properly pursue legal proceedings in the other country.

Secondly, the ECtHR consider the question of jurisdiction. Article 1 of the Convention provides that: «The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention». However, the disputed events, having occurred on a territory that is not within the borders of the defendant State, raises the question of extraterritorial jurisdiction (K. COSTA, *The extraterritorial application of selected human rights treaties*, Leiden, 2013, p. 93 ss.; M. MILANOVIC, *Extraterritorial application of human rights treaties,* cit., p. 173 ss.).

The Court, after emphasising that the general applicability of Article 1 is territorial, does not exclude that the States party to the Convention may, in exceptional cases, be attributed acts performed outside their borders (*Carter*, par. 124). There are two criteria traceable in its past case law (*Al-Skeini and Others v. United Kingdom*, ECtHR [GC], App. No. 55721/07, (2011), parr. 113-40; *Georgia v. Russia (II)*, ECtHR [GC], App. No. 38263/08, (2021), par. 115, *Carter* par. 125): the 'effective control' of the State over a territory outside its borders – so-called 'spatial concept of jurisdiction' (par. 57) –; or the 'State agent authority and control' over the individuals subject to the actions carried out by the State's agents - the so-called 'personal concept of jurisdiction'. In the present case, the latter is relevant (par. 58). Specifically, the Court, in order to establish its jurisdiction, must consider: «(i) whether the killing amounted to the exercise of physical power and control over the men's lives in a situation of proximate targeting; and (ii) whether the killing were carried out by an individual acting as a State agent» (par. 88).

It now appears necessary to analyse the Court's position on the substantive violation of Article 2 of the Convention. Based on the same paragraphs used for the identification of the facts, the legal issues will be examined. Article 2 of the Convention (C. PITEA, *Diritto alla vita*, in L. PINESCHI (a cura di), *La tutela Internazionale dei Diritti Umani: Norme, garanzie, prassi*, Milano, 2006, pp. 328-332) entails a twofold protection of the right to life, through the recognition of substantive obligations on the part of States Parties and, at the same time, also procedural obligations. Starting with the first declination, the substantial obligations oblige States to protect the right to life by law and throughout the prohibition of intentionally depriving individuals of life. Returning to the case in question, the factual reconstruction on which the Court bases its judgment has already been mentioned. Considering this, in order to understand both whether the Court's jurisdiction can be exercised and whether or not there is a violation of Article 2 ECHR, it is necessary to determine whether Gurbanov exercised 'physical power and control' over the lives of Armenian soldiers. The Court finds that such power existed in respect of Narayan and Abovyan, recalling that the exception approach to the application of extraterritorial jurisdiction also applies to «isolated and specific acts of violence involving an element of proximity» (par. 86). It is worth to remember that the two soldiers were unarmed and were on their way to the toilets and water tank. They were taken by surprise; they were unprepared to exercise any kind of defence; and they were unable to escape to the situation (par.108). The ECtHR's reading here appears to expand the perimeter of extraterritorial jurisdiction also to cases in which the exercise of control and power is not implemented by means of an actual deprivation of liberty, partly overturning the description of SAAC jurisdiction contained in *Al-Skeini*. In fact, in the latter judgment, the Court stated that the decisive factor in the application of that criterion is given by « [...] exercise of physical power and control over the person in question» (*Al-Skeini,* par. 160). It is evident how, in the present case, the Court has broadened the scope of its jurisdiction, which is, however, consistent with the case law development following the *Al-Skeini* case. Already in *Georgia v. Russia (II)* the personal jurisdiction has been applied «[...] beyond physical power and control exercised in the contest of arrest and detention» (*Georgia v Russia* (II), par. 131). The interpretation given by the Court, therefore, seems to be coherent with *Georgia v. Russia (II)*.

The ECtHR makes different considerations for Melikyan. The head of the military post was killed during an exchange of shots, in a condition of poor visibility due to fog, and «... nor as a selected unarmed target» (par.109). Therefore, the Court considers that SAAC jurisdiction does not apply in his case because he does not fall under the control of the

Azerbaijani soldier. In addition, the Court does not mention armed conflict as a relevant element for the recognition of its jurisdiction, nor as will be seen, for the determination of the question of merit.

Continuing its examination of the legal aspects, the Court evaluates whether Gubanov was an Azerbaijani State agent at the time of the two soldiers' killing. The ECtHR emphasizes that the soldier, belonging to the Azerbaijani army, wearing the national military uniform, and being armed, cannot but be considered a State agent, unless the Baku government is able to prove otherwise. Moreover, this *status* exists both if the operation was planned or if it was spontaneous and autonomously decided by the soldier (parr. 116-117).

At this point, it is useful to recall that the right to life in the Convention is not an absolute right. In fact, both the limitations of Article 2(2) ECHR and the exception in Article 15(2) of the Convention – more relevant for our purposes – apply, where it states: «No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, [...] shall be made under this provision». About the existence or not of an armed conflict as a relevant element for merits (V. GOWLLAND-DEBBAS, *The right to life and the relationship between Human Rights and Humanitarian Law*, in C. TOMUSCHAT, E. LAGRANGE, S. OETER, *The Right to Life,* Leiden, 2010, pp. 123-150), it should be observed that even here the Court does not express any assessment whatsoever. This analysis is deferred to the fifth paragraph, to explore whether applying the existing relational paradigm between IHL and the Convention already present in the Court's case law (*Hassan v United Kingdom*, ECtHR [GC], App. No. 29750/09 (2014)), could permit other interpretations.

The Court, therefore, considering Gubanov to be a State agent and holding that he exercised, at the time of the killing of the first two Armenian soldiers, 'physical power and control' over them, establishes that it had jurisdiction over the case. This implies that the State had the duty, pursuant to Article 1, to respect Article 2, avoiding arbitrary deprivations of life. The Court, therefore, not only establishes its jurisdiction, but also that Azerbaijan had violated the substantive profile of Article 2 (parr. 119-120). Indeed, the responded government argued that Mr. Gurbanov acted in self-defence. For this reason, according to Azerbaijan's point of view, the killing of Armenian soldiers should be justified pursuant to Article 2 par. 2. Nevertheless, the Court underline that the Azerbaijani government provided no proof or argument to support this conclusion. Consequently, in the absence of any evidence indicating the application of Article 2 par. 2, the Court finds a violation of the substantive declination of the right to life.

As far as the procedural profile is concerned, recalling consolidated case law (*Al-Skeini*, parr. 163-67; *Jaloud v The Netherlans*, ECtHR, [GC], App. No. 47708/08, (2014), par. 186), the ECtHR recognises that States have procedural obligations according to Article 2, read in conjunction with Article 1 of the Convention, which provides «[...] to secure everyone within their jurisdiction the rights and freedoms defined in [the] Convention». The procedural dimension of the right to life is embodied in the need for official investigations by the member States in the event of victims resulting from apparently unlawful conduct. As the Court states in *Al-Skeini* «[t]he essential purpose of such investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, [...] to ensure their accountability for deaths occurring under their responsibility» (*Al-Skeini,* par. 163). The Court adds in the same judgment that «[...] the investigation should be broad enough to permit the investigating authorities to take into consideration not only the action of the State agents who directly used lethal force but also the surrendering circumstances» (*ibidem*). According to the ECtHR, in the present case, these criteria have not been respected. Indeed,

the Azerbaijani authorities have not initiated any investigation into the killing of the Armenian soldiers, thus also breaching the procedural requirements under Article 2 of the Convention (par.126). Lastly, the Court does not consider necessary to examine the applications concerning Articles 13 and 14, as they are absorbed in the considerations made for Article 2 (parr. 131-138).

4. *Personal Jurisdiction in Strasbourg case law and doctrine. How to interpret the concepts of 'authority and control' over individuals outside State borders*

At this point, it seems appropriate to delve into the two mentioned topics: the SAAC jurisdiction in the Court's case law and its evolution; and, in the next paragraph, the question of the existence or non-existence of armed conflict in order to understand the applicable law.

In the Court's case law, there is no definition of the concept of 'authority and control'. To attempt such an interpretative effort, it seems useful to look to the doctrine and, by way of interpretation, to the Court's case law. While the European Commission of Human Rights' case law has included applications of extraterritorial jusrisdiction (*Cyprus v Turkey*, ECoHR, App. No. 6780/74 and 6950/75 (1975).), in literature the paradigmatic case is considered the *Bankovic* case (*Bankovic and Others v. Belgium and 16 Other Contracting States*, ECtHR, App. No. 52207/99 (2001)). In this decision, the territorial approach of the Court's jurisdiction was affirmed, indicating that the only exception may arise if the State exercises «effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation» (*Bankovic*, par. 71).

It is evident that there is a limitation on the application of Article 1. However, jurisprudential development has led to a progressive extension of the application of personal jurisdiction. A first example occurs already a few years later, with the case *Issa and Others v Turkey*, ECtHR, App. No. 31821/96, (2004). On that occasion, the Court emphasised that the concept of jurisdiction, according to Article 1, «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» (*Issa*, par. 71). This principle, previously adopted by the UN Human Rights Committee (UN HRC, General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant Adopted on 29 March 2004 (2187th meeting), CCPR/C/21/Rev.1/Add.13, 2004, par. 10), defines the perimeter of application of this type of jurisdiction. In *Ocalan v Turkey*, ECtHR, App. No. 462221/99 (2005), the ECtHR emphasised that Turkey, although outside its own territory, exercised jurisdiction over the applicant, who was subject to the 'authority and control' of the State (*Oclan*, par. 91). This principle enters in the Court's case law for the first time.

It is, however, in *Al-Skeini* that the Court identifies three principles according to which jurisdiction is extended without territorial control (*Al-Skeini*, parr. 113-136.). First, where there are acts performed by diplomats or consular agents present on foreign territory in accordance with the provisions of international law and they exercise authority and control over others. Secondly, the Court recognises the application of its jurisdiction even without territorial control when, with the consent or acquiescence of the territorial government, the foreign State exercises certain public powers normally exercised by the internal government. For this purpose, the Court clarifies that the term 'public powers' encompasses executive and judicial functions. Finally the Court refers to the use of force by the State agent outside its territory, specifying that the decisive element is the exercise of «physical power and control

over the person in question» (*Al-Skeini*, par. 160).

From the literal scope of the above-mentioned judgment, in order to integrate personal jurisdiction, physical control appears to be necessary, and therefore that the person is subject to detention or arrest. However, the Court's case law reveals several applications of this jurisdiction even in the absence of physical control *stricto sensu* (M. GUREGHIAN HALL, Who's Afraid of Human Rights in War? (Part I), 17/04/2024). Two cases can be cited: in *Jaloud v. Netherlands*, ECtHR [GC], App. No. 47708/08, (2014), the Grand Chamber held that there was a violation of Article 2 by the Netherlands because the victim died in a vehicle in which was travelling as a passenger that was fired upon at a checkpoint in Iraq under the command of the Dutch military. The ECtHR states that Article 1 was integrated because the victim was subject to the 'authority and control' of the State in question. A second example from Strasbourg case law is *Pad and Others v Turkey*, ECtHR, Admissibility decision, App. No. 60167/00, (2007), (parr. 52-55). In this case, the victim lost his life because of fire from a Turkish helicopter. The Court indicated that, for the purposes of Article 1, the location of the victims – whether in Turkey or Iraq – was not relevant, but Turkey had jurisdiction because the deaths were caused by gunfire from their helicopters. The examples just given may lead to indicate that the ECtHR does not consider necessary, in order to apply the *ratione personae* model, any means of physically restriction on the subject, contrary to what part of the observers have written (T. MUSAYEV, *Is the Harmonisation of IHL and IHRL Eroding?: Narayan and Others v. Azerbaijan*, Völkerrechtsblog, 18.03.2024).

Moreover, if SAAC jurisdiction's applicability was limited to mere detention, it would create the paradox that the most serious act, i.e. killing without prior detention, would not justify Strasbourg jurisdiction while the least serious act, i.e. detention, would. This more extensive reading of the application of Article 1 is made explicit in the already cited case *Georgia v. Russia (II)*, where the Court emphasises that: «In most of the cases that it has examined since its decision in *Banković and Others*, the Court has found that the decisive factor in establishing 'State agent authority and control' over individuals outside the State's borders was the exercise of physical power and control over the persons in question [...]. Admittedly, in other cases concerning fire aimed by the armed forces/police of the States concerned, the Court has applied the concept of 'State agent authority and control' over individuals to scenarios going beyond physical power and control exercised in the context of arrest or detention» (*Georgia v Russia (II)*, parr. 130-131). On account of this, the fact that Narayan and Abovyan were unarmed, caught unawares and under the close fire of the Azerbaijani soldier, even in the absence of arrest or detention, makes the Court's recognition of its jurisdiction appear consistent with the aforementioned case law, even though an explicit mention of the characteristics that could integrate the requirements of 'authority and control' remains silent. The most problematic element, indeed, is the absence international humanitarian law (IHL). Specifically, it is necessary to understand whether Article 2 ECHR should have been interpreted with the lens of international humanitarian law. To do so, it is necessary to move on a double track: a) how the Court interprets the connections between the law of armed conflict and the Convention; and b) to understand whether an armed conflict between the parties was in progress, or had arisen, on December 29, 2016.

5. *The question on the harmonization of Article 2 with the international humanitarian law*

The Court, in its analysis of the legal aspects of the case, completely omits any reference to IHL. However, the applicants, in their applications, pointed out that at the time of the events, there was no armed conflict taking place and the three Armenian soldiers posed no threat (par.28). To put it another way, the applicants consider that Article 2 has been violated because their deaths had not resulted from a use of force that was 'absolutely necessary'. If Article 2 should have been read in harmony with IHL, it is useful to underline that an enemy solider is a legitimate military objective. As Ian Handerson has written: «*It is always permissible due to military necessity to attack enemy's combatants. This is so because an individual soldier will always be adding to the military capacity to the enemy*» (I. HANDERSON, *The Contemporary Law of Targeting*, Leiden, 2009, pp. 86-87.)

The *ius in bello* is not even invoked in Melkian's case. Regarding the head of the military post, the Court does not assess the merits because it considers that the requirements of extraterritorial jurisdiction are not met. Furthermore, the analysis that interests this paragraph does not concern the investigation into the extraterritorial application, as this has already been exhausted, but rather the question of the merits. As already highlighted in the introduction, the ECtHR may have implicitly considered human rights law as provided by the Convention applicable to the case and therefore did not find it necessary to analyse the issue of harmonization with IHL's provisions. Furthermore, as evidenced in some cases, that will be discussed later, the application of international humanitarian law as *lex specialis* has led to derogations from the application of conventional norms in place of the specificities of IHL, and it was not a desirable outcome. However, it can be exploring further interpretative pathways.

Coming to the first line of analysis recalled, namely the connections between IHL and the Convention, this topic has been extensively developed in academic literature and practice. The paradigm adopted in international jurisprudence, ever since the advisory opinion of the International Court of Justice, *Legality Of The Threat Or Use Of Nuclear Weapons* has been the abovementioned criterion of *lex specialis derogat legi generali*. Notwithstanding the various criticisms raised by both doctrine and the pronouncements of judicial or quasi-judicial bodies, even the ECtHR, while never expressly citing the principle, has adopted a model of interpretation of the relationship between the Convention and IHL that rests on a complementarity of the obligations arising from the two areas of international law. More generally, the Court has emphasised that: «[t]he Convention should so far as possible be interpreted in harmony with other rules of international law, of which it forms part» (*Al-Adsani v. United Kingdom*, ECtHR, [GC], App. No. 35763/97 (2001), par. 55), consistently with the provisions of Article 31 of the Vienna Convention on the Law of Treaties. The Court has used the criterion of the *lex specialis* first and foremost as a means of harmonising IHL and the rules of the Convention. However, where two rules were simultaneously applicable and conflicting with each other, it implicitly employed the criterion of *lex specialis* to resolve the conflict and interpret the conventional provisions in light of the *lex specialis*. The key case is *Hassan*, in which the Court considered not necessary for the UK government to explicitly invoke the derogations of Article 15 ECHR to justify a restriction of the right to liberty. In fact, in cases of international armed conflicts, Article 5 «... could be interpreted as permitting the exercise of such broad powers» (*Hassan*, par. 104). According to this case law, it appears that in presence of two contradictory rules the Court consider the special rules for the interpretation of the ECHR, i.e. the rules of *ius in bello* concerning detention even if the State has not recourse to an explicit derogation, instead of general rule, which is Article 5. In short, if IHL was held to be applicable to the case, the Court should have considered in its

assessment of the merits the specificity of the right to life as protected in Article 2, in light of the right to life stated in international humanitarian law.

Turning to the analysis of the second issue, the matter is if, at the time of the killing of the two soldiers, there was an international armed conflict in progress. To be more precise, the questions to be asked are whether the December 29 firefight can, *in re ipsa*, give rise to an armed conflict and the consequent application of the rules of international humanitarian law; or whether there was a previous conflict and the facts that are the subject of the judgment can be considered as part of it.

The literature presents two different approaches to the question of whether a firefight between two regular armies can constitute an international armed conflict: on the one hand, some authors adhere to the so-called 'first shot theory' (J. PITET (ed.), *Commentary to the first Geneva Convention for the Amelioration of the Condition of Wounded and Sick in armed forces in the field,* 1952; D. FLECK, *The handbook of international humanitarian law*, Oxford, 2013, p. 45, p. 45. Case law: International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, Prosecutor V. Dusko Tadic A/K/A 'Dule', Decision On The Defence Motion For Interlocutory Appeal On Jurisdiction, 1995, par. 70; International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, Prosecutor V. Zejnil Delalic, Zdravko Mucic, Also Known As 'Pavo'; Hazim Deli Esad Land@o Also Known As 'Zenga', Judgement, 1998, par. 184.'); others, on the other hand, consider a certain «consistence and duration» (N. RONZITTI, *Diritto internazionale dei conflitti armati,* Torino, p. 156) of military operations necessary to give rise to such an armed conflict, and thus make the normative *corpus* of the *ius in bello* applicable.

For our purposes, whether we adhere to one doctrine or another is essential in determining if there was an international armed conflict at the time of the clashes. However, it is possible to say that the answer lies not so much in the capacity of the events of December 29, 2016, to generate an armed conflict, but in the pre-existing conflict between the two States, Armenia and Azerbaijan. So much so that, as the Court itself recalls at the beginning of its judgment (*Narayan*, parr. 5-6), at the time of the clashes between Azerbaijan and Armenia there was a ceasefire in place. This ceasefire had been agreed at the conclusion of the Four-Days War, a conflict fought between the two abovementioned States for the control of Nagorno-Karabakh between April 2 and April 5, 2016. As well as emphasising that the use of force perpetrated on December 29 was a clear violation of the agreements reached at the summits in Vienna and St Petersburg in May and June 2016, both OSCE and the Council of Europe called on the parties to respect this ceasefire. As established doctrine has underlined, the ceasefire is an international agreement that does not have the quality to end an armed conflict (N. RONZITTI, *Diritto internazionale dei conflitti armati,* cit., pp. 323-325) and consequently the application of *ius in bello* However, even with a less formalistic reading characterised by the principle of effectiveness (R. BAXTER, *'Armistices and Other Forms of Suspension of Hostilities',* in R. BAXTER ET. AL., *'Humanizing the Laws of War'*, Oxford, 2013, pp. 309-340), the agreement to end the state of war should bring permanent effects that make unlikely a resurgence of hostilities. States, even with a ceasefire and not a peace treaty, shall express their mutual will to definitively end hostilities. It seems clear that the ceasefire concluded between the parties is not a peace treaty, nor it does have the stability and the characteristic of the bilateral will to conclude the state of war, also considering the constant numerous violations, as in the latter case. Therefore, it is reasonable to argue that the state

of war, and thus the application of IHL, pre-existed to the border clash between the soldiers of the two parties. Considering this, according to the paradigm of complementarity and the principle of *lex specialis*, the right to life of Article 2 of the Convention should be interpreted according to the instruments of international humanitarian law «... in a manner which takes into account the context and the applicable rules of international humanitarian law» (*Hassan*, par.116). At this point, the relational paradigm between IHL and Conventional law can be considered. First, it is important to identify the provision - or provisions - of the *ius in bello* that would become relevant. Then, it will be essential to understand the complementarity or the incompatibility between relevant provisions of IHL and the Convention (specifically, with the substantive obligations contained under Article 2 ECHR).

The IHL rules that appear significant, *prima facie*, are those contained in Article 43(2) of the First Additional Protocol to the 4 Geneva Conventions (hereinafter, AP1).This provision specifies: «Members of the armed forces of a Party to a conflict are combatants, that is to say, they have the right to participate directly in hostilities». This definition of combatant does not apply to religious and military personnel, as protected by Article 33 of the Third Convention. Both rules are considered customary law (J. HENCKAERTS, L. DOSWALD-BECK, *Customary International Humanitarian Law*, Volume I (rules), 2005, Rule 3. Definition of Combatants). In application of the principle of distinction, also provided by Geneva Convention (Article 46, Article 51(2) e Article 52(2), AP1) as well as considered a principle of general law, combatants are considered legitimate military targets. However, this provision must always be considered in the light of the principle of proportionality, military necessity, in the light of the protection offered *hors de combat* by customary law as codified in Article 41 of the First Additional Protocol and the rules on prisoners of war (PoW).

The relevance of the existence of the rule on *hors de combat* in customary law is crucial: Azerbaijan has not ratified AP1; therefore, this rule is applicable to the present case only if it is present in general law. The rule, as set forth in Article 41 AP1, is considered customary law by the ICRC, as the *opinio iuris* of States demonstrates a general *consensus* in the international community (Henckaerts, Doswald-Beck, Rule 47. Attacks against person Hors de Combat). In addition, there are several doctrinal considerations made on the application of the principle of military necessity (S. BORRELLI, H. LAUFER, *Protection of individuals hors de combat: converge of international humanitarian law and international human rights law,* in D. ROGERS *(edt.), Human Rights in War,* Singapore, 2022, pp. 309-343) to the killing of enemy soldiers who are unable to defend themselves or who have surrendered (R. BUCHAN, *The rule of surrender in international humanitarian law*, in *Israel Law Review*, vol. 51 n. 1, Cambridge, 2018, pp. 9-10). It is indeed difficult to justify such a principle when applied to soldiers who, incapable of causing harm, could be put out of combat, and thus securing a military advantage for the attacker, without being killed. Article 41 AP1, after prohibiting, in the first paragraph, the possibility of directing attacks towards holders of such *status*; the second paragraph describes the *hors de combat* as the enemy who, *inter alia*, «[...] is in the power of an adverse Party [...] provided that in any of these cases he abstains from any hostile act and does not attempt to escape». It can be argued that the complementarity of the protection of the substantive right to life, as defined in Article 2 ECHR, in the case where a foreign military person exercises 'power and control' over the life of an enemy military person and international humanitarian law concerns the norm recalled (M. G. HALL, *Who's Afraid of Human Rights in War? (Part I): On the Place of the ECHR during Armed Conflict in Response to a Misguided Critique of Narayan and Others v. Azerbaijan*, Völkerrechtsblog, 17.04.2024).

To ascertain the presence of such complementarity, it is necessary to comprehend

whether the degree of power exercised by the opposing party that gives rise to the status of *hors de combat*, and consequently prohibiting attacks against them, is overlapped in whole or in part to that applied by the Court analysed there in the *Narayan* case. However, the meaning of 'being in power' in Article 41(2) AP1 and the customary rule is not specified, leaving it to the interpreter to identify when this *status* becomes applicable. Even if Military Manuals are not sources of international humanitarian law, they could be a useful instrument to understand the positions of States. But neither of them define the meaning of the terms mentioned. Therefore, we must look to the doctrine for clarification. Specifically, Article 41(2) and Article 4 of the Third Geneva Convention (hereinafter GCIII) concerning the definition of prisoner of war use similar language. While Article 41(1) AP1 define *hors de combat*, as already seen, as those who *are* in power of an enemy, Article 4 GCIII considers PoWs who «… falling in the power of an enemy». Due to this similarity, some scholars believe that the prohibition of attacking *hors de combat*, not only is part of customary law, but can also be derived from Article 4 GCIII itself. The element of interest here is that the link between these two rules is more relevant because the terminology suggests a broader application intention in the first case than in the second. If, therefore, one tends to believe that the status of prisoner of war applies when one falls into enemy hands, it is not necessary to *fall* into enemy hands to *be* in the power of the enemy, and therefore *hors de combat*. The ICRC, in its Commentary to the First Protocol of 1987, after mentioning this distinction, points out that «A defenceless adversary is '*hors de combat*' whether or not he has laid down arms» (Commentary par. 1612). Moreover, in the same Commentary, the ICRC highlights that according to some delegations, during the preparatory work of AP1, the condition of the unarmed soldier was already covered by Article 4 of the Third Convention. Thus, there is a partially overlap between the discipline of prisoner of war and *hors de combat*. For our purposes, this means a prohibition, in both cases, to attack subjects protected by that *status*. Others, on the other hand, considered the PoW regulations applicable only when the enemy had *fallen* into enemy hands, while the previous moment, when the enemy soldier was in the *control* of the adversary, provided for the application of the *hors de combat* provisions. As seen in previous paragraphs, although on duty and during an international armed conflict, the two Armenian soldiers were unarmed and taken by surprise, so that they were defenceless against the enemy attack. This ICRC's point of view implies a complementarity between Article 2 ECHR and the applicable provisions of international humanitarian law. The 'being in the power' of an enemy concept under IHL aligns with the Court's 'power and control' model. In both cases, the key is the ability to the State agent to decide the victim's life or death, not necessarily physical control. Consequently, Article 2 ECHR is breached, and the exceptions provided by Article 15(2) ECHR and Article 2(2) do not apply because, even for the *ius in bello*, the killing is unlawful.

6. *Concluding thoughts*

In the light of the forgoing, it appears that the Narayan case falls within the case law trend that extends the Court's jurisdiction to extraterritorial act. Furthermore, it reinforces the principle that States are not permitted to violate the Convention, also beyond their borders. Thus, the applicability of Article 1 European Convention on Human Rights – regarding jurisdiction – and Article 2 – for the merit – to cases of the use of force perpetrated outside State's territory is consolidated. Nevertheless, the issue of the harmonization of

Conventional provisions with IHL remain unexplored in the judgment. One of the possible interpretations, in the presence of an international armed conflict, is that the ECtHR ought to apply the Conventional provision, as stated in Article 32 ECHR, in light of IHL applicable provisions' to the case in question. Consequently, the unlawfulness of the killing of the two soldiers according to *ius in bello* – because the soldiers had the status of *hors de combat* and the attack was perpetrated by a State agent – would not have activated the exception provided by Article 15(2) ECHR, resulting in Azerbaijan's responsibility for substantial obligation of Article 2 ECHR. Moreover, this pathway of interpretation should have been coherent with the other cases cited, providing the relational paradigm between ECHR and IHL with a clearer definition.

It is possible also noting that, beyond the somewhat ambiguous interplay between international humanitarian law and the provisions of the European Convention on Human Rights as evidenced within the Court's case law, a further challenge arises from an explicit and precise articulation of the concepts of 'power and control'. Accordingly, it might be argued that, to facilitate a more consistent and harmonious application of both the SAAC jurisdiction and the application of substantive obligation of the rights enshrined in the ECHR in situation of use of force outside the territorial application of the Convention, a terminological clarification could be helpful.

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