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Violations of Human Rights during Military Operations in Chechnya

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Violations of Human Rights during Military Operations in Chechnya

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Abstract

The case-law of the European Court of Human Rights concerning violations of human rights law during armed conflict has been extended after the first decisions on cases arose from violations, committed during the war in Chechnya between 1999 and 2000. In the words of the Court, at that time the situation called for exceptional measures, in order to regain control over the Republic and suppress an illegal armed insurgency. The Court has been ready to admit those measures, including the deployment of army units equipped with heavy combat weapons, military aviation and artillery, were necessary to counter the aggressiveness of the separatists, but in such a way as to avoid or minimize, to the greatest extent possible, damage to civilians. This brief paper focuses on the means and methods employed. It aims firstly at illustrating the core of the Court's decisions, in order to identify the key aspects of the protection granted by the system of the European Convention in situations requiring the use of military force. Then it clarifies the approach of the Court to the law of armed conflict.

In February 2005 the European Court of Human Rights ruled upon the first cases concerning violations of human rights committed by the Russian Army during the conflict in Chechnya, between 1999 and 2000. This paper examines *Isayeva, Yusupova and Basayeva* and *Isayeva v. Russia,* two of six cases decided on 24 February, 2006, which concern the conduct of hostilities during military operations and the measures a democratic society should adopt in order to avoid, or at least reduce, the risk of incidents involving the civilian population and limit collateral damages ([1]). Operations affected mainly villages and populated areas, as well as the main lines of communication. Although the Russian Government held the operations in Chechnya were law enforcement operations directed at

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1 Medka Isayeva, Zina Yusupova and Libkan Bazayeva complained about the indiscriminate bombing by Russian military planes of civilians leaving Grozny on 29 October 1999. As a result of the bombing, Ms Isayeva was wounded and her two children and her daughter-in-law were killed, Ms Yusupova was wounded and Ms Bazayeva's cars containing the family's possessions were destroyed. Zara Isayeva complained about indiscriminate bombing of the village of Katyr-Yurt on 4 February 2000. As a result of the bombing, her son and three nieces were killed. See ECtHR, *Chamber judgments in six applications against Russia*, Press Release, 088, 24 February 2005.

disrupting terrorist and criminal activities, and were in defense of any person from unlawful violence, the Federal Army used heavy combat weapons, including aviation and artillery, repeatedly. In its reasoning, the Court conceded the situation on the ground called for exceptional measures but noted however that no declaration under Article 15 had been addressed to the Council of Europe ([2]). Pending the lack of any declaration under Article 15, the operations conducted by the Federal Army in and around Grozny have been evaluated by the Court as occurring in a normal legal contest. Consequently, the Court based its reasoning on principles it elaborated in law enforcement incidents. The core principles date back to the decision on *McCann*, which stands as a milestone in the jurisprudence of the Court. The case concerned the killing of three operatives of the Irish Republic Army (IRA) suspected of

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[2] Article 15 of the European Convention permits a State to derogate from its obligations under the Convention in times of war or other public emergency threatening the life of the nation, including a derogation to the right to life for deaths resulting from lawful acts of war. In *Lawless v. Ireland* the European Commission on Human Rights defined a "public emergency" as "a situation of exceptional and imminent danger or crisis affecting the general public…constituting a threat to organized life of the community…" while a different approach, stressing on the term "war", retained a "public emergency" as a situation "tantamount to war" (ECHR, *Lawless v. Ireland,* 1960-61) Commission Report, Dissenting Opinion of member Susterhenn). Furthermore, while the European Court admits it falls to each Contracting State to determine whether a situation of public emergency requires exceptional measures, sponsoring a "margin of appreciation" theory, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) considers the *de facto* situation, holding in *Tadic* that "an armed conflict is distinguished from internal disturbances by the level of intensity of the conflict and the degree of organisation of the parties to the conflict. As the Appeals Chamber stated: "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State." ICTY, *Prosecutor v. Dusko Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

detonating a car-bomb in Gibraltar ([3]). In its decision the Court held that any use of force must be no more than "absolutely necessary" for the achievement of one or more of the purposes set out in the second part of Article 2 of the European Convention. In keeping with the importance of this provision, the Court retained not only the use of force, but also the planning and control of the operation, must be carefully scrutinized. The Court held the United Kingdom in violation of Article 2 for having planned and conducted the military operation (deploying a SAS detachment, which acted on the honest belief that the killings were necessary) on inadequate intelligence assessments. In its view, the authorities failed to exercise the greatest of care in evaluating the information at their disposal before transmitting it to soldiers whose use of firearms automatically involved shooting to kill ([4]). Consequently, the Court did not retain that the killing of the three terrorists constituted the use of force which was "no more than absolutely necessary in defence of persons from unlawful violence". The principles set forth in the *McCann* case have been integrated by further elements resulting from subsequent decisions, arisen from incidents primarily involving IRA activists or members of the Kurdistan Workers Party (PKK). In particular, in *Ergi v. Turkey,* the Court held that any State has to take all feasible precautions in the choice of means and methods of a security operation, with an effort to avoid or at least minimize incidental loss of

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[3] European Court of Human Rights (ECtHR) *McCann And Others v. The United Kingdom* - 18984/91 [1995] ECHR 31 (27 September 1995), § 148: "The Court considers that the exceptions delineated in paragraph 2 (art. 2-2) indicate that this provision (art. 2-2) extends to, but is not concerned exclusively with, intentional killing. As the Commission has pointed out, the text of Article 2 (art. 2), read as a whole, demonstrates that paragraph 2 (art. 2-2) does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The use of force, however, must be no more than "absolutely necessary" for the achievement of one of the purposes set out in sub-paragraphs (a), (b) or (c) (art. 2-2-a, art. 2-2-b, art. 2-2-c)". *Ibidem*, § 149: "In this respect the use of the term "absolutely necessary" in Article 2 para. 2 (art. 2-2) indicates that a stricter and 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 (art. 8-2, art. 9-2, art. 10-2, art. 11-2) 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 (art. 2-2-a-b-c)". *Ibidem* § 150: "In keeping with the importance of this provision (art. 2) in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where 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".

[4] *McCann,* § 211.

civilian life ([5]).

In the judgments delivered on 24 February 2005 the main issue concerns the way in which operations were planned and conducted. In the case of *Isayeva, Yusupova and Basayeva,* concerning the death of civilians during an air strike, the Russian Government held that the huge number of casualties caused by the attack launched by two fighter jets against a convoy of civilian vehicles, was unintended. In its statement the Government held the planes were conducting a reconnaissance mission and simply returned fire when attacked by a separatist formation hidden within the convoy. The Court, after considering that 12 non-guided missiles, which were the full load of the two planes, were shot, concluded that, even assuming the pilots were pursuing a legitimate aim in launching 12 air-to-ground missiles, it could not accept that the operation was planned and executed with the requisite care for the lives of the civilian population ([6]). In *Isayeva v. Russia*, Federal forces shelled the village of Katyr-Yurt with high-explosive ammunition and air strikes. At that time in Katyr-Yurt there were up to 1000 rebel fighters hiding among the civilian population, totaling 25,000 inhabitants (including local residents and internally displaced persons from elsewhere in Chechnya). The Court, while observing that the presence of a large group of armed fighters in Katyr-Yurt may have justified the use of lethal force, nonetheless stated that a balance must be achieved between the aim pursued and the means employed. The massive use of indiscriminate weapons in a populated area, outside wartime and without prior evacuation of the civilians, sounded fully incompatible with the aim of protecting lives from unlawful violence ([7]).

A second question refers to the way the forward air controllers were employed. During operations in populated areas, outside wartime, the capability of positively identifying the engaged target as legitimate is essential. The Court observed, in the first case, that the fighter jets did not have a forward air controller entitled to evaluate the nature of the targets on

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[5] ECtHR, *Ergi v. Turkey* - 23818/94 [1998] ECHR 59 (28 July 1998), § 79: "The responsibility of the State is not confined to circumstances where there is significant evidence that misdirected fire from agents of the State has killed a civilian. It may also be engaged where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising, incidental loss of civilian life".

[6] ECtHR*, Isayeva, Yuzupova and Bazayeva v. Russia* - 57947/00; 57948/00; 57949/00 [2005] ECHR 129 (24 February 2005).

[7] ECtHR, *Isayeva v. Russia* - 57950/00 [2005] ECHR 128 (24 February 2005).

board. Consequently, the authorization for opening fire was requested and then released by a remote operational center. In the opinion of the Court, this fact, which could be regarded as a failure in the planning process aimed at preventing incidental loss of lives, gravely amplified the risk of casualties. In the siege of Katir-Yurt, forward air controllers were deployed the day before the attack, a circumstance which confirms the intention of using aviation in the area, accepting in that way the risk of huge civilian casualties.

A further issue concerns the activation of "safe exits" in order to permit the civilian population to evacuate the combat area. In *Isayeva*, the Court observed that there was no evidence that at the planning stage of the operation any serious calculations were made about the evacuation of civilians and that if a "safe exit" was established, it became known to the residents only after several hours of bombardment by indiscriminate weapons. The Court numbered, as essential provisions in an operational plan, those indicating how long an evacuation would take, what routes evacuees were supposed to take, what kind of precautions were in place to ensure safety, what steps were to be taken to assist the vulnerable and infirm ([8]).

As seen above, the Court of Strasbourg does not shy away from dealing with cases which pose significant questions on the use of military force and has made relevant efforts in adapting principles arisen from decisions on incidents occurred during law enforcement operations to wide-scale armed conflicts ([9]). Some analysts are uncomfortable with the Court's approach and, recalling the advisory opinion of the International Court of Justice (ICJ) of 8 July 1996, recalled in the recent advisory opinion on the construction of the "wall" in the Occupied Palestinian Territory ([10]), believe strongly that acts performed during armed conflict should be judged under the law of armed conflict, or international humanitarian law (IHL), as *lex specialis.* Those analysts argue that international humanitarian law provides a

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[8] *Isayeva,* § 189.

[9] Those principles can be summarized as follows: where potentially lethal force was used in pursuit of a permitted aim, the force had to be strictly proportionate to the achievement of that aim. Operations involving potential use of lethal force had to be planned and controlled by the authorities so as to minimise the risk to life. Authorities had to take all feasible precautions in the choice of means and methods with a view to avoiding and, in any event, minimising incidental loss of civilian life. See ECtHR, *Chamber judgments in six applications against Russia*, Press Release, 088, 24 February 2005.

[10] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 9 July 2004, § 105.

detailed set of rules, specifically aimed at protecting civilians from attacks ([11]).

International humanitarian law is founded on the four Geneva Conventions of 1949, which have been integrated by two Additional Protocols signed in 1977. Protocol I, relating to the protection of the victims of international armed conflicts, devotes an entire section to the protection against the hostilities, including a complete set of precautionary measures in its Article 57. Launching an indiscriminate attack (among others, an attack which may be expected to cause incidental loss of civilian life which would be excessive in relation to the concrete and direct military advantage anticipated) as an act constituting a grave breach of the Protocol, is a war crime. Such an act entails a criminal responsibility of subordinates and superiors, but any indictment is greatly limited by the fact that the rules set forth in the Protocol are not self-executing, and individuals are not allowed to file a claim in order to obtain compensation ([12]). Protocol II, relating to internal armed conflicts, shows similar general principles but less detailed rules. In order to guarantee the same standards of protection, some scholars hold the broad rules included in Protocol II ought to be interpreted through the specific provisions set forth in Protocol I ([13]).

Assuming a general indeterminacy of the European Convention in questions concerning military operations, scholars and judges have sustained the importance of international humanitarian law as a guideline in deciding on the legality of acts committed during armed conflict. Others, bearing in mind the jurisprudence of the Court on the

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[11] International Court of Justice, ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996, § 25: "The Court observes that the protection of the International Covenant of 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. Thus 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".

[12] Article 91 of the Additional Protocol I, which reproduces Article 3 of the Hague Convention Concerning the Laws and Customs of War on Land of 1907, reads: "A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces", while Article 1 of the Draft Articles on State responsibility holds that "every internationally wrong act of a State entails that State's international responsibility".

[13] According to the ICRC Commentary to Additional Protocol II, "The general principles relating to the protection of the civilian population apply irrespective of whether the conflict is an international or internal one." See ICRC Commentary on Article 13, § 4772.

procedural obligation to undertake an investigation aiming at identifying and punishing those agents responsible of unlawful killings entailed in Article 2, assume that a more decisive approach of the Court could be an occasion for implementing the rules on criminal responsibility for war crimes set forth in humanitarian law treaties ([14]). The Inter-American Commission on Human Rights, in the *Abella* case, affirmed the importance of humanitarian law as a source of authoritative guidance in its resolution of claims alleging violations of the American Convention in combat situations ([15]).

The Court of Strasbourg, in the case of *Banković,* concerning the NATO bombing of a broadcasting station in Belgrade during the air campaign against the Federal Republic of Yugoslavia in 1999 ([16]), held that while the Court must take into account any relevant rules of international law when examining questions concerning State responsibility, it must remain mindful of the Convention's special character as a human rights treaty ([17]). The statement is declaratory of the attitude of the Court towards those sources of law which cannot be referred to the European Convention or its jurisprudence. The European Court shows reluctance in founding its decisions on the law of armed conflict or upon other rules of international law, and retains its jurisprudence as the main source of authoritative guidance in

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[14] ECtHR, *McBride v. the UK* - 1396/06 [2006] ECHR 9 May 2006, § 1: "The Court's case-law establishes that Article 2 not only prohibits the use of lethal force, save in certain very restricted circumstances, but imposes obligations of a procedural and protective nature. In particular, it is recognised as an essential element of protection of the right to life that an effective investigation must be carried out into the use of lethal force by soldiers or other agents of the State (see, *mutatis mutandis*, *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, § 161, and *Kaya v. Turkey,* judgment of 19 February 1998, *Reports* 1998-I, p. 324, § 86). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. This investigation should be independent, accessible to the victim's family, carried out with reasonable promptness and expedition, effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances or otherwise unlawful, and afford a sufficient element of public scrutiny of the investigation or its results".

[15] Inter-American Commission on Human Rights, IACHR, *Juan Carlos Abella v. Argentina*, Case No. 11.137, Report No. 5/97, 1997, § 158-161. In particular: "…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".

[16] On 23 April 1999, one of the Radio-Television Serbia (RTS) buildings at Takovska Street in Belgrade was hit by a missile launched from a NATO aircraft. Two of the four floors of the building collapsed and the master control room was destroyed. Sixteen people were killed.

[17] ECtHR, *Banković and Others v. Belgium and 16 Other Contracting States* - 52207/99 [2001] ECHR 970 19 December 2001, § 57.

its decisions.

As stated above, the core of its approach represented by some assumptions generated in the praxis, have allowed the Court to build up a doctrine on the legitimacy of killings during law enforcement, starting from the literal formulation of Article 2 (2), for transferring that doctrine in incidents directly involving armed forces and military operations. Part of the criticism aims at pointing out that the Court, in refusing to apply international humanitarian law, assumes a low-profile attitude towards the effective implementation of fundamental rights, just when they suffer the fiercest attack. A second criticism refers to the highly imprecise manner in which the Court treats incidents involving the right to life, which in its own words ranks as one of the most fundamental provisions in the Convention. Finally, by refusing to recognize a role for international humanitarian law in its jurisprudence, the Court is favoring new gray areas.

Despite this subdued sense of criticism, in the two cases involving Russia mentioned above (as well as in other decisions concerning the war in Chechnya) the Court has been exhaustive and persuasive ([18]). The provisions of the Convention have been interpreted and applied "so as to make its safeguards practical and effective." As seen above, the cases focus on the way in which hostilities have been conducted. Regarding the use of aviation equipped with heavy combat weapon in a populated area the Court observed that these methods invariably put civilians at risk, a circumstance which imposes serious scrutiny in implementing the operational plan. Furthermore, the Court affirmed that the use of free-falling high-explosion aviation bombs and other non-guided heavy combat weapons (as indiscriminate weapons) without prior evacuation of the civilians (who should be considered as hostages *de facto* of the rebel militias), instead of organizing an exodus or using localized fire, is inadmissible in a democratic society ([19]). In *Isayeva, Yusupova and Bazayeva,* the Court literally held that the Russian forces used an extremely powerful weapon *for whatever aims they were trying to achieve*. Intending to make an assessment of the legitimacy of the attack, it expressed significant doubt that the military was pursuing a legitimate goal in launching 12 S-24 non-guided air-to-ground missiles (with an impact radius exceeding 300

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18 See ABRESCH, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, European Journal of International Law (EUR. J. INT'L L.), Vol. 16 (2005) No. 4, p. 763.

19 *Isayeva*, § 191.

meters) over a convoy made principally of civilian vehicles ([20]).

In summarizing the outcomes of the Court's approach, some preliminary elements have to be considered. First, the European Court's role is essentially that which is imposed on the Member States: to secure the rights and freedoms defined in Section I of the European Convention. Second, the Court is sensitive to the subsidiary nature of its role, while humanitarian treaties specifically oblige the State to search for persons alleged to have committed, or to have ordered to be committed, grave breaches, and bring such persons, regardless of their nationality (universal jurisdiction), before its own national courts. Third, talking about jurisdiction, but enunciating a general principle, the Court has held in *Banković* that had the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a text the same as or similar to the contemporaneous Articles 1 of the four Geneva Conventions of 1949 *(*[21]). In keeping with these premises, the Court's approach, while showing that the Convention is an instrument devoid of limitation *ratione materia,* it actually provides an effective remedy to violations. In refusing to use international humanitarian law explicitly, the Court avoids fueling any criticism for applying that discrete body of law, which falls outside the scope of the Convention and which requires expertise some could sustain the Court does not master. Furthermore, by openly discussing issues traditionally belonging to international humanitarian law, the Court cannot be accused of regarding itself as *a separate little empire* ([22]). In short, while the Court retains its identity as a human rights court, it also contributes to enlarging the protection afforded by the European Convention beyond its original reach, firstly by removing any residual doubt on the applicability of the Convention in wartime. Secondly, by granting an effectiveness which at present international humanitarian law cannot.

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[20] *Isayeva, Yusupova and Bazayeva*, § 195 and 199.

[21] Common Article 1 to the Geneva Conventions of 1949 reads as follows: " The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances". Article 1 of the ECHR reads as follows: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention".

[22] See GREENWOOD*, Comment on Banković v. Belgium,* Proceedings from ASIL Annual Meeting 2002, p. 24.