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# The right to life in internal armed conflict: a study of the Chechen cases before the European Court

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# Contents

<b>SUMMARY</b>	<b>1</b>
<b>PREFACE</b>	<b>3</b>
<b>ABBREVIATIONS</b>	<b>4</b>
<b>1 INTRODUCTION</b>	<b>6</b>
<b>2 THE RIGHT TO LIFE IN THE LAW OF INTERNAL ARMED CONFLICT</b>	<b>7</b>
2.1 Article 3 Common to the Geneva Conventions	8
2.2 Additional Protocol II	9
2.3 Customary law applicable in internal armed conflicts	9
2.3.1 <i>The principle of distinction</i>	10
2.3.2 <i>The principle of proportionality</i>	12
2.4 Applicability: Definition of internal armed conflict	12
2.5 Problems relating to the law of internal armed conflict	14
2.5.1 <i>The qualification of a conflict</i>	14
2.5.2 <i>Threshold for application</i>	15
2.5.3 <i>Absence of a clear definition of combatants</i>	15
2.5.4 <i>Absence of 'grave breaches' in internal armed conflict</i>	16
<b>3 INTERNATIONAL HUMAN RIGHTS LAW</b>	<b>17</b>
3.1 The application of HRL in armed conflict	17
3.2 The right to life in the ICCPR and the ECHR	20
3.2.1 <i>Article 6 ICCPR</i>	20
3.2.2 <i>Article 2 ECHR</i>	22
3.3 Possibilities for derogations from the right to life	26
3.3.1 <i>Emergency situations</i>	27
<b>4 THE RIGHT TO LIFE IN ARMED CONFLICT</b>	<b>29</b>
4.1 The Abella Case	29
4.2 The Chechen cases before the European Court of Human Rights	33
4.2.1 <i>Background of the conflict</i>	33
4.2.2 <i>Khashiyev and Akayeva</i>	35
4.2.3 <i>Isayeva, Yusupova and Bazayeva</i>	37
4.2.4 <i>Isayeva</i>	40

4.2.5	<i>Bazorkina</i>	42
4.2.6	<i>Imakayeva</i>	44
4.2.7	<i>Luluyev and others</i>	46
4.2.8	<i>Estamirov and others</i>	48
<b>5</b>	<b>LEGAL ANALYSIS</b>	<b>51</b>
5.1	Two different human rights approaches to armed conflict	51
5.2	The Chechen cases and the European approach	52
5.2.1	<i>Is IHL lex specialis?</i>	52
5.2.2	<i>The importance of Article 15 ECHR</i>	53
5.2.3	<i>A comparison between HRL and IHL</i>	54
5.2.4	<i>Is there a role for IHL in Strasbourg?</i>	58
5.2.5	<i>'Enforced disappearances' as a violation of the right to life</i>	60
5.2.6	<i>Limits to counterterrorism operations</i>	61
5.2.7	<i>The right to an effective remedy</i>	61
5.3	The 'humanization' of the law of war	62
5.3.1	<i>Introduction of a new minimum standard</i>	63
<b>6</b>	<b>CONCLUSION</b>	<b>64</b>
	<b>BIBLIOGRAPHY</b>	<b>66</b>
	<b>TABLE OF CASES</b>	<b>69</b>

# Summary

A thesis about the right to life in internal armed conflict must necessarily take both human rights law and humanitarian law into account. Human rights law, which has codified the right to life in its main instruments, is applicable both in time of peace and in time of war, whereas humanitarian law is only applicable during armed conflict. The question is thus how these two branches of law influence each other, and if IHL can be considered *lex specialis* in relation to human rights law.

The right to life is protected during armed conflict, through various provisions in IHL. Civilians have their lives protected through the principles of distinction and proportionality: the belligerent parties must distinguish between combatants and civilians, and only combatants may be attacked. These principles are applicable in both international and non-international armed conflict. In international armed conflict, there are groups of protected persons (the wounded, sick and shipwrecked, prisoners of war, and civilians) who are protected from murder and inhumane treatment. In internal armed conflict there is no such group of protected persons. Instead, anyone not taking an active or direct part in the hostilities must be treated humanely, which includes respect for his or her right to life.

Human rights law protects the right to life in both time of peace and time of war. Article 6 ICCPR and Article 2 ECHR are always applicable, but contain exceptions for lawful acts of war. Even though the ICCPR does not mention this specifically, lawful acts of war will not be regarded as ‘arbitrary killings’ and will therefore not lead to a violation of the right to life. The ECHR mentions lawful acts of war as a specific exception, but this entails that a State has made a notice of derogation under Article 15 of the ECHR.

In several cases concerning Chechnya, the European Court of Human Rights has investigated violations of the right to life in armed conflict situations. While the Court does not answer the question of whether or not there was an (internal) armed conflict going on in Chechnya, the Court refers to terms used in IHL to describe the various situations it was asked to examine. Especially in the cases of *Isayeva*, and *Isayeva, Yusupova and Bazayeva*, the Court investigated situations that clearly live up to the threshold of Common Article 3 GC, and maybe even to Additional Protocol II to the Geneva Conventions, both applicable in non-international armed conflict. However, as Russia never made a derogation under Article 15 ECHR, the Court could not but investigate the situation in Chechnya against ‘a normal legal background’, meaning it applied the Convention in full.

It has been argued that the European Court has interpreted certain articles of humanitarian law in a way that is at odds with this law. I do not agree with this. The Court has on the contrary only used human rights law, applying

this law to armed conflict situations. The principles the Court uses and which can be deducted from the Chechen cases have their counterparts in IHL – such as the principle of proportionality and the prohibition of indiscriminate attacks.

The Chechen cases are important, since they show that human rights law can mend some of the holes that can be found in the protection granted by IHL in internal armed conflict. Human rights law grants victims the possibility to complain to a judicial body, thereby giving them a possibility for redress and providing for justice.

On the other hand, human rights law does not provide all the answers. Whereas IHL binds both belligerent parties, be they States or insurgent groups, human rights law only conveys duties upon the State. This means that serious violations of human rights law by insurgent groups cannot be dealt with by human rights law monitoring or judicial mechanisms.

A process, by Theodor Meron called ‘the humanization of the law of war’, is also showing in the Chechen cases. Human rights law and humanitarian law are growing closer together, influencing each other. This may in the end be to the benefit of victims of war. However, both branches still have their own strengths, as well as their own problems to deal with. To fill the gaps that exist in – or in between – human rights law and humanitarian law, it has been suggested to introduce a minimum humanitarian standard, applicable at all times.

# Preface

*“All is fair in love and war.”*

... Or so the saying goes. Anyone working with, or even anyone having the slightest knowledge of international law, knows that this is not true. There may not be any conventions or rules regulating love, but there are many rules relating to what may be considered ‘fair’ in times of war.

This thesis is thus about war and about what is considered to be ‘fair’; about who may be killed and who should be protected. In other words: this thesis concerns the right to life in armed conflict. Since this subject is very broad – it basically touches upon all facets of war – I’ve chosen to narrow it down to an analysis of the cases before the European Court of Human Rights concerning deprivation of life in Chechnya.

What has made me choose this subject is a personal fascination for the law of war, which on first sight seems to be so contradictory. Apparently, we accept that wars are inherent to mankind; that people will continue killing each other in a fight for greater power or a bigger territory – or in a fight for freedom and democracy. On the other hand, we do not accept all ways of conducting warfare and we do not accept all types of victims. Some people – soldiers, combatants – may be killed, whereas others – civilians – are protected. The Chechen cases have caught my attention, since they are so politically sensitive. The European Court has tried to give redress to those who seemed left without the legal protection of humanitarian law, by applying human rights law.

Hopefully, this thesis will give the reader some more insight into the rules and regulations concerning the right to life in (a European) internal armed conflict, through an analysis of the Chechen cases before the European Court. I have certainly learned a lot, and I have enjoyed writing this thesis.

Dorien van Veelen  
March 2008.

# Abbreviations

ACHPR	African Charter for Human and Peoples' Rights
ACHR	American Convention on Human Rights
AJIL	American Journal of International Law
API	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977
APC	Armoured Personnel Carrier
COE	Council of Europe
ECHR	[European] Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECmHR	European Commission of Human Rights
EJIL	European Journal of International Law
GC	The (Four) Geneva Conventions of August 12, 1949
GC I	Geneva Convention for the Amelioration of the Condition of the Wounded and sick in Armed Forces in the Field of August 12, 1949
GC II	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949
GC III	Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949
GC IV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949
HRC	UN Human Rights Committee
HRL	Human Rights Law
IACmHR	Inter-American Commission for Human Rights
ICCPR	[International] Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IJHR	International Journal of Human Rights

IRRC	International Review of the Red Cross
IHL	International Humanitarian Law
OSCE	Organization for Security and Co-operation in Europe
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council

# 1 Introduction

*“War and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year...”*<sup>1</sup>

If one realises how many people die each year because of war, it seems almost absurd to mention ‘the right to life’ when talking about armed conflict situations.

That being said, if not such a right existed I am sure that many more people would lose their lives as a consequence of war. Both Human Rights Law (HRL) and International Humanitarian Law (IHL) contain provisions that protect the right to life in armed conflict situations. This thesis will set out the provisions concerning protection of life in internal armed conflict and explain their applicability (Chapters 2 and 3). I will focus on non-international armed conflicts, but will of course mention rules applicable in international armed conflicts, where relevant. In Chapter 4, I will discuss the Chechen cases from the European Court of Human Rights and the Inter-American *Abella* case, in which the right to life in armed conflict situations has played a central role. Chapter 5 will contain a legal analysis of these cases, and finally in Chapter 6 I will state my conclusions.

For clarification, I would like to point out that the terms non-international armed conflict and internal armed conflict will be used without distinction. The term ‘armed conflict’ is taken from the Geneva Conventions and their Protocols, and will not be used to describe situations that do not live up to the threshold set out by these instruments.

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<sup>1</sup> HRC, General Comment no. 6 on the Right to Life (Article 6), 30 April 1982, UN Doc. HRI/GEN/1/Rev.6 at 127 (2003), para. 2.

## 2 The right to life in the law of internal armed conflict

The law of armed conflict traditionally meant the law applicable in war between two sovereign powers. At the international conferences that were held in The Hague and Geneva in the 19<sup>th</sup> and beginning of the 20<sup>th</sup> Century internal conflicts received little or no attention. A draft convention on the role of the Red Cross in civil wars, submitted to the International Red Cross Conference in 1912, was never even discussed.<sup>2</sup> The atrocities of the Spanish Civil War though lead to the first international article concerned with internal armed conflicts: Article 3 common to the Four Geneva Conventions of 1949. Concerning this development, Gasser states:

“First of all, States have certainly realised that unbridled violence and murderous weapons cause just as much injury and destruction in civil war as in conflicts between States. The horrible example of the Spanish Civil War gave the impetus for the first special provision relating to non-international armed conflicts to be incorporated into international humanitarian law: common article 3 of the 1949 Geneva Conventions. A further explanation is the enormous progress, since the Second World War, of the idea of Human Rights. International Human Rights law ‘interferes’ quite consciously and deliberately in the internal affairs of States. The differences between humanitarian law applicable in non-international armed conflicts and human rights law do not alter the fact that both types of law are directed to a common purpose: to guarantee respect for human dignity at all times.”<sup>3</sup>

Even though almost sixty years have gone since the adoption of the Geneva Conventions, there are still fewer and lesser protections granted to victims of internal armed conflict than to those of inter-state wars, even though internal conflicts by now have become rule rather than exception. In international conflict, all four Geneva Conventions are applicable, as well as Additional Protocol I, adding up to 527 articles in all.<sup>4</sup> In non-international conflict, only Common Article 3 and Additional Protocol II are applicable, counting a total of 29 articles.<sup>5</sup>

In this Chapter, I will briefly discuss Common Article 3 and Additional Protocol II, both applicable in non-international armed conflicts. I will explain how they protect the right to life in internal armed conflicts and describe when they are to be applied. More importantly, I will describe which problems arise in their application, and why I consider the protection granted by these instruments not sufficient.

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<sup>2</sup> J. Pictet (ed.), *The Geneva Conventions of 12 August 1949: commentary, vol. I: Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field*, (ICRC Geneva 1995 (reprint)) [hereinafter Commentary GC I], Article 3, p. 39.

<sup>3</sup> H.P. Gasser, *International Humanitarian Law, an Introduction* (Henry Dunant Institute, Geneva 1993), p. 70.

<sup>4</sup> This number is exclusive Common Article 3 and the Annexes to the Geneva Conventions and AP I.

<sup>5</sup> This number is exclusive the Annexes to AP II.

## 2.1 Article 3 Common to the Geneva Conventions

The International Court of Justice described Common Article 3 as ‘an expression of fundamental considerations of humanity’.<sup>6</sup> This in a way already discloses how basic, and thus limited, the protection granted by Article 3 is. However, it still gives some fundamental guarantees. The main provision in Article 3 is given in its first subparagraph:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion, faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect for the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.

The second subparagraph of Article 3 states that the wounded and sick shall be collected and cared for. In international armed conflicts, they are so-called ‘protected persons’,<sup>7</sup> a term not used here.

A guarantee of humane treatment is thus given to all persons who are not actively taking part in the hostilities, and any form of discrimination is explicitly forbidden. This prohibition is of enormous importance in internal armed conflicts, since these tend to be divided along ethnic or religious lines – as became painfully clear by the conflicts in Rwanda and the former Yugoslavia.

Categories (a) and (c) lie in the same lane: no torture, no degrading or humiliating treatment, no murder or mutilation. These acts directly violate human dignity, and do not need further explaining.<sup>8</sup> The prohibition of murder and prescription of humane treatment is furthermore part of customary law, applicable in both international and non-international armed conflicts.<sup>9</sup>

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<sup>6</sup> ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), ICJ Reports 1986.

<sup>7</sup> See Articles 12 and 13 GC I and GC II; Article 16 GC IV.

<sup>8</sup> See also Commentary GC I, *supra* note 2, Article 3, p. 54.

<sup>9</sup> J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (ICRC, Cambridge University Press 2005) [hereinafter Customary IHL], Volume I, rules 87 and 89, pp. 306-308 and 311-314.

## 2.2 Additional Protocol II

Supplementing Common Article 3, Protocol II gives some more detailed provisions applicable in non-international armed conflicts. Where Common Article 3 only gives some fundamental guarantees to persons taking no active part in the hostilities, Protocol II reaches wider. The Protocol exists of five parts, and parts II, III and IV aim to give protection to different groups of ‘victims’, specifically mentioning persons whose liberty has been restricted, the wounded, sick and shipwrecked, and the civilian population.

Part II, consisting of three articles, gives a guarantee of humane treatment. The rights set out in these articles are inalienable and fundamental; they are ‘inherent in respect to the human person’.<sup>10</sup> Being influenced by the Covenant on Civil and Political Rights, some of the rights contained here clearly resemble some of the non-derogable rights contained in this human rights treaty.<sup>11</sup>

Article 4 contains fundamental guarantees for those who – for whatever reason – do not take a direct part in hostilities. It resembles Common Article 3, but the list of prohibited acts in Article 4 AP II is longer and more detailed (e.g. rape and other forms of ‘indecent assault’ are explicitly mentioned). Just as in Common Article 3 GC, violence to the life of persons, in particular murder, is also explicitly prohibited.

Otherwise, there are various provisions that indirectly provide for protection of the right to life, e.g. by prohibiting starvation of the civilian population<sup>12</sup> and attacks upon dams, dykes or nuclear installations that would cause the release of dangerous powers and consequent severe losses among the civilian population.<sup>13</sup>

## 2.3 Customary law applicable in internal armed conflicts

In 2005 the ICRC published the results of an enormous study on customary international humanitarian law.<sup>14</sup> The study shows that many customary rules apply to *all* armed conflicts, international and non-international. Especially gaps in the regulation of the conduct of hostilities have to a large extent been filled by state practice, which has led to customary rules

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<sup>10</sup> Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC Geneva, Martinus Nijhoff Publishers 1987) [hereinafter *Commentary AP II*], Part II, p. 1365.

<sup>11</sup> *Ibid.*, p. 1365-1366.

<sup>12</sup> Article 14 AP II, *see also* Article 54 AP I.

<sup>13</sup> Article 15 AP II, *see also* Article 56 AP I.

<sup>14</sup> Customary IHL, *supra* note 9.

applicable in non-international armed conflict that are similar to the rules contained in Protocol I.<sup>15</sup>

### 2.3.1 The principle of distinction

The principle of distinction is based on the reality of war: that people get killed. It would be impossible to fight a war if ‘killing’ as such was prohibited; therefore the Geneva Conventions and Protocol I – the main instruments applicable in international armed conflict – differ between those who are not involved (civilians) from those who bear weapons (combatants).<sup>16</sup> The latter may kill each other, without having to bear any criminal responsibility for this, as long as they kill in a way that is compatible with IHL.<sup>17</sup> The former are ‘protected persons’ and may not be directly targeted.<sup>18</sup> The same goes for objects: military objects may be attacked, whereas it is prohibited to attack civilian objects.<sup>19</sup>

Rules applicable in international armed conflicts contain a clear definition of civilians. The Geneva Conventions and Protocol I state that civilians are all persons, who do not belong to certain, well described other categories of persons, such as members of the regular armed forces or organised militias.<sup>20</sup> In other words: civilians are all persons who are not combatants.

Article 43 of Protocol I mentions that all members of the armed forces of a Party to the conflict are combatants, which means they have the right to participate directly in the hostilities.<sup>21</sup> Combatants have to distinguish themselves from the civilian population “in order to promote the protection of the civilian population from the effects of hostilities”.<sup>22</sup> Furthermore, Protocol I states that in case of doubt, a person shall be considered to be civilian.

As for non-international armed conflicts, there is no definition of the terms ‘combatant’ and ‘civilian’. A definition stating that “a civilian is anyone who is not a member of the armed forces or of an organised armed group” was actually included in the draft version of Protocol II, but was deleted for purposes of simplifying the text.<sup>23</sup> This explains that the terms ‘civilian’ and ‘civilian population’ are used in several articles in this Protocol, without it containing a definition. Common Article 3 and AP II thus make no distinction between civilians and combatants. Instead, these instruments

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<sup>15</sup> *Ibid.*, Volume I, p. xxix.

<sup>16</sup> Article 48 AP I.

<sup>17</sup> Article 43(2) AP I. *See also* F. Kalshoven and L. Zegveld, *Constraints on the Waging of War* (ICRC Geneva 2001), at p. 87.

<sup>18</sup> Article 48 AP I, and Customary IHL, Volume I, Rule 1, pp. 3-8. The rules applicable in non-international armed conflicts do not mention civilians as ‘protected persons’ though.

<sup>19</sup> Article 48 AP I, and Customary IHL, Volume I, Rule 7, pp. 25-29.

<sup>20</sup> Article 4 A GC III; Article 43 (1) AP I; Article 50 AP I. *See also* Customary IHL, Volume I, Rules 4 and 5, pp. 14-19.

<sup>21</sup> Article 43 (2) AP I.

<sup>22</sup> Article 44 (3) AP I.

<sup>23</sup> Customary IHL, Volume I, Rule 5, p. 19.

protect those who take no active or direct part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat*.<sup>24</sup> Read *a contrario*, this means that those who do take an active part in the hostilities – whether civilian or members of the armed forces – are not protected and thus legitimate targets.

A definition of military objectives and civilian objects is contained in Article 52 of Protocol I. Through the development of customary law and the incorporation of similar articles in instruments that are valid in internal armed conflicts, this definition is of importance both in international and non-international armed conflicts.<sup>25</sup> Military objectives are described as those “which by their nature, location, purpose or use make an effective contribution to military action and whose partial or complete destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage”.<sup>26</sup> Civilian objects are then all those, which are not military objectives.<sup>27</sup>

It follows from these definitions that there are only two categories of objects: those, which are military objectives, and those which are not. The latter are considered to be civilian objects. The distinction is not always that easily made though. There might be civilian objects that are used by the military, and thus ‘by their use’ make an effective contribution to military action. In case of doubt about the use of a normally civilian object for such military purposes, the object “shall be presumed not to be so used”.<sup>28</sup> The criterion is thus whether or not the object through its use makes an effective contribution to military action *and* if the object’s partial or total destruction, capture or neutralisation offers a definite military advantage.

It is not only prohibited to directly target the civilian population or civilian objects; it is also prohibited to perform indiscriminate attacks, meaning attacks that do not distinguish between combatants or military objectives and civilians or civilian objects.<sup>29</sup> A prohibition of indiscriminate attacks was included in the draft version of Protocol II, but did not make it into the final version.<sup>30</sup> Luckily, this gap has been filled by customary law, so that both the principle of distinction<sup>31</sup> and the prohibition of indiscriminate attacks<sup>32</sup> are fully applicable in internal armed conflicts as well.<sup>33</sup> Thus, the

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<sup>24</sup> *Hors de combat* are all combatants who no longer are capable of taking part in the hostilities. This can be for several reasons, e.g., they may be wounded, sick or shipwrecked or taken prisoner of war.

<sup>25</sup> Customary IHL, Volume I, Rules 8 and 9, pp. 29-34; Amended Protocol II (Article 2(6) and (7)) and Protocol III (Article 1(3) and (4)) to the Convention on Certain Conventional Weapons; Article 1(f) Protocol II to the Hague Convention for the Protection of Intercultural Property.

<sup>26</sup> Article 52(2) AP I.

<sup>27</sup> Article 52(1) AP I.

<sup>28</sup> Article 52 (3) AP I.

<sup>29</sup> Article 51(4) and (5) AP I.

<sup>30</sup> Customary IHL, Volume I, Rule 11, p. 38.

<sup>31</sup> *Ibid.*, Rule 1, pp. 5-8.

<sup>32</sup> *Ibid.*, Rule 11, pp. 37-40.

principle of distinction protects the life of civilians in both international as well as non-international armed conflicts, making this principle vital for the protection of the right to life in armed conflict.

### 2.3.2 The principle of proportionality

Another important principle protecting the lives of civilians is the principle of proportionality: civilian casualties are only accepted if these are proportionate to the military advantage obtained by the attack. If an attack on a military objective is expected to cause loss of civilian life, civilian injuries or damage to civilian objects that is excessive in relation to the anticipated concrete and direct military advantage, such an attack is prohibited.<sup>34</sup> For internal armed conflicts, this principle is codified in the Amended Protocol II to the Convention of Certain Conventional Weapons, and it has become customary law.<sup>35</sup> The principle of proportionality is seen to be inherent to the principle of humanity contained in Protocol II and Common Article 3 GC.<sup>36</sup>

## 2.4 Applicability: Definition of internal armed conflict

Both the Geneva Conventions and the Additional Protocols apply automatically as soon as the given criteria are fulfilled. For, as the Commentary puts it, “the implementation of rules for the protection of victims should not be dependent on the subjective judgment of the parties”.<sup>37</sup>

As mentioned before, Common Article 3 is applicable in armed conflicts not of an international character, which exists “when government and insurgents oppose each other in collective hostilities and using the force of arms”.<sup>38</sup> The Commentary mentions that the Article should be applied “as widely as possible”. The Article is so basic, that a State would have a hard time

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<sup>33</sup> See however Article 8(2)(e)(i) ICC Statute, listing the crimes of non-international armed conflict. According to this article, it is prohibited to attack the civilian population intentionally, meaning it is not prohibited to perform an indiscriminate attack on a military objective.

<sup>34</sup> Articles 51(5)(b) and 57(2)(a)(iii) and (2)(b) AP I; Article 3(3) Protocol II and Article 3(8) Amended Protocol II to the Convention on Certain Conventional Weapons. See also Article 8(2)(b)(iv) ICC Statute, that declares the intentional launch of a clearly disproportionate attack a war crime.

<sup>35</sup> *Ibid.*; Customary IHL, Volume I, Rule 14, pp. 46-50.

<sup>36</sup> See M. Bothe *et al.*, *New Rules for Victims of Armed Conflicts* (Martinus Nijhoff Publishers, The Hague 1982), pp.677-678.

<sup>37</sup> Commentary AP II, Part I, p. 1343.

<sup>38</sup> See Gasser, *supra* note 3, p. 70.

arguing against its application, whereas it at the same time in no way limits the State's possibilities to put down armed rebellion.<sup>39</sup>

It is generally accepted that the threshold for the application of Common Article 3 is lower than for the application of AP II. Where Article 3 is to be applied as widely as possible, Protocol II sets a higher threshold.

The Protocol states in Article 1 that it is applicable in all situations not covered by AP I and

“which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”

Article 1(2) AP II explicitly excludes situations of internal disturbances and tensions, “such as riots, isolated and sporadic acts of violence and other acts of a similar nature, not being armed conflicts”.

The Commentary to Article 1 AP II says:

“In fact, the Protocol only applies to conflicts of a certain degree of intensity and does not have the same field of application as common Article 3, which applies in all situations of non-international armed conflict.”<sup>40</sup>

The difference between common Article 3 and Protocol II is to be found in the description of insurgency groups, given in the Protocol: they need to have a responsible command, and control over a part of the territory allowing them to carry out military operations and to implement the Protocol. Even though there is nothing about the intensity or duration of the conflict in this definition, in reality it means that Protocol II can only be applied in conflicts with a certain intensity. Insurgent groups will not have the necessary control from one moment to another; some fighting must already have taken place before the insurgent group will fulfil the three criteria mentioned in Article 1 AP II.

Even though one can regret the high threshold Protocol II sets for its own application, one must also admit that the criteria are realistic. The protection provided for in the Protocol cannot be guaranteed if not both belligerent parties are able to implement the Protocol. One can assume that a state will be able to implement the Protocol, but for an insurgent group to do so, they would need some form of organisation and the necessary infrastructure (communication, transport, hospitals). This implies that they would need to have control over at least a small part of the territory.<sup>41</sup>

In the *Tadic* case the ICTY gave a definition of armed conflict that covers both international and non-international armed conflict:

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<sup>39</sup> Commentary GC I, Article 3, p. 50.

<sup>40</sup> Commentary AP II, Article 1, p. 1348.

<sup>41</sup> *Ibid.*, pp. 1352-1353.

“An armed conflict exists whenever there is a resort between States to armed force, or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.”<sup>42</sup>

It is interesting to note that this definition does not differ between international and internal armed conflicts, a difference otherwise used throughout the Geneva Conventions and the Protocols. The *Tadic* definition becomes more interesting with the development of customary law though, which may be applicable in all types of armed conflict.

## 2.5 Problems relating to the law of internal armed conflict

Even though the right to life seems adequately protected in Common Article 3 GC and Protocol II, their application during internal armed conflict can be problematic. These problems sometimes concern international politics more than they concern a lack of legal regulations. In comparison to the law of international armed conflict, some regulations applicable in internal armed conflict lack the necessary strength or possibilities for execution.

These problems in the application of humanitarian law limit the protection of the right to life granted in internal armed conflicts. Individual victims of such conflicts do not have any legal possibilities under IHL to stop the violations or to hold their State and other belligerent parties responsible.

### 2.5.1 The qualification of a conflict

A first problem in the application of Common Article 3 and AP II concerns the qualification of a situation as an armed conflict. This assessment is largely left to the discretion and good faith of the parties concerned, even though the Conventions and the Protocols apply automatically in case the given criteria are fulfilled.<sup>43</sup> The reality is more complicated. States may not agree on the existence of an armed conflict, especially if it is partly on or even completely within their own territory. They may fear that the application of humanitarian law will limit their sovereign powers, and grant rights to – in their eyes unlawful – insurgent groups.

Pressure from the international community and especially from the ICRC is often necessary before IHL is applied. As the willingness of the international community to pressure a State relies on international politics, this may become a problem – especially when the armed conflict takes place on the territory of one of the permanent members of the UN Security Council. The Security Council is the only body in international law that can

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<sup>42</sup> *Prosecutor v. Dusko Tadic*, 2 October 1995, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ICTY (Appeals Chamber), Case No. IT-94-1-A, par. 70, <<http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>>, visited on 1 December 2007.

<sup>43</sup> Kalshoven and Zegveld, *supra* note 17, p. 39.

make binding decisions, when it has established a threat against international peace and security.<sup>44</sup> However, its five permanent members have a veto, and these five States are likely to stop any resolution directed against them. I do not pretend to be an expert on international politics, but if not the Russian Federation had had a veto right in the UN Security Council, the situation in Chechnya had been on the international agenda a lot more than it has been. This shows how intertwined international law and politics are in some areas, and how difficult it can be for the international community to pressure a State into compliance with IHL.

## 2.5.2 Threshold for application

Secondly, there is quite a high threshold for the application of Protocol II. Conflicts need to be of a certain intensity and duration before the Protocol can be applied, which leaves victims of conflicts just below this threshold with a lesser protection – that of Common Article 3. This means that only basic guarantees are given, which to a large extent resemble those human rights that are non-derogable (such as the prohibition of arbitrary deprivation of life and the prohibition of torture and inhuman or degrading treatment). Luckily some of the gaps in the protection have been filled by customary law, but in general the protection given in internal armed conflicts of a lower intensity is lagging behind.

## 2.5.3 Absence of a clear definition of combatants

A third problem existing in the law of internal armed conflict is the lack of combatant status, which makes it more difficult to distinguish between those who take an active part in the hostilities, and those who do not. When reading Common Article 3 and Additional Protocol II one immediately notices that there is no distinction between civilians and combatants; a distinction otherwise followed throughout the Geneva Conventions and of great importance for the protection that is granted (see paragraph 2.3.1 above). The reason for this lies in the reluctance of States to call insurgents for combatants. To the sovereign State, insurgents are no more than civilians that have taken up arms; they are not more than criminal offenders.

In international armed conflicts, combatants have to wear a uniform or at least distinguish themselves from the civilian population,<sup>45</sup> but such a requirement is lacking in the law concerning non-international armed conflict. Neither does customary law define who is a ‘combatant’ in internal conflicts,<sup>46</sup> nor does it give anyone a right to combatant status.<sup>47</sup>

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<sup>44</sup> UN Charter, Chapter VII.

<sup>45</sup> Article 44 (3) AP I.

<sup>46</sup> Customary IHL, Volume I, Rules 3 and 6, pp. 11-13 and pp. 19-24. Members of a State’s armed forces will also in internal armed conflicts be considered combatants, *never* civilians. There is however no clarity on the status of members of insurgent or rebel groups.

Deciding who is a lawful target may therefore become a difficult exercise in non-international armed conflicts.<sup>48</sup> Henckaerts and Doswald-Beck consider that “a clear rule on this subject would be desirable as it would enhance the protection of the civilian population against attack”. They suggest that in situations of doubt a careful assessment should be made as to whether there are sufficient indications that could justify an attack.<sup>49</sup>

## 2.5.4 Absence of ‘grave breaches’ in internal armed conflict

All four Geneva Conventions list the wilful killing of protected persons in international armed conflict as a grave breach.<sup>50</sup> Protocol I adds that the acts described as grave breaches in the four conventions are also grave breaches of the Protocol if they are committed against the persons who are protected by the Protocol.<sup>51</sup> AP I even lengthens the list of grave breaches, by adding several acts, including indiscriminate attacks.<sup>52</sup>

The committing or ordering to commit any of the grave breaches must be penalised under national law, and any person alleged to have committed or ordered to commit a grave breach, must be searched for and prosecuted.<sup>53</sup>

However, since the concept of ‘grave breaches’ does not exist in internal armed conflict, there is no obligation to investigate or prosecute acts of wilful killing in internal conflicts. States are obliged to take the measures necessary for the suppression of all acts contrary to Common Article 3,<sup>54</sup> which may include criminal prosecution, but may just as well consist of a disciplinary correction.<sup>55</sup> Additional Protocol II does not contain any obligation for the belligerent parties to investigate or prosecute. It is silent on the issue of how its provisions should be executed and how violations should be repressed. Here human rights law – with its monitoring and judicial mechanisms – may be very helpful, which I will discuss in the next chapter.

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<sup>47</sup> Customary IHL, Volume I, Rules 106-108, pp. 384-395.

<sup>48</sup> *Ibid.*, Rule 5, p. 19. *See also* the Report of the Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation, UCIHL Geneva, September 2005, <[http://www.adh-geneva.ch/events/pdf/expert-meetings/2005/3report\\_right\\_life.pdf](http://www.adh-geneva.ch/events/pdf/expert-meetings/2005/3report_right_life.pdf)>, visited on 1 December 2007 [hereinafter Report on the Expert Meeting], p. 38-40, for a discussion on who may be lawfully targeted during internal armed conflicts.

<sup>49</sup> Customary IHL, Volume I, Rule 6, p. 24.

<sup>50</sup> Article 50 GC I; Article 51 GC II ; Article 130 GC III; and Article 147 GC IV.

<sup>51</sup> Article 85 AP I.

<sup>52</sup> Article 85 (3) and (4) AP I.

<sup>53</sup> Articles 49 GC I; 50 GC II; 129 GC III; 146 GC IV.

<sup>54</sup> Articles 49 GC I; 50 GC II; 129 GC III; 146 GC IV.

<sup>55</sup> *See* Kalshoven and Zegveld, *supra* note 17, at p. 81.

# 3 International Human Rights Law

In this Chapter, I will give a short introduction to human rights law and explain its importance and field of application. I will focus on the right to life and the way this right is protected in two main treaties: the ICCPR and the ECHR. I have chosen to focus on the European Convention and not on the other regional treaties, since the ECHR has a very strong implementation system and because the European Court for Human Rights has given several important judgments on the right to life in armed conflict situations. Where relevant I will of course refer to other regional instruments or judicial decisions.

## 3.1 The application of HRL in armed conflict

Other than IHL, which is only applicable in situations of armed conflict, human rights law is applicable both in time of war and in time of peace.<sup>56</sup> Treaties such as the ICCPR and ECHR are *always* applicable, which is supported by the notion of human rights as being universal. The rights contained in the various human rights conventions are granted to all persons within a State's territory or under a State's power or effective control, irrespective of their nationality or status.<sup>57</sup> This means that a State also must guarantee human rights protection to non-nationals, including nationals of an enemy State in case of an international armed conflict,<sup>58</sup> and that a State is bound by its human rights obligations also outside its own territory, as long as the State is exercising effective control.<sup>59</sup> However, in certain circumstances States can derogate from or limit the application of a number of rights, if the relevant convention allows for this. I

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<sup>56</sup> See also the preamble to AP II, where the basic protection offered by human rights is recalled in paragraph 2, and the commentary hereto in M. Bothe *et al.*, *supra* note 36, at p. 619.

<sup>57</sup> See General Comment 15 on 'The position of aliens under the Covenant', 1986, U.N. Doc. HRI/GEN/1/Rev.6 at 140 (2003), and General Comment 31 'on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant', 29 March 2004, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), par. 10.

<sup>58</sup> See Art. 2 UDHR: "Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust; non-self-governing or under another limitation of sovereignty."

<sup>59</sup> See *Loizidou v. Turkey*, 23 March 1995, ECtHR, Judgment (Preliminary Objections), Series A 310, para. 62; and *Bankovic v. Belgium* (and others), 12 December 2001, ECtHR, Decisions as to Admissibility, Reports of Judgments and Decisions 2001-XII, para. 71. Compare also the ICJ's judgment on State responsibility in the case of *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), I.C.J. Reports 1986, p.14, at para. 115.

will discuss the possibility for derogations and limitations of human rights during armed conflicts further below, of course with focus on the right to life.

As set out in Chapter 2, humanitarian law automatically becomes applicable if a situation of armed conflict arises, which then leads to a situation where two branches of law are concurrent. IHL is often said to be *lex specialis* in relation to human rights law, meaning that the rules of humanitarian law set aside the provisions contained in HRL. Certain human rights may thus be limited: the special provision rules over the general provision. This is for example made clear by Article 2 in conjunction with Article 15(2) ECHR: loss of life due to ‘lawful acts of war’ does not lead to a violation of the right to life. The word ‘arbitrary’ in Article 6 ICCPR also needs to be interpreted according to the rules of IHL when there is an armed conflict ongoing.<sup>60</sup>

In both its *Nuclear Weapons* Advisory Opinion and its *Palestinian Wall* Opinion the ICJ held that IHL constitutes *lex specialis* in situations of armed conflict.<sup>61</sup> In the *Nuclear Weapons* case, some States argued the illegality of the use of nuclear weapons, stating that such use would violate the right to life as contained in Article 6 ICCPR. Others meant that since the ICCPR does not mention war or the use of weapons, it does not regulate the legality of the use of nuclear weapons.<sup>62</sup> On this argument the Court considers:

“[T]hat the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. This whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.”<sup>63</sup>

However, experts seem to have different opinions on this issue, especially since the ICJ never made clear how it understands the concept of *lex*

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<sup>60</sup> *Legality of the threat or use of nuclear weapons*, 8 July 1996, ICJ, Advisory Opinion, I.C.J. Reports 1996, p.226 [hereinafter ‘*Nuclear weapons* Advisory Opinion’], par. 25.

<sup>61</sup> *Ibid.*; *Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory*, ICJ, Advisory Opinion, 9 July 2004, available at < <http://www.icj-cij.org/docket/files/131/1671.pdf>>, [hereinafter *Palestinian Wall* Advisory Opinion], par. 106.

<sup>62</sup> *Nuclear Weapons* Advisory Opinion, *supra* note 60, par. 24. The HRC does not share this opinion. In its General Comment No. 23 the Committee clearly considers the use of nuclear weapons contradictory to the ICCPR. See General Comment No. 23 ‘on the Use of Nuclear Weapons’, 1984, UN Doc. HRI/GEN/1/Rev.1.

<sup>63</sup> *Nuclear Weapons* Advisory Opinion, *supra* note 60, par. 25.

*specialis* in this specific situation.<sup>64</sup> Normally the rule *lex specialis derogate legis generalis* means that the more specific law completely sets aside the general law. This is however not the case with IHL and HRL: human rights remain applicable. In General Comment 29 the Human Rights Committee mentions that the Covenant requires that “even during an armed conflict measures derogating from the Covenant are [only allowed] if and to the extent that the situation constitutes a threat to the life of the nation”, thereby referring directly to Article 4 of the Covenant.<sup>65</sup> It then continues to say that “[i]n practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party”.<sup>66</sup> In its General Comment 31 the HRC specifically states:

“[T]he Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”<sup>67</sup>

The ICRC study on customary humanitarian law has also concluded that human rights remain applicable during armed conflicts.<sup>68</sup> However, not everyone agrees with this point of view. Israel and the USA can be named as objectors to this custom.<sup>69</sup> This is why when concerning armed conflict situations, the *lex specialis* rule needs further clarification.

As for the right to life, combining the two branches of law can create conflicts. A human rights body, such as the Human Rights Committee, may be forced to apply rules of IHL when confronted with a complaint on the right to life in armed conflict. This may be tricky though: IHL does not belong to the Committee’s normal field of work, and the Committee might take a stand that is not followed by experts on humanitarian law. The same goes for the European Court: its mandate is to apply and interpret the ECHR,<sup>70</sup> but in cases concerning Article 15(2) it has to consider rules of IHL. The discussion as to whether or not IHL can be considered *lex specialis* and to what extent it may set aside human rights law is therefore extremely relevant. I will get back to this discussion in Chapter 5.

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<sup>64</sup> For a short overview of the discussion amongst experts, see the Report on the Expert Meeting, *supra* note 48, at p. 18 (Chapter C).

<sup>65</sup> HRC General Comment no. 29 on ‘States of Emergency (article 4)’, 31 August 2001, UN Doc. CCPR/C/21/Rev.1/Add.11, para. 4.

<sup>66</sup> *Ibid.*

<sup>67</sup> General Comment 31, *supra* note 57, para. 11.

<sup>68</sup> Customary IHL, Volume I, pp. 299-306.

<sup>69</sup> See Peter Vedel Kessing, ‘Terrorism and Human Rights’, in S. Lagoutte, H-O. Sano and P. Scharff Smith (eds.), *Human Rights in Turmoil* (Leiden 2007), at pp. 156-158.

<sup>70</sup> See Article 32 ECHR.

## 3.2 The right to life in the ICCPR and the ECHR

Within human rights law, the right to life has a fundamental place. It has been described as ‘the supreme right’ by the Human Rights Committee and is a basis for all other human rights.<sup>71</sup> Nowak, in his commentary to the ICCPR, mentions that the wording of the right to life in this Covenant has sought to give “expression to the natural-law basis of the right to life” by emphasizing that this right is *inherent* and by using the present tense “has” instead of “shall have”.<sup>72</sup>

### 3.2.1 Article 6 ICCPR

The right to life is codified in article 6 ICCPR. Its first paragraph says:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

The article furthermore contains provisions on capital punishment (par. 2, 4, 5 and 6) and genocide (par. 3).<sup>73</sup> As mentioned before, the wording of the article refers to the natural-law basis of the right to life, emphasizing its fundamental character.<sup>74</sup> The article contains both a positive and a negative component: positive in the way that the State must establish rules and measures that make sure that others do not infringe on a person’s right to life, negative in the way that the State itself must refrain from unlawfully depriving lives.

In its General Comment on the right to life the HRC considers that States have “the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life”.<sup>75</sup> Apparently the mere fact that a war is going on and humanitarian law is applicable does not mean that Article 6 has become meaningless. Loss of life due to war might still be considered arbitrary and constitute a violation of Article 6 ICCPR. The HRC thus goes on to consider that every effort made to stop wars and strengthen international peace and security “would constitute the most important condition and guarantee for the safeguarding of the right to life”. In his commentary to Article 6 ICCPR and the Committee’s general comment, Nowak appears to make a difference between armed conflicts that are permissible under international law and those that are not. He states:

“This means that the Committee would also deem killings in the course of a war – insofar as the latter is not permissible under the UN Charter – to be a

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<sup>71</sup> General Comment 6, *supra* note 1.

<sup>72</sup> M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel Publisher, Kehl, 2005), p. 122.

<sup>73</sup> Similar articles are found in the American Convention on Human Rights (Article 4) and the African Charter on Human and Peoples’ Rights (also Article 4).

<sup>74</sup> Nowak, *supra* note 72.

<sup>75</sup> General Comment 6, *supra* note 1, para. 2.

violation of the individual right to life. Arbitrary killings [understood to be, e.g., those that contradict the humanitarian law of war] in the course of armed conflicts permissible under international law and civil wars also represent a violation of the right to life.”<sup>76</sup> [footnotes omitted].

It is interesting to see that Nowak makes this distinction between ‘lawful’ and ‘unlawful’ armed conflicts, since the law of war itself is not concerned with the question of legality. Humanitarian law is, as mentioned here above, applicable as soon as an armed conflict arises, regardless of the reason or the goal for the conflict. It thus regulates all armed conflicts, also those that are deemed unlawful under the UN Charter. Nowak’s opinion that killings during an armed conflict that is not permissible under the UN Charter constitute a violation of Article 6 ICCPR, appears to me to be contradictory to the rules contained in IHL and is definitely up for debate.

More in general, the question is of course what constitutes an *arbitrary* deprivation of life. ‘Arbitrary’ is a broader concept than ‘unlawful’, as is pointed out by Joseph.<sup>77</sup> A lawful killing under domestic law may still be arbitrary under the Covenant if it is unreasonable or disproportionate in the circumstances. In this assessment, the intention behind the action and the necessity for the action must be taken into account. Nowak mentions the opinions of several delegations during the drafting of the ICCPR, who argued that the word arbitrary contains “elements of unlawfulness and injustice, as well as those of capriciousness and unreasonableness”.<sup>78</sup>

The HRC has assessed killings during hostilities or in armed conflict, as for example in its Concluding Observations on Israel (concerning the targeted killings of suspected terrorists),<sup>79</sup> the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Russian Federation (concerning the disproportionate use of force during war).<sup>80</sup>

As shown by its observations on Israel the HRC is not satisfied by the State’s assurance that only persons directly involved in hostilities were targeted – which would be allowed under IHL. Article 6 ICCPR assumingly sets a higher standard, and also requires the State to exhaust all possibilities to arrest suspected terrorists before resorting to the use of deadly force.<sup>81</sup> I will return to this requirement in my discussion of the European Court’s jurisprudence.

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<sup>76</sup> Nowak, *supra* note 72, pp. 125-126.

<sup>77</sup> S. Joseph *et al.*, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, New York, 2004), p. 156.

<sup>78</sup> Nowak, *supra* note 72, p. 111.

<sup>79</sup> HRC Concluding Observations on Israel, 21 August 2003, UN Doc. CCPR/CO/78/ISR, para. 15. *See also* the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990, UN Doc. A/CONF.144/28/Rev.1.

<sup>80</sup> HRC Concluding Observations on the FRY (Serbia and Montenegro) 1992, UN Doc. A/48/40, pp. 82-88; HRC Concluding Observations on Russia 1996, UN Doc. CCPR/C/79/Add.54, paras. 26-30.

<sup>81</sup> Concluding observations on Israel 2003, *supra* note 79.

All in all the Human Rights Committee makes very clear that the protection offered by Article 6 continues throughout the course of armed conflicts, and that humanitarian law must be considered when assessing if a killing was arbitrary or not.<sup>82</sup>

### 3.2.2 Article 2 ECHR

In the European Convention on Human Rights, the right to life has gotten a prominent place in article 2:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
  - a). in defense of any person from unlawful violence;
  - b). in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
  - c). in action lawfully taken for the purpose of quelling a riot or insurrection.

The exceptions listed in paragraph 2 are “exhaustive and must be narrowly interpreted”.<sup>83</sup> The prohibition on deprivation of life concerns both intentional and unintentional killings, as is made clear by the second paragraph that defines situations where the use of force is allowed – which may result in unintentional deprivation of life.<sup>84</sup>

The first case before the Court concerning Article 2 was the case of *McCann v. UK*.<sup>85</sup>

The case of *McCann and others* concerned the killing of suspected IRA terrorists on the British island of Gibraltar. The authorities had become aware that the IRA was planning a terrorist attack on Gibraltar. From the intelligence received it appeared that this attack would be by way of a car bomb, which very likely would be detonated by using a remote-control. The soldiers that were to arrest the three suspected IRA terrorists had heard that these three suspects were ruthless, and if confronted would resort to the use of weapons or the ‘button job’, meaning pressing the button on the remote-control that would detonate the bomb. At least one of the soldiers mentioned

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<sup>82</sup> See also HRC General Comment 14, where the Committee considers nuclear weapons to be the greatest threat to the right to life. General Comment no. 14 on ‘Nuclear weapons and the right to life’, 9 November 1984, UN Doc. HRI/GEN/1/Rev.6 at 139 (2003).

<sup>83</sup> *Stewart v. UK*, 10 July 1984, ECmHR, Application no. 10044/82, 39 DR (1984) p. 162, at para. 13.

<sup>84</sup> *Ibid.*, par. 15.

<sup>85</sup> *McCann and others v. United Kingdom*, ECtHR, 5 September 1995, series A, no. 324 [hereinafter *McCann*].

that there was a chance they would have to shoot to kill in view of the very short time factor a ‘button job’ would impose.<sup>86</sup>

The soldiers followed after the three suspects and wanted to arrest them once they would be close enough to enforce an arrest. However, once the suspects were confronted with the soldiers, the soldiers were certain that the three suspects – independently of each other – were reaching for a detonating device and intended to push the button. The soldiers therefore shot to kill.<sup>87</sup>

As for Article 2, the Court considered:

“[T]he use of the term ‘absolutely necessary’ in Article 2, para. 2 indicates that a stricter and a more compelling test of necessity must be employed from that normally applicable when determining whether State action is ‘necessary in a democratic society’ under paragraph 2 of Articles 8 to 11 (...) of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2(a), (b) and (c) of Article 2 (...).

In keeping with the importance of this provision in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly when deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination.”<sup>88</sup>

The Court then continued assessing the facts of the case. It decided that the shooting of the three suspected terrorists in itself wasn’t in violation of the right to life, since the soldiers that were involved in the shooting had had an ‘honest belief’ that it was necessary to shoot to kill in order to render the suspects physically unable to detonate a bombing device. If such an honest belief subsequently turns out to be mistaken, the use of force may still be justified. Holding otherwise would according to the Court impose an unrealistic burden on the State and its law-enforcement personnel, that might even lead to danger to their lives or those of others.<sup>89</sup>

The Court however decided that there had been a violation of Article 2, in that the planning and organization of the anti-terrorist operation as a whole had not been done with the appropriate care.<sup>90</sup> The British authorities could for example have prevented the three suspects in entering Gibraltar, or should in general have taken into consideration that their intelligence assessments might – at least to a certain extent – have been erroneous. The Court was therefore not convinced that the force used was “no more than absolutely necessary in defence of persons from unlawful violence in the meaning of Article 2 par. 2(a) of the Convention”.

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<sup>86</sup> *Ibid.*, paras. 13-31.

<sup>87</sup> *Ibid.*, paras. 59-67 (shootings of suspects Mc Cann and Farrell) and paras. 77-81 (shooting of suspect Savage).

<sup>88</sup> *Ibid.*, paras. 149, 150.

<sup>89</sup> *Ibid.*, para. 200.

<sup>90</sup> *Ibid.*, para. 213.

The *McCann* case shows clearly that the Court not only considers the actual use of force, but also takes the planning, organization and control of law-enforcement operations into account. The Court also briefly touched upon the issue of the domestic investigation of the shootings, and considered:

“The obligation to protect the right to life under this provision (art. 2), read in conjunction with the State’s general duty under Article 1 of the Convention to “secure to everyone within their jurisdiction the rights and freedoms defined in the Convention”, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by [...] agents of the State.”<sup>91</sup>

The importance of an effective official investigation by the authorities has been further emphasized by the Court in the case of *Kaya v. Turkey*.<sup>92</sup> This case concerned the killing of Abdülmenaf Kaya by Turkish security forces. The applicant, the deceased’s brother, alleged that his brother was killed by security forces in violation of Article 2 of the Convention. The Government however maintained that Abdülmenaf Kaya was a member of the PKK and a terrorist, and that he had died during an armed clash between government forces and the PKK. The Government had therefore acted within the borders of Article 2.<sup>93</sup>

The Commission concluded that the facts were disputed and that there was not enough evidence as to what had really happened. The Commission could therefore not properly investigate if there had been a violation of Article 2 in the killing of Abdülmenaf Kaya. The Court followed this decision.<sup>94</sup>

However, both the Commission and the Court found Article 2 to have been violated, since there hadn’t been an effective investigation of the shooting. After having repeated the need for an effective official investigation the Court stated:

“The Court observes that the procedural protection of the right to life inherent in Article 2 of the Convention secures the accountability of agents of the State for their use of lethal force by subjecting their actions to some form of independent and public scrutiny capable of leading to a determination of whether the force used was or was not justified in a particular set of circumstances.”<sup>95</sup>

The Government’s submission, that this was a “clear-cut case of lawful killing” and that the authorities therefore were “dispensed from having to comply with anything other than minimum formalities”, was not accepted by the Court. There was a lack of forensic evidence, and the assumption that Abdülmenaf Kaya was a terrorist, was never challenged or tested by the authorities. In fact, the Court was struck by the fact that the public

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<sup>91</sup> *Ibid.*, para. 161.

<sup>92</sup> *Kaya v. Turkey*, ECtHR, 19 February 1998, Reports 1998-I.

<sup>93</sup> *Ibid.*, see paras. 8-15 for a summary of the facts as given by the parties.

<sup>94</sup> *Ibid.*, paras. 73-78.

<sup>95</sup> *Ibid.*, para. 87.

prosecutor “assumed without question” that the deceased was a terrorist. The Court then noted:

“that loss of life is a tragic and frequent occurrence in view of the security situation in south-east Turkey (...). However, neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into deaths arising out of clashes involving the security forces, more so in cases such as the present where the circumstances are in many respects unclear.”<sup>96</sup>

In the *Mc Cann* and *Kaya* judgments, the Court has set the standards for the investigating of complaints concerning a violation of Article 2. From these judgments it follows, in short, that there are three phases which the Court must investigate:

1. The planning, organization and control of the law enforcement operation that has led to the use of force and the loss of life;
2. The actual use of force, leading to the loss of life;
3. The following domestic investigation.

Even though the actual use of force was not in violation of Article 2, a lack of organization in the first stadium or the lack of an effective investigation in the last stadium can still lead to the conclusion that there has been a violation of Article 2 of the Convention – even in armed conflict situations, as will be discussed in Chapter 4 below.

As for the requirements to such an investigation, the Court has developed its standard in several judgments.<sup>97</sup> As a start, the authorities must act of their own motion as soon as the matter has come to their attention; starting an investigation may not be dependent on an initiative of the deceased’s next-of-kin. The investigation must be effective in the sense that it is capable of leading to a determination of whether the force used was justified and to the identification and punishment of those responsible – which is not an obligation of result, but of means. The authorities must take all reasonable steps available to secure relevant evidence, and any deficiency in the investigation which undermines its ability to establish the cause of death or the person(s) responsible, will risk falling short of this standard. And the investigation must be independent in the sense that the investigating authorities must be independent of those involved in the lethal actions, meaning not only a lack of hierarchical or institutional connection, but also a practical independence. Furthermore the investigation must be prompt and handled with ‘reasonable expedition’. Finally there must be a ‘sufficient element of public scrutiny’ to secure accountability, and the victim’s next-of-kin must always be involved.

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<sup>96</sup> *Ibid.*, para. 91. The Court refers to the judgment in *Aydin v. Turkey*, 28 November 1997, as to the security situation in South East Turkey.

<sup>97</sup> See e.g. the case of *Isayeva v. Russia*, paras. 209-214 for a good overview of the Courts jurisprudence concerning the requirements for an ‘effective investigation’.

As is shown by the Court's judgment in the *Kaya* case, as well as its judgments in the Chechen cases that will be discussed in Chapter 4, the need for the State to perform an effective investigation also exists during armed conflict situations. This means that even killings that are allowed under IHL may constitute a violation of Article 2 ECHR, if there is no effective and independent investigation into these killings.

### 3.3 Possibilities for derogations from the right to life

Both the ICCPR and ECHR allow for derogations in emergency situations. Henckaerts and Doswald-Beck summarise the European and Inter-American Courts' approaches to the assessment of derogation measures, and state that these Courts stress "the need for safeguards so that the essence of the right is not totally eliminated, as well as the need for proportionality so that the measures are only those strictly required and not more."<sup>98</sup>

Article 4 ICCPR describes the rights which can be derogated from, and in which situations this may be done. According to this article, the right to life cannot be derogated from. However, according to the HRC – which has given its opinion in General Comments no. 4 and no. 29<sup>99</sup> – this doesn't mean that no limitations or restrictions would ever be justified; it means that restrictions are subject to the criteria given in article 6 ICCPR itself, irrespective of the existence of an emergency. In short: deprivation of life may never be arbitrary, and what is considered arbitrary depends entirely on the situation – irrespective of whether or not a State has invoked Article 4, and whether or not there is an armed conflict.

This is different under the ECHR. Article 15 of this convention makes a specific provision for situations of armed conflict: paragraph 2 states that the right to life cannot be derogated from, unless "in respect of deaths resulting from lawful acts of war".

Comparing Article 15 to Article 2 ECHR, one notices that the former concerns 'lawful acts of war', whereas the latter includes 'action lawfully taken for the purpose of quelling a riot or insurrection'. According to Doswald-Beck this necessarily means that 'war' in Article 15 only covers international armed conflict, since 'quelling an insurrection' already includes non-international armed conflicts.<sup>100</sup>

If a State has fulfilled the other criteria mentioned in Article 15, lawful acts of war cannot be seen as violating the right to life. What constitutes a lawful

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<sup>98</sup> Customary IHL, Volume I, p. 301.

<sup>99</sup> General Comment 29, *supra* note 65.

<sup>100</sup> L. Doswald-Beck, 'The right to life in armed conflict: does international humanitarian law provide all the answers?', 88 IRRC (2006) No. 864, 881, at p. 882.

act of war is of course a question that can only be answered by IHL. So far no State has derogated from the right to life.

However, comparing the ECHR and the ICCPR, the results are not all that different. What constitutes an ‘arbitrary’ deprivation of life depends on the situation; in armed conflict situations, the answer will surely depend on the applicable rules of humanitarian law as well. The main difference is though, that for a State to rely on IHL as an excuse for taking lives, a State must make an official declaration under Article 15 ECHR for it to be allowed within the Council of Europe system. Within the ICCPR system, it seems that no such official declaration is needed, since the criteria set out in Article 6 on the right to life are independent of the application of derogation measures under Article 4.

### 3.3.1 Emergency situations

One of the criteria that needs to be fulfilled before a State can derogate from the ICCPR or ECHR is the existence of an emergency situation. In its General Comment No. 29 on States of Emergency, the Human Rights Committee states that not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation.<sup>101</sup> According to the HRC, if States want to invoke Article 4 in other situations than armed conflict, they should be careful in considering why derogating measures are necessary and if the measures are legitimate. The HRC stresses that derogations from the Covenant are only allowed to the extent that the situation constitutes a threat to the life of the nation – also during armed conflict situations.

Furthermore, the HRC states that the derogating measures must be proportionate. Not only must the decision to invoke article 4 as such be proportionate to the exigencies of the situation; all separate measures taken under the emergency regime must also be proportionate. Shortly said: States must constantly evaluate if the situation at the moment calls for the use of exceptional, derogating measures. The existence of a lawful emergency situation as such is not sufficient.

The question then is of course what constitutes an emergency situation threatening the life of the nation. Using the words of Article 25 (on necessity) of the Draft Articles on State Responsibility, one could say that an emergency situation may be called if it is “the only means of safeguarding an essential interest (...) against a grave and imminent peril”. Emergency legislation must be inevitable to maintain public order.<sup>102</sup>

General Comment 29 concerning Article 4 ICCPR does not make an attempt to define emergency situations, but we can find some guidance in the jurisprudence of the ECtHR concerning Article 15 ECHR.

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<sup>101</sup> General Comment No. 29, *supra* note 65.

<sup>102</sup> D. Momtaz, ‘The minimum humanitarian rules applicable in periods of internal tension and strife’, 80 IRRC (1998) No. 324, pp. 455-462.

In the *Lawless* case the Court found that:

“[T]he national and customary meaning of the words “other public emergency threatening the life of the nation” is sufficiently clear; whereas they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed.”<sup>103</sup>

Apparently the French version of this text adds the word ‘imminent’, which in the English version is first mentioned in the next paragraph where the Court speaks of “the imminent danger to the nation” caused by unlawful activities in Northern Ireland by the IRA and other associated groups.<sup>104</sup>

In the case of *Greece v. UK*,<sup>105</sup> the European Commission on Human Rights meant that emergency situations must meet certain criteria: there must be an actual or imminent threat, effecting the whole nation and threatening the continuance of the organized life of the community. The threat or danger must furthermore be exceptional, so that ‘ordinary’ measures simply are inadequate for the maintenance of public safety, health and order.

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<sup>103</sup> *Lawless v. Ireland*, ECtHR 1 July 1961, Series A, no. 2, at para. 28.

<sup>104</sup> *Ibid.*, para. 29. See also A. Mokhtar, ‘Human Rights Obligations v. Derogations: Article 15 of the European Convention on Human Rights’, 8 *IJHR* (2004) 65, p. 68.

<sup>105</sup> *Greece v. UK*, ECmHR, Report of 5 November 1969, Yearbook XII (1969), para. 153.

## 4 The right to life in armed conflict

In this Chapter I will look into case law concerning the right to life in armed conflicts. I will focus on the case law developed by the European Court of Human Rights concerning the conflict in Chechnya.

### 4.1 The Abella Case<sup>106</sup>

Even though I choose to focus on the ICCPR and the European Convention, the *Abella* case from the Inter-American Commission can hardly be left aside when discussing the right to life in armed conflict. As the wording of the right to life in the American Convention is similar to the wording of that right in the ICCPR, the *Abella* case might also be important when interpreting Article 6 ICCPR.

#### Facts of the case

In the morning of 23 January 1989 42 armed persons launched an attack on the 'RIM 3' military barracks at La Tablada, Argentina. They believed a military coup was being planned at the barracks, and felt the need to prevent such a coup. They used their own private vehicles to crash the gate, and had private, legally obtained firearms with them. After entering the site, the attackers seized some military weapons found at the site to defend their positions.

Soon after the attack, the barracks were surrounded by approximately 3,500 police forces who used rifles and automatic pistols against the attackers. Around noon military troops arrived, who used tanks, armoured vehicles and cannons. According to the attackers, incendiary bombs were also used. The attackers claim they waived a white flag from the window in the morning of 23 January, before the military arrived, but that this attempt to surrender was denied.

The attackers surrendered at around 9 am on 24 January 1989. The conflict had resulted in the deaths of 19 of the attackers and several state agents. After the end of the armed struggle, ten persons were either unlawfully executed or disappeared and 20 persons were arrested and later convicted to prison sentences.

#### The parties submissions

The petition with the Inter-American Commission on Human Rights was filed on behalf of the mentioned 49 persons. The petitioners claimed that the

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<sup>106</sup> *Juan Carlos Abella v. Argentina*, IACmHR, 18 November 1997, case no. 11.137 [hereinafter *Abella*], <<http://www.cidh.org/annualrep/97eng/Argentina11137.htm>>, visited on 7 January 2008.

means and methods used by the military during the armed struggle were disproportionate and indiscriminate and that an attempted surrender in the morning of 23 January 1989 was not accepted, resulting in the death of 19 persons. After the end of the struggle, four people were extrajudicially executed and six were victims of forced disappearances. The remaining 20 people were submitted to torture and inhumane treatment, before they were sentenced to imprisonment. The petitioners complained of violations of the right to life (Article 4), the right to humane treatment (Article 5) and several articles concerning judicial guarantees and due process.<sup>107</sup>

The State's first reaction concerned the inadmissibility of the case, otherwise it remained silent throughout a large part of the proceedings. Only in the end stage, after the Commission had presented its report under Article 50 of the Convention did the government comment on parts of the allegations.

### **The Commissions considerations**

The Commission divided the case into different stadia, and then into different groups. It first made a distinction between the period during the attack and the armed struggle, which it considered an internal armed conflict, and the period after the surrender. It then went on to consider the case of those on whom there was multiple direct testimony, followed by the cases in which there was either direct testimony or where allegations were based on presumptions, and then ended by considering the cases of the 20 survivors. I will only discuss those considerations that are relevant for the subject of this thesis – meaning those that concern the armed conflict - and leave others aside.

Starting with the period of the attack, the Commission found it necessary to characterize the struggle in order to determine the sources of applicable law: did the situation fall under one or more rules of humanitarian law, or did it not? According to the Commission:

“Based on a careful appreciation of the facts, the Commission does not believe that the violent acts at the La Tablada military base on January 23 and 24, 1989 can be properly characterized as a situation of internal disturbances. What happened there was not equivalent to large scale violent demonstrations, students throwing stones at the police, bandits holding persons hostage for ransom, or the assassination of government officials for political reasons -- all forms of domestic violence not qualifying as armed conflicts.

What differentiates the events at the La Tablada base from these situations are the concerted nature of the hostile acts undertaken by the attackers, the direct involvement of governmental armed forces, and the nature and level of the violence attending the events in question. More particularly, the attackers involved carefully planned, coordinated and executed an armed attack, i.e., a military operation, against a quintessential military objective - a military base. The officer in charge of the La Tablada base sought, as was his duty, to repulse the attackers, and President Alfonsín, exercising his constitutional

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<sup>107</sup> *Ibid.*, paras. 5-67.

authority as Commander-in-Chief of the armed forces, ordered that military action be taken to recapture the base and subdue the attackers.”<sup>108</sup>

The Commission concluded that, even though the struggle didn’t last long, it was an armed conflict that triggered the applicability of Common Article 3 GC, as well as of “other rules relevant to the conduct of internal hostilities”.<sup>109</sup>

The question that followed, was if the Commission has the competency to apply these rules of IHL. In answering this question, the Commission gave an overview of the relation between HRL and IHL, and summed up several relevant articles from the American Convention. It started by noticing that these two branches of law “share a common nucleus of non-derogable rights and a common purpose of protecting human life and dignity”.<sup>110</sup> It then continued by stating that these two branches of law most converge and reinforce each other during situations of internal armed conflict:

“For example, both Common Article 3 and Article 4 of the American Convention protect the right to life and, thus, prohibit, inter alia, summary executions in all circumstances. [...] But the Commission’s ability to resolve claimed violations of this non-derogable right arising out of an armed conflict may not be possible in many cases by reference to Article 4 of the American Convention alone. This is because the American Convention contains no rules that either define or distinguish civilians from combatants and other military targets, much less, specify when a civilian can be lawfully attacked or when civilian casualties are a lawful consequence of military operations. Therefore, the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law [...]. To do otherwise would mean that the Commission would have to decline to exercise its jurisdiction in many cases involving indiscriminate attacks by State agents resulting in a considerable number of civilian casualties. Such a result would be manifestly absurd in light of the underlying object and purposes of both the American Convention and humanitarian law treaties.”<sup>111</sup>

Furthermore, Article 29(b) of the American Convention contains a so-called ‘most favourable’ clause, meaning that the Convention may never impair or limit rights or freedoms following from other domestic laws or international conventions. If the applicable rules of IHL thus are more favourable than the rights and freedoms listed in the American Convention, the former must be applied.

Zegveld has given a critical comment on the arguments the Commission used for its decision to apply IHL.<sup>112</sup> In a way, the Inter-American Commission does the opposite of the European Court of Human Rights, as

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<sup>108</sup> *Ibid.*, paras. 154-155.

<sup>109</sup> *Ibid.*, para. 156. It does however not become clear to which rules the Commission refers exactly. It mentions AP II in its considerations concerning the relation between the American Convention and IHL, but never explicitly states the applicability of AP II. *See* paras. 157-171.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*, para. 161.

<sup>112</sup> L. Zegveld, ‘The Inter-American Commission on Human Rights and international humanitarian law: A comment on the Tablada case’, 80 *IRRC* (1998) 505.

becomes clear from a comparison of the *Abella* case with the Chechen cases (discussed below). Where the Commission decides to apply IHL (since it otherwise ‘would have to decline to exercise its jurisdiction in many cases involving indiscriminate attacks by State agents’), the ECtHR chooses to apply only the European Convention. Seen in this light, it’s unclear why the Commission holds the opinion that it would have to decline to exercise its jurisdiction, if it could not apply IHL. Is not the American Convention applicable both in time of peace and in time of armed conflict? Is not the right to life non-derogable? As Zegveld says in her comment: the Commission could have sufficed by applying the American Convention interpreted in the light of IHL. This way the Commission could have used rules of IHL to interpret whether or not a deprivation of life was arbitrary – and thus forbidden – or not.

While applying humanitarian law, the Commission seems to forget about applying human rights law. The Commission clearly states that the attackers assumed the role of combatants, thereby ‘becoming legitimate military targets’ and losing the benefits that ‘peaceable civilians’ have.<sup>113</sup> This is of course in conformity with humanitarian law. The Commission however does not discuss if a qualification as combatant has any consequences for the right to life under Article 4 of the American Convention. Does the Commission mean that this rule of humanitarian law sets Article 4 ACHR aside, being *lex specialis*? Or is the Commission saying that deprivation of life in conformity with IHL is not arbitrary and thus not in violation of Article 4 of the American Convention? By only applying humanitarian law, it leaves some questions about the application of Article 4 ACHR in armed conflict unanswered.

As for the petitioners complaint concerning the behaviour of the military during the armed conflict and the denial of the supposed surrender, the Commission found that there was not sufficient evidence.<sup>114</sup> The Commission could not for sure establish that the attackers had waived a white flag from a window in the morning of the 23<sup>rd</sup> of January, and could therefore not conclude that the military had purposefully rejected the attacker’s surrender. The Commission couldn’t find sufficient evidence for the use of any illegal methods and means of warfare either, and thus concluded that the killing and wounding that occurred during the armed conflict was not in violation of the American Convention or applicable humanitarian law.

The Commission then considered:

“The Commission wishes to emphasize, however, that the persons who participated in the attack on the military base were legitimate military targets only for such time as they actively participated in the fighting. Those who surrendered, were captured or wounded and ceased their hostile acts, fell effectively within the power of Argentine state agents, who could no longer lawfully attack or subject them to other acts of violence. Instead, they were

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<sup>113</sup> *Abella* case, *supra* note 106, para. 178.

<sup>114</sup> *Ibid.*, paras. 180-188.

absolutely entitled to the non-derogable guarantees of humane treatment set forth in both common Article 3 of the Geneva Conventions and Article 5 of the American Convention. The intentional mistreatment, much less summary execution, of such wounded or captured persons would be a particularly serious violation of both instruments.”<sup>115</sup> [emphasis in the original]

In my opinion, the Commission could have sufficed with mentioning Article 4 and Article 5 ACHR, interpreting both the right to life and the right to humane treatment by using Common Article 3. As Common Article 3 GC prohibits both the killing and inhumane treatment of anyone who does not take a direct part in the hostilities, the Commission could easily have come to the conclusion that any such killing would be ‘arbitrary’ and thus prohibited by Article 4 ACHR, whereas any inhumane treatment would be directly prohibited by Article 5 ACHR.

The Commission’s direct application of humanitarian law has later been recalled by the Inter-American Court in the case of *Las Palmeras v. Colombia*.<sup>116</sup> The Inter-American Court here made clear that it is only mandated to interpret the provisions of the Convention.

## **4.2 The Chechen cases before the European Court of Human Rights**

### **4.2.1 Background of the conflict<sup>117</sup>**

The conflict in Chechnya has a long historical background of colonial wars and the deportation of many Chechens by Stalin after 1944. When the Soviet Union started to fall apart in 1990-1991, nationalist Chechen forces proclaimed Chechnya independent. A “clumsy effort” by Russia’s President Boris Yeltsin to introduce martial law only intensified the Chechen’s desire for independence. During this period in the beginning of the 1990’s, pressure on ethnic Russians increased and many of them fled Chechnya, leaving many educational and industrial establishments depleted. Slowly a conflict emerged between Chechnya’s President Dudajev and its parliament, which in June 1993 led Dudajev to move against his opposition by closing down opposition papers and storming the offices of his democratic opponents. Sixty people were killed. Both in Chechnya and Russia there was a development towards resolving conflicts by the use of force, which together with a breakdown of law and order in Chechnya, formed “a powerful combination in spurring the Russian invasion of Chechnya in December 1994”.<sup>118</sup>

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<sup>115</sup> *Ibid.*, para. 189.

<sup>116</sup> *Las Palmeras v. Colombia*, IACt.HR, 6 December 2001, <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_90\\_ing.doc](http://www.corteidh.or.cr/docs/casos/articulos/seriec_90_ing.doc)>, visited on 7 January 2008.

<sup>117</sup> See J. Weiler, *Human Rights in Russia: A darker side of reform*, 2004, pp. 107 *et seq.*

<sup>118</sup> *Ibid.*, p. 108.

The first invasion took place from December 1994 to the fall of 1996, when a peace agreement was signed. The second invasion began in October 1999. Russia had gained control over the most of Chechnya by March 2000. Since 2003 law-enforcement and counterterrorism operations have increasingly become the responsibility of Chechen forces that are loyal to Moscow, under leadership of Chechnya's President Kadyrov.

The Russian authorities never accepted that there was an armed conflict going on in Chechnya. Russia has always explained its actions as counterterrorism and law-enforcement operations. However, already in 1995 the Russian Constitutional Court declared AP II applicable and binding upon both parties to the conflict, labelling the conflict as a "prolonged internal armed conflict having great intensity".<sup>119</sup> The Russian Court however also mentioned that AP II was not implemented in Russian legislation, and that this probably was the 'primary ground' for non-compliance by the Russian military with the rules of IHL embedded in Protocol II.<sup>120</sup>

The decision by the Russian Constitutional Court is interesting in more ways. Gaeta notes that:

"[T]he Court underscored that according to the Russian Constitution and the UN Covenant on Civil and Political Rights 'victims of any violations, crimes and abuses of power shall be granted efficient remedies in law and compensation for damages caused'. In this way the Court has established the applicability of these human rights instruments to remedy at least the most blatant violations of international humanitarian law."<sup>121</sup>

Gaeta comes to this conclusion without asking himself if it is possible to use human rights complaints and compensation mechanisms for violations of humanitarian law. This is interesting, since neither the text of the ICCPR, nor the Human Rights Committee names a possibility for remedying violations other than those of the Covenant itself. In my opinion 'blatant violations of international humanitarian law' will only be relevant for discussion within human rights complaints mechanisms, as far as they constitute a violation of human rights law. Of course this will often be the case in internal armed conflicts. Violations of rules on humane treatment will also be violations of the prohibition of torture and inhumane and degrading treatment, found in human rights treaties. Indiscriminate or disproportionate bombings will violate the right to life in HRL as well as the humanitarian principles of distinction and proportionality.

The Constitutional Court's decision on the applicability of IHL only concerned the first invasion 1994-1996. There are clear indications that the second invasion also lived up to the threshold of at least Common Article 3, as is confirmed by several experts that were interviewed by the Crimes of

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<sup>119</sup> Paola Gaeta, 'The Armed Conflict in Chechnya before the Russian Constitutional Court', 7 EJIL (1996) 563.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

War Project.<sup>122</sup> As the (retired) British Major General Rogers put it: “once heavy armour, artillery and ground attack aircraft are deployed it is clear that the threshold has been crossed.”<sup>123</sup> One could question though if AP II is applicable, since this highly depends on the organization and structure within the Chechen fighter groups. According to Abresch journalistic accounts suggest that the fighters were under responsible command.<sup>124</sup> The experts asked by the Crimes of War Project seem to come to different conclusions here.

In February 2005, the European Court for Human Rights came to judgements in several Chechen cases, all concerning the period after the second invasion (post fall 1999). Since then, more cases have been presented to the Court; in May 2007 over 200 Chechen cases were still pending. Most of them concern the right to life (art. 2), the right to be free from torture and ill-treatment (art. 3) and the right to an effective remedy (art. 13). Complaints about enforced disappearances are dealt with under Article 2. I will discuss some of the cases concerning the right to life here.

## 4.2.2 Khashiyev and Akayeva<sup>125</sup>

### Facts of the case

As hostilities broke out again, both applicants left Grozny in October or November 1999, leaving some of their relatives behind. In December the Russian federal forces started operations to take control of Grozny, and there was heavy fighting until the end of January.

At the end of January 2000, applicants learned that their relatives had been killed in Grozny. On 25 January 2000 the first applicant travelled to Grozny where he found the dead bodies of his sister, nephew and that of the second applicant’s brother. They had been shot and showed signs of beatings or torture. The body of Adlan Akayev, the second applicant’s brother, was found holding his identity card from the Grozny Teaching Institute where he worked in his hand. His passport and another identity card were found in his shirt pocket; identity documents were also found on the other two bodies. The bodies of the first applicant’s brother and another nephew were found on 10 February 2000, together with a third body of a neighbour, grossly mutilated. Witnesses testified that they’d seen the first applicant’s brother and nephew being lead away by soldiers.

The newspaper ‘Novaya Gazeta’ published an article entitled ‘Freedom or Death’ on 27 April 2000, about a mass murder of civilians by the 205<sup>th</sup> Brigade in Grozny that had taken place on 19 January 2000.<sup>126</sup>

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<sup>122</sup> See ‘Chechnya and the Laws of War’, interviews with experts by The Crimes of War Project, <<http://www.crimesofwar.org/expert/chechnya.html>>, visited on 7 January 2008.

<sup>123</sup> *Ibid.*

<sup>124</sup> William Abresch, ‘A human rights law of armed conflict’, 16 EJIL (2005) 741, at p. 754.

<sup>125</sup> *Khashiyev and Akayeva v. Russia*, ECtHR, 25 February 2004, Application no. 57942/00 and 57945/00. A reference containing the web link to the judgement may be found in the bibliography.

In a civil case, the first applicant was granted pecuniary damages after he had sought redress for his loss at a domestic court.

### **The parties submissions**

Applicants submit that since Grozny was under control of government forces at the time, the state must be responsible for the death of their relatives. Several witnesses also claimed that applicants' relatives were killed by government forces.<sup>127</sup>

The government however submitted that the circumstances under which applicants' relatives had died weren't clear. They might have been killed by Chechen rebels, by 'ordinary criminals' or they might have been shot by government forces because they participated in armed resistance.<sup>128</sup>

### **The Courts considerations**

The government submitted about two-thirds of the domestic investigation file to the Court, stating the other documents were 'irrelevant'. The Court then considers that a failure to submit such information "without a satisfactory explanation may give rise to the drawing of inferences as to the well-foundedness of the applicants' allegations".<sup>129</sup>

The Court considers that none of the exceptions listed in Article 2 have been invoked by the government. Furthermore, the deaths of applicants' relatives were unlawful according to the domestic authorities, and the investigation file repeatedly refers to military servicemen as the perpetrators. Besides this, the evidence put forward by applicants is supported by human rights groups and international organizations.<sup>130</sup> The Court then concludes:

"On the basis of the material in its possession the Court finds it established that the applicants' relatives were killed by servicemen and that their deaths can be attributed to the State. It observes that no explanation has been forthcoming from the Russian Government as to the circumstances of the deaths, nor has any ground of justification been relied on by them in respect of any use of lethal force by their agents (see §§ 129-130 above). Liability for the applicants' relatives' deaths is therefore attributable to the respondent State and there has been accordingly a violation of Article 2 on that account."<sup>131</sup>

Concerning the domestic investigation of the deaths, the Court considers that there have been serious and unexplained failures to act: there have been

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<sup>126</sup> This article was written by Anna Politkovskaya, who was found murdered late 2006. As the Court describes in par. 60, she was questioned several times by the authorities, and testified that she had interviewed several witnesses of the massacre and relatives of the deceased. Many suspect that Anna Politkovskaya was murdered because of her critical and disclosing articles on Chechnya.

<sup>127</sup> *Khashiyev and Akayeva*, para. 126.

<sup>128</sup> *Ibid.*, para. 129.

<sup>129</sup> *Ibid.*, paras. 136-137.

<sup>130</sup> *Ibid.*, paras. 141-144.

<sup>131</sup> *Ibid.*, para. 147.

no efforts to obtain a plan of the military operations in Grozny around that time; no attempts to establish any details of the 205<sup>th</sup> Brigade, that was named several times; there has been a failure in the identifying of victims and witnesses; there was no attempt to get a comprehensive picture of the circumstances; no autopsies were done; and the investigation was adjourned and again resumed at least eight times.<sup>132</sup>

Applicants complaints of a violation of Article 3 was not substantiated by the evidence. The Court however decided there had been a violation of Article 3, since there hadn't been a domestic investigation into the allegations of torture made by applicants.<sup>133</sup>

### **4.2.3 Isayeva, Yusupova and Bazayeva<sup>134</sup>**

#### **Facts of the case**

Applicants all lived in Grozny or its suburbs when hostilities began in Autumn 1999. The city and its suburbs were the targets of wide-scale attacks by the military. Applicants heard that a humanitarian corridor to Ingushetia would be opened on 29 October 1999, to allow civilians to escape from the hostilities.

All applicants travelled towards the roadblock placed on the border with Ingushetia on 29 October, called 'Kavkaz-I'. There was a huge line of cars waiting, and they were informed the roadblock would open at around 9AM. At around 11AM a senior officer told the people in line that the roadblock wouldn't open that day and that he didn't know if or when it would open. He ordered everyone to clear the space in front of the roadblock and to return to Grozny.

Applicants estimated there was a line of up to 12 kilometres, so it took time before all cars had turned and were able to drive away. Also in line were at least 5 vehicles from the local Red Cross, displaying the distinctive sign.

On the way back to Grozny the whole convoy of vehicles got bombed by two fighter jets. The first applicant's two children and many others died, and the three applicants themselves were wounded.

#### **The parties submissions**

Applicants submit that the government must have known there were many civilians and refugees on the 'Kavkaz' highway that day. The fighters jets flew over on low altitude, so they must have been able to see the distinctive sign of the Red Cross on ca. 5 vehicles and how many people there were on the road. According to applicants there were no Chechen fighters around the road, and the fighter jets were at no point shot or fired at.

Applicants referred to a report by Human Rights Watch, containing eyewitness testimonies collected by HRW researchers in Ingushetia between

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<sup>132</sup> *Ibid.*, paras. 158-164.

<sup>133</sup> *Ibid.*, paras. 172-174.

<sup>134</sup> *Isayeva, Yusupova and Bazayeva v. Russia*, ECtHR, 24 February 2005, Application no. 57947/00.

November 1999 and May 2000. The report describes incidents where fleeing civilians were being attacked *en route*, and contains eyewitness testimonies on what happened on 29 October 1999 on the ‘Kavkaz’ highway. In this report, HRW specifically refers to IHL:

“[...]where aircrafts make multiple attack passes over a civilian convoy, or convoys are subject to prolonged attack by ground troops, the most plausible inference is that such attacks are intentional and with the likely knowledge of the predominantly civil character of the convoy. Customary international law requires that any attack discriminates between the civilians and military objects and that foreseeable injury to civilians be proportionate to the direct and concrete military advantage to be gained by the attack. ... Each of the incidents described below raises concerns that civilians may have been targeted intentionally or that the force used was not proportionate to the military advantage pursued...”<sup>135</sup>

Applicants complained of a violation of Article 2, since the bombings were indiscriminate, with the use of heavy bombs, while the government should have been aware that there were many civilians and/or refugees in the area.

The government on the other hand submitted that there was no official humanitarian corridor. The fighter jets had been attacked by Chechen fighters from a ‘Kamaz’-truck, which had been alone on the road. The pilots of the jets asked the commando centre for permission to fire, and only thereafter dropped their bombs. They were not aware there were civilians on the road and they did not see any distinctive sign of the Red Cross. The government maintained that the actions were covered by the exceptions listed in Article 2, paragraph 2, and that there had been no violation.

A third party submission was made by ‘Rights International’, a USA based NGO, addressing rules of IHL concerning “armed attacks on mixed combatant/civilian targets during a non-international armed conflict”.<sup>136</sup> The submission refers to Common Article 3 GC and the ICC Statute, and states that the “norms of non-international armed conflict should be construed in conformity with international human rights law governing the right to life and to humane treatment”. In the words of the Court:

“The submission argued that the law of non-international armed conflicts as construed by international human rights law established a three-part test. First, armed attacks on mixed combatant/civilian targets were lawful only if there was no alternative to using force for obtaining a lawful objective. Second, if such use of force was absolutely necessary, the means or method of force employed could only cause the least amount of foreseeable physical and mental suffering. Armed forces should be used for the neutralisation or deterrence of hostile force, which could take place by surrender, arrest, withdrawal or isolation of enemy combatants – not only by killing and wounding. This rule required that States made available non-lethal weapons technologies to their military personnel. Furthermore, the authorities should refrain from attacking until other non-lethal alternatives could be implemented. Third, if such a means or method of using force did not achieve

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<sup>135</sup> *Ibid.*, par. 102.

<sup>136</sup> *Ibid.*, paras. 161-167.

any of its lawful objectives, then force could be incrementally escalated to achieve them.”<sup>137</sup>

## The Court’s considerations

The Court begins its deliberations by stating:

“It is undisputed that the applicants were subjected to an aerial missile attack, during which the first applicant’s two children were killed and the first and the second applicant were wounded. This brings the complaint, in respect of all three applicants, within the ambit of Article 2 (...).”<sup>138</sup>

The Court then continues by mentioning there was a lack of information from the governments side, which severely hampers the Court’s ability to make a decision on the legitimacy of the attack. The pilots’ statements are incomplete and contradicting and can therefore not form convincing evidence. However, given the context of the conflict in Chechnya at that time, the Court is willing to assume there was (a risk of) a rebel attack and that the air strike pursued a legitimate aim. The Court then examines if the actions were ‘no more than absolutely necessary’ to achieve this legitimate aim.<sup>139</sup>

About the existence of a humanitarian corridor, the Court states that all witness testimonies refer to a ‘safe passage’ that was announced for 29 October. The government itself mentioned that the ‘Kavkaz-I’ roadblock was closed, because it couldn’t handle so many refugees. The government therefore knew or should have known there were many people in the area, which should have lead to ‘extreme caution’ regarding the use of lethal force.

The governments submission on the ‘sudden presence’ of civilians on the road is contradicted by a ‘substantial mass’ of other evidence, including the number of vehicles that was actually hit and the fact that the aviation attacks lasted for several hours. The Court also puts a lot of weight on the type of weapon that was used: the missiles had a radius of at least 300 metres, and created “several thousand pieces of shrapnel”. The Court concludes that anyone on the road that day would have been in mortal danger. The evidence furthermore is enough to suggest that the number of casualties might be significantly higher than the official figures.

The overall conclusion by the Court is that even if the military was pursuing a legitimate aim, the operation was not “planned and executed with the requisite care for the lives of the civilian population”. There has therefore been a violation of the right to life under Article 2 ECHR.

Article 2 has also been violated in that there hasn’t been an effective investigation of the lethal actions.

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<sup>137</sup> *Ibid.*, para. 167.

<sup>138</sup> *Ibid.*, para. 174.

<sup>139</sup> *Ibid.*, paras. 178-182

## 4.2.4 Isayeva<sup>140</sup>

### Facts of the case

The day or night before the 4<sup>th</sup> of February 2000 a large group of fighters had entered the village of Katyr-Yurt, which in the morning of February 4<sup>th</sup> lead to fighting at a road block just outside of the village. The government then withdrew its ground troops and an order was given to start aviation bombings. At around 9 or 11 AM fighter jets were called in, carrying heavy bombs with a damage radius exceeding 1,000 metres, and the village was bombed. There was evidence that heavy free-falling high-explosion aviation bombs were used as well as other non-guided heavy combat weapons against targets both in the centre and on the edges of the village. The local hospital mentioned there were so many wounded that the personnel was unable to keep records.

There was a pause in the bombings in the afternoon (around 3 PM) and several villagers had heard that the military had opened a safe corridor for civilians to leave. Applicant left the village together with her family in a minibus, as many other of the villagers did. But while they were on the road, the planes reappeared (at around 3:30 PM), descended and started bombing again. Applicant's son was hit by shrapnel and died within a few minutes. Three of applicant's nieces were killed and four other persons in the minibus were wounded.

### The parties submissions

Applicant complained to the Court that there had been a violation of Article 2. The bombings were indiscriminate and the military used heavy and indiscriminate weapons, such as heavy aviation bombs and multiple rocket launchers. Applicant submitted that over 150 people were killed in the village during the bombings. Applicant referred to the same HRW report as was submitted in the case of *Isayeva, Yusupova and Bazayeva*, that also describes the bombing of Katyr-Yurt on 4 February 2000.<sup>141</sup>

According to applicant two roadblocks were opened before the fighters arrived in the village, leaving the villagers to believe that entry and exit of the village was controlled by government troops and that they were protected from the fighters. The villagers had not expected the arrival of such a large group of fighters, and they were not warned before the bombings began. The lethal force that was used was neither absolutely necessary, nor strictly proportionate.

The government submitted on the other hand that the arrival of the fighters in Katyr-Yurt had been unforeseen and there hadn't been time to plan the military action in advance. The head of administration in Katyr-Yurt had been warned by the military that there would be bombings, but he had failed to instruct the villagers. Otherwise the authorities had warned the villagers

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<sup>140</sup> *Isayeva v. Russia*, ECtHR, 24 February 2005, Application no. 57950/00.

<sup>141</sup> See *Isayeva, Yusupova and Bazayeva*, *supra* note 134.

by use of a helicopter and a mobile station equipped with loud speakers. The government submitted that fighters must have prevented the villagers from leaving, using villagers as human shields. According to an expert report asked for by the government, the bombings were necessary and proportionate, and were therefore within the limits of Article 2, paragraph 2a of the Convention.

### **The Court's considerations**

The Court began its deliberations by pointing out that there was a lack of information from the government's side. Based on the information before it, the Court found that the situation in Chechnya called for exceptional measures, even justifying the use of lethal force. But there has to be a balance between the legitimate aim and the means to achieve this and it needs to be examined if the actions taken were 'absolutely necessary'.<sup>142</sup>

The Court found that the arrival of the fighters had been a surprise for the villagers, but not for the government. The government had put up two roadblocks and a commando centre, showing its operations were planned in advance.<sup>143</sup> As for the use of heavy combat weapons, the Court considered that there was no evidence that the government had made a "comprehensive evaluation of the limits and constraints on the use of indiscriminate weapons within a populated area".<sup>144</sup>

In its main consideration concerning the use of heavy weapons the Court stated:

"that using this kind of weapon in a populated area, outside wartime and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society. No martial law and no state of emergency has been declared in Chechnya, and no derogation has been made under Article 15 of the Convention (see § 133). The operation in question therefore has to be judged against a normal legal background. Even when faced with a situation where, as the Government submit, the population of the village had been held hostage by a large group of well-equipped and well-trained fighters, the primary aim of the operation should be to protect lives from unlawful violence. The massive use of indiscriminate weapons stands in flagrant contrast with this aim and cannot be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents."<sup>145</sup>

As for the existence of a safe passage for the villagers, the Court considers that all evidence points to the fact that an announcement of such safe passage – if any – had been made after the bombings had begun, putting the lives of the civilians in Katyr-Yurt at great risk. Even though most evidence supports the 'fairly substantial' presence of civilians and civilians cars on the road to Anchor-Martan, there is no evidence as to the military's reaction to this: there was no order to stop or reduce the intensity of the attacks, nor

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<sup>142</sup> *Isayeva, supra* note 140, par. 180-181.

<sup>143</sup> *Ibid.*, par. 184-188.

<sup>144</sup> *Ibid.*, par. 189.

<sup>145</sup> *Ibid.*, par. 191.

seems there to have been any communication between the forces manning the roadblock and the air-controllers.<sup>146</sup>

The Court decided that even though the government pursued a legitimate aim, the planning and execution of the actions were not done with the requisite care for the lives of the civilian population, leading to a violation of Article 2.<sup>147</sup>

The Court also considered there had been a violation of Article 2 in that there hadn't been an effective official investigation.

#### **4.2.5 Bazorkina<sup>148</sup>**

##### **Facts of the case**

Applicant hadn't heard news from her son since he left their home to go to Grozny in August 1999. Grozny was captured by government forces somewhere in January-February 2000. On 2 February 2000, applicant's son was shown on TV, wearing a camouflage uniform and being questioned by a Russian officer. The video shows some of the dialogue between them, which ends with the officer saying:

“Take him away, damn it, finish him off there, shit – that's the whole order. Get him out of here, damn it. Come on, come on, come on, do it, take him away, finish him off, shot him, damn it...”.

The video also shows wounded detainees and interviews with villagers, that said their village was shelled.

After the TV broadcast, applicant requested information from the authorities, and heard that her son was listed as missing. As no corpse had been found, the authorities said he could not have been killed. Therefore no criminal investigation was opened. Later the authorities told applicant her son had been detained and handed over for transport, but he had never arrived at the detention centre. The officer who was shown on the video, said his words had never been an order to execute applicant's son, but that he just wanted to stop the son's behaviour. This was confirmed by an expert, who said that the form and the words the officer had used, had been inappropriate for an order, and that it must have been a figure of speech. Witnesses stated that applicant's son had been seen standing at the same place for a longer time and that the troops around hadn't been under command of this particular officer. Besides, there had been too many people around to execute him anyway. Witnesses stated how applicant's son had been taken away by an APC vehicle.

In mid February 2000 five unidentified male bodies were found.

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<sup>146</sup> *Ibid.*, paras. 193-198.

<sup>147</sup> *Ibid.*, para. 200.

<sup>148</sup> *Bazorkina v. Russia*, ECtHR, 27 July 2006, Application no. 69481/01.

## **The parties submissions**

Applicant submitted there had been violations of Article 2, Article 3, Article 5 and Article 13. She submitted her son had been unlawfully killed by State agents and that the State had failed to carry out an effective investigation. She meant the State was responsible for her son's death, leading to a violation of Article 2.<sup>149</sup>

The government on the other hand submitted that applicant's son had been detained, but that he had disappeared. He had not been killed by government forces. Besides, the official investigation as to what had happened, was still going on.<sup>150</sup>

## **The Courts considerations**

The Court began by stating that there was no clear evidence as to applicant's son's death, so the first question would be if applicant's son was to be presumed dead. The Court identified a number of crucial elements that should be taken into account. First of all, the government had stated that applicant's son had been detained during a counter-terrorist action. Secondly, the video and several witnesses mentioned the officer's words, which could be regarded as life threatening – even if they weren't an official order. Finally, the Court put weight on the fact that there had been no reliable news on applicant's son after February 2000, that his name was not found in any detention register and that the government couldn't provide any reliable evidence or even a reliable explanation as to what had happened after 2 February. These facts, seen in combination with each other, lead to the conclusion that applicant's son must be presumed dead, following unacknowledged detention.<sup>151</sup> The Court therefore concluded that there has been a violation of Article 2.

The fact that applicant's son had been detained and hadn't been seen since, also led to a violation of Article 5. There were no official documents on his detention, which in itself is a most serious failing.

As for the domestic investigation, the Court also concluded there had been a violation of Article 2. The serious delays in the investigation had a negative impact on chances of getting to the truth. Servicemen that had been involved, were not identified or questioned and the information on the five mail bodies that were found, was never investigated. The investigation was adjourned and reopened six times, without promptly informing applicant, so she could not appeal these decisions. There has therefore not been an effective investigation.

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<sup>149</sup> *Ibid.*, para. 99

<sup>150</sup> *Ibid.*, para. 100

<sup>151</sup> The Court here refers to the case of *Timurtaş v. Turkey*, App.nl. 23531/94, ECHR 2000-VI.

## 4.2.6 Imakayeva<sup>152</sup>

### Facts of the case

On 17 December 2000 applicant's son, Said-Khuseyn Imakayev, drove to the neighbouring village to go to the market. Some witnesses saw how he was stopped by Russian servicemen at a roadblock and that he was forced into another car. Applicant has not heard from her son since. The following day applicant and her husband started to apply to several authorities on numerous occasions, such as the prosecutors office, the Minister of the Interior and the Administrative Authorities of Chechnya. On 12 February 2002 applicant and her husband file their complaint with the Court.

On 2 June 2002 military servicemen show up at applicant's house to do a house search. During the search applicant's husband, Said-Magomed Imakayev, is being held against a wall and afterwards he is taken away with the men. After the servicemen had finished the search of applicant's house, more houses were searched and four other men were detained. There has been no news from these five men since. Directly after applicant's husband had been detained, applicant started to search for him and again applied at several authorities.

### The parties submissions

Applicant submitted that both her son and her husband had disappeared following apprehension by Russian servicemen. They had been unlawfully killed and there has been a failure to carry out an effective investigation. Applicant referred to sources that state there is a pattern of forced disappearances in Chechnya, which supported her own statements.

As to the son's disappearance, the government stated that his apprehension might well have been committed by members of illegal armed groups 'in order to discredit federal forces'. Since the investigation on Said-Khuseyn's disappearance was still pending, the government refused to disclose relevant documents to the Court.

As for Said-Magomed, the government first denied, but later admitted his detention. He was suspected of being involved in a terrorist organisation. The government though submitted that they released applicant's husband after interrogation and that he had been transferred to the head of the District Administration. He had then disappeared. The government submitted that all documents concerning Said-Magomed were classified as state secrets and that it was therefore impossible to show these documents to the Court.

### The Courts considerations

Concerning Said-Khuseyn Imakayev the Court considered it established that he was last seen in the hands of unknown military or security personnel on 17 December 2000. His subsequent fate and whereabouts are uncertain.

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<sup>152</sup> *Imakayeva v. Russia*, ECtHR, 9 November 2006, Application no. 7615/02.

The detention of Said-Magomed by Russian security forces on 2 June 2002 is also proven. There are however no records on his detention, questioning or subsequent release and transfer.

With referral to the *Timurtaş* case, the Court names a number of crucial elements that should be taken into account on the question of whether or not Said-Khuseyn can be presumed dead and whether or not this can be attributed to the authorities:

“The Court recalls that it has found it established that the applicant's son was last seen on 17 December 2000 in the hands of unidentified military or security personnel. There has been no news of him since that date, which is more than five and a half years ago. The Court also notes the applicant's reference to the available information about the phenomenon of “disappearances” in Chechnya and agrees that, in the context of the conflict in Chechnya, when a person is detained by unidentified servicemen without any subsequent acknowledgement of detention, this can be regarded as life-threatening. Furthermore, the Government failed to provide any explanation of Said-Khuseyn Imakayev's disappearance and the official investigation into his kidnapping, dragging on for more than five years, produced no known results.

For the above reasons the Court considers that Said-Khuseyn Imakayev must be presumed dead following unacknowledged detention. Consequently, the responsibility of the respondent State is engaged. Noting that the authorities do not rely on any ground of justification in respect of the use of lethal force by their agents, it follows that liability for his presumed death is attributable to the respondent Government.”<sup>153</sup>

As for the investigation into Said-Khuseyn's disappearance, the Court considers that the only important procedural step (to grant applicant victim status) was taken after one and a half year. The prosecutor's orders show no progress, and the government has refused to submit any other documents. The Court therefore considers there has been no effective, prompt or thorough investigation.

Concerning Said-Magomed the Court referred to the same considerations as quoted here above, and stated he also had been detained in circumstances that can be described as life-threatening. That, in combination with the fact that there had been no news from him for almost four years, leads to the presumption of Said-Magomed's death.

The Court then makes a clear statement on the government's involvement in his disappearance or death:

“Moreover, the stance of the prosecutor's office and other law-enforcement authorities after the news of his detention had been communicated to them by the applicant significantly contributed to the possibility of disappearance, because no necessary actions were taken in the crucial first days or weeks after the detention. Their behaviour in the face of the applicant's well-established complaints gives a strong presumption of at least acquiescence in

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<sup>153</sup> *Ibid.*, paras. 141-142.

the situation and raises strong doubts as to the objectivity of the investigation.”<sup>154</sup>

The Court also considers the unacknowledged detentions of father and son Imakayev violations of Article 5. The governments “mere reference to the provisions of the Suppression of Terrorism Act” in the case of Said-Magomed “cannot replace a proper assessment of the reasonableness of suspicion in respect of the person in question” and can therefore not be excuse for violation of Article 5.<sup>155</sup> Furthermore, the absence of any official documents concerning the detention of both applicant’s husband and son, and the authorities denial of applicant’s husbands detention during two years shows the “complete absence of the safeguards contained in Article 5”.<sup>156</sup>

## 4.2.7 Luluyev and others<sup>157</sup>

### Facts of the case

On 3 June 2000 Nura Luluyeva, along with 2 cousins, left her house in Gudermes to go to the market place at Mozdokskaya Street in the northern part of Grozny. Between 7 and 9 AM an APC appeared and a group of armed and masked men in camouflage uniform got out. Nura Luluyeva, her cousins and some other women are taken away; sacks are put over their heads and they are loaded into the APC. Local police and the Deputy Chief of the village administration tried to intervene, but the uniformed men shot up in the air and said they were “lawfully carrying out a special operation”. Later that day applicants, Luluyeva’s husband and relatives, found out about Nura Luluyeva’s arrest and start their search for her.<sup>158</sup>

In February 2001 the women’s bodies were found in a mass grave close to Khankala, the Russian military’s headquarters in Chechnya. A death certificate dd. 12 April 2001 stated that Nura Luluyeva had died on 3 June 2000 due to a gunshot to the head. The death certificate described the circumstances of her death as “period of hostilities”. A forensic report dd. 28 April 2001 determined Luluyeva must have died three to ten month earlier.<sup>159</sup>

### The parties submissions

Applicants state that their wife and mother was deprived of her life by state agents. She was detained during a ‘mopping up’ operation, of which there are several witnesses, and then killed. Her body was found close to a large Russian military base in Khankala, an area in which access was restricted or

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<sup>154</sup> *Ibid.*, para. 155.

<sup>155</sup> *Ibid.*, para. 175.

<sup>156</sup> *Ibid.*, para. 176-178.

<sup>157</sup> *Luluyev and others v. Russia*, ECtHR, 9 November 2006, Application no. 69480/01.

<sup>158</sup> *Ibid.*, paras. 10-13.

<sup>159</sup> *Ibid.*, paras. 28-37.

at least closely monitored by the Russian federal forces. This constitutes a violation of Article 2.<sup>160</sup>

The government does not dispute that Nura Luluyeva was murdered and that her body was found in a mass grave. However, the domestic investigation into her death is still ongoing, and the identity of the masked men that apprehended her on 3 June 2000 has not been determined. There can therefore be no conclusion on the involvement of any state agency or servicemen.<sup>161</sup>

### **The Courts considerations**

The Court notes that the government does not deny any of the underlying facts of Nura Luluyeva's disappearance and death: that she was abducted from the market place by armed men, masked and dressed in camouflage uniforms, that she was driven away in an APC, died as a result of murder and that her body was found in a mass grave, together with the bodies of other people with whom she'd be detained. However, the government denies any involvement of State servicemen. The Court then notes:

“It also appears uncontested that Nura Luluyeva's apprehension took place at the same time as a security raid was being conducted in the same street. According to the witness testimony of K., quoted by the Government, a “mopping-up operation” was being carried out in Grozny's Mozdokskaya Street by the military detachment referred to as the Sofrino interior security troops. Although this detachment's participation was not confirmed or disproved in the domestic proceedings, the fact that a security operation was indeed taking place at that time and place has never been denied by any officials advising on the matter. The Court therefore considers it established that Nura Luluyeva's apprehension coincided with a special security operation carried out by military or security servicemen in the immediate vicinity.”

As neither the government, nor any of the evidence suggested that any other armed individuals had been at the scene of Nura Luluyeva's apprehension, the Court cannot but conclude that State servicemen apprehended and detained her in the course of the ‘special security operation’.

As for her killing, the date of her death remains unclear. However, a link between her death and her apprehension on 3 June 2000 has been assumed in all domestic proceedings, and the death certificate also mentions this date as the date of Luluyeva's death. Above all, the discovery of her body together with the bodies of the people that were detained at the same time and place, “strongly suggest that her death belonged to the same sequence of events as her arrest”. According to the Court there is proof beyond reasonable doubt that the authorities must be held responsible for Nura Luluyeva's death, which leads to the conclusion that there has been a violation of Article 2.<sup>162</sup>

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<sup>160</sup> *Ibid.*, para. 73.

<sup>161</sup> *Ibid.*, para. 74.

<sup>162</sup> *Ibid.*, paras. 82-85.

As for the domestic investigation it is once again held that it had been erroneous, and that there also in that regard had been a violation of Article 2. Furthermore the Court concluded that applicants had suffered distress because of the ineffectiveness of the domestic investigation, amounting to ill-treatment and thus to a violation of Article 3. Luluyeva's unacknowledged detention lead furthermore to a violation of Article 5.

## 4.2.8 Estamirov and others<sup>163</sup>

### Facts of the case

Because of the renewed hostilities, the first applicant, his mother and nephew (also applicants) left Grozny in November 1999. His father, his brother and pregnant sister-in-law, together with their one year old son and a cousin stayed behind in their house in the Oktyabrskiy district in Grozny.

In February 2000 applicant's aunt went to Grozny, where she met with another relative, Vakhid M., who told her all applicant's family members who had stayed in Grozny had been killed by Russian soldiers on 5 February 2000. The house had been partly burned and possessions had been stolen. The dead bodies all had gunshot wounds; some were also partly or severely burned. Vakhid M. had provisionally buried the bodies in the courtyard of the house the same day as he had found them.

On 4 April 2000 the first and second applicant travelled to Grozny, where they sought permission to exhume the bodies and bury them at the cemetery. On 8 April 2000 the two applicants, accompanied by several local policemen go to the house to exhume the bodies. One of the policemen had a camera and took photos of the faces of the bodies. Applicant also asked the police to gather other evidence from the site, such as bullets and cartridges and APC tracks in front of the house. A certificate issued by the temporary district office of the interior (VOVD) states that "the bodies were examined by the investigator of the VOVD, evidence of a violent death was established (...)." <sup>164</sup>

On 5 February 2000 other civilians were killed in the Novye Aldy suburb, about 10 minutes by foot away from applicants' house in Oktyabrskiy. Both Human Rights Watch and Memorial have documented these killings; applicants themselves have also given testimony to HRW. <sup>165</sup>

### The parties submissions

Applicants alleged that their relatives had been unlawfully killed by government forces and that the authorities had failed to carry out an effective investigation. They complained of a violation of Article 2. <sup>166</sup>

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<sup>163</sup> *Estamirov and others v. Russia*, ECtHR, 12 October 2006, Application no. 60272/00.

<sup>164</sup> *Ibid.*, paras. 13-19.

<sup>165</sup> *Ibid.*, paras. 22-23, where applicants refer to reports by these two NGO's. They themselves testified to HRW about the killing of their family in Oktyabrskiy.

<sup>166</sup> *Ibid.*, para. 96.

The government did not dispute the death of applicants' family. But since the domestic investigation was still in progress, the government couldn't draw any conclusions as to if Article 2 had been violated. Besides, there hadn't been identified any direct witnesses, and applicants only based their allegations on hearsay. Finally, the domestic investigation had not been able to establish a link between the killings in Novye Aldy and the killings of applicants' relatives.<sup>167</sup>

### **The Courts considerations**

In this case, the Court first considers applicants complaints concerning the (in)effectiveness of the domestic investigation, before moving on to the 'real' merits of the case.<sup>168</sup>

The Court notices that most documents in the file it has received from the government were produced in July 2003, after applicants had complained to the Court and the case had been communicated to the government. The investigation was first opened two months after applicants had notified the authorities – a substantial delay, which according to the Court “could not but affect the future effectiveness of the proceedings”.<sup>169</sup> Other failures in the investigation include investigating the wrong date, absence of any autopsies or other forensic reports, failure to grant applicants victim status in the proceedings and a total exclusion of applicants from the proceedings, and the repeated adjournment and resumption of the investigation. All in all the Court holds there has been no effective investigation, and a violation of Article 2 in this respect.<sup>170</sup>

When assessing if there otherwise had been a violation of Article 2, the Court begins by recalling its jurisprudence concerning the standard of proof 'beyond reasonable doubt'. When certain facts are disputed, proof may be found in the “coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact”. The Court will hereby take the conduct of the parties concerning the gathering of evidence into account.<sup>171</sup> In this regard, the Court puts significant weight on the government's refusal to disclose certain documents to the Court.<sup>172</sup>

As to the merits, the Court recalls that it is undisputed that applicants' relatives were unlawfully killed. Applicants, supported by local residents, have constantly stated that the killings had been performed by members of the army or police forces, but the government has failed to verify their account. It has however also failed to provide for any alternative account of applicants' relatives death.<sup>173</sup> The Court then considers that the burden of proof has shifted from applicants to the government:

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<sup>167</sup> *Ibid.*, para. 97.

<sup>168</sup> *Ibid.*, para. 82.

<sup>169</sup> *Ibid.*, para. 89.

<sup>170</sup> *Ibid.*, paras. 90-95.

<sup>171</sup> *Ibid.*, para. 100. The Court refers to its judgments in *Avsar v. Turkey* and *Ireland v. the United Kingdom*.

<sup>172</sup> *Ibid.*, para. 105.

<sup>173</sup> *Ibid.*, paras. 106-108.

“The Court has already noted the difficulties for an applicant to obtain the necessary evidence in support of his or her allegations which is in the hands of the respondent Government in cases where the Government fail to submit relevant documentation. Where the applicant makes out a *prima facie* case and the Court is prevented from reaching factual conclusions for lack of such documents, it is for the Government to argue conclusively why the documents in question cannot serve to corroborate the allegations made by the applicants, or to provide a satisfactory and convincing explanation of how the events in question occurred. The burden of proof is thus shifted to the Government and if it fails in its arguments, issues will arise under Article 2 and/or Article 3 (...).”<sup>174</sup>

The Court thus finds that applicants made a *prima facie* case that the death of their relatives could be attributed to the State, whereas the government has failed to provide any other explanation. The Court also refers to the governments conduct in respect of the investigation. On this basis the Court decides that the death of the five members of the Estamirov family can be attributed to the State. And “in the absence of any justification in respect of the use of lethal force” by the State, the Court concludes there has been a violation of Article 2.<sup>175</sup>

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<sup>174</sup> *Ibid.*, para. 112.

<sup>175</sup> *Ibid.*, paras. 113-114.

## 5 Legal analysis

Now that I have set out the relevant rules in Chapters 2 and 3, and have summarised the European Court's jurisprudence in Chapter 4, I would like to continue by analysing the discussed cases.

The first three cases concerning Chechnya, *Kashiyev and Akayeva, Isayeva, Yusupova and Bazayeva* and *Isayeva* all concern 'typical' situations of armed conflict. There's mentioning of aviation bombings and fighting on the ground, and these events have led to loss of life for the relatives of the applicants. The other cases do not so much concern armed clashes or direct fighting, but show a wider picture of the human rights abuses that took place in Chechnya. All of the cases are relevant for the discussion of the right to life in armed conflict though.

### 5.1 Two different human rights approaches to armed conflict

Before going into more detail about the Chechen cases, I would first like to make some comments on the different approaches that the European Court and the Inter-American Commission seem to have chosen.

As the European Court does not directly apply humanitarian law, it simply avoids the question if the situation in the cases before it could be characterized as armed conflicts. It applies the European Convention fully, irrespective of the existence of an armed conflict or the possible automatic application of IHL. This is different in the *Abella* case of the Inter-American Commission.

First of all, that case was concerned with a very clearly defined armed conflict, which started with the attack on the La Tablada barracks in the early morning of 23 January 1989, and ended with the surrender of the attackers at around 9 AM the next morning. The situation in Chechnya is harder to define. Was there one long conflict situation, or were there several smaller conflicts going on? As discussed above, most experts believe that the situation in Chechnya at some point triggered the applicability of Common Article 3 GC or even of AP II. But none of them clearly state when the threshold was reached, or when the conflict could be supposed to have ended.

Secondly, the wording of Article 2 ECHR in combination with Article 15 ECHR allows for another interpretation than Article 4 ACHR. Since the European Convention allows for derogations on the right to life for lawful acts of war under Article 15, the Court can easily fully apply Article 2 when such a derogation has not been made. I will discuss this in more detail later. Article 4 ACHR (together with the similar articles in the ICCPR and ACHPR) does not allow for derogations, but simply states that a life may

never be deprived ‘arbitrarily’. Applying this article must necessarily mean that the Inter-American Commission had to interpret the meaning of the word arbitrary, and it did so through a direct application of humanitarian law.

## 5.2 The Chechen cases and the European approach

### 5.2.1 Is IHL *lex specialis*?

The first and most important thing to note about the Chechen cases, is that the Court investigates all complaints against a ‘normal legal background’ and fully applies Article 2 ECHR. Even though the situations that are described in the cases can clearly be labelled as armed conflict situations (such as the shelling of villages and aviation attacks), the application of the Convention is in no way impaired by IHL.

Concerning the *lex specialis* character of IHL, there seems to be a difference between the law of international armed conflict and that of internal armed conflict. As the ICJ has made clear in both the *Nuclear Weapons*<sup>176</sup> and the *Palestinian Wall*<sup>177</sup> Advisory Opinions, it considers the law of international armed conflict *lex specialis*. The ICJ has however not mentioned the law of internal armed conflict, of which Abresch (amongst others) has questioned if this can be seen as *lex specialis*.<sup>178</sup> The reasoning behind the rule *lex specialis derogate legis generalis* is that a law that was specifically written to apply in a certain situation, should not be set aside by a law that concerns the general situation. Specific laws are supposed to provide for more detail. But the law of internal armed conflict can hardly be called specific or more detailed than human rights law. When it comes to the conduct of hostilities, Common Article 3 is almost silent, and AP II only contains one general provision on the protection of civilians.<sup>179</sup> Provisions concerning humane treatment are furthermore quite similar in both HRL and IHL. I agree with William Abresch that Common Article 3 is much more general than e.g. Article 2 ECHR concerning the right to life. If then the reasoning behind the *lex specialis* rule is absent, the rule itself shouldn’t be applied.

One expert attending the Expert Meeting in Geneva though disagreed with this point of view, stating that a *lex specialis* doesn’t have to be more detailed, more sophisticated or clearer than the rules found in the *lex generalis*; it need only have been designed especially for the given situation.<sup>180</sup>

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<sup>176</sup> *Nuclear Weapons* Advisory Opinion, *supra* note 60, paras. 24-25.

<sup>177</sup> *Palestinian Wall* Advisory Opinion, *supra* note 61, par. 104-106.

<sup>178</sup> Abresch, *supra* note 124, at p. 747. *See also* the Report of the Expert Meeting, *supra* note 48, at pp. 19-20.

<sup>179</sup> Article 13 AP II. *See also* Abresch, *supra* note 124, at p. 748.

<sup>180</sup> Report of the Expert Meeting, *supra* note 48, p. 20.

The latter opinion does however not give a solution for the overall problem: that the law of internal armed conflict fails to provide adequate protection. To argue that it was *designed* for a specific situation and that one therefore must accept a lesser protection, would in my opinion go directly against the purpose of humanitarian law, and can therefore not be accepted.

This is supported by Bothe *et al.* in their commentary on Protocol II:

“Protocol II should not be interpreted as remaining behind the basic standard established in the Covenant [on Civil and Political Rights]. On the contrary, when Protocol II in its more detailed provisions establishes a higher standard than the Covenant, this higher standard prevails, on the basis of the fact that the Protocol is “*lex specialis*” in relation to the Covenant. On the other hand, provisions of the Covenant which have not been reproduced in the Protocol which provide for a higher standard of protection than the protocol should be regarded as applicable irrespective of the relative times at which the two instruments came into force for the respective State. It is a general rule for the application of concurrent instruments of Human Rights – and Part II “Humane Treatment” [of Protocol II] is such an instrument – that they implement and complete each other instead of forming a basis for limitations.”<sup>181</sup>

Customary law may increasingly be able to fill some of the gaps that already seem to be effectively filled by [European] human rights law. But: the more human rights law is applied to internal armed conflict, the less room there is for development of customary humanitarian law. And the other way around: the more gaps are filled by customary humanitarian law, the less arguments there will be for applying human rights law. This leads Abresch to conclude that “the ‘customary humanitarian law of internal armed conflicts’ and the ‘human rights law of internal armed conflicts’ are competing projects.”<sup>182</sup>

## 5.2.2 The importance of Article 15 ECHR

Tied together with the question whether or not Common Article 3 and/or AP II should be considered automatically applicable as *lex specialis* is the question of which role Article 15 ECHR plays. An interesting aspect of this article is that a *declaration* is required when derogating from Article 2 for ‘lawful acts of war’. But if IHL applies automatically – a basic principle of the law of war – then shouldn’t it also automatically set aside laws that are conflicting with IHL?<sup>183</sup> However, by requiring a declaration of derogation, the ECHR denies this automatic application of IHL or at least its supremacy, as *lex specialis*, over the Convention.

From the Chechen cases it does not become clear if the Court questions the *lex specialis* character of IHL as such – as argued for by Abresch – or if the Court holds the opinion that Article 15 ECHR does not allow for an automatic application of IHL. Doswald-Beck (amongst others) would for

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<sup>181</sup> Bothe *et al.*, *supra* note 36, at p. 636.

<sup>182</sup> Abresch, *supra* note 124, p. 749.

<sup>183</sup> This was also mentioned by one of the experts in Geneva, *see* Report of the Expert Meeting, *supra* note 48, at p. 13.

sure not agree with the latter statement, as she considers derogations for lawful acts of war under Article 15 not required for non-international armed conflicts.<sup>184</sup> As the use of force necessary for quelling an insurrection is already allowed under Article 2(2)(c) ECHR itself, there would be no need to derogate from this article.

Question is if the Court follows the same reasoning. Irrespective of the arguments the State uses to justify its actions, the Court must fully consider Article 2, and thus also the three exceptions listed in paragraph 2 of this article. In none of the Chechen cases has the Court seriously considered if the Russian State was involved in the ‘quelling of a riot or insurrection’. It has on the other hand specifically referred to the absence of an emergency situation or derogations made under Article 15, considering the cases against a ‘normal legal background’. To me, this indicates that the Court does not agree with Doswald-Beck that situations of internal armed conflict are fully covered by Article 2 ECHR.

On the whole, the Court seems not bothered by the question whether or not there was an armed conflict going on. For example in *Isayeva* the Court considers that the use of heavy combat weapons *outside wartime* is incompatible with the degree of caution expected from law-enforcement authorities. Does this mean that the Court will only take the existence of an armed conflict into consideration, when the State argues an exception to the right to life under Article 2(2)(c), or when there is a notice of derogation under Article 15? Or is the Court simply avoiding the question of whether or not there was an armed conflict situation in the case of *Isayeva*?

If a notice of derogation under Article 15 for lawful acts of war is necessary in internal armed conflict – contrary to the reasoning of Doswald-Beck *et al.* – then at least the Court takes the existence of such a notice of derogation very serious.

### 5.2.3 A comparison between HRL and IHL

As mentioned earlier, the Court doesn’t explicitly refer to IHL as a source of law.<sup>185</sup> However, the Court does ‘borrow’ some terms from this branch of law and indeed takes rules of IHL into account. Terms such as ‘military necessity’ or ‘indiscriminate attacks’ are directly taken from the law of war, and serve to assess whether or not the use of force had been in breach of Article 2 ECHR.

The most direct referral to IHL is made in *Isayeva, Yusupova and Bazayeva*, where the Court assesses a report submitted by ‘Rights International’, an USA based NGO, on the applicability of human rights in internal conflicts. The report directly refers to Common Article 3 GC, but the Court refrains from referring to this article in its judgement. Looking at the cases in more

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<sup>184</sup> Doswald-Beck, *supra* note 100, at p. 883.

<sup>185</sup> See also Report of the Expert Meeting, *supra* note 48, pp. 10-13.

detail, it becomes clear though that the human rights law, developed in the jurisprudence of the Court has its counterparts in (customary) humanitarian law. As the conflict in Chechnya is of a non-international character, I will only discuss the rules of IHL that are applicable in internal armed conflicts.

### **A. The principle of proportionality**

In general the Court found that, based on the information before it, the situation in Chechnya called for exceptional measures, even justifying the use of lethal force.<sup>186</sup> In *Isayeva, Yusupova and Bazayeva* the Court was even willing to assume that “the military reasonably considered that there was an attack or a risk of attack from illegal insurgents, and that the air strike was a legitimate response to that attack”.<sup>187</sup> But there has to be a balance between the legitimate aim and the means to achieve this and it needs to be examined if the actions taken were ‘absolutely necessary’. Consequently, says the Court, “the force used must be strictly proportionate to the achievement of the permitted aims”.<sup>188</sup> In *Isayeva, Yusupova and Bazayeva* the Court mentions that the State used “an extremely powerful weapon” and that anyone on the road at the time of the attack “would have been in mortal danger”. This leads to the conclusion that even if the State was pursuing a legitimate aim in launching the non-guided air-to-ground missiles, this operation was not planned and executed with the requisite care for the lives of the civilian population.<sup>189</sup>

The applicable rules of IHL in this case would be:

- The principle of proportionality, that prohibits attacks that are expected to cause excessive suffering in relation to the anticipated military advantage;<sup>190</sup>
- The obligation on parties to the conflict to take constant care to spare the civilian population and civilian objects<sup>191</sup> and to avoid or at least minimize incidental loss of civilian life.<sup>192</sup>

One of the experts at the expert meeting in Geneva though pointed out that proportionality under IHL is not the same as proportionality under HRL:

“First, in HRL, we are not concerned with proportionality in relation to a military objective but rather with proportionality in relation to the protection of the right to life. Proportionality in HRL is really a matter of necessity [...] and the ECHR test requires absolute necessity.”<sup>193</sup>

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<sup>186</sup> *Isayeva, Yusupova and Bazayeva*, *supra* note 134, par. 178; *Isayeva*, *supra* note 140, par. 180.

<sup>187</sup> *Isayeva, Yusupova and Bazayeva*, *supra* note 134, par. 181.

<sup>188</sup> *Ibid.*, par. 182; *Isayeva*, *supra* note 140, par. 181.

<sup>189</sup> *Isayeva, Yusupova and Bazayeva*, *supra* note 134, par. 195-199.

<sup>190</sup> Customary IHL, Volume I, rule 14, p. 46.

<sup>191</sup> *Ibid.*, rule 15, p. 51.

<sup>192</sup> *Ibid.*, rule 17, p. 56.

<sup>193</sup> Report of the Expert Meeting, *supra* note 48, p. 11.

I do not agree with this analysis though. Proportionality will per definition always take two things into account, and in IHL it measures the relation between the anticipated military advantage and the number of expected civilian casualties or injuries. It does thus take protection of the right to life into account. It is correct that proportionality in human rights law not always takes ‘military advantage’ in consideration, as this branch of law has a much broader application. But by accepting that the situation in Chechnya asked for ‘exceptional measures’, I would argue that the Court has taken military reasons into account. The Court might even have been willing to accept civilian casualties, if not the number of victims had been so excessive in the cases brought before it, and if not the State had lacked to provide sufficient evidence for the necessity of the military operations.

This was also the line of thought of other experts. They stated that the use of potentially lethal force in HRL is governed by both the principles of necessity and proportionality. The cases of *Isayeva*, and *Isayeva, Yusupova and Bazayeva* “demonstrate that HRL can take cognizance of the fact of hostilities and will not require a State to do what is impossible”, these experts argued.<sup>194</sup>

## **B. The prohibition of indiscriminate attacks**

In *Isayeva*, the Court comes to the conclusion that the massive use of indiscriminate weapons stood in flagrant contrast to the aim to be achieved, namely to protect lives from unlawful violence.<sup>195</sup> The Court’s consideration in *Isayeva* contained several aspects relevant for a comparison with IHL, namely:

“that using this kind of weapon in a populated area, outside wartime and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society.”<sup>196</sup> [emphasis added].

The Court thus took into consideration that 1) the heavy weapons that were used resulted in the attack being indiscriminate; 2) the civilian population was not evacuated prior to the attack; and that 3) this could not be reconciled with the requisite care that can be expected from the State. According to the Court a State should make “a comprehensive evaluation of the limits and constraints on the use of indiscriminate weapons within a populated area”.<sup>197</sup>

These considerations resemble the prohibition of indiscriminate attacks:

- Indiscriminate attacks, meaning those attacks that either are not directed at a specific military objective, or that employ a method or

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<sup>194</sup> *Ibid.*, pp. 37-38.

<sup>195</sup> *Isayeva*, *supra* note 140, par. 191.

<sup>196</sup> *Ibid.*

<sup>197</sup> *Ibid.*, par. 189.

means that cannot be directed or the effects of which cannot be limited, are prohibited.<sup>198</sup>

### **C. The obligation to take constant care and to avoid or minimize incidental loss of civilian lives**

In *Isayeva* and in *Isayeva, Yusupova and Bazayeva* the Court put an emphasis on the lack of care shown by the government in trying to avoid or minimize loss of civilian life. In both cases, the Court concluded that the State knew, or could and should have known about the huge amount of civilians that were present in the area that was to be attacked.

The communication between the officers at the roadblock and the command post in charge of the aerial bombardments was lacking; civilians weren't evacuated and not warned about the attacks beforehand; and the government, knowing that there were thousands of civilians present, did not take 'extreme caution' as to the use of lethal force. In both cases the Court concluded that the operations were not planned and executed with the requisite care for the lives of the civilian population.

These considerations cover several rules found in humanitarian law, applicable in internal armed conflict:

- The obligation on parties to the conflict to take constant care to spare the civilian population and civilian objects<sup>199</sup> and to avoid or at least minimize incidental loss of civilian life;<sup>200</sup>
- The obligation on parties to the conflict to verify that targets are military objects<sup>201</sup> and to assess whether or not an attack on such an object would cause incidental loss of civilian life;<sup>202</sup>
- The obligation to cancel or suspend an attack, if excessive loss of civilian life may be expected;<sup>203</sup>
- The obligation upon the parties to the conflict to give effective advance warning of attacks that might affect the civilian population;<sup>204</sup>
- The obligation to remove civilian persons and objects from the vicinity of military objectives.<sup>205</sup>

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<sup>198</sup> Customary IHL, Volume I, Rules 11 and 12, pp. 37-43.

<sup>199</sup> *Ibid.*, rule 15, p. 51.

<sup>200</sup> *Ibid.*, rule 17, p. 56.

<sup>201</sup> *Ibid.*, rule 16, p. 55.

<sup>202</sup> *Ibid.*, rule 18, p. 58.

<sup>203</sup> *Ibid.*, rule 19, p. 60.

<sup>204</sup> *Ibid.*, rule 20, p. 62.

<sup>205</sup> *Ibid.*, rule 24, p. 74.

## D. The prohibition of murder and disappearances

The five other cases, described in Chapter 4, all involve killings and/or disappearances of the applicants relatives. In these cases the Court consequently concludes that if it is proven that these persons were last seen in the hands of State forces, the responsibility of the State in their deaths is necessarily involved.

Humanitarian law would also condemn these killings and enforced disappearances, according to the following rules:

- Murder, meaning the direct killing of a civilian or a person *hors de combat* is prohibited;<sup>206</sup>
- Enforced disappearance is prohibited.<sup>207</sup>

### 5.2.4 Is there a role for IHL in Strasbourg?

As shown in the paragraph above, the Court seems to fit quite a lot of rules of humanitarian law into its considerations, without naming or referring to this branch of law. According to Abresch, the Court has applied its doctrine on the use of force in a manner that actually is at odds with humanitarian law.<sup>208</sup> He explains that before, lawyers had ‘borrowed’ from the law of international armed conflict to fill gaps that existed in the law of internal armed conflict, and they had done so in three ways:

- 1) by interpreting the rules contained in Common Article 3 and AP II in the light of the more detailed provisions of the four GC’s and AP I;
- 2) by arguing that customary rules paralleling the treaty law rules on international armed conflict govern internal conflicts as well; and
- 3) by ‘internationalizing’ internal armed conflict and thus extend the reach of the Four Conventions and AP I.<sup>209</sup>

Abresch means that the Court has broken with this process in three ways. First of all, the rules provided for in the ECHR are not limited by any threshold concerning the intensity of a conflict. Secondly, the Court assesses the means of force that have been used as a part of the question on the lawfulness of the use of force – thus mixing up *jus in bello* with *jus ad bellum*. And finally, the Court seems to only permit the use of force when capture is too risky, regardless of the question if the person concerned is a

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<sup>206</sup> Common Article 3 GC and Article 4(2)(a) AP II; Customary IHL, Volume I, rule 89, p. 311.

<sup>207</sup> *Ibid.*, rule 98, p. 340.

<sup>208</sup> Abresch, *supra* note 124, p. 742.

<sup>209</sup> In the *Tadic* case, the ICTY “construed foreign support and control over a rebel group to ‘internationalize’ an otherwise internal armed conflict”. See Abresch, *supra* note 124.

combatant or a civilian.<sup>210</sup> As much as he considers the Court's reasoning 'at odds' with humanitarian law, Abresch also mentions that:

“the ECtHR's adaptation of human rights law to this end may prove to be the most promising basis for the international community to supervise and respond to violent actions between the state and its citizens.”<sup>211</sup>

The question is however if the Court's interpretation is so much at odds with humanitarian law as Abresch argues. There are two notes I would like to make here.

First, if the Court leaves IHL completely aside – which it at least attempts to do – then its interpretation of the European Convention can hardly be seen to be at odds with any interpretation of humanitarian law. The Court is not seeking to amend or adjust IHL, but on the contrary only seeks to fully apply the Convention in all circumstances. All this would maybe have been different, had Russia made a derogation under Article 15 for 'lawful acts of war'. In that case the Court would have been forced to directly apply the law of war, and wouldn't have been able to leave it aside. Until now, the Court has never been presented with such a case though.

Secondly, the rules the Court applies to the various situations of armed attacks (as for example in *Isayeva*, and *Isayeva, Yusupova and Bazayeva*), have great resemblance to (customary) rules of international humanitarian law. The principle of proportionality and the obligation upon States to plan and organize their actions with the appropriate care, as developed in the Court's jurisprudence, have their counterparts in IHL, as shown in the previous paragraph. As for the other cases, where the Court found evidence that civilians (or at least persons not taking an active or direct part in the hostilities) died or 'disappeared' while they were in the power or under the control of State forces, it can hardly be argued that applying IHL to these cases would have lead to a different outcome.

The Court has thus shown that the jurisprudence it has developed, can be interpreted in ways that are indeed compatible with relevant rules of humanitarian law. Had the Court, through a Russian notice of derogation under Article 15 been forced to apply IHL, the outcome of the cases in might not have been so different.

One might ask which branch of law provides for the best protection; a question also taken up in the *Abella* case.<sup>212</sup> An advantage of applying human rights law instead of IHL in internal armed conflict for the State is the fact that applying human rights law “does not entail admitting that the

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<sup>210</sup> Comparing this to the *Abella* case, one notices that the Inter-American Commission does the opposite. In assuming their role as combatants, the attackers of the La Tablada barracks lost their right to have their lives protected, and became legitimate targets for the military. See *Abella*, *supra* note 106, par. 178.

<sup>211</sup> Abresch, *supra* note 124, at p. 743.

<sup>212</sup> *Abella*, *supra* note 106, paras. 164-167.

situation is out of control”;<sup>213</sup> a State can apply the same rules regardless if it’s fighting against ordinary criminals, terrorists, rebels or insurgents. A second advantage is that human rights mechanisms often have strong enforcement systems in place. All human rights mechanisms allow for reparations during or after violations have been committed, providing direct redress to the victims. The European Court of Human Rights may under Article 34 of the Convention take interim measures, allowing the Court to intervene even before a possible violation has taken place. Such a system is unknown to IHL, that only can be enforced through the silent negotiations of the ICRC or through political pressure by other states and the UN Security Council. The developments within international criminal law, such as the establishment of the ICC should not be forgotten though. Its impact on the enforcement of IHL during armed conflict must not be marginalized.

### **5.2.5 ‘Enforced disappearances’ as a violation of the right to life**

Many of the cases discussed concern enforced disappearances; a practice that may constitute a crime against humanity, if part of a widespread or systematic attack directed against the civilian population.<sup>214</sup>

The ICC Statute defines the term ‘enforced disappearance’ as follows:

“‘Enforced disappearance of persons’ means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.”<sup>215</sup>

In December 2006 the Convention for the Protection of All Persons from Enforced Disappearance was signed by 71 States; it has however not entered into force yet.<sup>216</sup> Neither this Convention, nor the Inter-American Convention on Forced Disappearances of Persons<sup>217</sup> or the ICC Statute mentions the right to life or the deprivation of life as part of the crime of enforced disappearances. The European Court could thus have sufficed by stating that disappearance constitutes unacknowledged detention and thus a

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<sup>213</sup> Abresch, *supra* note 124, at p. 757.

<sup>214</sup> Article 7(1)(i) ICC Statute.

<sup>215</sup> Article 7(2)(i) ICC Statute.

<sup>216</sup> According to Article 39 the Convention shall enter into force on the thirtieth day after 20 States have ratified or acceded the Convention. Until now only one State has ratified the Convention; Russia has not signed the Convention. *See* <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty29.asp>>, visited on 4 December 2007.

<sup>217</sup> The Inter-American Convention on Forced Disappearances of Persons was discussed in the *Abella* case, *supra* note 106, par. 191-194. Here the Inter-American Commission decided that there was not sufficient evidence to establish that the authorities had refused to recognize or report the detention of the allegedly disappeared persons. Five out of the six allegedly disappeared persons were though considered to have been extrajudicially executed.

violation of Article 5 ECHR. By stating that the disappearances had lead to violations of the right to life, the Court stretched the definition of enforced disappearances. Apparently the Court holds the opinion that persons who have been missing for so long (several years), must be presumed dead. In some cases the bodies of the missing persons were found, in which case death of course no longer is a presumption. In other cases one could question how much time the Court thinks must have passed before it can conclude a presumption of death.

The Court's line of thought is however consistent with a Resolution of the United Nations General Assembly. The Declaration on the Protection of all Persons from Enforced Disappearances mentions in Article 1 that the practice of enforced disappearances "also violates or constitutes a grave threat to the right to life".<sup>218</sup>

## 5.2.6 Limits to counterterrorism operations

Russia has been defending its actions as law-enforcement and counterterrorism operations, presumably to gain political support and to avoid the applicability of Common Article 3 and Protocol II.<sup>219</sup> But one could argue that this reasoning has come back like a boomerang: as long as Russia denies there is an armed conflict, the European Court will judge the situation against a 'normal' legal background, leaving very little room for exceptions to the right to life.

Moving close to the borders of both IHL and HRL, the Russian Federation has insinuated that 'more is allowed' during counterterrorism operations. The Court does not agree with that line of thought, and considers that anti-terrorism acts may not be so construed "as to create an exemption to any kind of limitations of personal rights for an indefinite period of time and without clear boundaries to the security forces' actions".<sup>220</sup> Obviously, a State needs to comply with international law in one way (IHL) or another (HRL). Setting both systems of law aside in the fight against terrorism is not accepted by the European Court.

## 5.2.7 The right to an effective remedy

As set out here above, Article 2 ECHR can be violated in three ways: by lack of adequate planning, by the actual act that deprives life, or through the lack of a prompt, independent and effective domestic investigation. In all Chechen cases, the Court has considered that such an effective, prompt and

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<sup>218</sup> UNGA Resolution 47/133, 18 December 1992. *See also* Nowak, *supra* note 72, at p. 131. He writes that human rights courts, especially the ECtHR are reluctant to establish violations of the right to life in cases of disappearances. The Court seems though to have changed its jurisprudence, seeing the decisions in the Chechen cases that are discussed here.

<sup>219</sup> *See* Abresch, *supra* note 124, p. 754. In his footnote 44 Abresch sums up the several declarations that have been made by Russia to deny the applicability of IHL.

<sup>220</sup> *Imakayeva*, *supra* note 152, para. 188.

independent investigation has been absent. In all cases, the Court also decided there had been a violation of Article 13 ECHR (the right to an effective remedy). Where the investigation required under Article 2 is mainly aimed at determining whether or not the use of force was justified and at identifying and punishing those responsible, Article 13 is mainly concerned with providing relief to the victims of a violation. However, in cases of severe violations, such as the deprivation of life and infliction of treatment contrary to Article 3, Article 13 requires more than the payment of compensation. In such cases “a thorough and effective investigation capable of leading to the identification and punishment of those responsible” and effective access for the complainant to the investigation procedure are required.<sup>221</sup> The Court’s emphasis on the need to investigate and to identify and punish perpetrators “echoes the obligations existing in humanitarian law to suppress war crimes and grave breaches of the Geneva Conventions.”<sup>222</sup> Furthermore:

“[t]he importance of this obligation, especially in a case where a particular breach of any of the forgoing articles [2, 3, 5 and 8 ECHR and Art. 1 Prot. I] also constitutes a breach of international humanitarian law, must not be underestimated. Demanding accountability and requiring effective remedies – from investigation to prosecution and payment of compensation – is the key to domestic implementation of human rights and humanitarian law.”<sup>223</sup>

### 5.3 The ‘humanization’ of the law of war

Another conclusion one could reach after having read the European cases that concerned armed conflict situations, is that humanitarian law and human rights law are growing closer together. According to Meron this development has much to do with the “current changing nature of conflicts” (from international to internal), and a shift from the interests of States to the interests and rights of individuals.<sup>224</sup> The application of humanitarian law by human rights bodies has stimulated “this symbiotic relationship”. Even though these bodies according to Meron often reach conclusions that humanitarian law experts find problematic, it is “their very idealism and naïveté” that forms their greatest strength. Human rights bodies fill an institutional gap “and give international humanitarian law an ever more pro-human-rights orientation”.<sup>225</sup> I already mentioned the promising use of human rights mechanisms to provide redress to victims of violations in paragraph 5.2.6 above.

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<sup>221</sup> See *Isayeva*, *supra* note 140, para. 226, where the Court refers to its principal cases on Article 13.

<sup>222</sup> A. Reidy, ‘The approach of the European Commission and Court of Human Rights to international humanitarian law’, 80 *IRRC* (1998) 513.

<sup>223</sup> *Ibid.*

<sup>224</sup> T. Meron, ‘The humanization of humanitarian law’, 94 *AJIL* (2000) 239, at pp. 242-247. Note that this article was written before any of the Chechen cases had been considered by the ECtHR.

<sup>225</sup> *Ibid.*, at p. 247.

The Chechen cases before the European Court are a clear example of the ‘humanization’ of the laws of war. Where the Inter-American Commission in the *Abella* case concluded that the 19 attackers killed during armed conflict were not entitled to the protection offered by Article 6 ACHR, the European Court does not consider whether or not the deceased might have been legitimate targets under humanitarian law, thereby losing their right to life. According to the Court, the protection offered by Article 2 ECHR stays in place as long as there is no lawful derogation under Article 15. Even though Russia has publicly argued that it is involved in anti-terrorism actions, and it in several cases specifically has argued that the persons killed were Chechen fighters, the Court has not accepted this as an excuse.

The sole use of human rights law by the European Court in assessing situations that clearly qualify as armed conflict, is therefore an important step in the process of humanization as described by Meron.

### 5.3.1 Introduction of a new minimum standard

The process of the humanization of the laws of war is one way of filling the gaps that exist in the protection offered by humanitarian law, especially in internal armed conflicts. Another solution to the problem would be the introduction of minimum humanitarian standards, applicable in all times, and specifically aimed at providing protection in situations of internal strife and emergency situations that do not trigger the applicability of humanitarian law. The efforts of Meron towards the drafting of such a declaration need to be mentioned here.<sup>226</sup> Drafts were made by the Norwegian Human Rights Institute in 1987<sup>227</sup> and in 1990 by experts, gathered in Turku, Finland.<sup>228</sup> The member States of the OSCE stressed the importance of such a declaration in 1994, which they meant should be drafted and adopted by the UN.<sup>229</sup> In 1998 the UN Secretary-General published a report on this issue, taking into account both human rights law and humanitarian law.<sup>230</sup>

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<sup>226</sup> T. Meron, ‘On the inadequate reach of humanitarian and human rights law and the need for a new instrument’, 77 AJIL (1983) 589, and ‘Towards a humanitarian declaration on internal strife’, 78 AJIL (1984) 859. *See also* T. Meron and A. Rosas, ‘A Declaration of Minimum Humanitarian Standards’, 85 AJIL (1991) 375.

<sup>227</sup> Oslo Statement on Norms and Procedures in Times of Public Emergency or Internal Violence, Norway 1987. Reproduced in UN Doc. E/CN.4/Sub.2/1987/31.

<sup>228</sup> Declaration on Minimum Humanitarian Standards, Turku, Finland 1990. Reproduced in UN Doc. E/CN.4/1996/80, Annex.

<sup>229</sup> *See Momtaz, supra* note 102, at p. 455.

<sup>230</sup> Analytical report of the Secretary-General submitted pursuant to Commission of Human Rights Resolution 1997/21, 5 January 1998, UN Doc. E/CN.4/1998/87.

## 6 Conclusion

Armed conflicts continue to occur, and within the last decades we've seen a development from international armed conflicts towards more and more internal armed conflicts. The protection offered in non-international conflicts is given in Common Article 3 GC and Additional Protocol II, both very basic instruments, that in no way can be compared to the many provisions provided for by the Geneva Conventions and Additional Protocol I, applicable in international armed conflicts. Besides, States have in many cases rejected to apply international humanitarian law, arguing that the threshold for application of Common Article 3 and/or Additional Protocol II hadn't been reached.

Human rights law on the other hand is applicable at all times, though States may derogate from some articles in emergency situations. According to the ICCPR, ACHR and ACHPR the arbitrary deprivation of life is prohibited at all times, a provision which cannot be derogated from. However, what constitutes 'arbitrary' deprivation of life will depend on the circumstances, and will in a situation of armed conflict be interpreted within the framework of humanitarian law. The European Convention makes a specific derogation from the right to life for lawful acts of war possible, but so far none of the Council of Europe member States has used this possibility.

The European Court of Human Rights has developed a solid and detailed jurisprudence concerning the right to life and has held on to this also in clear-cut cases of armed conflict, such as in the Chechen cases of *Isayeva*, and *Isayeva, Yusupova and Bazayeva*.

The process, by Meron named 'the humanization of humanitarian law' and begun with the introduction of human rights law and the revision of the laws of war after WW II continues through the jurisprudence of the European Court of Human Rights. Clear situations of armed conflict are dealt with within this human rights mechanism and judged against the 'normal' legal background of human rights law. Humanitarian law itself is no longer only concerned with military strategic prohibitions, but is more and more concerned with the individual rights of people.

Human rights law can fill gaps that exist in the protection offered by IHL, especially by protecting civilians against their own government. The strong judicial and monitoring mechanisms that exist within human rights law provide redress to victims and lead to a better implementation and enforcement of human rights. At the same time a State can keep on pretending everything is under control by applying human rights law in internal armed conflicts, whereas a decision to apply humanitarian law would imply the total opposite.

On the other hand, human rights law does not provide all the answers. Contrary to humanitarian law, human rights law does not bind non-state actors, leaving those that fall under the control of rebel forces or insurgent groups without protection.

Even though human rights bodies are not mandated to apply IHL directly, they may apply certain provisions of humanitarian law in their interpretation of human rights. The meaning of the word 'arbitrary' in Article 6 ICCPR will depend on whether or not there is an armed conflict going on, and if the person that was killed was combatant or civilian. The European Court will have to involve IHL in answering what constitutes 'lawful acts of war' in Article 15 ECHR.

The Inter-American Commission has proven that it is not afraid to apply IHL, even though it was later corrected by the Inter-American Court. In the *Abella* case, the Commission stated that the 19 persons killed in combat became legitimate targets at the moment they attacked the military barracks at La Tablada, thereby sacrificing their otherwise non-derogable right to life. The European Court on the other hand has chosen not to apply humanitarian law at all. If the Court has chosen this reasoning because of the non-existence of a notice of derogation under Article 15 ECHR, or because it denies the *lex specialis* nature of IHL is not easily answered.

Experts welcome this development, even though not all of them agree with the way human rights mechanisms interpret the laws of war.

To put a stop to the discussion whether or not human rights law can be fully applied in armed conflict situations, and to fill the gaps that exist in humanitarian law, it has been suggested to introduce minimum humanitarian standards, applicable at all times.

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