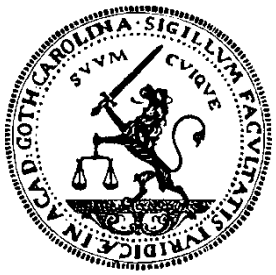

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Healthcare Within the Barbed Wires

International Legal Inquiry into the Right to Health in Occupied Akhalgori: The Prospects of Responsibility through Human Rights Litigation

JAMM07 Master Thesis

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Abstract

The humanitarian crises, which suddenly emerged in Akhalgori and claimed the lives of dozens of people, raised questions on the legal responsibility of Georgia and Russia to guarantee timely and adequate healthcare in the district. The uncertainties regarding the state's obligations were caused by the specific legal status of Akhalgori, which is Georgia's lost territory beyond its effective control, currently administered by the proxy forces of Russia by the name of the Republic of South Ossetia. The complexity of the case was further increased by the fact that the cause of the humanitarian crises was a deprivation of social and economic rights which requires the state to abstain from violation of the rights in question and to take positive actions to fulfil its obligations under human rights treaties. Therefore, the central question of this thesis is who should accumulate resources to guarantee the right to health in occupied Akhalgori. Furthermore, this thesis examines how the state alleged to have breached relevant human rights can be responsible.

Purported violations of the right to health have been studied from the perspectives of International Humanitarian Law (IHL) and International Human Rights Law (HRL) in this thesis. The research findings demonstrate that the establishment of the fact of occupation shifts the jurisdiction of Georgia and therefore the responsibility to the occupying power for guaranteeing human rights in Akhalgori, which is under the protection of both IHL and HRL. However, as the thesis has identified, while IHL does not offer any effective human rights protection mechanisms, HRL displays more resources to eliminate the crisis during the occupation. Subsequently, Russia's responsibilities regarding Akhalgori were primarily assessed through the human rights protection mechanisms.

In terms of litigation of the right to health, the thesis has identified that, while arguing the cases concerning the social and economic rights is complex in general, it is even more challenging when it comes to occupied territories. However, it has been noticed that the European Court of Human Rights frequently incorporates socio-economic rights and the rightto health in its application through the broad interpretations of the conventional rights. This observation brings new perspectives for the victims of the Akhalgori humanitarian crisis: the research revealed that if the European Court of Human Rights resources will be used effectively, the potential that Russia can be held responsible for the violation of the right to healthcare in Akhalgori is tangible.

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Special thanks to Lund, this heavenly place that always made me feel home, for giving me a sense of belonging and coloring my last two years even in the darkness of November.

Last but not least, thanks to my mother for giving me an example of being strong and persistent woman and to my father for his boundless and unconditional love. Finally, thanks to my extended family and friends in Georgia for always being there for me even on the distance.

Abbreviations

AAAQ	Availability, accessibility, acceptability, quality
CoE	The Council of Europe
COVID-19	Corona Virus Pandemic
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
GC	The Geneva Convention
HRL	Human Rights Law
HRW	Human Rights Watch
ICCPR	The International Covenant on Civil and Political Rights
ICESCR	The International Covenant on Economic, Social and Cultural Rights
ICG	International Crises Group
ICJ	International Court of Justice
ICRC	The International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IIFFMCG	Independent International Fact-Finding Mission on the Conflict in Georgia
NATO	The North Atlantic Treaty Organization
NGO	Non-Governmental Organization
PACE	Parliamentary Assembly of the Council of Europe
RULAC	International Humanitarian Law and Human Rights database
SSR	Soviet Federative Socialist Republic
UDHR	Universal Declaration of Human Rights
UN	United Nations
WHO	World organization of Health

Key Words: *Humanitarian Crises, Occupation, Healthcare, Social and Economic Rights, Jurisdiction, Effective Control, ECHR, Georgia, Russia, Humanitarian Law.*

Maps

Map no 1. – Occupied territories of Georgia

Map no 2. – Occupied Akhalgori

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CHAPTER 1. THESIS OUTLINE AND HISTORICAL BACKGROUND

This chapter will shortly review the identified problem, motivation of choice, as well as limitations and methodology employed. Afterwards, the research questions will be introduced, which will be followed by the review of the literature this thesis relied on.

1.1 Introduction

Russian occupation of Akhalgori began on 15th August 2008. This district, which had never had any legal link with the de facto South Ossetia before, was forced to incorporate itself in a new social, economic, and legal order. Georgia lost physical and legal access to Akhalgori; in other words, it lost effective control over the territory, populated mainly by ethnic Georgians. Subsequently, dependent on occupying powers essential assistance, the general situation in the district rapidly deteriorated. The challenge to meet basic needs, as well as living in constant fear of the Russian army were reasons why the young population fled the Akhalgori district.

The humanitarian crisis in the region started by closing the only checkpoint connecting Akhalgori to the rest of Georgia on September 4, 2019. Akhalgori became deprived of essential goods and services, most importantly timely and adequate medical care which resulted in the deaths of approximately 40 people before the checkpoint was reopened in February 2021. However, prior to the lifting of the restriction on crossing the so-called border with Georgia, the residents of Akhalgori were left alone beyond the control of Georgia and neglected by occupying power, Russia, appearing to be in a legal "black hole." Thus, whether residents of Akhalgori have the right to health and in which ways it can be claimed is the central topic of this thesis.

Following the August 2008 conflict, the Georgian government passed the Law on Occupied Territories, which imposed liability on the Russian Federation for violations of human rights in occupied territories of Abkhazia and South Ossetia. Simultaneously, Russia recognized South Ossetia, including Akhalgori, as an autonomous state. These circumstances have legitimately raised the question of who is responsible for ensuring social and economic rights in occupied Akhalgori, which by their very nature necessitate the utilization of resources and the implementation of concrete steps.

Along with the unclear theoretical framework of the applicable law in Akhalgori and uncertainty with whom the responsibility lies for ensuring the social and economic rights in Akhalgori, the practical approach to the existing problem is also ambiguous: the possibility to effectively litigate the right to health before the international bodies need further elaboration.

1.2 Aim and Research Question

Considering the background context and the ensuing problem, the aim of the thesis is to examine Georgian and Russian responsibility in guaranteeing Akhalgori's right to healthcare. As work on this thesis started while the humanitarian situation in Akhalgori was critical, the stated purpose for this study was to suggest findings that have theoretical and practical significance for those who were directly affected by the crisis. As a result, this thesis is an attempt to provide legal solutions for Akhalgori residents who have been left alone in dire need of proper healthcare.

Another compelling reason for this choice is the complex legal intersection and the probability of unanticipated variations in different areas during the analysis. The delimitation of obligations and responsibilities of the above-listed actors in this specific circumstance was inspired by the fact that Akhalgori has not been studied from a human rights and humanitarian law perspective; therefore, the angles this thesis employs have not been researched at all. Hence, the topic is crucial due to its novelty, urgency, and close link with the process, which was gradually unfolding in Akhalgori by the time of writing this thesis. In accordance with what has been stipulated above, the core research questions of the thesis are:

1. Who bears a legal duty to ensure the right to health in occupied Akhalgori?

2. What is the legal avenue to oblige the responsible states to respect the right to health of the residents of Akhalgori?

1.3 Methodology and the Structure of the Thesis

To answer the research questions and address the limitations in the existing literature, research has been conducted through a single qualitative case study aiming to map responsibilities of the states and identify potential legal gaps. A case study is an in-depth, real-world investigation of a current complex phenomenon that examines the relevant issues in depth rather than providing a broad overview, moreover the study also makes about the applicability of what has been learned to the similar situations that have not been yet studied.[1]

Therefore, the subject of examination is a territorially delaminated research object explored through the lenses of the IHL and HRL. For the analysis of the case, the tools of doctrinal legal research were employed. Therefore, laws, regulations, and case law were examined. The findings of this studies can be applied to the rest of occupied Georgia; however, extensive, and

[1] Lisa Webley, 'Stumbling Blocks in Empirical Legal Research: Case Study Research' [2016] Law and Method <http://www.bjutijdschriften.nl/doi/10.5553/REM/.000020> accessed May 26, 2021.

in-depth analysis on this matter is highly recommended since this thesis has limited capacity to be pertinent outside the context of Akhalgori.

In regard to the selected literature, there are no previous comprehensive analyses that review the protection of social and economic rights in Akhalgori or other parts of occupied Georgia. However, close parallel with the Israel – Palestine conflict and the existing exhaustive analysis of gross human rights violation in the occupied Territory of Gaza, the West Bank and East Jerusalem had a guiding role in selecting the perspectives of this research and literature chosen for in-depth analysis.

In pursuing the answers to the posed research questions, legal research started by identifying core authoritative sources relevant for the research questions, such includes existing legislations which were used as a primary source of this thesis:

1. The Hague Regulations;
2. Geneva Convention IV;
3. Universal Declaration of Human Rights;
4. The International Covenant on Economic, Social and Cultural Rights;
5. European Convention of Human Rights.

Regarding to the secondary sources, concerning the part of international humanitarian Law, International Review of the Red Cross, International Court of Justice (ICJ) case law and several authors have been in focus, among them Droege (2008), Kolb, (2012) Sassoli (2005) and Orakhelashvili (2001). As for the human rights part, along with the relevant human rights treaties and reports of the World Health Organization (WHO), the works of Tobin (2012), Ruger (2006) and San Giorgi (2012) had a particular significance. Researching the exterritorial application of human rights law is one of the central aspects of this thesis that connects certain human right violations to the occupying power. Discovering important trends and findings regarding jurisdiction was possible by analysing the case-law of the European Court of Human Rights and concluding observations of the United Nations (UN) Committee of Social and Economic Rights. The analysis in this regard is also heavily based on the works of Milanovich (2008, 2011, 2018), Besson (2012) and Talmon (2009).

Lastly, to outline and indicate the extent of the Akhalgori humanitarian crisis, international organizations, and Georgian non-governmental organisations (NGO) reports and non-legal sources, such as media articles and blog posts were used. Media sources of South Ossetia have been disregarded due to their partiality and non-independence. According to the Freedom House, the local media in South Ossetia is not free, as it is monitored by the local authorities: "Self-censorship is pervasive, and defamation charges are often employed against critical media".[2] In addition to this, the same report underlined that Tamara Mearakishvili, a journalist and activist whose interviews and statements are frequently referred to in this thesis to describe the situation in Akhalgori, is prosecuted on false charged mainly due to her collaboration with

[2] South Ossetia: Freedom in the World 2020 Country Report (*Freedom House*) <https://freedomhouse.org/country/south-ossetia/freedom-world/2020> accessed May 16, 2021.

Georgian and international media. The other Georgian sources deployed in this thesis are commonly regarded to be authoritative and reliable.

In addition to the above-mentioned methodology, healthcare system in Akhalgori was assessed through the AAAQ framework which is considered to be the first human rights standard applicable for social and economic rights. This analytical tool has been widely employed by UN Committee on Social, Economic, and Cultural Rights in General Comments where specific characteristics to define minimum standard of the right to health was set out.[3] According to the framework, there are normative expectations that healthcare system should be Available, Accessible, Acceptable, and Quality. Those elements are interrelated and illustrates existing shortcomings of the medical management in the specific country as well as certain obligations of the state to provide. Hence, the AAAQ framework as a mapping methodology was guiding tool in this thesis to depict concrete violations of the right to health by examining the humanitarian crises through the lenses of the AAAQ framework.

As regard to the structure, the thesis has 6 main chapters. **First chapter** outlines the general context and provides an overview of the research, motivation, and limitations of the thesis, as well as an assessment of the relevant literature. An in-depth factual analysis of the humanitarian crisis in Akhalgori is presented in the **second chapter**. It then establishes the fact of occupation in Akhalgori based on IHL and demonstrates that the international community also perceives Akahalgori under Russia's effective control. Once the legal status of the territory in question has been identified, **chapter 3** discuss international humanitarian law and international human rights law in occupied territories. Then the focus will be given to IHL. Its provisions will be analysed in light of the Akhalgori's crisis, in the end, the chapter examines the availability of effective remedies under IHL**. Chapter 4** substantively explores the right to health and identifies violations of the right in Akhalgori by employing the AAAQ framework, which is suggested by the WHO in order to capture certain flaws in the concrete medical system. **Chapter 5** then moves on to the question of responsibility and exterritorial jurisdiction of the state for its wrongdoings outside its sovereign borders and seeks a practical solution for the humanitarian crises in Akhalgori; it reviews the most important human rights mechanism suggested by the Council of Europe and the United Nations. **Chapter 6** discusses Georgia's residual jurisdiction and its positive obligations toward the residents of Akhalgori, in the end, it concludes with the recommendation for the government of Georgia.

[3] Socio-Economic Human Rights in Essential public services provision. (ROUTLEDGE 2020). P.300.

1.4 Research Limitations

Territorial limitation

Akhalgori, according to the de facto government, is an integral part of South Ossetia. Therefore, South Ossetia, Tskhinvali, a so-called capital city of the breakaway region, and Akhalgori will be used interchangeably throughout the thesis. For this thesis, however, the deprivation of healthcare will be discussed only in relation to the district of Akhalgori, which was the epicenter of humanitarian crises. The territorial limits of the thesis are also motivated by the availability of reliable information concerning Akhalgori on account of local activists and international media, which still maintains the link with the district. Tskhinvali has closed its borders for international press and international organisations except for the International Committee of the Red Cross (ICRC). Therefore, obtaining substantive and detailed information regarding the health care system in the rest of the South Ossetia could have been extremely challenging.

The research periods

The de facto government of South Ossetia eased the limitations for transferring the patients from Akhalgori to Georgia proper on February 14, 2021; therefore, the research is limited to a period from September 4, 2019, when the crossing point with Georgia proper was closed, to February 14, 2021. However, it should be noted that hospitals in Akhalgori are still unable to provide timely and adequate health care for the resident.

1.5 Historical Background

The occupation of Akhalgori has a long history and is associated with the fragmentation of the Soviet Union in 1989. That is when nationalist sentiments started to emerge and sparked inter-ethnic incidents and conflict throughout the former Soviet Union. However, intensified tension and hostility was unprecedented and particularly acute between Georgians on the one side and Ossetians – ethnic minorities of autonomous regions of what was then the Georgian Soviet Socialist Republic – on the other.[4]

After Georgia regained its independence, abolishing South Ossetia's autonomous status culminated in Ossetian demands for secession from Georgia. For Ossetians, this claim was backed by a long history of fraternity with the Russians both in czarist and soviet times when they had sided with the bolsheviks in 1918, and "had accordingly been rewarded with their own Autonomous Republic inside the Russian Soviet Federative Socialist Republic Russian

[4] Amnesty International, 'Behind Barbed Wire: Human Rights Toll of "Borderization" in Georgia' (2019) EUR 56/0581/2019 <https://www.amnesty.org/download/Documents/EUR5605812019ENGLISH.PDF> accessed May 23, 2021. p.10.

(SSR), as well as their own Autonomous District inside the Georgian SSR."[5] This aspiration of independence escalated into armed conflicts in 1989, which continued until 1992. In 1990 South Ossetia declared independence from Georgia. A bit later, in a referendum held on January 19, 1992, most South Ossetians overwhelmingly supported integration with bordering neighbour, the Republic of North Ossetia, which is part of the Russian Federation.[6]

Moscow, whose peacekeeping mission in the region was considered questionable and biased, led the mediation process after the conflict parties agreed on a ceasefire in 1992. According to the Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG), which was established by the Council of the European Union the Russian political elite and governmental institutions were split on the subject and were only partially involved. While remaining on uneasy terms with Tbilisi, Russia apparently supported insurrectionists.[7] According to Goltz, "without overt and covert Russian military intervention, it is difficult to imagine that the grossly outgunned and outnumbered South Ossetians could have held their own against the Georgians."[8] This opinion has been shared by the majority of independent observers, who believe that the Russian armies were not passive bystanders in the conflict, while Georgia's defeats in South Ossetia at the time were ideally matched with Russian political and geopolitical interests in the region.[9]

Russia became a key factor in controlling the course of the conflict, which forced Georgia to soften its policy regarding the breakaway regions and compromise parts of its territory. According to the ceasefire agreement, South Ossetia retained control over the districts of Tskhinvali. However, Java, Znauri, Akhalgori and several ethnic Georgian villages in the Tskhinvali district remained under the central government's jurisdiction in Tbilisi.[10]

Russia not only supported the de facto South Ossetian government politically: from the early 1990s, it also started to provide economic assistance to the de facto governments in South Ossetia and has granted passports to significant numbers of people living in Russian controlled territory. Without these passports, residents of South Ossetia would have been deprived of international travel since the war left South Ossetia separated from Georgia but unrecognised as a separate state.[11]

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[5] Svante E Cornell and Frederick Starr, *The Guns of August 2008: Russia's War in Georgia* (Routledge 2015) <https://www.taylorfrancis.com/books/e/9781315699660> accessed April 19 2021. p.10.
[6] Georgia: Avoiding War in South Ossetia (*Crisis Group*, November 26 2004) <https://www.crisisgroup.org/europe-central-asia/caucasus/georgia/georgia-avoiding-war-south-ossetia> accessed May 23 2021. p.4.
[7] Heidi Tagliavini, 'Independent International Fact-Finding Mission on the Conflict in Georgia' (2009) <https://www.echr.coe.int/Documents/HUDOC_38263_08_Annexes_ENG.pdf> accessed May 23 2021. p.13.
[8] Cornell and Starr (n 5). p.18.
[9] Dennis Sammut and Nikola Dvetkovski, *The Georgia-South Ossetia Conflict* (Verification Technology Information Centre 1996).p.13.
[10] 'Georgia: Avoiding War in South Ossetia' (n 6).
[11] Amnesty International, 'Amnesty International, Civilians in the Line of Fire: The Georgia-Russia Conflict' (November 18 2008) EUR 04/005/2008 <https://www.amnesty.org/download/Documents/52000/eur040052008eng.pdf> accessed May 23 2021. p.7.

After almost 15 years, the conflict between South Ossetia/ Russia and Georgia is considered "frozen", with only smaller escalations over the years. However, the ever-evolving tension between Georgia and Russia resulted in the war that started from the night of 7 to August 8, 2008 and lasted until August 12, 2008, when a ceasefire was concluded. While the precise circumstances around the outbreak of hostilities on August 7 are still being debated, there is an agreed position in the international community that Russia provoked the conflict.

On August 8, the first Russian fighter plane entered Georgian airspace from South Ossetia. This is considered to be the beginning of a full-scale Russian invasion of Georgian territory.[12] The declared purpose of the intervention was to protect Russian citizens and peacekeepers living in South Ossetia, who were "facing attacks and persistent persecution in Georgia's breakaway republics of Abkhazia and South Ossetia".[13] However, as the aftermath of the war shows, Russia's response had gone far beyond the boundaries of South Ossetia that Moscow claims it wanted to protect.[14]

After signing a so-called six-point plan on a ceasefire proposed by French President Nicolas Sarkozy on behalf of the European Union on August 12, Russian forces were directed to suspend combat operations. "However, the Russian and South Ossetian forces reportedly continued their advances for some days after the August ceasefire was declared and occupied additional territories, including the Akhalgori district, which had been under Georgian administration until the August 2008 conflict, even if it is located within the administrative boundaries of South Ossetia as they had been drawn during the Soviet period."[15] Due to diplomatic pressure from the West, the Russians eventually withdrew from the buffer zones around the territories of Abkhazia and South Ossetia in October 2008; however, Russian and South Ossetian forces have refused to pull back from their positions from upper Kodori Valley, the Akhalgori district and the village of Pareve which until today are considered to be occupied by Russia.

In the end, As the result of five days of active hostility, 850 persons lost their lives, far more than 100 000 civilians fled their homes[16] and Georgia, along with other territories, lost the Akhalgori district, mainly populated by ethnic Georgians. The district had always been under the control of the central authorities in Tbilisi and was not part of the conflict zone even in the August war of 2008.

[12] Cornell and Starr (n 5). p. 153.
[13] P Okowa, '*The International Court of Justice and the Georgia/Russia Dispute'* (2011) 11 Human Rights Law Review 739.p.741.
[14] Magdalena Frichova, 'Transitional Justice and Georgia's Conflicts: Breaking the Silence' Breaking the Silence (May 2009) 42. p.18.
[15] 'Independent International Fact-Finding Mission on the Conflict in Georgia' (n 7). p. 22.
[16] ibid. p.5.

CHAPTER 2. HUMANITARIAN CRISIS AND THE STATUS OF OCCUPATION IN AKHALGORI

This chapter first discusses the preexisting political tension between Georgia and its breakaway region and then the dynamics and consequences of the humanitarian crisis in Akhalgori. The legal status of the occupation of Akhalgori, according to the IHL, will also be examined since the fact that residents of Akhalgori were being subjected to legal and territorial isolation provides a separate contextual basis to the problem. Lastly, the current situation regarding the international recognition of the occupation of Akhalgori will be explored.

2.1 Humanitarian Crisis in Akhalgori

Ethnic Georgian-settled Akhalgori is located in eastern Georgia, in the Southeastern part of South Ossetia. The district was under Tbilisi control until August 15, 2008, when it was occupied by Russian forces, just three days after signing the ceasefire agreement that ended the Russo-Georgian "five-day" war. Due to deteriorated socio-economic conditions, locals started migrating to Georgia proper, with the number of Akhalgori residents rapidly falling from 9,00016 to 1,500 within a first few month. The ones that stayed in the district for various reasons had to live in constant fear of the closure of the Mosabruni checkpoint, the only crossing point connecting Akhalgori and nearby villages to Tbilisi-controlled territory where the residents of the occupied district could access medical treatment, medicines, food supplies, and pensions.

On September 4, 2019, when the Tskhinvali de facto government arbitrarily closed the checkpoint, the worst fears of inhabitants of Akhalgori were realised. The border closure was related to a newly opened police guard by the central government officials, which aimed to protect local people; however, according to the de facto government, the police guard was placed on the territory of South Ossetia.[17] Tskhinvali demanded Tbilisi to abolish a police checkpoint close to the barbed wire; nevertheless, the Georgian government, which had been constantly criticised by the opposition for its overly lenient policies, did not back down.[18] In response to this, "Tskhinvali actually took the population of Akhalgori hostage."[19]

Closure of the checkpoint created critical problems regarding access to basic goods and services. Food products and medication quickly ran out of supplies, access to education deteriorated, family bonds and relationships suffered, and retirees lost the ability to receive the pension they could access only through Georgian banks.[20]

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[17] Social Justice Centre, A/HRC/43/37' Submission for the UN High Commissioner for Human Rights (OHCHR) under Human Rights Council Resolution'. p.2.
[18] Democracy Research Institute (DRI), 'The Akhalgori Deadlock' (2021) <http://www.democracyresearch.org/files/95akhalgori%20deadlock%2001.03.2021.pdf> accessed, May 24 2021. p.9.
[19] ibid.p.4.
[20] A/HRC/43/37, Submission for the UN High Commissioner (n 17). p.2.

Notwithstanding all the circumstances mentioned earlier, the greatest setback for Akhalgori turned out to be a lack of adequate and timely medical assistance. From September 2019 until February 14, 2020, at least 25 Akhalgori residents died while waiting for or requesting medical evacuation to Georgian-controlled territories.[21] However, according to a civil activist living in Akhalgori, Tamar Mearakishvili, the death toll is actually higher and ranges up to 40.[22] According to Georgian media sources, the reason for that was that people living in Akhalgori could not go to planned surgeries, regular chemotherapy, postoperative treatment therapies and were unable to continue treatment because some medicines are not available in South Ossetia at all.[23]

At the same time, while hospitals in Akhalgori and Tskhinvali were in poor condition due to a shortage of equipment and unqualified staff, any patient was seeking treatment in Georgian clinics had first to obtain a special permit. However, this process was highly bureaucratic and required between 10-20 days for the issue of permission; eventually, it ended lethally for the patients who could not wait for the proper treatment.[24] According to the regulation issued by the de facto government of South Ossetia,[25] patients had to seek medical attention first in Akhalgori. If the local hospital could not treat the disease, they would be transferred to Tskhinvali, where the decision about the transfer to Georgia proper would be made. The majority of the patients affected by the border closure were taken to Tskhinvali only to seek approval for a transfer.

For example, one of the first victims of the humanitarian crisis, Margo Martiashvili, was admitted to Tskhinvali hospital with the presumed diagnosis of a stroke on October 28, 2019. Due to imposed regulations, she could not be taken to Georgian territory in time for immediate medical attention, and she died as a result.[26] If prompt emergency attention had been sought, a fatal result would have been likely to be avoided in other cases as well; however, the problem was not only the lack of timely assistance but also the quality of the medical care.

Another victim of the border closure, Vera Kotolova, who was initially admitted with a fever to the Akhalgori hospital, died on October 14, 2020.[27] The reason for that was considered

[21] 'The Akhalgori Deadlock' (n 18). p.9.
[22] HUMAN RIGHTS. GE' Coronavirus Pandemic in the Occupied Regions' (March 1, 2021) (<http://www.humanrights.ge/index.php?a=main&pid=20335&lang=eng> accessed April 30, 2021.
[23] 'Netgazet, ახალგორელთა ნელი სიკვდილი ბიბილოვის ავტორიტეტის გადასარჩენად' (1November 2019) <https://netgazeti.ge/news/402575/> accessed April 30, 2021.
[24] Mtisambebi.ge, 'ახალგორის იზოლაციის 16 მსხვერპლი' (11 December 2020) <https://mtisambebi.ge/news/people/item/1242-axalgoris-izolaziis-16-msxverpli> accessed April 30, 2021.
[25] Public Defender of Georgia, 'The Impact of so Colled Checkpoint Locking, On the Legal Status of the Population Living in the Territories In 2019-2020' (2021) Special report <https://www.ombudsman.ge/res/docs/2021042112101218621.pdf> accessed May 24, 2021.
[26] Social Justice Center, 'EMC Responds to the Humanitarian Crisis in Akhalgori' (October 30 2019) <https://socialjustice.org.ge/en/products/emc-akhalgorshi-shekmnil-humanitarul-kriziss-ekhmianeba> accessed May 24, 2021.
[27] Civil.ge, 'Reports: Occupied Akhalgori Resident Dies after Denied Transfer to Georgia Proper' (October 15 2020) <https://civil.ge/archives/375554> accessed April 30, 2021.

inability of physicians to locate her diagnosis. Doctors in Tskhinvali considered that she had suffered a stroke but discharged her home anyway.

The youngest victim of the deadlock, 40-year-old Gela Garieva, who had liver problems, regularly requested to be moved to Tbilisi, but he was denied access to medical care. Finally, from Akhalgori already unconscious patient was referred to Tskhinvali hospital, where he died a few days later, June 15, 2020, and was buried by his neighbours since his family was not allowed to enter Akhalgori.[28]

The general situation got even worse during the COVID-19 outbreak since the hospital in Akhalgori has not been provided with any medical equipment for addressing cases of infection.[29] The de facto government of South Ossetia did not recognise the spread of the virus in a timely manner in its territories and later also failed to provide minimum core medical care and safety for the residents.[30]

The International Crisis Group, (ICG) a think tank that released a report evaluating the response to the COVID-19 pandemic by Moscow-backed authorities in Georgia's occupied territories, regarded South Ossetia as "at greatest risk" in coping mechanisms with a pandemic.[31] A significant part of the population – 17 % – is elderly, the report notes, adding that "hospitals are severely under-equipped," and one of the region's few doctors "refused" to operate due to a shortage of basic protective equipment.[32] According to the same report, the only humanitarian organisation active in South Ossetia, the International Committee of the Red Cross (ICRC), does not have enough medical personnel on the ground to determine local health needs.[33] However, the South Ossetian government refuses to collaborate with the World Health Organization (WHO) and other relevant organisations that are working with the Georgian side as well to combat the pandemic, citing concerns that even indirect cooperation with Georgia would jeopardise the region's independence process.[34]

The think tank also underlined that South Ossetia is heavily reliant on funding from Russia while Russia itself is struggling with its substantial domestic demands. It is therefore not surprising that "Russia, which provides a majority of the region's needs, stopped most exports of medical supplies in early March",[35] the report indicates. Eventually, in self-reliant South Ossetia, people "don't dare to even go for blood tests with the local doctors",[36] especially after

[28] HUMAN RIGHTS. GE, 'Population of Gail and Akhalgori Lack Access to Necessary Health Care Amid the Coronavirus Outbreak' (April 6 2020) <http://www.humanrights.ge/index.php?a=main&pid=20120&lang=eng> accessed May 24 2021.
[29] ibid.
[30] International Crisis Group Europe, 'The COVID-19 Challenge in Post-Soviet Breakaway Statelets' (2020) BRIEFING N89 <https://d2071andvip0wj.cloudfront.net/b089-covid-and-statelets%20(1).pdf> accessed May 24 2021.
[31] ibid.
[32] ibid.
[33] ibid. Ch. 2.
[34] ibid. Ch. 5.
[35] ibid.
[36] ibid.

cases of misdiagnosis and mistreatment of the patients. A victim of the pandemic, the 68 years old Onise Gatenashvili, was demanding to be transferred to Tbilisi since he got infected with Covid. However, he was transferred to Tskhinvali instead, where his condition worsened. After that, the doctors from Tskhinvali decided to transfer him to Tbilisi; Onise Gatenashvili died on the way.[37]

South Ossetia started to vaccinate residents on May 4, 2021, with the so-called Russian vaccine "Sputnik V",[38] for which the local government had to allocate 2 million Russian rubles from the budget,[39] indicating that Russia did not provide vaccination for South Ossetia. However, at the same time, Russia had already vaccinated its military bases in occupied Abkhazia and the Tskhinvali area against Covid-19 in January 2021.[40]

Therefore, by closing the checkpoint while the health care system was in a deteriorating situation in South Ossetia was extreme negligence of the de facto government which let elderly people die in degrading condition. The de facto regime, which was aware of the situation in the region, did not lift its restrictions for nearly two years;

In chapter 4, a more thorough analysis of the structural problem of medical care in Akhalgori will be provided; in the meantime, the legal status of Akhalgori must be elaborated in order to shed light on the obligations resulting from healthcare deprivation.

2.2 Akhalgori as an Occupied Territory under International Humanitarian Law

The concept of occupation and the duties of the occupying power were first codified in the Regulations Concerning the Laws and Customs of War on Land annexed to the Fourth Hague Convention of August 18, 1907.[41] Since then, the definition has not been altered, although often criticised for its imprecision and vagueness.[42] Article 42 of the Hague convention reads as follows: "territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."[43]

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[37] Radioliberty, 'დაბა ახალგორში ცნობილი ექიმი COVID-19-ით გარდაიცვალა. იზოლაციის კიდევ ერთი მსხვერპლი' (15 November 2020) <shorturl.at/iALU4 > accessed 30 April 2021.
[38] Civil.ge 'Russia's COVID Vaccine Delivered to Tskhinvali Region, Abkhazia' (May 4, 2021) <https://civil.ge/archives/417592> accessed May 24, 2021.
[39] RadioLiberty'ოკუპირებულ ცხინვალის რეგიონში ვაქცინაცია არ დაწყებულა. ექიმები ხელისუფლებას აკრიტიკებენ' (April 20, 2020) < shorturl.at/pBE19 > accessed May 24 ,2021.
[40] Civil.ge,' COVID-19 Vaccination Rollout Begins at Russian Military Bases in Abkhazia, Tskhinvali' (January 15 2021) <https://civil.ge/archives/391474> accessed April 30, 2021.
[41] Médecins Sans Frontières, 'The Practical Guide to Humanitarian Law' (*Occupied Territory*) <https://guide-humanitarian-law.org/content/article/3/occupied-territory/> accessed 24 May, 2021.
[42] Tristan Ferraro, 'Determining the Beginning and End of an Occupation under International Humanitarian Law' (2012) 94 International Review of the Red Cross 133. p.134.
[43] International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, October 18 1907, available at: https://www.refworld.org/docid/4374cae64.html [accessed May 24 2021] art. 42.

Later, in order to make this description more concrete and clear, legal discourses created the concept of "effective control", which specifies the concrete circumstances and conditions required to qualify the occupation.[44] According to the existing practice of international humanitarian law, occupation is considered established when the aspects of the "effective control" are cumulatively met and therefore "1) The armed forces of a State are physically present in foreign territory without the consent of the effective local government in place at the time of the invasion. 2) The effective local government in place at the time of the invasion has been or can be rendered, substantially or completely, incapable of exerting its powers under the foreign forces' unconsented presence. 3) The foreign forces can exercise authority instead of the local government over the concerned territory."[45]

In addition to this, it is important to note that humanitarian law defines belligerent occupation not only as an occupation through the direct forces of the occupying power but also the proxy when occupying power "exercises overall control over de facto local authorities or other local organised groups that are themselves in effective control of a territory or part thereof."[46] The possibility of occupation by proxy was first established in Tadić by the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY),[47] when the chamber noted that "the relationship of de facto organs or agents to the foreign Power includes those circumstances in which the foreign Power "occupies" or operates in certain territory solely through the acts of local de facto organs or agents."[48]

The ICTY developed the criterion of "overall control" to identify the threshold of the cooperation necessary to establish proxy occupation and determined that participation in armed conflicts along with the de facto government and financing, training, equipping or providing operational support to them is sufficient without requiring from the outside power to control acts committed by secessionists strictly.[49] The International Court of Justice backed up this perspective in the case of DRC v. Uganda, in which the Court considered whether Uganda exercised overall control over Congolese rebel groups.[50] According to Ferraro, the case "clearly demonstrates that the Court had endorsed the position developed by the ICTY and thus accepted the possibility of an occupation being conducted through effective indirect control."[51]

The Russian occupation of South Ossetia is considered to be a classic example of proxy occupation. This view has also been supported by the Geneva Academy of International Humanitarian Law and Human Rights database (RULAC), which identified that "Russia

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[44] The International Committee of the Red Cross, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (2015) 32IC/15/11 <https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts> accessed May 24, 2021. p.11.
[45] ibid. p.12.
[46] Ferraro (n 42). p.158.
[47] Alexander Gilder, 'Bringing Occupation into the 21st Century: The Effective Implementation of Occupation by Proxy' (2017) 13 Utrecht Law Review 60. p. 63.
[48] Ferraro (n 42). P.159 Tadic Case (Judgment) ICTY-94-1 (January 26 2000) para. 584.
[49] Sylvain Vité, 'The Interrelation of the Law of Occupation and Economic, Social and Cultural Rights: The Examples of Food, Health and Property (2008) 90 International Review of the Red Cross 629. p.71.
[50] Ferraro (n 42). p. 159.
[51] ibid.

occupies South Ossetia through the presence of its regular troops underpinned by series of agreements with the separatist territory. In addition, the local separatist armed groups could also be seen as Russia's proxies given their rather modest size, high level of coordination with the Russian Armed Forces, command structures staffed by the Russian citizens and the military and financial support provided by Russia."[52]

Establishing the fact of occupation is the prerogative of humanitarian law. However, since the establishment of the occupation is closely related to the enactment of occupying powers' responsibilities and obligations regarding human rights protection, the European Court of Human Rights (ECtHR) is also well placed to adjudicate whether the disputed territory is occupied based on humanitarian law.

In the case of Georgia v Russia, the European Court of Human Rights found that the "buffer zone" and, among them, Akhalgori was "undeniably" occupied by Russian armed forces.[53] It is a legal acknowledgement of the occupation, which is expected to have judicial and political consequences in the future. The Court, which was guided by humanitarian law principles, underlined the presence of Russian forces in South Ossetia as well as the economic, military, and political support to the de facto government of South Ossetia from the Russian Federation. The ECtHR considered the findings from international organisations like Human Rights Watch and Amnesty International, indicating that Russia had gradually strengthened its influence and level of control over the territory in question.[54]

According to the International Crisis Group report, after 2008, Russian funding accounted for 99 per cent of South Ossetia's budget, and more than half of the administration's staff were Russian. Due to these circumstances, Russia has full authority over the decision-making processes in areas such as the border, public order, and foreign policy.[55] Russia is also physically present in the occupied territory. According to Amnesty International, "Russia has three military bases in the South Ossetia/Tskhinvali Region in the towns of Java, Tskhinvali and Akhalgori."[56] Based on the Agreement on Friendship and Cooperation signed by Russia and South Ossetia in 2008, Russia is in charge of protecting the borders of South Ossetia, which gives a right to Russia to deploy its military bases in its occupied territories. The same agreement recognised dual citizenship and established common transportation, energy, and communications infrastructure.[57]

According to the ICRC, the end of occupation can be identified through the same effective-control test, which means that the conditions to be followed can usually mirror those used to

[52] RULAC: Rule of Law in Armed Conflicts, 'Military Occupation of Georgia by Russia' (February 22, 2021) <https://www.rulac.org/browse/conflicts/military-occupation-of-georgia-by-russia> accessed May 24, 2021.
[53] Georgia v. Russia (II) [GC] (merits), no. 38263/08, § 173 (January 21, 2021).
[54] ibid.
[55] International Crisis Group Europe, 'South Ossetia: The Burden of Recognition' (2010) 205 <https://www.crisisgroup.org/europe-central-asia/caucasus/south-ossetia-burden-recognition> accessed May 24 2021. p.1.
[56] 'Behind Barbed Wire: Human Rights Toll of "Borderization" in Georgia' (n 4). p.14.
[57] 'Military Occupation of Georgia by Russia' (n 52).

decide the beginning of the occupation, except in reverse.[58] However, since none of the above-described circumstances has changed as of today and Russia still maintains effective overall control of the territory, it can be concluded that Akhalgori is occupied.

2.3 International Recognition of Occupation of South Ossetia/Akhalgori

On October 23, 2008, soon after the August war, the Parliament of Georgia adopted the Law of Georgia on the Occupied Territories. On the basis of the Hague Regulations, the four Geneva Conventions and customary international humanitarian law, the law of Georgia states that certain territories of Georgia are occupied by foreign military forces.[59] Article 10 especially addresses that scope of the law applies to the territory of Akhalgori district as well.[60]

The law on occupied territories declared a state of emergency in the occupied territories until the full restoration of Georgia's jurisdiction; prior to that, certain limitation on free migration, economic activities and real estate transactions were imposed.[61] However, according to Georgian experts, the main purpose of adopting the law was to officially confirm Abkhazia and South Ossetia as an integral part of Georgia while also acknowledging the fact of Russian occupation.[62] Even though the Law of Georgia on the Occupied Territories is only domestic law with no legal significance outside the Georgian territory, it has declaratory nature and reaffirms the state's official position relevant for its international affairs.[63]

Russia's occupation of Georgia has not gone unnoticed by international organisations. The Parliamentary Assembly of the Council of Europe (PACE) adopted a resolution on Georgia on October 2, 2008, regarding the consequences of the war between Russia and Georgia. In the text of the resolution, part of the territory of Georgia is considered occupied.[64] It was followed by a resolution of the same Parliamentary Assembly in 2009, which had already specified that the former conflict zones of Abkhazia and South Ossetia were now occupied territories.[65]

The European Parliament not only directly declared Abkhazia and South Ossetia as Russian-occupied territories in its resolution but also blamed Russia for human rights abuse in occupied territories, stating:

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[58] The International Committee of the Red Cross (n 43). p.12.
[59] *Georgia: Law of 2011 on Occupied Territories* [Georgia], 20 November 2011, available at: https://www.refworld.org/docid/536cb46d4.html [accessed 24 May 2021], Preamble.
[60] ibid. art. 10.
[61] ibid. art. 4, 5, 6.
[62] Oleg (Bacho) Tortladze, Saba Pipia, 'Perspectives for Abkhazia and Tskhinvali Region/S. Ossetia to Be Recognised as Occupied Territories by International Courts' <https://www.geocase.ge/media/1139/GC-Policy-Paper_March-2021.pdf> accessed May 24, 2021. p.11.
[63] ibid.
[64] Council of Europe: Parliamentary Assembly, *Resolution 1633 (2008), The consequences of the war between Georgia and Russia*, October 2 2008, Res. 1633 (2008), available at: https://www.refworld.org/docid/48ec68f22.html [accessed May 24 2021] para 6.
[65] Council of Europe: Parliamentary Assembly, *Resolution 1633 (2008), The consequences of the war between Georgia and Russia*, October 2 2008, Res. 1633 (2008), available at: https://www.refworld.org/docid/48ec68f22.html [accessed May 24 2021] para.16.

"Unresolved Russia-Georgia conflict hampers the stability and development of Georgia; whereas Russia continues to occupy the Georgian regions of Abkhazia and the Tskhinvali region/South Ossetia, in violation of the fundamental norms and principles of international law; whereas ethnic cleansing and forcible demographic changes have taken place in the areas under the effective control of the occupying force, which bears the responsibility for human rights violations in these areas."[66]

One more important recognition was by The North Atlantic Treaty Organization (NATO) Parliamentary Assembly, which regarded South Ossetia and Abkhazia as occupied territories in its resolution.[67]

Some individual states have further supported Georgia's territorial integrity.[68] However, the most significant step towards the international recognition of occupation was taken by the European Court of Human Rights in its recent judgment on Georgia v. Russia case mentioned before. In the case which was lodged in the context of the armed conflict between Georgia and the Russian Federation in August war in 2008, The Court found that "Russian Federation exercised "effective control," over South Ossetia, Abkhazia and the "buffer zone" from August 12 to October 10, 2008, the date of the official withdrawal of the Russian troops."[69] The Court underlined that "effective control which" is at the heart of the notion of occupation and has long been associated with it"[70] triggers exterritorial jurisdiction of the occupying power under the international human rights law.[71]

Lastly, the occupation of Georgian territories and specifically Akhalgori has been addressed and assessed from a humanitarian law standpoint by Human Rights Watch in its authoritative report, "Up in Flames," stating that: "There were no hostilities there during the August conflict, but following the Russian conflict forces occupied the district, prompting the dismissal of the Tbilisi-backed administration. "[72]

Concluding Remarks

As has been indicated in this chapter, according to reports from international organisations and local media, Akhalgori was facing an unprecedented humanitarian crisis, which was primarily reflected in the failure of the healthcare system. It was demonstrated, in South Ossetia and

[66] European Parliament resolution of November 17 2011, containing the European Parliament's recommendations to the Council, the Commission and the EEAS on the negotiations of the EU-Georgia Association Agreement, paras. [accessed 24 May 2021] F, 1(g-h).
[67] NATO Parliamentary Assembly RESOLUTION 382 on THE SITUATION IN GEORGIA Presented by the Committee on the Civil Dimension of Security and adopted by the Plenary Assembly on Tuesday, November 16, 2010, Warsaw, Poland, [accessed May 24 2021] par. 5.
[68] Oleg (Bacho) Tortladze, Saba Pipia (n 62).
[69] Georgia v Russia, (II) (n 53) par. 174.
[70] Ferraro (n 42). p. 139.
[71] Georgia v Russia, (II) (n 53) par. 196.
[72] Human Rights Watch, 'Up In Flames Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia' (2009) <https://www.hrw.org/sites/default/files/reports/georgia0109web.pdf> accessed May 24 2021.p.147.

specifically in Akhalgori, hospitals lack qualified staff and medical equipment. In this context, the de facto government's decision to limit Akhalgori citizens' right to be transferred to hospitals in Georgian-controlled territories resulted in the patient's death. The chapter also reviewed the legal status of Akhalgori. It established that, according to humanitarian law, there is a proxy occupation of the territory and that Russia maintains effective control over it. As it was also shown, this position has received widespread support and recognition from the international community, which gives more credibility to the earlier analysis regarding the status of the occupation and responsibilities of occupying power it entails. The chapters that follow will address the international legal implications of deprivation of medical care in occupied territory.

CHAPTER 3. PROTECTION OF CIVILIANS DURING THE OCCUPATION

The purpose of this chapter is to find out what legal guarantees and protection IHL offers to the citizens of Akhalgori against the deprivation of healthcare. For this reason, the relevant provisions of the Geneva Convention will be reviewed. Subsequently, the humanitarian crises of Akhalgori will be assessed through the legal framework of IHL, and potential violations will be identified. Finally, the chapter will explore the implication of liability for violating humanitarian law and whether any enforcement mechanisms are available under this field of law. However, before delving into the matter of obligations and responsibilities arising from humanitarian law, the interplay between HRL and IHL will be scrutinised. Since this thesis aims to examine the humanitarian crisis in Akhalgori from both IHL and HRL perspectives, it is necessary to explore the relationship between those two different fields of law from the very beginning. To do so, international case law and authoritative comments from academia will be further analysed.

3.1 Interplay Between Human Rights and Humanitarian Law

The relationship between humanitarian law and human rights law grew closer by adopting the Fourth Geneva Convention after the notorious atrocities of World War II. For the first time, the convention established necessary humanitarian protections for civilians during military conflict and occupation, hence it introduced a layer to humanitarian law that made it far closer to the concept of human rights law.[73] The main base for that is Article 3 of the conventions, which provides international minimum protection and non-discriminatory treatment for individuals who are not actively participating in conflicts; hence it addresses the protection of a state's own citizens, which is usually characteristic to HRL.[74]

Even though the idea of HRL applicability in the war time met an extensive criticism, nowadays there is an almost unanimous consent within the academia that human rights law applies to cases covered by international humanitarian law, including armed conflicts and military occupations.[75] It is considered a fact that while "IHL applies only in the context of armed conflict, international human rights law is not a mirror-opposite that only applies in times of peace,"[76] but on the contrary, international human rights law is binding in war as well.

However, according to the ICRC, which affirms that both IHL and HRL are applicable in general, "humanitarian law will be the lex specialise in situations of conduct of hostilities."[77] But Kolb considers that instead of defining the hierarchy between IHL and HRL, it is more important to focus on two main aspects of the relationship of those two fields of law:

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[73] Cordula Droege, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) 90 International Review of the Red Cross 501. p. 504.
[74] ibid.
[75] Vité (n 49). p.630.
[76] Noam Lubell, 'Human Rights Obligations in Military Occupation' (2012) 94 21.p.318.
[77] Cordula Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' 310. (December 15, 2007) p.47.

"a) gap filling and development of the law by coordinated application of norms of HRL in order to strengthen IHL and vice versa; b) interpretation allowing an understanding of one branch in the light of the other normative corpus in all situations where this is necessary, in armed conflict or occupation."[78]

According to him, in the situation of armed conflict and occupation, the coordinated application of these two fields should secure the quality of protection of individuals.[79] Hence, as stated by Kolb, both IHL and HRL are equally special and relevant in armed conflict, especially in occupation, which remains one of the least controversial scenarios where the IHL and HRL complement each other. In addition to this, Lubell also indicates a strong basis for asserting that the occupying power must uphold international human rights law.[80] The basis for this can be claimed to be grounded on the presumption that the occupying power is operating as the administrator of the territory and, as such, must adhere to human rights responsibilities in its interactions with people in the territory under its control.

In accordance with the position mentioned above, the ICJ has acknowledged the complementarity of those two fields of law.[81] In its opinion on the Wall in the occupied Palestinian territory, the ICJ stated that the terms of both Covenants on Social and Economic Rights and Civil and Political rights, (ICCPR) as well as the Convention on the Rights of the Child, (UNCRC) extended extraterritorially during the military occupation and that "the protection offered by human rights conventions does not cease in case of armed conflict, save through the provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights."[82] As Lubell comments, "[a]ccording to such an approach, territorial control – including occupation – does trigger the applicability of the full range of human rights obligations that the state is committed to upholding."[83]

This approach has been approved by ICTY, which has determined that human rights law and humanitarian law assist each other in ensuring quality protection; therefore, each other's scope and content are both appropriate and essential.[84] The ICTY also clarified that "international humanitarian law continues to apply beyond the cessation of hostilities."[85]

Therefore, the protection provided by humanitarian law and human rights law overlap; while military operations and occupation trigger the special regime of the IHL, human rights law does not cease applicability. Moreover, as it will be shown, human rights law offers the most

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[78] Ibid.
[79] Robert Kolb, Human Rights and Humanitarian Law, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, and Oxford University Press, 2012, p.9.
[80] Lubell (n 77). p.319.
[81] ibid.
[82] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion, July 9, 2004, 43 ILM 1009.
[83] Lubell (n 77). p.324.
[84] Alexander Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' (2008) 22. (Kunarac, IT-96-23-T, Judgment of February 22 ,2001, at para. 467.) p. 164.
[85] ibid.

valuable asset - procedural mechanisms to the victims/potential victims of the conflict, which IHL, in turn, is unable to provide.

To conclude, the legal framework review suggests that the individuals living in Akhalgori during the humanitarian crises were protected by two different fields of law. However, what does it mean for the residents of Akhalgori will be explored in the following chapters.

3.2 Protection of Civilians under International Humanitarian Law

People living under occupation have the right to enjoy the right to health guaranteed by international humanitarian law and the laws of occupation. More specifically, according to the Geneva Convention relative to the Protection of Civilians in Time of War of August 12, 1949, as well as the Additional Protocols and customary international law, the occupying power holds the ultimate responsibility to ensure civilians access to health care in occupied territory.[86]

Among the wide range of duties prescribed by law, the central one is:

"the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics."[87] In addition to this, the occupying power is also responsible for ensuring medical supplies.[88]

Occupying powers' responsibilities have been constantly reminded to Israel by Special Rapporteur on the situation of human rights in the Palestinian territories. Michael Lynk, who notes that "Israel, as the occupying power, has specific and significant obligations under international law to ensure the health and welfare of the Palestinian population under its control."[89] He further reaffirmed that the occupying power "would actively work to restore and enhance the health care system for the people under its effective control."[90] Fulfilment of the obligations under humanitarian law has grown to be extremely important during the pandemic. With respect to the new pandemic COVID-19, Lynk stated that

"the legal duty, anchored in Article 56 of the Fourth Geneva Convention, requires that Israel, the occupying power, must ensure that all the necessary preventive means available to it are utilised to combat the spread of contagious diseases and epidemics, (…) the right to dignity

[86] Human Rights Council (HRC), A/HRC/37/75, (February 26 –23 March 2018) Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, pp. 8.
[87] International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, August 12 1949, 75 UNTS 287, available at: https://www.refworld.org/docid/3ae6b36d2.html [accessed May 24, 2021] Article 56.
[88] ibid. art. 55.
[89] HRC, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, (n 85) p.9.
[90] Ibid.

requires that all persons under their authority should enjoy equality of access to health services and equality of treatment."[91]

Obligations attached to the occupying power can be divided into categories, the ones which compel the occupant administration to abstain and not intervene in certain rights, which is called the negative aspect of the obligation and another one, the positive aspect which obliges, in this case, the occupant power also to take constructive action to "fulfil" the right and "proactively engage in activities that ensure its enjoyment."[92] A positive obligation to act is mostly required to ensure social and economic rights such as the right to health; more specifically, "an obligation to fulfil requires a State to take legislative, administrative, budgetary, judicial and other measures towards the full realisation of rights."[93]

However, given the fact that the occupation is considered a temporary measure and, on this basis, article 43 of the Hague Regulations of 1907 practically excludes institutional changes that would have an impact on the long-term future of the occupied territories:

"The authority of the legitimate power having, in fact, passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety while respecting, unless absolutely prevented, the laws in force in the country." Hence, it is interesting to inquire how far the occupying power's positive obligations stretch?

According to Lubell, the context of occupation and its duration should be considered while answering this question. According to him, in general, the positive obligations of an occupying power in light of the nature of military occupation would be limited due to the expectation of its temporariness. However, Israel, which has occupied Palestine for more than four decades, would need to take a broader path to positive duties.[94]

During a prolonged occupation, the Occupying Power may be required not only to fulfil the core minimum of duties but also to maintain the long-term strategic dimensions of fulfilling the population's rights.[95] According to Gross, "the scope and duration of Israel's control translate into extensive obligations."[96] In other words, in case of prolonged occupation, the occupier should abstain from infringement of the right to health and develop long-term strategies and action plans for providing a better healthcare system.

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[91] OHCHR | COVID-19: Israel Has "Legal Duty" to Ensure That Palestinians in OPT Receive Essential Health Services – UN Expert <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25728> accessed May 24 ,2021.
[92] Aeyal Gross, 'Litigating the Right to Health under Occupation: Between Bureaucracy and Humanitarianism' <https://core.ac.uk/download/pdf/217211049.pdf> accessed May 24, 2021.p. 430.
[93] International Commission of Jurists,' State Obligations Stemming from International Law' (<https://www.icj.org/chapter-2 > accessed May 24, 2021.
[94] Vité (n 49). p.332.
[95] Lubell (n 77).p.333.
[96] Aeyal Gross (n 92). p.431.

Regarding article 43 of the Hague Regulation, which imposes an obligation to occupying power to avoid abolition or termination of existing laws, except in cases of "absolutely prevented", does not provide for the prospect of implementing human rights law as an exception to the continued applicability, however, can be easily explained by the fact that when the Hague Regulations were enacted in 1907, universal human rights law did not yet exist. [97]

Later, article 64 of the Fourth Geneva Convention clarified that legal amendments could be made regarding the rule given in Article 43 of the Hague Regulations when they are "essential" to the realisation of three objectives: "(i) to implement international humanitarian law; (ii) to maintain the orderly government of the territory and (iii) to ensure the security of the occupying power and the local administration."[98]

According to Vite, the obligation to respect human rights must be added to these three objectives since human rights, including social and economic rights, often require the state to take positive (including legislative) action.[99] For example, during the Iraqi occupation, the occupation administration revised the Iraqi penal code to forbid torture and inhuman treatment or punishment.[100]

Therefore, academia almost unanimously agrees that reform of the legal system in occupied territory is permissible to improve the standard of human rights. However, as the ICRC Commentary stresses, occupying authorities can not alter municipal laws "merely to make it accord with their own legal conceptions,"[101] Even if those conceptions are perfectly consistent with international human rights principles.[102]

However, since humanitarian law does not suggest a concrete scope of the positive rights that need to be fulfilled by occupying power, Lubell proposes that protection provided by humanitarian law should be assisted by human rights law since many of the key responsibilities discovered by the Committee are not dissimilar to the standards for basic healthcare and medical supplies found in occupational law.[103] HRL does certainly "contain greater detail on ESC rights and the obligations that they entail."[104]

The facts that human rights law is essential to determine the scope of protection of occupied people was echoed in the UN Special Rapporteurs' report on the human rights situation in Kuwait under Iraqi occupation. The Special Rapporteur notes that assessing the occupier's conduct solely on the basis of articles of the Fourth Geneva Convention did not reveal the full

[97] Marco Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) 16 European Journal of International Law 661. p.676.
[98] Vité (n 48). p. 635.
[99] ibid.
[100] ibid.
[101] J. Pictet, The Geneva Conventions of August 12 1949: Commentary IV Geneva Convention relative to the Protection of Civilians in Time of War (1958), p.336.
[102] Sassòli (n 98). p. 677.
[103] Lubell (n 75). p.331.
[104] ibid. p.332.

scope and gravity of the abuses committed.[105] According to him: "the true significance of these events was only elucidated by recourse to the concept of the right to health as guaranteed by the Covenant on Economic, Social and Cultural Rights."[106]

To conclude, international humanitarian law guarantees protection of some aspects of the right to health, however, since the Geneva Convention is not a human rights treaty, it is arguable whether the protection of the right to healthcare under IHL is substantive enough. Subsequently, it has been proposed that in order to strengthen the protection of the right to health in occupied territory, human rights legislation should play a critical role in shaping occupying powers' responsibility in this regard.

3.3 Violation of Humanitarian Law in Akhalgori

To reiterate the conclusion from the previous chapter, prolonged occupation evokes obligations of the occupying power which is not limited to only "respect" and "protect" obligations but also the "fulfil" dimension, which means that the occupier has to provide resources to ensure social and economic rights. Among those right is the right to healthcare. The fact that Russia has controlled South Ossetia for decades and maintains a heavy presence in the area supposes that the occupation of Akhalgori is long-term. However, since Russia has denied the fact of occupation from the outset, it is questionable whether it views its commitments in the region in terms of healthcare through the lens of humanitarian law.

It was only in 2019 when for the first time in South Ossetia, a multidisciplinary medical cluster was developed as a result of the Investment Program for Assistance to the Socio-Economic Development from the Russian budget.[107] The findings were utilised to build a surgical complex with a hemodialysis department and a children's hospital with a rehabilitation centre, an anti-tuberculosis dispensary was also reconstructed. A modern maternity hospital with a gynecological department was commissioned in the republic.[108] Nevertheless, the construction of a hospital centre alone could not provide an adequate and quality healthcare system in Tskhinvali, which became most apparent during the pandemic.[109]

The fact that Russia is failing to fulfil article 56 of the Geneva Convention, "the duty of ensuring and maintaining, the medical and hospital establishments and services, public health and hygiene in the occupied territory."[110] It could be demonstrated by the following facts - all across South Ossetia, including in Akhalgori, the lack of competence of the medical personnel

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[105] Vité (n 48). p.333.
[106] Walter Kälin (ed), *Human Rights in Times of Occupation: The Case of Kuwait* (Stämpfli 1994). p.28.
[107] „Рес" Государственное информационное агентство (April 11, 2019) <http://cominf.org/node/1166521964> accessed 2 May 2021.
[108] ibid.
[109] Netgaztet 'ერთადერთი გაფუჭებული ტომოგრაფი და არასაკმარისი მედპერსონალი ცხინვალში ' (ნეტგაზეთი) <https://netgazeti.ge/news/457059/> accessed May 2, 2021.
[110] International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, August 12 1949, 75 UNTS 287, available at: https://www.refworld.org/docid/3ae6b36d2.html [accessed May 24 2021] art. 56.

and the lack of medical equipment is alarming. The reason for this is considered to be the fact that qualified doctors have already left the region, and young professionals who graduated from reputable Russian universities during the war have never returned; at the same time, those who remained did not have any chance for enhancing qualification.[111] With regards to medical equipment, there is also a scarcity of quality and updated technic; for example, during the pandemic, there were no pulmonologists in Tskhinvali clinics and not enough resuscitation brigades, only a few devices for artificial lung ventilation and one broken tomography for the whole South Ossetia.[112]

Russia and its proxy forces also failed to meet the demand to adopt preventive measures necessary to combat the spread of contagious diseases.[113] According to the International Crisis Group, instead of taking precautions, de facto authorities allowed a youth wrestling tournament to occur on March 22-25, 2019. On March 25, the de facto president gave a state speech in front of hundreds of local officials. Schools and universities were open later than anywhere else in the South Caucasus.[114] Overall, the response of the de facto government was very slow and also delayed. According to the local official, disinfectant was in short supply, so officials have de facto ordered local clothing manufacturers to sew masks and protective gowns for the medics. It has been reported that there was a shortage of protective masks in pharmacies in the Tskhinvali region, and at the same time, the price of masks has increased 20 times.[115] Owing to a shortage of basic safety equipment at the hospital, one of the region's few doctors declined to work.[116]

Article 55 of the GC requires from occupying power to ensure medical supplies in occupied territory; however, de facto government, in contrast to this provision, totally withdrew medicines from pharmacy chains with Georgian inscription in occupied Tskhinvali.[117] This decision of the de facto government put most pensioners in Akhalgori in a precarious condition since most of them were struggling with chronic illnesses.[118]

Article 55 of the same convention obliges the occupying power to provide general medicine and vaccines, as well as injection supplies and personal protective equipment throughout the occupied territory.[119] However, Russia, which imported most of the region's requirements,

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[111] ერთადერთი გაფუჭებული ტომოგრაფი და არასაკმარისი მედპერსონალი ცხინვალში | (n 110).
[112] ibid.
[113] International Crisis Group Europe (n 30).
[114] ibid.
[115] Roadmap to Kremlin's Policy in Abkhazia and the Tskhinvali Region'ცხინვალის რეგიონი რუსეთს დამცავი ნიღბებით დახმარებას სთხოვს' <http://kremlin-roadmap.gfsis.org/ge/news/display/498> accessed May 3 2021.
[116] International Crisis Group Europe (n 29).
[117] Netgazet, 'ცხინვალში ქართული წამლების აკრძალვაზე ზურაბიშვილი WHO-ს, გაეროს და ევროსაბჭოს მიმართავს ।' (19 February 2020) <https://netgazeti.ge/news/428116/> accessed May 2, 2021.
[118] ibid.
[119] 'COVID-19 Vaccines for the Palestinian Population: Who Is Responsible under International Law? - Diakonia' <https://www.diakonia.se/en/IHL/News-List/covid-19-vaccines-for-the-palestinian-population-who-is-responsible-under-international-law/#Q1> accessed May 2, 2021.

halted most medical supply shipments in early March 2019.[120] As for the vaccine, Russia intends to supply the region with its vaccine, but not for free.[121] As a result, it is unlikely that the de facto government would obtain enough vaccination for everybody due to the scarcity of funds.[122] Therefore, Russia breaches the humanitarian law by not providing the citizens of South Ossetia with a vaccine for free.

Lastly, Russia also violates article 59 of the Geneva Conventions, which obliges occupying power to do everything in its power to provide humanitarian assistance to the local population if the humanitarian needs of a part of the civilian population in the occupied territories are inadequately met; this means that Russia has to allow international humanitarian organisations provide humanitarian assistance to the population and ensure their freedom of movement. The obligation to request humanitarian assistance also applies to the supply of the vaccine. If the occupying power fails to meet its duty to provide, it must allow and facilitate the passage of vaccines provided by the third countries or humanitarian organisations.

However, the de facto government of Tskhinvali, which was hoping for Russia's support, has rejected Tbilisi's offer to be included in the vaccination program; at the same time, it also refused to accept international assistance. WHO was offering Tskhinvali specialists who would inspect hospitals and conduct training with medical staff. The aid also included effective tests with an error of 1%.[123] The reluctance of South Ossetia to provide foreign assistance was believed to have been politically motivated. The de facto government had its own condition for receiving the international aid, according to it, it should have reached South Ossetia via Russia and not through Georgia. However, since the border with Russia was closed due to the pandemic, South Ossetia was left without international assistance in the end.[124]

Subsequently, as of today, access to Akhalgori is limited to representatives of the International Committee of the Red Cross, which is the only international humanitarian organisation operating in the occupied region of South Ossetia. However, the organisation's mandate is limited, and it fails to provide the multifaceted humanitarian needs of the people of Akhalgori.[125]

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[120] International Crisis Group Europe (n 29).

[121] qartli.ge, 'კოვიდის გამო გართულებული გადაადგილება და დე-ფაქტო სამხრეთ ოსეთი ვაქცინის მოლოდინში' (30 April 2021) <https://www.qartli.ge/ge/akhali-ambebi/article/17352-kovidis-gamo-garthulebuli-gadaadgileba-da-de-faqto-samkhreth-osethi-vaqcinis-molodinshi> accessed May 2, 2021.

[122] ibid.

[123] 'ერთადერთი გაფუჭებული ტომოგრაფი და არასაკმარისი მედპერსონალი ცხინვალში |' (n 110).

[124] Qartli.ge 'ცხინვალი საერთაშორისო დახმარების გარეშე დარჩა - ბიბილოვის რეპუტაცია ზიანდება' (21 April 2021) < shorturl.at/afsE6 l> accessed May 3, 2021.

[125] Human Rights Centre, 'ადამიანის უფლებათა მდგომარეობა აფხაზეთისა და სამხრეთ ოსეთის გამყოფ ხაზებზე' (2019) p.7.

3.4 Responsibility for the Violation of Humanitarian Law

The 1949 Geneva Conventions and 1977 Additional Protocol stipulate that the parties to an international armed conflict must respect and ensure respect for those treaties. As a result, each party is obligated to do whatever is appropriate to ensure that all authorities and individuals under its jurisdiction follow international humanitarian law.[126] The Geneva Convention also provides rules designed to protect civilians living in occupied territories from deprivation of medical care; however, residents of Akhalgori are gradually dying due to systemic failure of medical management. Therefore, it is important to ask what the legal implications of the violation of the GC are.

According to Kolb, "the mechanisms to ensure respect and to sanction violations of international humanitarian law are insufficient in many ways."[127] There are two main reasons, according to him, why the mechanisms for securing the rights under IHL is rather a week: first, the entire implementation system is based on voluntary action, and thus on the parties' goodwill, which means that there are no mandatory means for resolving disputes over the scope of IHL protections or for enforcing IHL.[128] Second, the mechanisms suggested by IHL for implementing the specific norms are strictly normative: they place obligations on nations, they help in the implementation of the legislation if the states fulfil their responsibilities; however, they do not place sanctions on states that refuse to meet their IHL commitments.[129]

Therefore, the absence of coercive mechanisms in the IHL that operate independently of the consent of the belligerent states creates a situation where guaranteeing the right to healthcare in Akhalgori under international humanitarian law is dependent on Russia's goodwill. The IHL, which operates on the basis of the state party permissions, cannot provide a resource to oblige occupier power to ensure adequate healthcare. At the same time, restoring the already violated right under IHL is also beyond the formal and practical limits of this field of law. Hence, residents of Akhalgori are unable to request to activate a timely and effective mechanism for the protection of rights under the IHL simply because those kind of mechanisms do not exist.

However, due to the humanitarian crisis in Akhalgori, the International Committee of the Red Cross has been exercising its right of humanitarian initiative to enhance the protection of victims in Akhalgori. According to the Statutes of the International Red Cross and Red Crescent Movement, the ICRC is "to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable

[126] Toni Pfanner, 'Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims' (2009) 91 International Review of the Red Cross 279. p. 280
[127] Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart Pub 2008). p. 284.
[128] ibid.
[129] ibid.

in armed conflicts and to take cognisance of any complaints based on alleged breaches of that law."[130]

According to the ICG report, ICRC was ready to ramp up operations in South Ossetia during the pandemic. However, it lacks medical personnel on the ground to determine local health needs. Still, the work of "guardians of humanitarian law" in South Ossetia is of utmost importance. Without the ICRC, transportation of the patients granted a permit to transfer to the hospitals in Georgia proper could have been impossible. Nevertheless, it must be noted that the practical application of the humanitarian law is limited to the work of ICRC in Akhalgori.

Concluding Remarks

The chapter has clarified that due to the complementary nature of IHL and HRL, the right to healthcare for Akhalgori residents is under double protection. The analysis of the provisions of the Geneva Conventions and its application to the Akhalgori's humanitarian crisis demonstrated that Russia was actively violating provisions of humanitarian law by not fulfilling its positive obligations. However, even though states are legally obliged to respect IHL, it has been observed that the lack of enforcement mechanism within the humanitarian law system often results in deprivation of the rights secured under the law. In this view, holding Russia responsible for its wrongdoing under IHL would be very difficult, if not impossible.

[130] International Committee of the Red Cross, ICRC, the Statutes of the International Red Cross and Red Crescent Movement, October 1986, available at: https://www.icrc.org/en/doc/assets/files/other/statutes-en-a5.pdf [accessed May 24 2021] art.5 (c).

CHAPTER 4. PROTECTION OF THE RIGHT TO HEALTH UNDER INTERNATIONAL HUMAN RIGHTS LAW

Until now, most attention has been paid to the IHL in the context of medical care. However, as mentioned in the previous chapter, humanitarian law may not be sufficient to identify the significance of the events that occurred in Akhalgori. Therefore, this chapter will employ the recourse of the human rights law to elucidate concrete human rights violations. The first subchapter will closely examine the right to health by clarifying the notion of the right and its scope. Then the focus will be given to determinants of adequate healthcare. Finally, the described human rights standards will be further used to assess the healthcare system in Akhalgori to reveal the systemic nature of the violation of the right to health.

4.1 Emergence of the Right to Health and its Development Across Time

The right to health emerged from "an interdisciplinary intersection of medical ethics, international relations, international human rights law, health policy, health law, and public health law."[131] According to Yamin, it stems from the idea that the right to health is necessary to lead a dignified and flourishing life and essential to guarantee the enjoyment of other rights substantively and autonomously.[132] Another precondition of claiming the right to health is that health is assumed to be socially constructed by "social determinants" like injustice and discrimination. Therefore, it is not mere "biological accident or individual luck."[133] On that account, human rights law started to address existing inequality and deconstruct the social fallacy that health belongs an individual's private realm rather than being a public issue. However, according to Ruger, the right to health emerged as the "most controversial or nebulous human right,"[134] since the volume of the right as well as the obligations flowing from this concept were difficult to elaborate on. However, the work of international organisation, including the UN Special Rapporteur on the Right to Health and the UN Committee on Economic Social and Cultural Rights (ESC Committee), as well as academic commentators, have made aspects of "the right to health" clear and legally enforceable across time.[135]

The turning point was 1945, when the right to health was listed as one of the concerns requiring international cooperation to solve problems related to health in the United Nations Charter.[136] In order to achieve this goal, the establishment of an international health organization was suggested.[137] In 1946, the World Health Organization was created, which introduced the idea

[131]Jennifer Prah Ruger, 'Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements' (2006) 18 Yale Journal of Law & the Humanities 3. p.273.
[132] ibid.
[133] Jackie Dugard (ed), *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Edward Elgar Publishing 2020).p. 160.
[134] Ruger (n 132). p.273.
[135] John Tobin, *The Right to Health in International Law* (Oxford University Press 2012). p.8.
[136] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: https://www.refworld.org/docid/3ae6b3930.html [accessed 24 May 2021] art.55.
[137] Tobin (n 136). P.27.

of the right to the highest attainable standard. The WHO Constitution defines health as: "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[138] The definition, which reflects postwar idealism and hope for a better future, has often been criticized for being too broad. However, mentioning mental well-being as essential aspects of health has been considered as an achievement of utmost importance.[139]

Recognition of the right of health was reaffirmed over time in several of formulations, including in many international and regional human rights instruments. In 1948, Article 25 of the Universal Declaration of Human Rights (UDHR) extended the international legal framework's foundations by defining the requirements needed for health:

"[e]veryone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in the circumstances beyond his control."[140]

When the UN started transforming the UDHR into a treaty, the right to health resurfaced in the legally binding international legal instrument, the International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted in 1966. ICESCR with UDHR has played a crucial role in establishing the foundation for the right to health: "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[141] In addition to ICESCR, the ESCR Committee has issued General Comment No. 14, which set out an extensive list of core obligations for the state by "defining a minimum quantitative and qualitative threshold of enjoyment of the right to health that should be guaranteed to everyone in all circumstances as a matter of top priority."[142]

Finally, at the regional level, the revised European Social Charter establishes the States obligation to take measures "to remove as far as possible the causes of ill-health; to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; to prevent as far as possible epidemic, endemic

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[138] UN General Assembly, *Entry into force of the constitution of the World Health Organization*, 17 November 1947, A/RES/131, available at: https://www.refworld.org/docid/3b00f09554.html [accessed 24 May 2021] preamble.

[139] *Brigit Toebes, Lisa Forman, Giulio Bartolini, Toward Human Rights-Consistent Responses to Health* Emergencies: What Is the Overlap between Core Right to Health Obligations and Core International Health Regulation Capacities? (December 2020) Health and Human Right Journal, <shorturl.at/cejnK> accessed April 2, 2021.

[140] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: https://www.refworld.org/docid/3ae6b3712c.html [accessed May 24, 2021](UDHR) Art. 25.

[141] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at:https://www.refworld.org/docid/3ae6b36c0.html [accessed 24 May 2021]Art 12.

[142] The Right to Health - an Empty Promise? *Healthcare as a Human Rights Issue: Normative Profile, Conflicts and Implementation* (Sabine Klotz and others eds, transcript 2017). p.56.

and other diseases, as well as accidents."[143] The obligation "to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition."[144]

Even though international and regional human rights instruments address the right to health through different wording and scope, there is no doubt that the public health precondition such as access to medical care is the central element of the right in question. The way the healthcare system is organized one of the most important social determinants of health, as well as legit lustration of the specific internal and international obligations that states must meet in this regard. At the same time, exploring the scope and volume of timely and adequate medical care is at the heart of the research question of the thesis since the aim is to identify concrete violations in regard to the right to health in Akhalgori. Hence, the next sections will delve into the legal basis of the right to healthcare and the obligations of the state it triggers.

4.2 The Right to Healthcare within the Right to Health

As General Comment 14 on article 12 indicates, ICESCR emphasizes the right to health as the unity of timely and appropriate healthcare, yet simultaneously, "the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health."[145] Hence, the right to healthcare is only one aspect of health, however central and fundamental. The GC 14 provides the basic content of the right to healthcare and mainly relies on two soft law documents adopted earlier and suggested concrete definitions of the right. These two documents: The Declaration of Alma-Ata (USSR) and the Program of Action of the International Conference on Population and Development (ICPD) are thus where the concept of the right to healthcare was born.[146] Based on the analysis of the General Comment and regulations mentioned above, San Giorgi suggests a comprehensive scope of the right to healthcare within the right to health.

As she explains:

"[t]he scope of the right to healthcare includes healthcare services, including child healthcare, mental healthcare, preventive healthcare, curative healthcare, primary healthcare, rehabilitative healthcare, family planning services, pre-and post-natal healthcare and palliative care, and provision of essential drugs. The core content of the right to healthcare entails access to

[143] Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163, available at: https://www.refworld.org/docid/3ae6b3678.html [accessed 24 May 2021] art. 11.
[144] ibid. art. 13, par.1.
[145] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, available at: https://www.refworld.org/docid/4538838d0.html [accessed 24 May 2021]art. 11.
[146] Maite San Giorgi, *The Human Right to Equal Access to Health Care* (Intersentia 2012). p.25.

healthcare on a nondiscriminatory basis and, among other things, includes as a minimum the right to primary healthcare and access to essential drugs. Other entitlements of comparable priority are:

i) reproductive, maternal (pre-and post-natal) and child healthcare.
ii) immunization against important infectious diseases, and
iii) measures to prevent, treat, and control the epidemic and endemic diseases. "[147]

San Giorgi continues by noting that "under each formulation, the object and purpose of the formulation are to ensure that a person with a medical condition has access to appropriate medical services."[148] Hence fulfilment of the right to care is closely related to the states positive obligation to provide. However, "states are not required to 'assure' medical services or 'ensure' the provision of medical assistance. Instead, they should take all appropriate measures considering available resources to satisfy the qualitative requirements as outlined by the ESC Committee to ensure that medical services are available, accessible, acceptable, and of appropriate quality to the various cohorts within their jurisdiction."[149]

4.3 Adequate Healthcare Determinants and State Responsibility

Availability, accessibility, acceptability, and quality are four core elements of the AAAQ framework, which was suggested by the General Comment No. 14 to check states compliance with the international regulations. Even though these criteria were not specially formulated to assess states' obligation in regard to healthcare and may not be used to identify concrete human rights violations, they help to frame the analysis and debate about how the right to health is guaranteed in the context of medical care in the specific country.

The first essential criteria of the right to health is the "availability" of the healthcare system, which means that healthcare facilities, goods and services, including hospitals, clinics and other health-related infrastructure, medical and professional personnel, drugs and other equipment should be obtainable in an adequate quantity and an in a timely manner.[150] The General Comment does not define the amount of this available quantity; however, at least three major parameters defining the provision of healthcare can be found in the Committee's and the European Committee of Social Rights' conclusions: "1. the number of hospital beds and healthcare staff per inhabitant, 2. the number of resources dedicated to healthcare, and 3. the length of time patients must wait for access to healthcare services."[151] However, since the demand for healthcare services varies from state to state, these standards do not reliably quantify the degree of healthcare availability.

[147] ibid. p. 19.
[148] Tobin (n 136). p. 262.
[149] ibid.
[150] General Comment 14: *The right to the Highest Attainable Standard of Health*, (n 144) 12(a).
[151] San Giorgi (n 147). p.42.

The second criteria - "accessibility" of healthcare, is arguably gaining the status of customary international law as well as being enshrined in treaty law.[152] For example, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) tackles economic accessibility by encouraging pre-and post-natal care to be "free services where necessary."[153] The accessibility of healthcare signifies physical and economic accessibility on the basis of non-discrimination and the inclusion of accessible information in order to make health-related decisions. Physically available healthcare ensures that all parts of the population, including those with disabilities and those living in remote places, have secure physical access to it. Economic accessibility means that the facilities are affordable for people regardless of their social-economic background. Therefore, the accessibility criteria focus on the most disadvantaged members of society and ensure access to medical services that are fair and equal.[154]

The last two criteria distinguished in the General Comment are the "acceptability and quality" of healthcare. Acceptable healthcare means that it must be "culturally appropriate, i.e., respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements ".[155] Whereas quality signifies that the available healthcare must be scientifically and medically appropriate and of good quality in the sense that healthcare personnel should be constantly trained and updated.[156] According to the WHO, the term "quality" needs to take a "whole-system perspective and reflect a concern for the outcomes achieved for both individual service users and whole communities.[157]

The World Health Organization also suggests six main determinants for quality health care system, according to which the service received by the patient should be

"**Effective -** delivering healthcare that is adherent to an evidence base and results in improved health outcomes for individuals and communities, based on need.
Efficient - delivering healthcare in a manner that maximizes resource use and avoids waste.
Accessible - delivering healthcare that is timely, geographically reasonable, and provided in a setting where skills and resources are appropriate to medical need.
Acceptable/patient-centred - delivering healthcare that considers the preferences and aspirations of individual service users and the cultures of their communities.
Equitable, delivering healthcare that does not vary in quality because of personal characteristics such as gender, race, ethnicity, geographical location, or socio-economic status.

[152] Dugard (n 134). p.3.
[153] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, available at: https://www.refworld.org/docid/3ae6b3970.html [accessed 24 May 2021] part 3, art. 12.
[154] San Giorgi (n 147). p.56.
[155] General Comment 14: *The right to the Highest Attainable Standard of Health*, (n 144) 12 (c).
[156] ibid.
[157] World Health Organization (WHO) ed), *Quality of Care: A Process for Making Strategic Choices in Health Systems* (WHO 2006). p.9.

Safe - delivering healthcare that minimizes risks and harm to service users." [158]

Life expectancy and child mortality rates, as well as the percentage of healthcare workers with secondary or higher education, are also being used to determine the quality of healthcare.[159]

The AAAQ framework is also very useful in the context of COVID-19, as it identifies the flaws in states' responses to the crisis.[160] The availability element refers to the state duty of maintaining an adequate supply of health workers, intensive care units, medications, masks, and gloves.[161] According to the accessibility criteria, disparities in access to healthcare for vulnerable people (such as the elderly, people of low socio-economic income, and people with underlying health conditions) should be eliminated, and a scarcity of geographically available, affordable, and of high-quality healthcare.[162] Third, in terms of acceptability, threats to medical ethics due to COVID-19 related complications should be avoided. Finally, in terms of quality, high-quality health insurance should be delivered even though the demand for properly trained personnel and suitable medical equipment has increased.[163]

As a result, the AAAQ framework's Committee can assess whether a specific state is meeting its obligations and identifying the weaknesses and strengths of the healthcare system in question. As for all aspects of the right to health, as previously mentioned, the right to healthcare is heavily reliant on a state's economic and social resources. Hence, the availability, accessibility, acceptability, and quality of the healthcare system can only be measured through the lens of the state's capabilities. This certain latitude for ensuring the right to health is derived from article 2 of ICESCR, which suggests state parties take steps to progressively achieve the full realization of the rights recognized in the Convention.[164] However, as Tobin notes, "the obligation to secure the right to health may be progressive, but this does not entitle a state to do nothing."[165] The General Comment 3 further restricts the already limited margin of states appreciation by imposing that "a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary healthcare, of basic shelter and housing, or the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant."[166]

For the Committee on Economic, Social and Cultural Rights to establish state liability for non-compliance with its obligations, it developed to test a depicting whether states have taken deliberate, practical, and targeted measures to enforce the right to health; states should be able

[158] ibid.
[159] San Giorgi (n 147). p.60.
[160] *Brigit Toebes, Lisa Forman, Giulio Bartolin* (n 138).
[161] San Giorgi (n 147).
[162] ibid.
[163] ibid.
[164] International Covenant on Economic, Social and Cultural Rights (ICESCR), (New York, 1966, 993 UNTS 3) art. 2.
[165] Tobin (n 136). p. 242.
[166] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, available at: https://www.refworld.org/docid/4538838e10.html accessed 26 May 2021.

to demonstrate that they "have acted in a nondiscriminatory manner, and have taken into account the precarious situation of disadvantaged and marginalized individuals and groups and prioritized grave situations or situations of risk."[167]

In case of the scarcity of resources, the Committee on Economic, Social, and Cultural Rights reminds the state parties of their obligation to claim international economic and technical assistance. The Committee also emphasizes the duty of governments and other actors in a position to assist in providing funding and other assistance to enable developing countries to fulfil core and related obligations.[168] The non-binding but influential Maastricht Guidelines further establishes that the burden of proof lies with each state party to the ICESCR to demonstrate that it is making "measurable progress toward the full realization of the rights in question."[169]

4.4 Violation of the Right to Healthcare in Akhalgori

UN Special Rapporteur on the human rights situation in Kuwait under Iraqi occupation, Walter Kälin, noted that assessing the occupier's conduct solely on the basis of Articles of the Fourth Geneva Convention did not reveal the full scope and gravity of the abuses committed. According to him: "the true significance of these events was only elucidated by recourse to the concept of the right to health as guaranteed by the Covenant on Economic, Social and Cultural Rights."[170] Therefore, in order to examine the violation of the right to health in Akhalgori comprehensively and thoroughly, it should be done from the human rights perspective with the help of assessment tools General Comment No. 14 provides.

Therefore, the healthcare system available in occupied South Ossetia and hence in Akhalgori will be reviewed through the lenses of the AAAQ framework.

The first A, which stands for availability, requires that facilities, goods, and services under the umbrella term of healthcare be available, including hospitals clinics and other health-related infrastructure, medical and professional personnel, drugs, and other equipment should be obtainable in an adequate quantity and an in a timely manner.

There are only two clinics in Akhalgori - maternity hospital and hospital.[171] However, in an emptied district, the number of healthcare facilities is less problematic than the scarcity of qualified doctors. According to the radio "Liberty", since Tskhinvali doctors refused to work

[167] ibid.
[168] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, available at: https://www.refworld.org/docid/4538838e10.html [accessed 24 May 2021] par. 38–42.
[169] ibid. art. 8.
[170] Kälin (n 107). p. 27.
[171] RadioLiberty 'ოკუპაციის ფასი - ადამიანის სიცოცხლე' (21 may 2020) < shorturl.at/mEHI4 > accessed 5 May 2021.

in Akhalgori, the district steadily lost medical personnel. Two therapists from Vladikavkaz (Russia) resigned in September 2020, according to Tamar Mearakishvili, a local civic activist.[172] During the interview with the radio "Liberty", she noted that, at the moment of the interview, which took place in December 2020, there was no single therapist in either the hospital or the polyclinic, neither surgeon, otolaryngologist, radiologist, or infectious disease specialist, and that medical team consisted only of three dentists, a pediatrician, a neuropathologist, and one traumatologist.[173] Not only in Akhalgori but also in Tskhinvali, there is no burn centre, and no hospital has such a department;[174] there is no a psychiatric hospital either.[175]

Following the outbreak of the latest pandemic, the Akhalgori District Hospital, as well as the maternity hospital, were completely transformed into a quarantine zone, and patients with various diseases were sent home.[176] Due to this reason, Jumber Miladze, who was in a life-threatening condition, was not allowed to receive medical services. A patient who had a stroke died while being transported to Georgia's controlled territory for medical assistance.[177]

Drugs and other medical equipment are reported to be unavailable in Akhalgori, as well as in the whole of South Ossetia. According to a local official, due to the Coronavirus outbreak, disinfectant was in short supply, so officials have de facto ordered local clothing manufacturers to sew masks and protective gowns for medics. It has been reported that there was a shortage of protective masks in pharmacies in the Tskhinvali region, and at the same time, the price of masks has increased 20 times.[178] Owing to the shortage of basic safety equipment at the hospital, one of the region's few doctors declined to work.[179]

Regarding medical equipment, according to the media sources, there were no pulmonologists in Akhalgori and in Tskhinvali clinics and not enough resuscitation brigades, only a few devices for artificial lung ventilation, one broken tomography for the whole South Ossetia.[180]

According to Gela Shermadini, the first de jure deputy governor of Akhalgori, medications are not available in hospitals. There are no pharmacies where you can buy medicine. However, the problem of the scarcity of medication is not only in Akhalgori but also in Tskhinvali. Citizens of the republic also started to raise concerns regarding a lack of medicines in January 2020. In accordance with the order of the South Ossetian government, on February 10, medicines with

[172] ibid.
[173] ibid.
[174] Mtisambebi.ge (n 24).
[175] Georgian Jamnews, "რატომ არ არის ცხინვალში ფსიქიატრიული საავადმყოფო" (15 April 2021) < shorturl.at/eDIO1 > accessed 7 May 2021.
[176] RadioLiberty 'ახალგორელი პაციენტები საავადმყოფოს გარეშე' (13 may 2020) < shorturl.at/jwAUX > accessed 6 May 2021.
[177] 'კიდევ ერთი დაღუპული ახალგორიდან' (20 May 2020) < shorturl.at/klAE9 > accessed 6 May 2021.
[178] 'ცხინვალის რეგიონი რუსეთს დამცავი ნიღბებით დახმარებას სთხოვს' (n 116).
[179] 'ცხინვალის რეგიონი რუსეთს დამცავი ნიღბებით დახმარებას სთხოვს' (n 114).
[180] 'ერთადერთი გაფუჭებული ტომოგრაფი და არასაკმარისი მედპერსონალი ცხინვალში |' (n 110).

Georgian inscriptions were seized from pharmacies in order to eliminate the sale of Georgian-made medicines.[181]

In the first round, South Ossetian authorities purchased 2,000 "Sputnik V" vaccines from Russia; however, because the amount might not be enough to vaccinate everybody, Alexander Pliev, the vice-speaker of the de facto South Ossetia, stated that people who had already recovered from COVID, they no longer need it.[182] This strategy definitely poses concerns about the efficacy of the vaccination outcomes.

Therefore, the existing healthcare system in Akhalgori does not satisfy the first element of the framework since the qualified medical personnel, medical equipment, and medication are in acute scarcity throughout the whole region.

The next element of the AAAQ element is the "accessibility" of healthcare. Accessibility of healthcare signifies physical and economic accessibility of the medical management. Both aspects of this element seem to be hugely problematic in regard to Akhalgori. To start with the physical accessibility, there are only two clinics in Akhalgori, as already mentioned; however, those clinics are not in a position to provide qualified consultation and services to patients with serious health problems. Prior to the de facto South Ossetian government closing the checkpoint, residents of Akhalgori were able to seek medical attention in the nearby cities of Georgia's controlled territories. For example, Kaspi Hospital is 27 kilometres from Akhalgori, and it takes a maximum of half an hour to get there, forty minutes drive to Gori Military Hospital, one hour is enough to get to Tbilisi.[183] However, after closing the checkpoint, patients of the Akhalgori district had to travel to Tskhinvali, which requires 2-3 hours, let alone a significant economic burden that was unaffordable for the pensioners.[184] Nevertheless, it is not just the travel time and costs that are problematic; the Akhalgori-Tskhinvali path traverses such rugged terrain that several patients could not make it.

Margo Martiashvili, who suffered a stroke, was one of the first victims of the border closing, which was initially admitted to Akhalgori hospital on 17 October, 2020. Due to the closing of the checkpoint, she could not be moved to Tbilisi; instead, the patient was transferred to Tskhinvali hospital; however, the patient died while being transported the mountain pass between Akhalgori and Tskhinvali.[185]

Jumber Miladze, whose health had worsened due to a stroke, was transferred to Tskhinvali hospital despite his request to be moved to a hospital in Georgian-controlled territory. When

[181] Кавказский Узел, 'Силовики Продолжили Изымать Грузинские Препараты Из Аптек Южной Осетии' (18 Fabruary 2020) <https://www.kavkaz-uzel.eu/articles/346045/> accessed 6 May 2021.
[182] qartli.ge (n 122).
[183] Mtisambebi.ge (n 24).
[184] 'ჩაკეტილი ახალგორი კორონავირუსის პირისპირ' <https://socialjustice.org.ge/ka/products/chaketili-akhalgori-koronavirusis-pirispir> accessed 6 May 2021.
[185] Mtisambebi.ge (n 24).

the patient's condition deteriorated five days later, he eventually crossed into Georgia, but Miladze died on the way there on 20 May 2020.[186]

According to activist Mearakishvili, since the majority of Akhalgori's population is retired and no longer has access to pensions, they are unable to see doctors, particularly because doctor services in Tskhinvali are very costly.[187] For example, neighbours of an already unconscious Gela Gariev was asked to pay several thousand rubles to start treatment in Tskhinvali; he died within several days on 14 July 2020.

There is a problem with administrative accessibility as well, which is highly bureaucratic and time-consuming. The complications in this regard became more apparent after the de facto government closed the checkpoint and implemented a new law for transporting a patient to a hospital in Georgia's controlled territory. According to the regulation, the patient had to go through multiple steps. First, the patient required consent from an Akhalgori doctor(s) to be admitted to a Tskhinvali hospital, and then the Tskhinvali doctors had to determine the patient's health condition. If the condition was concerning, the family would be granted permission to apply for a transition permit by de facto departments, and the patient would be assigned to Georgia proper with the assistance of the International Red Cross Committee; however, a lot of people died while waiting for the transition permit as well as on their way to hospitals on Georgia's controlled territories.[188]

In addition to the two patients mentioned above, Shota Driaev, who had been seeking a relocation for several months, was only given a transition permit after collapsing. He died of sepsis before being admitted to a hospital in Tbilisi in December 2020.[189] An elderly couple from Akhalgori who were caught in a fire and suffered burn wounds and unbearable pain, were first taken to Tskhinvali, where there is no burn centre but where they had to get the requisite papers, and only after that were transferred to Tbilisi. Vardo Gigauri died at Tbilisi's burn centre; her husband survived.[190] Therefore, meeting administrative requirements were given priority rather than the life and health of the patients, which lustrates the root problem of the healthcare system in occupied Tskhinvali.

Hence, secure physical access to the healthcare system in Akhalgori is not guaranteed, which puts most vulnerable groups, pensioners, and people with a poor socio-economic background in an adverse position; this situation is further exacerbated by the fact that patients often face bureaucracy in search of medical help, which costs them their own lives.

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[186] 'კიდევ ერთი დაღუპული ახალგორიდან' (n 178).
[187] Formulanews, 'ახალგორელმა კაცმა, ჩაკეტილი გზის გამო, ექიმთან მისვლა ვერ შეძლო და გარდაიცვალა' <https://formulanews.ge/News/42237> accessed 6 May 2021.
[188] Public Defender of Georgia, 'The Impact of so Colled Checkpoint Locking, On the Legal Status of the Population Living in the Territories In 2019-2020' (2021) Special report <https://www.ombudsman.ge/res/docs/2021042112101218621.pdf> accessed 24 May 2021.p.10.
[189] Mtisambebi.ge (n 24).
[190] ibid.

The third A in the AAAQ framework stands for "acceptability" of healthcare. As it was described in the previous chapter, acceptable healthcare signifies "culturally appropriate, i.e., respectful of the culture of individuals, minorities, peoples, and communities, sensitive to gender and life-cycle requirements."[191] To assess the acceptability of healthcare, the WHO asks whether health facilities, goods, services and programmers are people-centred and cater for the specific needs of different populations.[192] However, this question has been already answered in the analysis presented above, stating that the de facto government of Tskhinvali has not established any programs specific to the needs of Akhalgori citizens; on the contrary, the border closure basically deprived them of the right to healthcare. There is little information available on whether health facilities, goods, and services in Akhalgori are respectful of medical ethics and culturally appropriate and that they are sensitive to gender and age; the information also scarce with regards to the case of violation of confidence by the medical personnel; however, while medical staff in Akhalgori have never had the chance to enhance their qualification skills in accordance to WHO requirements, it is unlikely that the service provided by them meets the requirements under the element of acceptability. Hence, the overall situation of the healthcare system in Akhalgori indicates that it does not meet the requirements posed under the "acceptability" criteria.

The health facilities, goods, and services must be scientifically and medically approved and of good quality underlines WHO in the fourth element of the AAAQ framework; [193] Therefore Q stands for "quality". As it was explained in the previous chapter, the WHO suggests six main determinants for a quality healthcare system, according to which the service received by the patient should be: effective, efficient, accessible, acceptable/patient-centred, equitable and safe.[194] Therefore, it can be said that this element unites all the requirements mentioned above in itself.

However, in order to provide quality medical service, medical personnel employed should be qualified and experienced, as well as the equipment periodically upgraded and renewed. Although, as it has already been mentioned, competent doctors have already left the region, and the ones who stayed did not have any possibility for enhancing professional knowledge, at the same time, there is an acute scarcity of medical technique not only to treat new pandemic but also to handle general illness; as long as those two main determinants of the healthcare are absent it is hard to talk about effectiveness, efficiency and safety of the services provided in Akhalgori.

To illustrate, Vera Kotolova was first taken to Akhalgori hospital with a high fever, where she could not be diagnosed. She was sent from Akhalgori to Tskhinvali, where she was suspected of having a stroke, but the patient in serious condition was discharged home anyway. She died

[191] General Comment 14:*The right to the Highest Attainable Standard of Health*, (n 144) 12(c).
[192] 'WHO | What Do We Mean by Availability, Accessibility, Acceptability and Quality (AAAQ) of the Health Workforce?' (*WHO*) <https://www.who.int/workforcealliance/media/qa/04/en/> accessed 24 May 2021.
[193] ibid.
[194] WHO, (n 156) p.9.

the next day, on 14 October 2020.[195] Besik Korbesov, 49, living in Akhalgori, could not be diagnosed either. Feeling severe pain in the heart, the young man himself went to Akhalgori hospital. Doctors suggested a heart attack,a few hours later, Besik died at the hospital.[196] Zaur Chitishvili became ill in April 2020; he had excruciating stomach pain for two weeks and was hospitalized with a gastroenteritis diagnosis; however, According to the local activist Tamar Mearakishvili "the patient was only given sedatives. When he died, the doctor recorded a heart attack as a cause of death."[197]

The incompetence of the medical professionals, and therefore the inadequate efficiency of their services, is emphasized in the report of International Crisis Group, which covers not only the Akhalgori district but the whole territory of South Ossetia. ICG notes that doctors medical professionals have had no training for years, lacking even the know-how to operate equipment delivered from Russia during the pandemic.[198]

Along with all the problems mentioned above, the safety and sanitary of the facilities is also problematic, particularly after the spread of the new coronavirus. It was reported that sanitary norms were not observed either in the hospital or in the boxing ward in particular; no disinfection works was carried out in the hospital as of the end of March 2020. Medical staff who have contact with the placed patient move around without masks or special outfits since they had not received necessary antibacterial, disinfectant, and diagnostic tools.[199] Hence, the quality of the healthcare system in Akhalgori cannot be regarded as satisfying.

The circumstances in which Akhalgori citizens die illustrate the deep and systemic problem in the healthcare system, requiring prompt and effective resolution. At the same time, calling the existing medical management a healthcare system raises the question of accuracy since it can be argued that there is no healthcare system at all in Akhalgori.

Due to its poor and outdated design, healthcare policy fails to respond to patients needs and requirements in Akhalgori; at the same time, it also lacks integration and standardization. The healthcare system in Akhalgori suffers from constant stagnation and the inability to renovate and enhance itself and subsequently, it experiences frequent medical errors and failures.

The transfer of patients from Akhalgori to Tskhinvali demonstrates the deterioration state and lack of efficiency of Akhalgori hospital and the general fragmentation of the healthcare system, which put patients at risk. While in an optimal situation, healthcare personnel can diagnose and treat, evaluate new tests and procedures, and develop clinical practise, physicians in Akhalgori and in Tskhinvali who are deprived of opportunities to enhance their professional knowledge,

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[195] RadioLiberty, 'ახალგორში პედაგოგი გარდაიცვალა, „იზოლაციის"კიდევ ერთი მსხვერპლი' (15 Octomber 2020) <shorturl.at/qNTWZ > accessed 7 May 2021.
[196] Mtisambebi.ge (n 24).
[197] ibid.
[198] International Crisis Group Europe (n 30).
[199] Netgazet, 'COVID-19-ის პირობებში გალსა და ახალგორში სიტუაცია კრიტიკულია – DRI l' (20 March 2021) <https://netgazeti.ge/news/435965/> accessed 7 May 2021.

misdiagnose and mistreat patients. At the same time, shortages of medication and medical equipment were also pressing, while citizens lived in complete isolation.

Concluding Remarks

This chapter clarified the notion of the right to health under different legal documents and underlined its place in the system of international human rights law. The following subchapter narrowed down the focus from the right to health to the right to healthcare which is the central aspect of the right to health, along with other social determinants as education, nutrition, and housing. However, as it was already noted, this thesis aims to explore the standard of adequate medical care set by the IHL and its relevance to providing an accessible healthcare system in Akhalgori. To identify concrete human rights violations, the Akhalgori humanitarian crisis was assessed through the AAAQ framework, which suggests four main determinants that should be met to exclude state liability due to an inadequate healthcare system. The analysis revealed that the available healthcare system in Akhalgori fails to meet the requirements of the AAAQ framework. It is also clear that the malfunctioning of the healthcare system goes beyond mere medical errors and negligence of the doctors and indicates a range of systemic and structural problems.

CHAPTER 5. HUMAN RIGHTS PROTECTION MECHANISMS UNDER THE COUNCIL OF EUROPE AND THE UNITED NATIONS

The assessment of the healthcare system through the AAAQ system explained in the previous chapter demonstrated the systematic violation of the right to health, guaranteed by a number of human rights treaties, by the occupying power in Akhalgori. The violation of the right to health, in this case, has two underlying causes: first, due to the lack of equipment and properly trained medical personnel, the local healthcare system fails to meet the basic needs of the patients, let alone more serious health complications; secondly, the closure of the crossing point by the South Ossetian de facto authorities deprives the patients in need of emergency treatment of their recovery chances since it is not possible to transfer them.

While IHL, which applies to Akhalgori, does not offer its enforcement mechanisms for human rights protection, it becomes necessary to look into HRL to see how it addresses the deprivation of healthcare in the occupied territories and whether it offers any prompt and efficient solutions. However, unlike IHL, whose norms automatically apply to the sovereign territory under effective control by another state, the exterritorial application of HRL has been challenged by the principle of state sovereignty. This means that a state may not be held responsible for human rights violations committed outside its sovereign borders.

To establish the responsibility of a state for the wrongdoings outside its territory, it needs to be determined whether the state was exercising extraterritorial jurisdiction. In the present case, it has to be assessed whether the Russian Federation has been exercising extraterritorial jurisdiction in the occupied Akhalgori during the crisis. Therefore, the next section first looks into the conflict between state sovereignty and exterritorial jurisdiction in relation to human rights protection. Next, it will show the development of the so-called jurisdiction tests, which are commonly used to determine the responsibility of the states, and focus on the test employed by the ECtHR, the most specific and relevant in establishing the state responsibility in human rights violations. After discussing the question of extraterritorial jurisdiction, the chapter assesses legal tools allowing the prevention of human rights abuses in the Akhalgori district, as well as remedies for such violations under the systems of the CoE and UN.

5.1 The Concept of Exterritorial Jurisdiction in International Law

The word "jurisdiction" has Latin origin (**jus** or **jur** means law, and **dictio** means saying)[200] and means "the power or authority to pronounce the law."[201] or to put it in simple terms - the power to make judgments. Jurisdiction is an aspect of sovereignty that enables the state to have a monopoly of force over its internal affairs. It defines the competencies between States and thus serves as the basic traffic rules of the international legal order.[202] However, while

[200] Oxford Learner's Dictionaries, <shorturl. at/dpIOQ>, accessed April 23, 2021.
[201] John W Walsh, 'The True Meaning of the Term "Jurisdiction" (1901) 49 The American Law Register (1898-1907) 346. p. 347.
[202] Alexander Orakhelashvili (ed), Research Handbook on Jurisdiction and Immunities in International Law (Edward Elgar Publishing 2015). Chapt.2 p.104.

jurisdiction has a different understanding of international law and HRL, it should be noted from the beginning that this chapter explores what is the relationship between jurisdiction and human rights law only.

Therefore, jurisdiction, which initially was delimited to the state's sovereign territory, served the aim to distinguish the lawfulness of the acts or omissions of the state; for example, in contrast, actions carried out by the state within its territory falls under its sovereign power; acts committed outside the territory presumably infringed on other states internal affairs.

However, the reliance on territorial factors in determining the scope of states' jurisdiction has been called into question due to the "borderless" nature of some activities, which require an exterritorial response.[203] Having seen how territorial understandings of jurisdiction have shielded gross human rights abuses outside of sovereign territories in the recent past, the need for a new concept of exterritorial jurisdiction became clear.

Human rights law which emerged as a response to second world war atrocities, launched a broader scope and extended to actions that were not deemed to be within the limits of jurisdiction imposed by international law.[204] Gradually, the flexibility of the jurisdiction became even more important for the efficiency of protection of human rights and, most importantly, for holding states responsible for their wrongdoings committed outside their sovereign territory.

According to Coomans, the moral reasons for extraterritorial human rights obligations would include the idea that states cannot do abroad what they are prohibited from doing at home, namely doing harm and/or violating the rights of individuals.[205] In addition to this, the "positive" dimension of jurisdiction also became relevant, reflecting the evolution of international law towards a law of cooperation rather than just coexistence between States.[206]

However, it should be admitted that international law does not provide any guideline on what basis and circumstances human rights law activates its exterritorial mode. On the one hand, the Vienna Convention on the Law of Treaties defines that "unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."[207] On the other hand, a growing number of authoritative organisations emphasize the exterritorial nature of human rights due to their specific aim and place in

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[203] Hannah Buxbaum, 'Territory, Territoriality, and the Resolution of Jurisdictional Conflict' (2009) 57 American Journal of Comparative Law 631. p. 668.
[204] Marko Milanovic, Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy (Oxford University Press 2011). p. 30-34, 39-42.
[205] F Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights (2011) 11 Human Rights Law Review 1.p. 6.
[206] Orakhelashvili (n 203). Chapt.2.
[207] United Nations, *Vienna Convention on the Law of Treaties between States, and International Organizations or between International Organizations*, 12 March 1986, available at: https://www.refworld.org/docid/3ae6b3924.html [accessed 24 May 2021] p. 331.

international law. According to Besson, it is crucial to determine that in certain circumstances, human rights can and should also apply outside those boundaries, underlines that the "application of human rights not only is required in certain circumstances that need to be identified but that it also has to be possible before it can be required."[208] Answering whether the specific human rights treaty applies exterritorial is a complex issue and needs individual investigation. However, the immense work of international courts in elaborating the applicability of the conventions and covenants exterritorial demonstrates the flexibility of the scope of applicability which can be explained by the specific nature of IHL and the objectives it is serving.

In order to trigger states or breakaway regions international responsibility for wrongful acts, the act in question should be attributed to the state.' This has been codified by the International Law Commission (ILC) in its Articles on the Responsibility of States for Internationally Wrongfully, which is considered to reflect customary international law. The extraterritoriality of the liability implies the duties of States parties to be responsible for certain obligations outside their territory. Only when a state has an international responsibility will its violation contribute to the international liability of the state. States international responsibility itself exists when the wrongful act of the state (1) is attributable to the state under international law; and (2) constitutes a breach of an international obligation of the state[209]. As for the holding accountable a breakaway regions for its wrongful conduct, "it must be shown that the territorial scope of application of the outside power's international obligation extends beyond its own territory to that of the secessionist entity, so that the international obligation in question can be applied extraterritorially, and that the acts or omissions of the secessionist entity which violate that obligation are attributable to the outside power."[210] Therefore, in order to establish the international responsibility of an outside State for the international wrongful act/omission committed outside the State's territory, international courts usually test if the perpetrators had control over the violation of human rights outside their sovereign territory.[211] The problem arises in defining "control," as the default essence in it constantly evolves and changes.

Therefore, to establish the international responsibility of an outside State for the internationally wrongful act/omission committed outside the state's territory, international courts usually test if the perpetrators had control over the violation of human rights outside their sovereign territory.[212] The extraterritorial jurisdiction, which may attach the state responsibility,

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[208] Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (2012) 25 Leiden Journal of International Law 857.p. 866.

[209] Draft Articles on State Responsibility for Internationally Wrongful Acts, with commentaries, 2001, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10, UN doc A/56/10

[210] Stefan Talmon, 'THE RESPONSIBILITY OF OUTSIDE POWERS FOR ACTS OF SECESSIONIST ENTITIES' (2009) 58 International and Comparative Law Quarterly 493.

[211] 5 International Law Commission, Articles on the Responsibility of States For Internationally Wrongful Acts, Report of the International Law Commission on the Work of its 53rd session, A/56/10, August 2001, UN GAOR. 56th Sess Supp No 10, UN Doc A/56/

[212] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp. IV.E.1, available at: https://www.refworld.org/docid/3ddb8f804.html [accessed 24 May 2021].

determination technique varies from court to court and depends on its specific aims and circumstances; therefore, since ECtHR is a human rights court, its test is employed more in line with trends and values of human rights. The next chapter will discuss this test in detail.

5.2 Exterritorial application of The European Convention on Human Rights

The European Convention on Human Rights entered into force in 1953. Art.1 of the Convention states that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in (...) this Convention."[213] However, no specific scope of "jurisdiction" is provided in art. 1. Hence Convention's exterritorial applicability, including in the case of occupation, is determined by the court's interpretation of the Convention itself. Jurisdiction in the field of human rights and other areas of law plays a crucial role since it functions as a "threshold criterion," "it is an all-or-nothing matter - either one is giving reasons for action and requiring compliance, or one is not."[214]

According to Ilascu and others v. Moldova, "within their jurisdiction' in art. 1 of the Convention must be understood to mean that a State's jurisdictional competence is primarily territorial (...), that the jurisdiction is presumed to be exercised normally throughout the state's territory."[215] However, also according to ECtHR case law, "although art. 1 set limits on the reach of the Convention, the concept of 'jurisdiction' under this provision is not restricted to the national territory of the High Contracting Parties."[216]

The ECtHR and other international courts employed the special test to detect outside powers responsibility for human rights violation outside its sovereign territory; in other words, when and on what grounds is Convention applied exterritoriality. As Milanovic noted, the court developed its own "relevant test" with more flexibility and lower threshold without mentioning tests employed by other international courts.[217]

It was the Case of Loizidou where the court developed the tests called the "effective overall test." The ECtHR was concerned with two distinct questions here: "(a) whether, as a result of the presence of a large number of Turkish troops in northern Cyprus, that part of the Republic of Cyprus was within the extraterritorial 'jurisdiction' of Turkey, a High Contracting Party of the ECHR, and (b) whether acts and omissions of the authorities of the Turkish Republic of Northern Cyprus (TRNC), an unrecognized secessionist entity established in the Turkish occupied area of northern Cyprus, was 'imputable to Turkey' and thus entailed her

[213] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: https://www.refworld.org/docid/3ae6b3b04.html [accessed 24 May 2021] art. 1.
[214] Besson (n 206) p.878.
[215] Ilaşcu and Others v. Moldova and Russia [GC], no. 48787/99, § 312 ECHR 2004-VII.
[216] Loizidou v. Turkey (merits), 18 December 1996, § 62 Reports of Judgments and Decisions 1996-VI
[217] M Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 Human Rights Law Review 411. p.36.

responsibility under the ECHR."[218] The court did not necessarily find that all the acts of the TRNC were attributable to Turkey; however, it ruled that Turkey had effective overall control and, therefore, positive obligations to prevent human rights violation, regardless of whom they were committed. Thus, for the ECtHR to attribute the conduct of such an entity to the outside power, effective overall control of the external authority over the territory is sufficient.

The ECtHR has interpreted the word "jurisdiction" in two primary ways: "First, as a spatia concept – a Jurisdiction over an individual who is located within a territory a state exercise effective overall control over; and second, as a personal concept – an individual is within a state's jurisdiction if they were subject to the authority or control of a State agent."[219], both models of jurisdiction were reaffirmed in the case of Al-Skein.[220]

According to the ECtHR case law, the spatial concept of jurisdiction is usually relevant in cases of occupation, which is considered to be one of the exceptional cases when the Convention applies outside of the state territory. For example, in Loizidou, the court noted that: "The responsibility of a Contracting Party may also arise when as a consequence of military action whether lawful or unlawful exercises effective control of an area outside its national territory."[221] The exterritorial nature of the Convention in regards to the occupation has been reapproved in Bankovic which in the first place confirmed that jurisdiction is 'exceptional' but also noted that exterritorial jurisdiction would be activated "when the respondent state, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by that government."[222]

Finally, in the court's recent decision Georgia v Russia, the ECtHR made a significant remark regarding the connection between the notion of jurisdiction under Article 1 ECHR and occupation under humanitarian law and once again acknowledged that occupation presupposes exterritorial jurisdiction of the Convention:

"In the Court's view, the concept of "occupation" for international humanitarian law includes a requirement of "effective control". If there is "occupation" for international humanitarian law, there will also be "effective control" within the meaning of the court's case-law, although the term "effective control" is broader and covers situations that do not necessarily amount to a situation of "occupation" for the purposes of international humanitarian law."[223]

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[218] Stefan Talmon, 'THE RESPONSIBILITY OF OUTSIDE POWERS FOR ACTS OF SECESSIONIST ENTITIES' (2009) 58 International and Comparative Law Quarterly 493. p. 508 Loizidou v Turkey p.64.
[219] Marko Milanovic and Tatjana Papić, 'THE APPLICABILITY OF THE ECHR IN CONTESTED TERRITORIES' (2018) 67 International and Comparative Law Quarterly 779. p. 4.
[220] Al-Skeini and Others v. the United Kingdom [GC], no. 55721/07, §133-140, ECHR 2011.
[221] Loizidou v. Turkey (merits), 18 December 1996, § 62 Reports of Judgments and Decisions 1996-VI.
[222] Banković and Others v. Belgium and Others (dec.) [GC], no. 52207/99, § 71, ECHR 2001-XII.
[223] Georgia v. Russia (II) [GC] (merits), no. 38263/08, § 196 21 January 2021.

To sum up, jurisdiction under the ECHR has a primarily territorial meaning; however, the court's interpretation of the jurisdiction clause affirms that it can apply outside one's own territory. Even though the court struggled to have a coherent practice regarding the exterritorial application of the Convention, the recent decision of the ECtHR demonstrates that it has solidified its position over the cases concerning the occupation. According to recent developments of the court, when the territory is occupied, it is considered that the occupying power is exercising exterritorial obligation under the Convention. Hence, or the case at hand, this finding should be perceived that Russia is responsible for ensuring the right to health in Akhalgori. However, since the Convention does not contain the right to health, it will be necessary to examine whether it is possible to claim the right to health care under the Convention in the first place. However, before exploring the possibility of litigation of the right to health before the ECtHR, the jurisdiction of the ICESCR, which is a primary legal base for the right to health and guarantees human rights protection mechanisms, should be analyzed.

5.3 Exterritorial Application of the International Covenant on Economic, Social, and Cultural Rights

The obligation to secure economic, social, and cultural rights in the ICESCR is not expressed in relation to "jurisdiction" but rather it suggests a generalized obligation[224] for state parties to "take steps individually and through international assistance and cooperation."[225]

This "free standing" mode of applicability[226] and silence on the scope of jurisdiction is not accidental; according to Mottershaw, who is relying on the drafting history, silence on the scope of jurisdiction is not accidental, considering that the Covenant aims to provide "transnational obligations."[227] Especially when the provision refers to the obligation for the state in the context of "assistance and cooperation," it can be assumed that jurisdiction here should be understood in a broader sense. This view has been amplified by Cooman, who notes that the preamble of the Covenant, which promotes the universal respect and observance of human rights and freedoms, does not require to "limit the protection of ESC rights explicitly to those people resident in the territory of a State Party only."[228] According to him, the exterritorial nature of the ICESCR has been demonstrated in article 11 (2) of the Covenant.[229]

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[224] Ralph Wilde, 'Expert Opinion on the Applicability of Human Rights Law to the Palestinian Territories with a Specific Focus on the Respective Responsibilities of Israel as the Extraterritorial State, and Palestine as the Territorial State' <shorturl.at/dswHK>. p.9.

[225] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: https://www.refworld.org/docid/3ae6b36c0.html [accessed 24 May 2021] art 2 (1).

[226] Wilde, (n 224) p. 9.

[227] Elizabeth Mottershaw, 'Economic, Social and Cultural Rights in Armed Conflict: International Human Rights Law and International Humanitarian Law' (2008) 12 The International Journal of Human Rights 449. p.452.

[228] Coomans (n 206). p.7.

[229] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: https://www.refworld.org/docid/3ae6b36c0.html [accessed 24 May 2021] 11 (2).

This suggests that state parties take measures necessary to improve food production methods and distribution through international cooperation. In addition to this, in the General Comment on the Right to Water, the Committee urges state parties to prevent their citizens and companies from violating water rights in other countries.[230] Therefore, obligations under ICESCR are not constrained to the territory of state parties but reflects the challenges of a globalized world and urges governments to collaborate without borders to fulfil the objectives of the Covenant.

Other sources reveal the transnational nature of the obligation under ESC rights, for example, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, which also does not refer to the scope of the rights that it elaborates, describes jurisdiction in a general term to demonstrate the possibility of their applicability outside national territory. Furthermore, guideline makes essential reference to the legal connection between the jurisdiction and military occupation,[231] stating that:

"Under circumstances of alien domination, deprivations of economic, social and cultural rights may be imputable to the conduct of the state exercising effective control over the territory in question. This is true under conditions of colonialism, other forms of alien domination and military occupation. The dominating or occupying power bears responsibility for violations of economic, social and cultural rights."[232]

Military occupation is one category of a situation in which the ESCR Committee has expressly and extensively addressed the extraterritorial application of the ICESCR.[233] In its concluding observations about Israel, the Committee on Economic Social and Cultural Rights elaborated that "The Covenant applies to all areas where Israel maintains geographical, functional or personal jurisdiction."[234] In Israel's response that the Covenant does not apply exterritorialy, the Committee urged the occupying power to implement rights attached to the Covenant in occupied territories without further delay.[235]

ICJ has affirmed this position in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. Since Israel was occupying Palestine, the court noted that the responsibility to ensure social and economic rights in occupied territory lies in Israel. The court, as well as the Committee, departed from the Israeli

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[230] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11, available at: https://www.refworld.org/docid/4538838d11.html [accessed 24 May 2021] par. 33.
[231] Mottershaw (n 225). p.454.
[232] International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 26 January 1997, available at: https://www.refworld.org/docid/48abd5730.html [accessed 24 May 2021] n.17.
[233] Coomans (n 206). p.13.
[234] UN Committee on Economic, Social and Cultural Rights (CESCR), *UN Committee on Economic, Social and Cultural Rights: Concluding Observations: Israel*, 4 December 1998, E/C.12/1/Add.27, available at: https://www.refworld.org/docid/3f6cb4367.html [accessed 24 May 2021]par.8.
[235] UN Committee on Economic, Social and Cultural Rights (CESCR), *UN Committee on Economic, Social and Cultural Rights: Concluding Observations, Israel*, 31 August 2001, E/C.12/1/Add.69, available at: https://www.refworld.org/docid/3cc7fca44.html [accessed 24 May 2021]par.15.

position that the occupying power is bound only by humanitarian law and established that: "In the exercise of the powers available to it on the basis that Israel has for over 37 years been subject to its territorial jurisdiction as the occupying Power, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities."[236]

To conclude, there are clear indications that the ICESCR is meant to operate in armed conflicts and occupation; on the one hand, the absence of a derogation clause that enables the more flexible application of Covenant is not accidental if we rely on drafting history of the document, on the other hand, the extraterritorial application of ICESCR especially in occupied territories has been recognized by the CESCR and ICJ, which leaves no doubt that Russia as a part of the Covenant exercises it exterritorial jurisdiction over Akhalgori under International Covenant on Economic, Social and Cultural Rights.

Therefore, the analyses provided above make it pristine that Russia exercises exterritorial jurisdiction in Akhalgori under ECHR and ICESCR. This factual circumstance allows us to examine the deprivation of access to healthcare through relevant human rights protection mechanisms.

5.4 Litigation of the Right to Healthcare in European Court of Human Rights

The ECtHR is the only regional judicial human rights body with the authority to issue legally binding judgments. Its function within the context of the Council of Europe is to ensure the fulfilment of the commitments made by the ECHR signatory states.[237] According to article 34 of the Convention:

"The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights outlined in the Convention or the Protocols thereto."[238]

However, the court only deals with the cases where "all domestic remedies have been exhausted, according to the generally recognized rules of international law ..." [239] and when the case has not "already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information."[240]

[236] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion, 9 July 2004, http://www.icj-cij.org.
[237] San Giorgi (n 145).p.92.
[238] ECHR (n 213) art.34.
[239] ibid. art. 35.
[240] ibid.

If the case meets all of the above-mentioned admissible criteria, the court will decide the legal issue that emerged in the case in question. The Court may find a breach of the right in question and award compensation to the claimant and, in that way, enforce the rights enshrined in the ECHR.[241]

However, the ECHR, which guarantees civil and political rights, does not provide the right to health or healthcare. The instruments that have historically covered social and economic rights are the European Social Charter, the European Code on Social Security, and the Covenant on social and economic rights at the international level.[242] Although, it has been noted that drawing sharp and explicit distinctions between the human rights and freedoms enshrined in the Convention and socio-economic rights becoming extremely difficult.[243] Already in 1979, in the case of Airey v. Ireland, the court noted that: "the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation,"[244] In the same case, ECtHR acknowledged an overlap in the Convention between civil and political and socio-economic rights.[245]

According to Palmer's observation, even though the Court is "mindful of the limits of its legitimate intervention in national resource allocation policy, the Court has continued to lay the foundations for a body of socio-economic rights jurisprudence through an incremental interpretation of the traditional canon of civil and political rights and the development of positive state obligations in Articles 2, 3 and 8 and Articles 6 and 14 ECHR."[246]

The right to health is one of the social and economic rights that have come before the courts under the umbrella of civil and political rights in a number of situations.[247] Healthcare has been primarily dealt with in connection to the right to life, article 2 of the ECHR, which is generally understood as a negative right obliging the state not to intervene in the realm of the right. However, due to newly emerged various circumstances, Article 2 "began enforcing positive duties on States through the Court's jurisprudence."[248] Owning to the Court's broad interpretation, among other social and economic rights, the right to health has been found protected under several provision of the Convention of civil and political rights, however, most frequently under the right to life. Therefore, the link between the right to health and ECtHR will be explored in relation to article 2 of the Convention (the right to life).

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[241] San Giorgi (n 145). p.92.

[242] Council of Europe, Health-related issues in the case-law of the European Court of human rights, European Court of Human Rights, June 2015, p.4 available at: <https://www.echr.coe.int/Documents/Research_report_health.pdf> [accessed 24 May 2021]p.4.

[243] ibid.

[244] Airey v. Ireland, 9 October 1979, § 26 Series A no. 32.

[245] E. Palmer, 'Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights', Erasmus Law Review 2009-4, p. 397-425, p. 398.

[246] ibid.

[247] Health-related issues in the case-law of the European Court of human rights, (n 242) p. 4.

[248] Dr Maša Marochini, 'COUNCIL OF EUROPE AND THE RIGHT TO HEALTHCARE- IS THE EUROPEAN CONVENTION ON HUMAN RIGHTS APPROPRIATE INSTRUMENT FOR PROTECTING THE RIGHT TO HEALTHCARE?' (1991) 34 32. p. 734.

The possibility of a duty to provide medical services under article 2 was first examined by the Court in LCB v the United Kingdom, where the Court clarified that responsibilities under the right to life not only oblige states to refrain from the intentional or unlawful taking of life but also to take all necessary measures to protect the lives of those under their control.[249] Hence the positive aspect of the obligation has been invoked.

The following case where health-related issues were discussed was Erikson v Italy, involving potential medical malpractice. The Court again read states positive obligation in article 2. It stated that: "the positive obligations a State has to protect life under Article 2 of the Convention include the requirement for hospitals to have regulations for the protection of their patients' lives and also the obligation to establish an effective judicial system for establishing the cause of a death which occurs in hospital and any liability on the part of the medical practitioners concerned."[250]

In one of the few inter-State cases - Cyprus v Turkey,[251] the Court dealt with almost identical conditions to those faced by Akhalgori residents. Therefore, principled generality requires us to conclude that the same legal conclusion could apply to those in Akhalgori. Citizens of occupied Cyprus stated that Greek Cypriots living in the northern part of Cyprus were refused to use the southern part of Cyprus and that the facilities in the north were inadequate.[252] "Two different issues rose under Article 2; firstly, the 'access issue' – whether there was a de facto equality of access to health services, and secondly, the 'quality issue' – where the substantive quality of healthcare provided in the region was sufficient to comply with human rights standards."[253] Concerning the access question, the Grand Chamber was hesitant to say more than "an issue may arise" under Article 2, where treatment was systemically withheld to people, which was not proven on the evidence. Regarding the quality question, the court refused to consider the quality problem entirely, deeming it needless to investigate, effectively closing this path from Article 2's jurisdiction.[254]

Therefore, the Court did not find violation of the right to life even though the citizens of the applicant state were complaining about a shortage of healthcare. The Court's decision was based on two circumstances: first of all, there was no evidence that the respondent government, in this case, an occupier power, deliberately withheld medical care, and second of all, that patient was not put in danger due to the delays of medical treatment. However, the Court remarked that article 2 might be invoked "where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of healthcare which they have undertaken to make available to the population generally."[255] This part of judgment can have utmost

[249] ibid.
[250] Erikson v. Italy, 26 October 1999, no. § 49, admissibility decision of October 37900/97.
[251] Cyprus v. Turkey (just satisfaction) [GC], no. 25781/94, ECHR 2014.
[252] Machine, (n 248). p.738.
[253] 'The European Court of Human Rights and the Emerging Right to Health' (*OHRH*, 11 May 2017) <https://ohrh.law.ox.ac.uk/the-european-court-of-human-rights-and-the-emerging-right-to-health/> accessed 28 April 2021.
[254] ibid.
[255] ibid.

importance for victims of Akhalgori who found themselves put in danger due to the closure of the border with the Georgia proper since all the elements for establishing the states responsibility under article 2 is present.

In conformity with the previous case, the link between patient's death and the right to health has been established in the case of Mehmet Şentürk and Bekir Şentürk v. Turkey.[256] The Court held that the deceased had been the victim of blatant shortcomings on hospital officials when she was refused recourse to adequate medical care until she could not pay a service fee. As a result, the court found a State in violation of Article 2 for failure to provide medical treatment to a patient.[257]

In the second so-called exceptional case, where the court found a violation was Aydoğdu v. Turkey,[258] a systemic and structural dysfunction in-hospital services which resulted in a lack of access to life-saving emergency care where the authorities were aware of or should have been aware of the risk and neglected to take the appropriate precautions to prevent the threat from materializing, placing the patients' lives, including the life of the individual patient concerned, in danger.[259] The Court reasoned that the authorities ought to have known at the time of the occurrences that there was a severe risk to the lives among many patients due to a "chronic state of affairs that was common knowledge."[260] Therefore, this case has further shed more light on the circumstances necessary to establish the state's responsibility. As the Court underlined, the applicant must prove that the alleged violation of the right was part of the systemic and structural problem and foreseeable for the state. The test employed in this case seems to be borrowed from the court's landmark case Osman v. the United Kingdom.[261] Where the Court made a significant clarification regarding the positive obligation under art. 2. According to the ECtHR, "it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party, and second, that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."[262] Every application seeking to establish states' positive obligation under article 2 has to satisfy requirements of the so-called Osman test, which means that applicants from Akhalgori will be required to prove that de facto government/Russia knew about the existence of real and immediate risk and that they failed to take measures.

Suppose the applications pass the "Osman test." In that case, it will be needed to meet the requirements of another test as well, which was established to identify admissible claims regarding healthcare under article 2. In 2015, in the Lopes de Sousa Fernandes v. Portugal, the Court overturned the relatively loose and lenient position of the Court concerning medical

[256] Mehmet Şentürk and Bekir Şentürk v. Turkey, no. 13423/09, ECHR 2013.
[257] Machine, (n 248). p. 739.
[258] Aydoğdu v. Turkey, no. 40448/06, §180, 30 August 2016.
[259] Council of Europe/European Court of Human Rights, 'Guide on Article 2 of the Convention – Right to Life" (2021) <https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf> accessed 25 May 2021. p.12
[260] Aydoğdu v. Turkey, (n 259) par.181.
[261] Osman v. the United Kingdom, 28 October 1998, Reports of Judgments and Decisions 1998-VIII.
[262] Lopes de Sousa Fernandes v. Portugal, no. 56080/13, § 189, 15 December 2015.

negligence and listed out circumstances in which the state's responsibility under the substantive limb of Article 2 may be invoked, factors are "cumulatively" required:[263]

> Firstly, the acts and omissions of the healthcare providers had to go beyond a mere error or medical negligence in that those healthcare providers, in breach of their professional obligations, denied a patient emergency medical treatment despite being fully aware that the person's life is at risk if that treatment is not given.
>
> Secondly, the impugned dysfunction had to be objectively and genuinely identifiable as systemic or structural to be attributable to the State authorities.
>
> Thirdly, there had to be a link between the impugned dysfunction and the harm sustained; and
>
> Finally, the dysfunction must have resulted from the failure of the state to meet its obligation to provide a regulatory framework in the broader sense. [264]

Lauren criticizes that all above-listed factors need to be met cumulatively and suggest alternate bases for a breach in some instances.[265] However, the court's case law elucidates that the ECHR has adopted a restricting policy for finding the violation of the right to health and requires all four aspects of the violation to be present. For the applicants, it means that the damage they suffered should be demonstrated as a part of a systemic problem rather than mere negligence of medical personnel. Considering the quality of healthcare management, errors occurring in this regard should be predictable for the authorities.

Regarding the COVID-19, the Court has already issued its first case challenging measures taken by a state. In Le Mailloux v. France,[266] the applicant challenged the French response to the coronavirus outbreak under article 2, among other Convention articles. However, the court declared the application inadmissible on 5 November 2020.

The applicant's case addresses France's failure to carry on its positive commitments under some provisions of the ECHR and, among them, article 2, addressing the state's lack of positive intervention. In this respect, the applicant's particular concerns included the applicant's inadequate access to screening testing, medical measures, and even therapies, as well as the fact that people died as a result of the virus itself.[267] However, the ECtHR unanimously declared inadmissible the application as he lacked victim status. According to the Court, the applicant

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[263] 'Article 2 and the Provision of Healthcare - Part 1' (*UK Human Rights Blog*, 19 November 2020) <https://ukhumanrightsblog.com/2020/11/19/article-2-and-the-provision-of-healthcare-part-1/>accessed 29 April 2021.

[264] 'Guide on Article 2 of the Convention – Right to Life' (n 260). p. 13.

[265] ibid.

[266] Le Mailloux c. France, app. no. 18108/20, 5 November 2020, par. 5.

[267] 'The First Decision on Covid-19 Measures by the ECtHR: Le Mailloux c. France' (*University of Groningen*, 21 December 2020) <https://www.rug.nl/rechten/onderzoek/expertisecentra/ghlg/blog/the-first-decision-on-covid-19-measures-by-the-ecthr-le-mailloux-c-france-21-12-2020> accessed 30 April 2021.

could not demonstrate that he was directly affected by the measure allegedly infringing upon their Convention rights.[268] However, the ECtHR followed its case law and interpreted the applicant's complaint in terms of the "right to health" and reaffirmed that "States have positive obligations to take the measures necessary to protect the lives and physical integrity of persons within their jurisdiction, including in the sphere of public health."[269]

Therefore, the main finding of this subchapter is that the ECtHR acknowledges the legal link between the right to healthcare and the right to life, which gives the court power to adjudicate on the cases where the applicants has suffered from inadequate medical services. However, the Court interprets the denial to access to healthcare in a narrow sense. It establishes that "mere negligence" of medical personnel will not trigger the state's positive obligation but "denial of access to life-saving treatment" in the context of systemic failure of the medical system known for the state. These findings will be employed in the following subchapter to assess specific medical errors and systemic negligence during the humanitarian crisis in Akhalgori.

5.4.1 Victims of the Healthcare System in Akhalgori Before the European Court of Human Rights

The ECtHR analysis of case law elucidates that for the Court to establish a legal link between deprivation of medical care and the right to life, the individual case should satisfy the above-listed criteria. The landmark case Lopes de Sousa Fernandes v. Portugal adopted limited responsibility of the state under article 2 and, with this aim, established four cumulative conditions which need to be fulfilled for the Court to find the violation of the right to health. As it was stated before, those elements will be closely examined in relation to Akhalgori.

To start with the first element, healthcare providers actions and omissions have to go beyond a simple mistake or medical incompetence so that certain healthcare providers, in violation of their professional obligations, denied a patient emergency medical attention after being well aware that the person's life is at risk if that treatment is not provided.

Concerning Akhalgori, the qualification of the doctors employed in hospitals is very critical, which have been demonstrated by the number of deaths of patients due to misdiagnosis. However, the deaths of the patients due to medical negligence should be regarded as a symptom of the general healthcare management and not as an unforeseeable mistake of the medics. The absence of adequate provision for securing high professional standards among health professionals and lack of policy for maintaining qualified staff in local hospitals indicates an in-depth problem that manifests in periodic medical errors. Therefore, the mistreatment of the patients in Akhalgori hospitals goes beyond the mere negligence of medical personnel.

[268] ibid.
[269] Le Mailloux c. France, (n 272) par.9.

The second requirement is that dysfunction of the healthcare system should be objectively and genuinely identifiable as a systemic or structural defect to be attributable to the State authorities. In this regard, incompatibility of the medical services in Akhalgori with the framework of AAAQ is the primary evidence that patient deaths in Akhalgori are a part of systemic and structural problem that the occupied territory of South Ossetia is facing. The legal analysis of the healthcare system in Akhalgori revealed that it fails to respond to the basic needs of patients with chronic illnesses, let alone the patients with emergency needs. It has also been observed that chronic stagnation of the medical management resulting in repeated medical mistakes and failures. For example, the common practice of moving patient from Akhalgori to Tskhinvali hospital according to the de facto governments regulations demonstrates not only deterioration state and lack of efficiency of Akhalgori hospital but also general fragmentation of the healthcare system. As we saw in Aydoğdu v. Turkey,[270] "a systemic and structural dysfunction in-hospital services which resulted in a lack of access to life-saving emergency care while the authorities were aware of the risk and neglected to take the appropriate precautions, found to be a violation of article 2 Since the failure of the medical system is common knowledge."[271] The cases of death of Akhalgori residents can closely be related to the Aydoğdus case. However, unlike the above-discussed case, in Akhalgori, the patients' health was put in danger by omission and de facto governments reckless decision to close the checkpoint connecting residents to adequate healthcare. Due to this decision, Tskhinvali has been repeatedly criticized by the government of Georgia and international society.[272] Therefore, by knowing the existing situation in Akhalgori, it was foreseeable for the de facto government that patients could die due to the border closure. However, this circumstance had been neglected almost for two years.

Based on all of the above analysis, it is clear that the third requirement of the test is also met. More precisely, according to the test, there had to be a link between the impugned dysfunction and the harm sustained. This link can be confirmed because cases of misdiagnosis, delayed treatment and fatal results could have been easily avoided under proper healthcare conditions and/or if the checkpoint was open for the patients.

Finally, the dysfunction must have resulted from the failure of the state to meet its obligation to provide a regulatory framework in the broader sense. According to the judgment of Fernandes v. Portugal, "States' obligation to regulate must be understood in a broader sense

[270] Aydoğdu v. Turkey, (n 259) §181.
[271] ibid.
[272] The humanitarian crisis of Akhalgori and the death of people due to lack of access to adequate health care was quite a high-profile fact in connection with which a number of inter-state statements were made. For example, the president of Georgia, Salome Zourabishvili, addressed the Director-General of the World Health Organization, the UN High Commissioner for Human rights, and the Commissioner for Human rights of the Council of Europe regarding the ban on Georgian prescription drugs in the Tskhinvali region. Numerous facts of the death of patients became the subject of debate on the 51st Round of Geneva International Discussions (GID). The GIDs are co-chaired by delegates of the OSCE, the EU, and the UN. They include representatives from Georgia, Russia, and the US and both the Georgian exiled administrations of Abkhazia and Tskhinvali. Sessions are held to discuss peace and security issues, as well as humanitarian issues. Therefore, Russia was well aware of the inadequacy of the healthcare system in Akhalgori while the checkpoint with Georgia was closed.

which includes the duty to ensure the effective functioning of that regulatory framework. The regulatory duties thus encompass necessary measures to ensure implementation, including supervision and enforcement."[273] The practical regulatory framework in this regard implies adequate provisions for securing the protection of the lives of patients; however, on the contrary to this obligation, the de facto government of South Ossetia launched the normative act, which further limited access to adequate healthcare and therefore put resident's life in risk.

Therefore, cases of Akhalgori most probably satisfy both the Osman test and, also more specific, the Lopes de Sousa Fernandes test and thus promises prospects for holding the responsible state, in this case, occupying power responsible for violation of the right to health. However, it should be noted that the court's case law has been often criticized for its incoherence and unpredictability, especially when it comes to adjudicating economic and social rights, which always presupposes a specific volume of margin of appreciation for the states. However, victims of the Akhalgori humanitarian crisis can make a solid legal case before the Court.

However, it is still very nebulous what will be the court's attitude toward governments delayed and inadequate response against the pandemic in general; however, in its only case regarding the new pandemic, as for today, Le Mailloux v. Franc, the state reaffirmed the existing link between the right to health under the right to life, which raises the opportunities for the victims directly affected by the pandemic to file the cases against states negligence.

In this regard, the case of deputy director of Akhalgori hospital Onise Gatenashvili who was infected by COVID-19 and died due to delayed treatment, has potential before the Court also to make legally sound case since not opening the checkpoint by the de facto government during the pandemic can also be considered as a failure for responding to the outbreak by the Court.

Overall, residents of Akhalgori, especially family members of deceased patients who are also considered to be a victim under ECHR can claim a violation of the right by the Court and monetary compensation. As the overview of the case law suggests, the death of Akhalgori residents can fall into exceptional cases where the deprivation of healthcare triggers the violation of the right to life under article 2. However, this resource can be used mainly when the damage has already materialized.

However, the ECHR also provides the opportunity to request the prevention of gross human rights violations when "there is an imminent risk of irreparable harm. Such measures are decided in connection with proceedings before the court without prejudging any subsequent decisions on the admissibility or merits of the case in question."[274] In view of repeated conflict escalations between Georgia and Russia, the resource of interim measure is of utmost

[273] Lopes de Sousa Fernandes v. Portugal, (n 263) par. 189.
[274] The Council of Europe, European Court of Human Rights, 'Interim Measure - Factsheet' <https://www.echr.coe.int/documents/fs_interim_measures_eng.pdf> accessed 25 May 2021. p.1.

importance for the residents of Akhalgori. Therefore, the following subchapter reviews another human rights protection mechanism under the CoE.

5.4.2 Applying for the Interim Measure in the Context of "Imminent Risk of Irreparable Damage."

According to Article 39 of the ECHR, the Court has the power to issue binding interim measures to the parties in the proceedings before it. A temporary order preserves and protects the rights and interests of the parties concerned in a proceeding before the Court. Interim measure should be accompanied or followed by complete submission to the court in compliance with Article 34 of the ECHR. The measure will be lifted if a complete application is not submitted.[275] Therefore interim measures is a preventive mechanism and can be used when the risk of human rights violation is confirmed.

According to the ECtHR: "interim measures are urgent measures which, according to the court's well-established practice, apply only where there is an imminent risk of irreparable harm. Such measures are decided in connection with proceedings before the court without prejudging any subsequent decisions on the admissibility or merits of the case in question."[276] The role of article 39 further elaborated in the Grand Chamber Judgment on the Askerov v. Turkey case: "article 39 has an avital role in avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted."[277]

Although the grounds for applying Rule 39 of the ECHR are not specified in the Court's Rules, they can be derived from the Court's case law.[278] According to the ECtHR among the most typical cases, the applicants would fear for their lives, thus engaging Article 2, right to life.[279] hence, any person who faces an imminent risk of irreparable harm can submit article 39 of the ECHR. According to the Court's case law, the risk is imminent "only where there are no possibilities to make use of the domestic legal avenues capable of suspending removals, or where such avenues have been used unsuccessfully."[280]

The provision analysis shows that applicants, in our case, residents of Akhalgori or the government of Georgia on behalf of its citizens were entitled to address the Court with the interim measure against Russia who exercises the effective control over the territory in question. The Court, subsequently, could have requested Russia to take concrete measure for preventing gross violations of human rights. This right of the applicants was already

[275] UN High Commissioner for Refugees (UNHCR), Toolkit on How to Request Interim Measures under Rule 39 of the Rules of the European Court of Human Rights for Persons in Need of International Protection, February 2012, available at: https://www.refworld.org/docid/4f8e8f982.html [accessed 25 May 2021] p. 4.
[276] Fact sheet – interim measures (n 275). p.1.
[277] Mamatkulov and Askarov v. Turkey [GC], nos. 46827/99 and 46951/99, §125, ECHR 2005-EctHR.
[278] Toolkit on How to Request Interim Measures under Rule 39, (n 276) p.7.
[279] Fact sheet – interim measures, (n 275) p. 2.
[280] Toolkit on How to Request Interim Measures under Rule 39, (n 276) p.12.

materialized when the checkpoint was closed since it was obvious that the South Ossetian healthcare system would be unable to handle local medical needs. The necessity of activation of this mechanism became even more apparent when the first case of the death of patients was reported.

For uncertain reasons, the Akhalgori humanitarian crisis, ended without Georgia requesting interim measures or addressing the Court with the interstate application. Neither did Akhalgori avail themselves of the legal instrument, which can be explained by the lack of resources. However, as mentioned earlier, amid the persisting turbulent relations between the conflict parties, the application of interim measures may again become relevant for the residents of Akhalgori.

The court's response to the request of the interim measure depends on the substance of the application itself. However, as a rule, it calls on states to obtain from certain acts or omissions which allegedly violates human rights. For example, one of its recent decision on the interim measure, which was concerning the ongoing conflict of Nagorno-Karabakh, the Court urged both Azerbaijan and Armenia to refrain from taking any acts, primarily military actions, that could result in violations of the civilian population's rights under the Convention, including placing their lives and health at risk and, the Court subsequently called to states to comply with their obligations under the Convention, particularly Article 2, right to life.[281]

According to the Court's current jurisprudence, interim measures are binding on a state, and failure to comply with them would inevitably result in a violation of Article 34 of the ECHR.[282]

5.5 Supervisory Mechanism by European Social Charter (ESC)

As an alternative to the European Convention on Human Rights, which applies to civil and political rights, the European Social Charter is a treaty of the Council of Europe that guarantees fundamental social and economic rights. The European Committee of Social Rights (The Committee) monitors states' adherence to the Charter's rights. Based on state reports, the Committee determines if the national circumstances described in the reports are following the Charter. When the Committee determines that a condition is not in conformity, the State Party in question must bring the situation into compliance.[283]

Russia has ratified the Charter and accepted obligation under Article 11 of the ESC, which guarantees the right to health. However, since Russia does not consider itself an occupier power, it does not provide information about its compliance with the right to health in South Ossetia. The Committee's latest conclusion on Georgia does not contain any information about

[281] The Council of Europe, The Court makes a statement on requests for interim measures concerning the conflict in and around Nagorno-Karabakh, Registrar of the Court, November 4, 2020, p.1.
[282] Toolkit on How to Request Interim Measures under Rule 39, p. 16.
[283] International Justice Resource Center, 'Committee on Economic, Social and Cultural Rights' (February 19 2014) <https://ijrcenter.org/un-treaty-bodies/committee-on-economic-social-and-cultural-rights/> accessed May 13 2021.

South Ossetia's healthcare system either, which can be explained by the fact that Georgia does not have effective control over the territory in question. South Ossetia, in turn, is only recognized as a part of Georgia by the CoE.[284] Subsequently, the de facto government, which has not signed any relevant international human rights treaty, cannot cooperate with international organizations as a legal person. Hence, South Ossetia/Akhalgori is beyond the supervision of the Committee. It also should be noted that the CoE is denied physical access to the territories concerned. According to the Decision of the Committee of Ministers Deputies, the CoE Member States "deeply regretted that neither the Commissioner for Human Rights, Council of Europe monitoring bodies, nor the Secretariat delegation preparing the Secretary General's consolidated reports, have been granted access to the Georgian regions concerned …" and "called on the Russian Federation to secure immediate and unrestricted access to the territories beyond the control of the Government of Georgia to the Council of Europe bodies."[285]

Moreover, the collective complaint system, which enables international and local NGOs to bring complaints against any State that allegedly breaches the rights enshrined under the ESC, does not apply to Russia since it has not yet accepted the Additional Protocol for a system for it.[286]

Subsequently, guarantees of the right to health and its protection under the Social Charter for the residents of occupied Akhalgori is instead week and obscure, primarily because of limited mandate of the committee, especially in view of the already problematic legal status of Akhalgori. Consequently, the Committee lacks legal and material capacity to address the crisis in Akhalgori in a timely and effective manner.

5.5 Supervisory Mechanisms under The Committee on Economic, Social, and Cultural Rights

The Committee on Economic, Social, and Cultural Rights (CESCR) is the body of 18 independent experts who monitor the enforcement of the International Covenant on Economic, Social, and Cultural Rights by reviewing reports, individual complaints, inter-State complaints, and investigation demands, as well as preparing general comments, detailed statements, open letters, and general discussion days.

Unsurprisingly, in its reports, Russia does not refer to human rights condition in South Ossetia. The Committee itself is reserved in reminding Russia of its responsibilities regarding occupied Georgia. At the same time, it openly urges Russia to provide quality healthcare in Crimea,

[284] Council of Europe: Parliamentary Assembly, *Resolution 1633 (2008)* (n 67).
[285] Decision on the agenda item "Council of Europe and the Conflict in Georgia", adopted at the 1345th session of the Committee of Ministers' Deputies of the Council of Europe, May 2 2019, available at <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680943a23>.
[286] European Social Charter 'Russian Federation' (<https://www.coe.int/en/web/european-social-charter/russian-federation> accessed May 12 2021.

which is also another occupied territory under Russia's effective control.[287] However, at the same time, the Committee on the Rights of the Child, which is another monitoring body under the UN system, in its most recent observation, notes that "that Abkhazia, Georgia and the Tskhinvali region/South Ossetia, Georgia, remain outside the effective control of the State party."[288]

The CESCR in its "concluding observations" suggest how certain rights should be implemented effectively in the concrete states, however, the committee is reluctant to discuss the question of South Ossetia and Russia's exterritorial jurisdiction in regard to occupied territories of Georgia, hence, Akhalgori has been left out from the Committee's observations.

As of May 5, 2013, the CESCR is also allowed to consider individual cases as well when the conditions outlined in the First Optional Protocol to the ICESCR are fulfilled; however, neither Russia nor Georgia are signatories of the document,[289] which means that this legal procedure is not available for the residents of Akhalgori. Due to the same reason, there is no possibility to address the violation of the right to health by Russia through the interstate complaint either.

5.6 Applicability of the United Nations Bodies

Russia has ratified optional protocols and issued appropriate declarations, enabling individuals to file complaints against the government claiming violations of the (ICCPR), the (CEDAW), and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by its State parties (CAT) and Convention on the Elimination of All Forms of Racial Discrimination (CERD). Furthermore, some UN treaties have investigation protocols that enable the UN treaty body to investigate grave or systemic human rights abuses claims. Russia has agreed to the investigation process of the CAT and CEDAW.[290]

However, while CAT does not contain any provision about health protection, the CEDAW convention only guarantees the legal protection of pregnant women and enclose the provision addressing the right to reproductive and maternal care. Article 12 of the Convention on the Rights of the Child includes particular requirements requiring states to ensure family planning and perinatal care access.[291] Convention obliges states to "ensure to women appropriate

[287] UN Committee on Economic, Social and Cultural Rights (CESCR), consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights.
[288] UN Committee on the Rights of the Child, concluding observations on the report submitted by Georgia under article 8 (1) of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, October 30 2019, CRC/C/OPAC/GEO/CO/1, available at: https://undocs.org/CRC/C/OPAC/GEO/CO/1[accessed May 13 2021].
[289] OHCHR Dashboard' <https://indicators.ohchr.org/> accessed May 13 2021.
[290] International Justice Resource Center 'Russia Factsheet' (March 9 2020) <https://ijrcenter.org/country-factsheets/country-factsheets-europe/russia-factsheet/> accessed May 13 2021.
[291] Jennifer Templeton Dunn, Katherine Lesyna and Anna Zaret, 'The Role of Human Rights Litigation in Improving Access to Reproductive Health Care and Achieving Reductions in Maternal Mortality (2017) 17 BMC Pregnancy and Childbirth 367.

services in connection with pregnancy, confinement and the postnatal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."[292]

According to article 2 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, "Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights outlined in the Convention by that State Party."[293] Therefore, a resident of Akhalgori who falls under the above-listed criteria might file an individual or group complaint against Russia. However, the specific character of the treaty does not allow that the problem is comprehensively addressed.

Concluding Remarks

The examination of the exterritorial jurisdiction under the ECHR and ICESCR revealed that the fact of the occupation alone is enough to establish states exterritorial jurisdiction and hence its responsibility for wrongdoings outside the sovereign territory. For the case of Akhalgori this legal framework means that, Russia who if exercising effective control over South Ossetia is responsible for deprivation of medical care even if it has not had exhaustive control on de facto governments acts and omission in this regard. Human rights protection mechanism were reviewed under two deferent international and regional system, which revealed that while UN bodies fail to address and resolve the humanitarian crises in occupied Akhalgori adequately, the European Court of Human Rights provides efficient tools first to prevent the risk of human rights abuse from materializing and the same time offers the reparation of the violated right in certain circumstances.

[292] UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, December 21 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: https://www.refworld.org/docid/3ae6b3940.html [accessed 13 May 2021], art. 12.
[293] UN General Assembly, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, October 15 1999, United Nations, Treaty Series A/RES/54/4, available at: https://www.ohchr.org/en/professionalinterest/pages/opcedaw.aspx.

CHAPTER 6. GEORGIA'S RESPONSIBILITY TOWARD THE RESIDENTS OF AKHALGORI

International law establishes the scope of obligations of the occupying power towards the territory it has occupied. However, it must also be examined whether the state that has lost effective control over the part of its territory still retains the responsibility to protect its citizens' rights in the occupied area. Therefore, the present chapter seeks to identify the duties of the Georgian state towards Akhalgori residents and, should there be any, to assess their scope. The comprehensive examination of this question requires reviewing the ECtHR case law and looking into the Law of Georgia on Occupied Territories, which makes a particular reservation for the application of human rights in occupied territories. This chapter also suggests concrete recommendations for the government of Georgia and the international community.

6.1. Concept of Residual Jurisdiction and its Applicability to Georgia

As discussed in chapter 5, the jurisdiction that defines the state's competencies regarding its rights and responsibilities is primarily territorial. According to article 1 of ECHR, which affirms: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention is applicable all over the state's territory. As a result, obligations of State parties are activated whenever an individual is within a State party's jurisdiction."[294]

The territorial understanding of jurisdiction heavily influenced the ECHR's primary position regarding the disputed territories. Even though the exterritorial applicability of the Convention became a solution concerning the occupied territories, the Court, by introducing first the concept of rebuttal and then residual jurisdiction, tried to underline that the state that has lost its effective control is presupposed to have jurisdiction over the territory still or enjoys only limited jurisdiction. As it will be demonstrated later, holding a state responsible for not fulfilling its positive obligations in the territory where it has lost effective control have been met heavy criticism and therefore, the Court also rejected to retain this position; however, it would be interesting to have a closer look to the development of the case law in this regard.

According to the Commission's initial stance, there was an assumption that the state retained jurisdiction of much of the territory over which it had a title. Still, that presumption was rebuttable on the facts.[295] If it was refuted, the sovereign state no longer had responsibilities under the ECHR because it lacked control in the sense of Article 1.[296] The first such cases were northern Cyprus vs Turkey; The Commission initially confirmed Cyprus's continued sovereignty over the Turkish Republic of Northern Cyprus (TRNC) but, given the lack of actual control over the area, it was determined that Cyprus was not responsible for human rights

[294] ECHR (n 213) art. 1.
[295] Milanović and Papić (n 217). p.7.
[296] ibid. p. 8.

violations in the region, but Turkey, the occupying power. Therefore, Cyprus's sovereignty over the contested territory was rebutted.

This approach was shifted by the case of Ilaşcu, which was brought against two States, one of which was Moldova which could not exercise effective control in its territory and another one, Russia, which has supported the creation of the de facto state. In this case, regardless of its lack of effective control, the Court established Moldova's Responsibility.[297]

The Court determined that: "the Moldovan Government… does not exercise authority over part of its territory, namely that part which is under the effective control of the [separatist movement]."[298]

however, "even in the absence of effective control over the Transdniestria region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention."[299]

Therefore, according to this judgment, Moldova has not ceased to have jurisdiction and its obligations under ECHR. Instead, the Court considered that the extent of its authority was limited to those identified positive duties such as taking diplomatic, economic, judicial measures.[300] determining whether this obligation was fulfilled, the requirement to "what extent minimum effort was nevertheless possible and whether it should have been made."[301]

As Grant notes, by upholding residual jurisdiction, "the European Court implicitly recognized the well-established proposition that it takes a great deal more than a brief silence for a State to acquiesce in a loss of territory."[302] However, even though this position attempts to ensure the protection of individuals, it still has side results that could undermine the objectives it tries to achieve. The first element of the positive responsibilities has been interpreted as having a political rather than a legal connotation. In contrast, the second has been criticized because what can matter for authority is only a State's capacity to rule, not its title over territory.[303]

According to Milanovic employing residual jurisdiction has no meaningful impact on improving the human rights of any affected individuals since protection for human rights in Transdniestria is mainly dependent on the actions of local authorities.[304] Therefore, finding

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[297] Thomas D Grant, 'Ukraine v. Russian Federation in Light of Ilaşcu: Two Short Points' (*EJIL: Talk!* 22 May 2014) <https://www.ejiltalk.org/ukraine-v-russian-federation-in-light-of-ilascu-two-short-points/> accessed 20 May 2021.
[298] Ilaşcu and Others v. Moldova and Russia (n 215) § 330.
[299] Ilaşcu and Others v. Moldova and Russia (n 215) § 331.
[300] Milanović and Papić (n 217). p.11.
[301] Ilaşcu and Others v. Moldova and Russia (n 215) § 334.
[302] Grant (n 295).
[303] Strasburg Observers, 'Ilașcu: From Contested Precedent to Well-Established Case-Law' (*Strasbourg Observers*, 31 October 2019) <https://strasbourgobservers.com/2019/10/31/ilascu-from-contested-precedent-to-well-established-case-law/> accessed 20 May 2021.
[304] Milanović and Papić (n 217). p.22.

Moldova's positive obligations under the ECHR has been widely regarded to have only a "marginal benefit."[305] which in turn also raised "problems of fairness."[306] This is most likely why after Ilașcu, Moldova has never found responsible for violating positive obligation for not taking diplomatic, economic, judicial, or other measures. Development of the case law following the case of Ilașcu, for the Court to find a violation of the positive obligation, the applicant needs to be in Moldova's soil and then transferred to Transdniestria.[307]

Therefore, in the context of the above-given analysis, it is questionable whether Georgia can be held responsible for its failure to fulfil positive obligations since the victims of the humanitarian crises were beyond the effective control of Georgia. However, this does not exempt Georgia from its responsibility. The Georgian government should apply all the necessary and available measures during the humanitarian crises.[308]

It should be noted that Georgia's international obligations toward its citizens residing in the occupied territory come into conflict with the Law of Georgia on Occupied Territories adopted in 2008,[309] soon after the August war. The law imposes liability on the Russian Federation for human rights violations in the occupied territories.[310] At the same time, the Georgian government undertakes to periodically provide international organizations with the information about human rights condition of the occupied territories.[311] The Venice Commission also criticized this record and clarified that Russia's responsibility for violating rights is established only by international law, and it cannot be regulated by national law.[312]

Therefore, while holding Georgia responsible for unfulfilled positive obligations is questionable under the ECtHR's existing case law, the country still bears the responsibility towards the Akhalgori-settled Georgian citizens under the national constitution and international treaties ensuring human rights protection.

6.2 The Policy to Be Introduced by the Georgian Government to Enhance Human rights Protection in Akhalgori

The humanitarian crises that emerged in Akhalgori demonstrated the urgent need for Georgia to build a policy of reconciliation with the de facto government. The escalation of the political situation between Tbilisi and Tskhinvali also showed that the tension between the conflict

[305] ibid. p. 21.
[306] Grant (n 295).
[307] Strasbur Observers, (n 303).
[308] Public Defender of Georgia (n 25). p.23
[309] Law on Occupied Territories, (n 59).
[310] Human Rights Education and Monitoring Center, 2020, Assessment of the Law on Occupied Territories from Rights and Humanitarian Perspectives, (2020) available at: shorturl.at/akvC8, p.4.
[311] Law on Occupied Territories, (n 59) art. 7.
[312] OPINION ON THE LAW ON OCCUPIED TERRITORIES OF GEORGIA, Adopted by the Venice Commission At its 78th Plenary Session, (Venice, 13-14 March 2009), para 37-39.

parties which negatively affects the lives of the residents of Akhalgori, might escalate at any time. Subsequently, people in Akhalgori have to live in constant fear and anxiety.

These circumstances oblige Georgia to exhaust all the possible remedies to guarantee the protection of its citizens in occupied Akhalgori. Georgia should employ all the relevant international platforms in order to initiate peaceful settlement of the conflict that triggered the closure of the crossing point with Tbilisi controlled territory. The establishment of effect-oriented cooperation and constructive dialogue with the de facto government of South Ossetia can alleviate the risks of another humanitarian crisis. However, it should be noted that the separatist regime rejects any cooperation with Georgia proper.

Nevertheless, if Georgia, with the help of international community menages to establish a peaceful relationship with South Ossetia, it should initiate a special status-neutral coordination format focusing on human rights protection in occupied territories. The primary purpose of this format should be averting the systemic violations of human rights and humanitarian crises.[313] With the help of international organizations, Georgia should make all the effort possible to make human rights a priority for the de facto government as well, since it is not only ethnic Georgians who suffer from the deprivation of the rights but also Ossetians. It will be a step forward if the so-called borders of South Ossetia will open for the international organisations and allow them to monitor human rights protection in the region. Therefore, Georgia has to strengthen its diplomatic effort to put the international community under pressure in order them to be more actively engaged with the territory in question. In the absence of local civil society, the establishment of human rights monitoring mechanisms by the CoE and the UN and the Organization for Security and Co-operation in Europe (OSCE) could have been essential for avoiding critical situations.

The already existing framework for conflict resolution in this context is the Geneva International Discussions (GID), which address the security and humanitarian consequences of the Russo-Georgian War of August 2008,[314] should be used as much as possible to avoid escalations of conflicts and subsequent violations of the rights of civilians. Even though the high political politicization of the discussions fails to improve the legal situation in the conflict zone, Georgia should intensify its effort to draw attention to the protection of human rights within the framework.

At the same time, Georgia needs to make a diplomatic effort to proactively inform the international community about systemic human rights abuses in Abkhazia and the Tskhinvali region / South Ossetia, including raising awareness of all possible violations of the fundamental rights of ethnic Georgians and Ossetians living in Akhalgori and mobilizing the international community in advance.

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[314] Civil.ge '50th Round of Geneva International Discussions (12 December 2019) <https://civil.ge/archives/331178> accessed 21 May 2021.

Finally, Georgia should make full use of all international legal mechanisms to intervene in a timely and effective manner to protect human rights in a crisis and promote access to medical care. In this regard, the Georgian government needs to turn to the European Court of Human Rights and request an interim measure if the checkpoint is closed again, obliging Russia to take urgent steps to prevent human rights violations. At this stage, Georgia has all the legal grounds and leverage to submit another interstate application against Russia for systemic and structural violation of the right to health in Akhalgori.

Recommendations to Georgia's government:

Georgian government should use all the supranational legal measures available to prevent another humanitarian crisis in Akhalgori. The interim measures that the ECtHR may adopt should be used immediately if the risk of human rights violations gets imminent and real. It is also highly encouraged to take another interstate application against Russia addressing the deprivation of medical care in Akhalgori and the subsequent death of people.

Conclusion

In carrying out this analysis, two relevant fields of international law, the IHL and HRL, were examined in relation to Akhalgori humanitarian crises. The focus was on these branches of law which guarantees the right to health in occupied territories and their exterritorial applicability. In doing so, it has been found that human rights law provides more detailed and comprehensive protection of this right due to its specific nature. However, international humanitarian law also is significant since it sets out special provisions addressing occupying powers obligation to provide medical care for civilians in the occupied territories. Therefore, while the right to health of the residents of Akhalgori is under double protection of human rights and humanitarian law, the occupying power has a responsibility toward Akhalgori residents according to both these fields of law, which mostly complement each other in this regard. Since the status of occupation of Akhalgori is established according to humanitarian law, the protection guaranteed for civilians under the Geneva Conventions applies to Akhalgori by default. Therefore, in this case, Russia, which has occupied Akhalgori by proxy, is bearing an obligation to ensure the right to health of the residents of Akhalgori.

Russia is also responsible for protecting the right to health under HRL. However, the legal base for this finding is relatively complicated but still solid and sound. To start by, the ICESCR, which has played a crucial role in establishing the foundation for the right to health, has a "free standing" mode of applicability, meaning that obligations under the ICESCR are not constrained to the state's sovereign territory. The absence of the so-called jurisdiction clause enables broad interpretation for its applicability exterritorialy. The ESCR Committee has supported this understanding by urging Israel to ensure its obligations toward occupied Palestine under the ICESCR.

The ECHR does not provide the specific scope of "jurisdiction"; however, the ECtHR, by using a particular "effective overall test", has established the exterritorial applicability of the convention case by case. After being criticized for incoherency of the case law concerning the conventions exterritorial dimension, recent decisions of the ECtHR accentuated that the Court no longer stresses territory as a basis for jurisdiction, especially when it refers to occupied territories. In these respects, the most recent judgments of the Court regarding *Georgia v Russia's* exterritorial jurisdiction, which was issued while writing this thesis, made a significant clarification. The Court underlined that occupation of the territory presupposes exterritorial jurisdiction of the Convention. In other words, this means that Russia exercises exterritorial jurisdiction in Akhalgori and, therefore, as an occupying power, must ensure the right guaranteed under the ECHR.

However, one more interesting question emerged during this research after resolving the question concerning jurisdiction and responsibilities. Namely, what does Russia's obligation under the right to health imply? It is limited to "respect" and "protect", e. A negative aspect of the right, or does it also extend "fulfil" the right, involves taking positive actions towards the full realization of rights. Considering the temporary nature of the occupation, it was questionable whether the occupying power is expected to take steps that require time and

resources and are designed to achieve a long-term result. In this particular case, it needed to be clarified whether Russia's responsibility included the obligation to mobilize material resources to maintain the healthcare system. None of the international instruments indicates the specific volume of the commitment to realize the social and economic rights of the occupying power. Nevertheless, it has been suggested in the academia that, during a prolonged occupation, the occupying power may be required to fulfil the core minimum of duties and maintain the long-term strategic dimensions of fulfilling the population's rights. Considering Russia's solid and prolonged presence in the region, it would be fair to apply this opinion concerning the scope of obligations to occupying powers responsibilities towards Akhalgori.

The legal remedies to prevent the humanitarian crises due to inadequate medical care or lack of access to a proper healthcare system and damage compensation were also discussed within the scope of the IHL and HRL. Contrasting with HRL, which offers several human rights protection mechanisms, it was identified that the IHL has no capacity for obliging the state parties to fulfil their duties under the Geneva Conventions. Therefore, to answer the above-posed questions, the focus was narrowed down to human rights law.

The review of protection mechanisms under HRL found that the Council of Europe can take effective and timely action in a humanitarian crisis if the individuals directly affected by the human rights violation approach the ECHR first.

However, after establishing Russia's jurisdiction over Akhalgori for the purposes of Article 1 of the Convention, another critical question in this regard was whether it is possible to bring a case concerning alleged violations of the right to health under the ECHR when the right to health or healthcare is not explicitly provided in the Convention. However, the existing case law research pointed out that an incremental interpretation of the traditional canon of civil and political rights, suggested by the Court, enabled itself to address violations of social and economic rights and, among them, violations of the right to health. It is observed that the right to health, traditionally, is claimed under the right to life; however, for the respondent state to be found in violation of the right to health, the applicant should demonstrate the existence of a systemic problem in the medical system, which should go beyond mere negligence of the medical staff. It has been shown in this thesis that the victims of the humanitarian crises of Akhalgori have the potential to contribute to the existing case law by bringing the case to the ECHR. The unique factual circumstances of the situation in Akhalgori, which were created by combining passive and active deprivation of healthcare, require proper, in-depth legal engagement by the Court.

As for the UN bodies, it has been observed that the limited mandate and restrained policy toward occupied Akhalgori enable them to engage with the urgent needs of the humanitarian crises effectively.

Therefore, it has been established that, while Russia as the occupying power should provide the right to health to the residents in Akhalgori, it at the same time needs to be held responsible

for not enabling timely and adequate access to medical care in Akhalgori. Since the ECHR is the only practical way for preventing or/and claiming compensation for human right violation, Georgia has to use all legal measures available to protect its citizens according to its national and international obligations.

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