e-books of the kind Ulmer offered to the library in this case. But any digitization and dissemination conducted under such a liberal reading must still conform to the overarching rule that fair use exceptions must be limited to "special cases" that do not conflict with normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder—a limitation contained in all of the relevant international copyright treaties.

Finally, it remains to be seen whether the U.S. courts, the European courts, and the courts of other jurisdictions ultimately arrive on the same page as to mass digitization of library collections and their shared obligations under international copyright treaties. As the contours of mass digitization continue to be litigated, and perhaps legislated, one must remember that copyright protection is mandatory under international copyright treaties that now bind most countries. But fair use exceptions to copyright protection remain permissive under those same treaties.

The legality of mass digitization of library collections and its ultimate communication depends on the scope of fair use exceptions. Creation of a global, digital library will entail reconciliation of differing conceptions of fair use and even nonrecognition of fair use in some countries. Australia's Copyright Act, for example, contains no broad fair use exception but, instead, establishes "fair dealing" exceptions that are confined to specific, prescribed purposes. The government is therefore revisiting whether to transition to a fair use regime that could respond more flexibly to new technologies.[27] In sum, challenges remain in balancing copyright protection and mass digitization of libraries, where the traditional regime is often based on the outmoded conception of libraries as geographically discrete, brick-and-mortar institutions with an identifiable body of patrons and a quantifiable inventory of print or phonographic material.

ANNE-MARIE CARSTENS
Georgetown University Law Center

European Convention on Human Rights—Article 4 of Protocol 4—arrest, detention, and collective expulsion—inhuman or degrading treatment—judicial review of detention—right to an effective remedy

GEORGIA v. RUSSIA (I). Application No. 13255/07. 53 ILM 813 (2014).
European Court of Human Rights (Grand Chamber), July 3, 2014.

On July 3, 2014, the Grand Chamber of the European Court of Human Rights (Court) rendered its judgment in *Georgia v. Russia*,[1] concerning Russia's collective expulsion of a large number of Georgian nationals between October 2006 and January 2007. The Court held that Russia had violated several provisions of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention or ECHR),[2] in particular Article 4

[27] AUSTRALIAN LAW REFORM COMMISSION, DISCUSSION PAPER 79, COPYRIGHT AND THE DIGITAL ECONOMY (2013), *available at* http://www.alrc.gov.au/sites/default/files/pdfs/publications/dp79_whole_pdf_.pdf.

[1] Georgia v. Russia (I), App. No. 13255/07 (Eur. Ct. H.R. July 3, 2014), 53 ILM 813 (2014) [hereinafter Judgment]. Judgments, decisions, and other documents of the Court cited herein are available at its website, http://hudoc.echr.coe.int.

[2] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 5, 213 UNTS 222.

of Protocol No. 4 to the ECHR (prohibition of collective expulsions). Because the Russian government had failed to cooperate with the Court by providing relevant information, the Court also found a violation of Article 38 of the ECHR, which obliges states to furnish "all necessary facilities" for the effective conduct of the Court's investigation of the case. The Court deferred its decision on the question of "just satisfaction" under Article 41 pending further submissions by the parties. This was the first of three interstate proceedings that Georgia has brought against Russia under the special procedure of Article 33, and it is the first decision on the merits of these cases.

In its application, filed March 26, 2007, Georgia alleged that the Russian government had pursued an "administrative practice of arresting, detaining and collectively expelling Georgian nationals from the Russian Federation in the autumn of 2006, in a violation of Articles 3, 5, 8, 13, 14 and 18 of the Convention" (para. 3). It contended that the expulsions took place in response to Georgia's arrest, on September 27, 2006, of four Russian service personnel in Tbilisi for spying. Shortly thereafter, Russian authorities suspended "all aerial, road, maritime, railway, postal and financial links with Georgia" (para. 22). Georgia contended that between September 2006 and the end of January 2007, "Georgian nationals were expelled regardless of whether they were lawfully or unlawfully resident in the Russian Federation, simply because they were Georgian" (para. 24).[3] For its part, Russia denied that the expulsions constituted reprisals and claimed it had "merely continued applying the statutory provisions for the prevention of illegal immigration in compliance with the requirements of the Convention and the Russian Federation's international obligations" (para. 25).

The European Court reviewed the three instructions of the Main Directorate of Internal Affairs from St. Petersburg and the Leningrad Region, of October 2 and 3, 2006, and an "order" and an "information note," which, according to Georgia, document a policy of expulsions. The Court noted that these documents purportedly substantiated the localization, detention, and expulsion of Georgians by citing the Russian government's circulars Nos. 0215 and 849. But Russia characterized these circulars as "state secrets" and argued that they could not be disclosed to the European Court (paras. 32, 98). Georgia alleged that these two circulars were essential to proving the attribution of the expulsions to the state of Russia.

The Court also took note of the three written inquiries of October 2 and 3, 2006, from the Directorate of Internal Affairs of two Moscow districts requesting that schools identify Georgian pupils. Russia confirmed these requests and provided more information about similar requests sent to other schools but argued that they had nothing to do with the Georgians' expulsions. Instead, Russia claimed it had intended to find out whether immigrant families had paid bribes to schools and whether certain schoolchildren were "living in insalubrious conditions" (para. 37). The Court also considered reports from the Parliamentary Assembly of the Council of Europe and several nongovernmental organizations that demonstrated that the Russian government had systematically expelled Georgians (paras. 39–40). In addition, the Court summarized witness statements that discussed how Russian immigration legislation results in the arrest, detention, and expulsion of Georgians (paras. 41–61), as well as how Russian legislation applies to the entry and residence of Georgians, among other things.

[3] According to Georgia's submissions, some 4634 expulsion orders were issued against Georgian nationals during the relevant time period. *See* Judgment, para. 27.

In admissibility proceedings, a chamber of the Court had decided that the question of exhaustion of domestic remedies, as required by ECHR Article 35 on admissibility, is so closely related to the question of the existence of an administrative practice that they must be considered jointly during the examination of the merits.[4] On the merits, the Grand Chamber determined that two elements of an administrative practice were evident: reiteration of the same acts or conduct, and tolerance or acquiescence by state officials (paras. 122–46). The finding of an administrative practice allowed the Court to analyze, in only a general manner, the Russian objection that domestic remedies had not been exhausted, without going into each individual case. The Court ruled that the victims were prevented from exhausting the domestic remedies because Russian officials had intimidated the expelled Georgians, Russia maintained few personnel at its consulate in Georgia, and only a few appeals had succeeded. As for the specification in Article 35 that applications to the Court must be filed within six months, the Grand Chamber considered that, in the absence of domestic remedies, the time limit was "to be calculated from the date of the act or decision which is said not to comply with the Convention."[5] Since Georgia filed its case on March 26, 2007, and the events started in October 2006, Georgia had satisfied the six months' rule.

On the basis of the parties' submissions (including documentary evidence) and various witness statements, the Court found that "the respondent Government have fallen short of their obligation to furnish all necessary facilities to the Court in its task of establishing the facts" (para. 109), in violation of Article 38 of the Convention. Lacking credible information that would refute the Georgian allegations, the Court therefore "assume[d] that during the period in question more than 4,600 expulsion orders were issued against Georgian nationals, of whom approximately 2,380 were detained and forcibly expelled" (para. 135), which led it to conclude that a "coordinated policy of arresting, detaining and expelling Georgian nationals was put in place in the Russian Federation which amounted to an administrative practice for the purposes of Convention case-law" (para. 159). A further consideration, which constituted an "administrative practice in breach of Article 4 of Protocol 4," was that "the expulsions of Georgian nationals during the period in question were not carried out following, and on the basis of, a reasonable and objective examination of the particular case of each individual" (para. 178).

The Court then weighed the details of the collective expulsion to determine whether Russia had violated other European Convention rights. In particular, the Court sought to clarify whether Russia's actions in detaining Georgians before expelling them had complied with Article 5(1) and (4) of the ECHR (para. 183). Since the Court concluded that collective expulsions were illegal, the mass arrests violated Article 5(1) on lawful arrests and detention. In addition, as the Parliamentary Assembly and nongovernmental organizations reported, the Georgian nationals had no effective recourse against the detentions, which violated Article 5(4) on the right of access to a court (para. 188).

The Court also considered the conditions of detention, which lasted from a few hours to one or two days in police stations, and then for two to fourteen days in detention centers for foreigners (para. 193). Prison cells were overpopulated, adequate health and sanitary facilities were lacking, and inmates had no privacy relating to such basic needs as the use of toilets. As

[4] Georgia v. Russia (I), App. No. 13255/07, Decision on Admissibility, para. 50 (Eur. Ct. H.R. June 30, 2009) [hereinafter Admissibility Decision].

[5] Judgment, para. 160 (quoting Admissibility Decision, para. 47).

a result, the Court concluded that Russia had violated Article 3 of the ECHR on inhuman and degrading treatment (para. 205). Moreover, the detainees' deprivation of effective access to judicial review of their arrests and the conditions of their detentions meant that Russia had also violated Article 13 on effective remedies, in conjunction with Articles 5(1) and (4), and Article 3.

In response to Georgia's allegation that Russia committed the violations by discriminating on the grounds of race and/or national origin, prohibited under Article 14 of the ECHR, Russia argued that the arrest and expulsion of Georgians was part of its general immigration policy, as applied to other nationalities on its territory (para. 219). The Court observed that these allegations were the same as those under Article 4 of Protocol No. 4, and Article 5(1) and (4) of the ECHR, so that it was unnecessary to inquire into such a violation of Article 14 (para. 220). Similarly, the Court did not consider the violation of Article 14 in conjunction with ECHR Article 3 since the conditions of detention were the same for all detainees in Russia.

The Court rejected Georgia's claim under Article 1 of Protocol No. 7 that Georgians lawfully residing in Russia had been expelled because Georgia had not sufficiently substantiated the claim (para. 230). It also rejected the claims for violation of Articles 18 and 8 of the ECHR, and Articles 1 and 2 of Protocol No. 1 (paras. 224, 236), the latter three for the same reason. Finally, the Court deferred the decision on reparations under Article 41 of the ECHR to a later stage (para. 240).

Five of the seventeen judges dissented. Opinions varied as to whether the Court should have analyzed allegations of unlawful detention and expulsion under the Convention's general provisions that require the availability of legal recourse (Article 13) and nondiscrimination (Article 14). Judge López Guerra maintained that once a violation of Article 5(4) was established, it would be "redundant" to evaluate the same facts under Article 13.[6] Judge Tsotsoria argued that Russia also violated Article 14, Article 18 in conjunction with Article 5 of the ECHR, and Article 14 in conjunction with both Article 4 of Protocol No. 4 and Article 3 of the ECHR. Judge Dedov, the Russian judge on the Grand Chamber, criticized the Court for not engaging in a thorough investigation and for interpreting the facts too narrowly. In his view, the Grand Chamber should have dismissed the entire claim against Russia.

* * * *

Ever since Georgia gained independence after the dissolution of the Soviet Union in 1991, its relationship with Russia has been marked by political crises and violent incidents. By the end of the summer of 2006, political tensions between the two states had reached a critical point. When Georgia detained four Russian servicemen, Russia retaliated, including by expelling many Georgians. Two years later, in August 2008, Georgia and Russia engaged in military conflict over South Ossetia and Abkhazia.

These incidents triggered several legal actions before international tribunals and human rights bodies. The present case was the first of a series of three brought by Georgia before the European Court of Human Rights. The second concerned the Russian occupation of South Ossetia and Abkhazia in August 2008.[7] And the third concerned Russia's detention of four

[6] Judgment, Partly Dissenting Opinion of Judge López Guerra Joined by Judges Bratza and Kalaydjieva, 3d para.

[7] To date, the Court has decided only on admissibility. Georgia v. Russia (II), App. No. 38263/08, Decision [on admissibility] (Eur. Ct. H.R. Dec. 13, 2011).

children in South Ossetia but was withdrawn after their release in December 2009.[8] In 2008, Georgia also took Russia to the International Court of Justice (ICJ) for violating the International Convention on the Elimination of All Forms of Racial Discrimination.[9] The ICJ adopted provisional measures in favor of Georgia but subsequently rejected the claim because Georgia had not exhausted the negotiation requirement of that Convention's Article 22.[10] On Russia's behalf, three lawyers from South Ossetia filed more than 3300 individual complaints with the European Court of Human Rights in the name of Russian soldiers. So far, the Court has joined and dismissed 1549 of these cases for lack of response to requests for more information.[11] The remaining cases are pending.

Georgia's resort to international courts to denounce and obtain reparation for Russia's hostile acts demonstrates that smaller countries can benefit from the rigorous judicial application of international law. In such cases, the interstate procedure, as laid out in Article 33 of the ECHR, gains importance. At the beginning of this millennium, some observers announced the "failure" of the interstate procedure, arguing that it was barely used and did not fulfill the goal of providing a "collective guarantee."[12] But times seem to have changed. The interstate procedure has become a means of protecting smaller countries from neighboring states' hostile acts. In fact, Ukraine has filed an interstate application against Russia before the European Court for using, and threatening to use, military force against the Ukrainian population on Ukrainian territory.[13] Ukraine is also filing cases and depositing information with other international human rights bodies.[14]

The judgment in *Georgia v. Russia* is timely, having been handed down during the middle recess of the sixty-sixth session of the International Law Commission (ILC). During that session, the ILC adopted the final version of the Draft Articles on the Expulsion of Aliens.[15] These

[8] Georgia v. Russia, App. No. 61186/09, Decision [on withdrawal] (Eur. Ct. H.R. Mar. 16, 2010).

[9] International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, S. EXEC. DOC. 95-C (1978), 660 UNTS 195 (entered into force Jan. 4, 1969).

[10] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Provisional Measures, 2008 ICJ REP. 353 (Oct. 15) (reported by Cindy Galway Buys at 103 AJIL 294 (2009)); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Preliminary Objections, 2011 ICJ REP. 70, 120–40 (Apr. 1) (reported by Bart M. J. Szewczyk at 105 AJIL 747 (2011)).

[11] *See* Eur. Ct. H.R. Press Release No. 006, 1,549 Cases Against Georgia Concerning the Georgia-Russia Conflict of August 2008 Struck out by the European Court of Human Rights (Jan. 10, 2011).

[12] *See, e.g.*, FRÉDÉRIC SUDRE, DROIT INTERNATIONAL ET EUROPÉEN DES DROITS DE L'HOMME 405 (5th ed. 2001) (affirming that "[l]a faillite du recours interétatique est manifeste"). This observation appears to be particularly disenfranchising, since the enforcement of the Convention is based on the idea of a collective mechanism. See, for example, the fifth paragraph of the ECHR preamble, which establishes that the European system provides for collective enforcement.

[13] The European Court adopted interim measures against Russia in this case on March 13, 2014, the day it was lodged as Application No. 20958/14, *Ukraine v. Russia*. *See* Eur. Ct. H.R. Press Release No. ECHR 073 (2014) (Mar. 13); *see also* Eur. Ct. H.R. Press Release No. ECHR 345 (2014) (Nov. 26) (reporting the Court's invitation to Russia to submit observations on admissibility of the case).

[14] According to the Ukrainian minister of justice, Pavlo Petrenko, so far Ukraine has applied to the UN Human Rights Committee and the European Committee for the Prevention of Torture, besides the European Court of Human Rights. *See* Ukraine Crisis Media Center, *Ukraine Files USD 85 Billion Lawsuit Against Russia* (June 5, 2014), *at* http://uacrisis.org/ukraine-files-usd-85-billion-lawsuit-russia/.

[15] Draft Articles [on the Expulsion of Aliens] and Commentaries Thereto, Report of the International Law Commission [ILC], Sixty-Sixth Session, para. 44, UN GAOR, 69th Sess., Supp. No. 10, at 17, UN Doc. A/69/10 (2014) [hereinafter Expulsion Draft Articles]. The 66th session met from May 5 to June 6, and July 7 to August 8, 2014.

draft articles, the result of thirteen years' work by the ILC and nine reports by Special Rapporteur Maurice Kamto, are intended to codify the customary rules on expulsion of aliens.[16] Although, historically, the expulsion of aliens was common in situations of tension between states, under contemporary international law collective expulsions seem to be prohibited.[17] This *opinio juris*[18] is supported by several international instruments, as well as various regional human rights conventions.[19]

Georgia v. Russia was filed specifically under Article 4 of Protocol No. 4 to the ECHR, a treaty norm that prohibits collective expulsions. This treaty norm confirms the general regime as laid out in the ILC's draft articles. *Georgia v. Russia*, however, is marked by an additional feature: the facts suggest that Russia imposed collective expulsion as a countermeasure against Georgia for its detention of the four Russian servicemen.[20]

Although the European Court analyzed this case within the four corners of the ECHR, under general international law the case could fall within the regime on countermeasures as set forth in Articles 49–54 of the ILC Articles on State Responsibility.[21] Specifically, under Article 50(1)(b), countermeasures must not affect obligations of fundamental human rights. The provision on fundamental human rights has been interpreted as prohibiting the suspension of nonderogable human rights.[22] Since Article 4 of Protocol No. 4 is not a nonderogable right according to ECHR Article 15,[23] it remains open whether the formulation on countermeasures in the Articles on State Responsibility encompasses the current development of general human rights law.

The recent adoption of the Draft Articles on the Expulsion of Aliens allows such questioning of the Articles on State Responsibility. On the one hand, one may argue that it is time to revise the restrictions on countermeasures and extend the human rights that may not be violated by such measures.[24] In addition, the regime of countermeasures should be made compatible with

[16] ILC, Preliminary Report on the Expulsion of Aliens, para. 28, UN Doc. A/CN.4/554 (2005) (Maurice Kamto, special rapporteur).

[17] Article 9(2) of the Expulsion Draft Articles, *supra* note 15, contains such a prohibition.

[18] *See* ILC, Third Report on the Expulsion of Aliens, para. 115, UN Doc. A/CN.4/581 (Apr. 19, 2007) (Maurice Kamto, special rapporteur).

[19] For an international instrument, see, for example, Declaration of Principles of International Law on Mass Expulsion, 62 INTERNATIONAL LAW ASSOCIATION, CONFERENCE REPORT 13 (1986). For regional human rights treaties, see ECHR Protocol No. 4, Art. 4, *opened for signature* Sept. 16, 1963, ETS No. 46, *as amended by* Protocol No. 11, ETS No. 155; African Charter on Human and People's Rights, Art. 12(5), June 27, 1981, 1520 UNTS 217, 21 ILM 58 (1982); American Convention on Human Rights, Art. 22(9), Nov. 22, 1969, OASTS No. B-32, 1144 UNTS 123; Arab Charter on Human Rights, Art. 26(2), May 22, 2004, 12 INT'L HUM. RTS. REP. 893 (2005), 24 B.U. INT'L L.J. 147 (2006). Specifically for migrant workers, see International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art. 22(1), Dec. 18, 1990, 2220 UNTS 3, 30 ILM 1517.

[20] See further the comments by Judge Tsotsoria in Judgment, Partly Dissenting Opinion of Judge Tsotsoria, pt. I.

[21] Text of the Draft Articles [on Responsibility of States for Internationally Wrongful Acts] with Commentaries Thereto, Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, at 30, UN Doc. A/56/10 (2001) (adopted by the ILC on Aug. 9, 2001). Article 49(2) provides that "[c]ountermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State."

[22] *Id.*, Art. 50, cmt. 2.

[23] Note that of all the human rights applied in the present case of *Georgia v. Russia*, only Article 3 (prohibition of torture) falls into the category of nonderogable rights under the ECHR.

[24] In 1992, the special rapporteur, Gaetano Arangio-Ruiz, adverted to problems that could arise from wording the human rights limitation for countermeasures too narrowly. ILC, Fourth Report on State Responsibility, para. 81, UN Doc. A/CN.4/444 & Adds.1–3, at 31 (May 12, 25, & June 1, 17, 1992).

regional human rights obligations that prevail over general rules, in accordance with the principle of *lex specialis*.[25] On the other hand, one may also criticize the Draft Articles on the Expulsion of Aliens. They do not refer at all to suspension in emergency situations, which suggests that states may not suspend these rights in any situation. Such an understanding reaches beyond established customary law to become progressive development of international law.[26] Nevertheless, the commentary to draft Article 3, on the "other applicable rules of international law," states that these "include rules in human rights instruments concerning derogation in times of emergency."[27] Thus, allowing states to suspend the prohibition of collective expulsion in cases of emergency may also enable them to employ countermeasures in accordance with Article 50 of the Articles on State Responsibility. For the sake of clarity, it might have been more appropriate for the ILC to incorporate an express reference to suspension, in cases of emergency, in the text of the draft articles themselves.[28] Such a reference would signal the applicability of the provision on countermeasures in the Articles on State Responsibility and enhance the coherence of international regulation.

BJORN ARP
American University College of Law

[25] The ILC has not yet fully analyzed this topic. See, in particular, the references on the relationship between self-contained regimes, such as the European human rights system, and general international law, in the report of the ILC study group Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, paras. 159–64, UN Doc. A/CN.4/L.682 (Apr. 13, 2006).

[26] The commentary to the Expulsion Draft Articles confirms that they are "both a work of codification of international law and an exercise in its progressive development." Expulsion Draft Articles, *supra* note 15, Art. 3, cmt. 2, at 23.

[27] *Id*.

[28] On the need to provide clearer rules on suspension in cases of emergency, see further Sean D. Murphy, *The Expulsion of Aliens and Other Topics: The Sixty-Fourth Session of the International Law Commission*, 107 AJIL 164, 166 (2013).