

# Narayan and Others v. Azerbaijan

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## Introduction

On 19 December 2023, the European Court of Human Rights (ECtHR) delivered its Judgement on the case of [Narayan and Others v. Azerbaijan](#) and established extraterritorial jurisdiction of Azerbaijan with respect to the substantive limb of the right to life of soldiers acting in an official capacity (para. 119). The Court then found the violation of the substantive limb of the right to life (para. 122). The case originated in the military clashes between Azerbaijan and Armenia on 29 December 2016, which led to the killing of one Azerbaijani and three Armenian soldiers (para. 4). The ECtHR observed that the Azerbaijani soldier had entered the Armenian military post and fired on Armenian soldiers. The attack resulted in the killing of two unarmed Armenian soldiers, 'one while using the toilet and the second while attempting to fill a water tank' (paras. 92, 94, 95, 101, 105). The exchange of firing between the Azerbaijani soldier and the other Armenian soldiers rendered the killing of the former and the third Armenian soldier who repelled the attack (paras. 92, 94, 95, 105).

The ECtHR found that Azerbaijan exercised extraterritorial jurisdiction of state agent authority and control (SAAC) over the first two soldiers (para. 108), not the third Armenian soldier, 'who himself had fired his gun in the direction of the enemy but was shot shortly afterwards' (paras. 108, 109, 110). The Court's reasoning stems from the fact that the distance between the Azerbaijani soldier and the third Armenian soldier was 'around 60 to 70 m', the crossfire took place 'in conditions of reduced visibility because of the fog and drizzle', and the third Armenian soldier was not an unarmed target (para. 109).

This blog post analyses whether the Court is consistent with its case law in establishing the jurisdictional link and finding violation of the substantive limb of the right to life concerning the armed attack against enemy combatants during the active phase of international armed conflict (IAC). The Court's finding on SAAC remains controversial. When a state agent attacks enemy, a state agent must bear the adversarial effects of the attack, including the risks of repelling the attack during the active phase of IAC. In this respect, the state agent's control is limited compared to attacks against civilians or detention of civilians or combatants. However, the Court disregarded the extent of control and mechanically applied the term of control derived from other cases to this case without considering the status of the victims. Furthermore, the Court's conclusion appears particularly curious to apply human rights norms without taking international humanitarian law (IHL) into account when it found the violation of the substantive limb of the right to life. The ECtHR did not explain why the incident should not be assessed under IHL. Therefore, the Court is inconsistent with its case law that interpreted violations of International Human Rights Law (IHRL) during IAC through the lens of IHL.

## Reasoning of the State Agent Authority and Control

The Court's main reasoning on SAAC rests on whether a state agent exercises 'physical power and control over the men's lives in a situation of proximate targeting' in the territory of another State. (para. 88). Therefore, the Court enumerated cases engaging in the extraterritorial application of the European Convention on Human Rights ([see, see](#)) including, the [Öcalan](#), [Issa](#), [Pad](#), [Andreou](#), [Solomou](#) cases and concluded that '[i]n those cases, control over individuals ... was sufficient to bring the affected persons "under the authority and/or effective control of the respondent State through its agents" (para. 86).

Nevertheless, this analysis does not appear entirely tenable and appropriate concerning the present case. This is because both [Öcalan](#) and [Issa](#) cases engage in the unlawful detention or arrest of victims, and the character of authority and control in these cases are different from the present case, which engages in firing without capture or arrest. This is because 'the concept of "[SAAC]" over individuals to scenarios going beyond physical power and control exercised in the context of arrest or detention' ([see](#), para.131).

Moreover, unlike the enumerated cases, in this case, the victims were combatants exercising their military functions regardless of the character of their activity during the attack. Although the first two victims were unarmed and did not realise the functions of direct firing, attacking or repelling the assault, they were combatants acting in an official capacity. It follows that the character of authority and control in the cases of engaging in an attack or shooting during the IAC is different from cases of detention, arrest and killing unarmed civilians. In the former cases, the control is limited because the state agent is in a situation of crossfire or attack, and the state agent must bear an adversarial effect of an enemy's firing that lessens the control. Thus, the Court's finding is unreasonable because it equates civilians to belligerents and less risky situations to cases carrying potential threats of death for state agents.

## The Harmonisation of IHL and IHRL

Disregarding the interplay between IHL and IHRL is one of the main shortcomings of the judgment that led to a further controversial finding of the violation of the substantive limb of the right to life. Nevertheless, harmonisation is a tool for interpreting IHRL and IHL ([see](#), p. 386). The ECtHR stressed that 'the Convention must be interpreted in harmony with other rules of international law of which it forms part. This applies no less to [IHL]' ([see](#), para. 55). The Court went on to say that the right to life 'should be interpreted in so far as possible in light of the general principles of international law, including the rules of [IHL]' ([see](#), para. 102). Then, it concluded that 'in cases of [IAC], where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of [IHL], that Article 5 could be interpreted as permitting the exercise of such broad powers', and IHL precludes a violation of Article 5 § 1 ([see](#), paras. 104, 105).

Furthermore, 'where the armed forces of a state kill someone in the course of an armed conflict the killing will be lawful provided it is consistent with IHL even if it results from use of force which is not absolutely necessary' from the perspective of

right to life ([para. 111](#)). In other words, violations of human rights norms exist when the IHL norms have been violated during IAC ([para. 95](#)). Notwithstanding, in the present case, the ECtHR did not analyse the interplay between the two regimes of international law and disregarded its own case law. Disregarding the interplay between IHL and IHRL by the ECtHR indicates the erosion of harmonisation. Nevertheless, actions that conform to IHL are not violations of IHRL. Therefore, particular questions arise about whether this incident occurred during the active phase of IAC.

### **Is this Incident Part of IAC or ‘Short of War’?**

It is uncontroversial that the IAC between Azerbaijan and Armenia did not cease in 2016 ([see](#)). First, the occupation by Armenia of the territory of Azerbaijan did not cease on the date of the incident. Second, when a state of war exists, the cessation of active hostilities and military operations ‘is not in itself sufficient to terminate the state of war’ ([see](#), p. 62). This is because the end of IAC is “the general close of military operations” ([GC IV](#), Article 6). In IHL, “the general close of military operation” differs from “the cessation of active hostility” ([see](#), p. 172). The cessation of active hostility may occur before the general close of military operations ([see](#), para. 4454). Such cessations are temporary, and they do not terminate the hostility entirely. However, the end of IAC depends on whether the hostility terminates “with a degree of stability and permanence” ([see](#), p. 171). Otherwise, every lapse of and each resumption of combat in the fighting would be considered as an end of the IAC or the start of a new IAC, respectively ([see](#), p. 171). The long-lasting armed conflicts, such as IAC between Armenia and Azerbaijan, consist of several stages of active hostilities, each of them having its beginnings and cessations. For instance, the active hostilities of the [4-day war](#) of April 2016, the [44-day war](#) of 2020 and the [24-hour war](#) of September 2023 show that the IAC between Azerbaijan and Armenia did not cease on 29 December 2016.

Whether this incident constitutes an act ‘short of war’ or a part of IAC would appear particularly curious. Incidents involving the use of force but not reaching the threshold of war are characterised as ‘short of war’, such as exchanging fires between border patrols of neighbouring countries, using torpedos on vessels of or shooting down aeroplanes of the other state ([see](#), p. 11). Since these incidents do not constitute armed conflict, IHRL takes primacy over IHL.

If this incident had been isolated from the general context of IAC between Azerbaijan and Armenia, it might have been classified as an act short of war. However, this attack should be assessed from the perspective of IAC. This is because the incident falls under the temporal and territorial scopes of IAC. The previous paragraph showed that the IAC between Armenia and Azerbaijan existed on the date of the incident. Concerning territorial scope, IHL rules of IAC are applied “in any location where opposing State forces exercise belligerent activity against each other irrespective of whether or not this activity occurs on their territories” ([see](#), p. 187). However, the ECtHR did not provide any clarification that the incident in the present case should not be under IAC. Since this incident is analysed from the perspective of IAC, IHL rules shall be applied to this case.

## Application of IHL

One of the main challenges in applying IHL rules is whether the killing of an enemy combatant constitutes a violation of the right to life. With respect to IAC, all members of the armed forces (except medical and religious personnel) of a party to the conflict are combatants ([see](#), Rule 3; [see](#), Article 43(2)). In IAC, '[u]nlike civilians, combatants – even if they do not pose an actual threat to the enemy at the time of the attack – may be directly targeted at any time until they surrender or are otherwise hors de combat' ([see](#), p. 21). In this case, although the first two soldiers did not pose an actual threat to the Azerbaijani soldier at the time of attack due to being unarmed and realising different activities, they were legitimate targets. Therefore, attacking them is not prohibited by IHL rules.

Notwithstanding this, the ECtHR did not analyse the alleged attack of the Azerbaijani soldier in light of IHL norms and found a controversial finding of a violation of the substantive limb of the right to life. Instead, the Court limited its reasoning of whether the attack was committed against armed or unarmed combatants. During IAC, the use of lethal force is governed by IHL, although a state has obligations of the right to life ([see](#), p. 110). In this regard, the interplay between IHL and IHRL should be analysed from the perspective of the harmonised interpretation of IHRL in light of IHL. Thus, IHL norms should guide the determination of the violation of the right to life during the IAC. However, the Court eschewed applying IHL in analysing the alleged violation of the right to life during IAC.

## Conclusion

The ECtHR's reasoning for establishing the SAAC was based on the cases where the victims were civilians, but in the present case, the victims were combatants. Therefore, the Court should consider the state agent's limited control over the combatants during the active phase of IAC. If the Court had analysed the state agent's limited control, it would not have established extraterritorial application of the right to life. Moreover, the Court's case law envisages the interpretation of IHRL in harmony with IHL, and when analysing the violation of the right to life during the IAC, the IHL should be taken into account. Nevertheless, the Court disregarded the provisions of IHL in the present case.

