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How will the European Court of Human Rights deal with the UK in Iraq? Extra-territorial jurisdiction, tensions between International Humanitarian Law and International Human Rights Law, and lessons from Turkey and Russia

BILL BOWRING

1. INTRODUCTION

The invasion and occupation of Iraq have placed international law as a whole and human rights law in particular under extraordinary stress. In the face of brute and lawless force all normativity may appear to have evaporated from the international scene. Nevertheless, it is highly likely that in due course the European Court of Human Rights (ECtHR) will be called upon to adjudicate on complaints arising from the conduct of the United Kingdom, and possible other European states of the ‘Coalition of the Willing’. My argument in this chapter is that significant normative and legal resources already exist in the jurisprudence of the ECtHR, and that through the cases decided over the years, especially the Chechen cases, a wholly positive clarification of the relationship between International Humanitarian Law (IHL) and International Human Rights Law (IHR) is already taking place. However, this process, on my account, can only be understood in the context of colonial and post-colonial armed struggles.

In order to show this, I engage with two points of – apparently – positive legal doctrine; and a more general problem of human rights confronted by gross, widespread and systematic violations.

The first point of doctrine is the question of the extra-territorial reach of human rights law. This question is far from technical in the current context. It is the question whether the UK can be condemned in the European Court of Human Rights (ECtHR) for some of its actions in Iraq – specifically, for those actions which violate the European Convention on Human Rights (ECHR). It is significant but not surprising that legal doctrine on this question has been developed in relation to Turkey and Russia.

My second point of doctrine joins Vladimir Putin and Tony Blair in an unholy coupling. The technical issue is that the war in Iraq, like Russia’s own wars in Chechnya, throws into sharp relief a hitherto latent tension between the international law of human rights (IHR) and international humanitarian law (IHL), the international law of armed conflict. Is IHL a *lex specialis* which displaces IHR in the context of international or internal armed conflict?

The general problem in question is the following. The ECHR and ECtHR were elaborated as an ideological instrument in the context of the onset of the Cold War.¹ The UK was very reluctant to accept the creation of a Court capable of interfering in internal affairs and rendering obligatory judgments, but finally agreed in a spirit of solidarity against the threat of Communism.² For the first three decades of the work of ECHR mechanisms the Court was for the most part called upon to deal with lapses, more or less inadvertent, by Western European

¹ Brownlie, Ian and Goodwin-Gill, Guy (2006) *Basic Documents on Human Rights* 5th ed (Oxford: Oxford University Press, 2006) at 609

² See Council of Europe *Collected edition of the “Travaux préparatoires” of the European Convention on Human Rights* in eight volumes (Dordrecht: Martinus Nijhoff, 1975-1985)

states in which the rule of law and adherence to generally understood principles of democracy was not seriously in doubt. Even the many Northern Irish cases against the UK did not present as the result of serious armed conflict. Only in the 1990s, with the tidal wave of Turkish Kurdish cases, especially those concerning village destruction, followed by the many Chechen cases against Russia, has the Court been obliged to confront the human rights consequences of armed conflict. The question is whether the concepts and systems developed in a quite different context half a century ago are remotely effective or indeed legitimate when the UK invades and occupies Iraq.

It will be recalled that United Kingdom has been in Iraq before. As Joel Rayburn points out, the UK seized the provinces of Basra, Baghdad, and Mosul from the Ottoman Empire at the end of World War I and formally took control of the new country in 1920, under a mandate from the League of Nations. In 1920, a large-scale Shiite insurgency cost the British more than 2,000 casualties, and domestic pressure to withdraw from Iraq began to build. The UK's premature pullout in 1932 led to more violence in Iraq, the rise of a dictatorship, and a catastrophic unravelling of everything the British had tried to build there.³ It may be that history repeats itself as farce; but this time there is an international mechanism which may see the UK called to account for its actions.

2. EXTRA-TERRITORIAL EFFECT

The question of extra-territorial applicability of IHR has recently been the subject of intense scholarly engagement⁴. The key cases have arisen in the context of the application of the European Convention on Human Rights (ECHR). This is because the consequences of the post-colonial if not imperial behaviour of Turkey, of the Russian Federation, and of the UK, have been adjudicated upon by judicial instances at the international level, and now in domestic courts as well. These are the cases where the armed forces of a State are alleged to have violated human rights outside the national territory.

In this area, at least, international law demonstrates its resilience. Since the early 1990s, states have not, on balance, done well. Thus, Turkey lost in respect of its occupation of North Cyprus in the *Loizidou* case⁵, the UK together with other NATO members in the ECHR system had a close shave regarding the bombing of Serbia in the *Bankovic* case⁶, Russia has been condemned for its alleged occupation of part of Moldova⁷ in *Ilascu v Moldova and Russia*, and Turkey was once more found to be responsible for violations in neighbouring territory in *Issa v Turkey*.⁸ The *Bankovic* case has been described, by a leading judge of the Strasbourg Court, Loukis Loucaides, as 'a set-back in the effort to achieve the effective

³ Rayburn, Joel "The Last Exit from Iraq" v.85 n.2 (2006) *Foreign Affairs* pp.29-40

⁴ See Hampson, Françoise and Inrahim Salama 'Working paper on the relationship between human rights law and humanitarian law' Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 53rd session, Doc. E/CN.4/Sub.2/2005/14, 21 June 2005 at 19-22; Lubell, Noam, 'Challenges in applying human rights law to armed conflict' (2005) 87:860 *International Review of the Red Cross* 737-754 at 739-741; Leach, Philip 'The British military in Iraq – the applicability of the *espace juridique* doctrine under the European Convention on Human Rights' (Autumn 2005) *Public Law* 448-458

⁵ *Loizidou v Turkey (Preliminary Objections)* 40/1993/435/514, paras 62-64

⁶ *Bankovic and others v Belgium and 16 other states*, Application No.52207/99, decision of 12 December 2001

⁷ *Ilascu and others v Moldova and the Russian Federation, Romania intervening*, Application No.48787/99, decision of 8 July 2004

⁸ *Issa and others v Turkey*, Application no.31821/96, admissibility decision of 30 May 2000; decision of the second Chamber, 16 November 2004

promotion of and respect for human rights... in relation to the exercise of any State activity within or outside their country.’⁹ The UK’s occupation of Iraq is at the time of writing under scrutiny in the domestic courts in *Al-Skeini*¹⁰ and *Al-Jedda*¹¹ - decisions in the lower courts are at the time of writing under scrutiny in the House of Lords, as I explain in more detail below. Writing in 2003, Vaughan Lowe suggested that in view of the principles set out in the *Loizidou* and *Bankovic* cases ‘the UK may in principle incur liability under the ECHR in respect of its conduct in areas where it is in military occupation and exercising governmental powers.’¹² The crucial principle at stake is whether a state party to the ECHR can be in “effective control” outside its own territory or indeed outside the overall territory of the Council of Europe states so that the actions of its state agents can engage Convention rights.

It should also be noted that the UN Human Rights Committee has interpreted this aspect of the International Covenant on Civil and Political Rights (ICCPR). In its *General Comment No 31*, ‘The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’, which it adopted on 29 March 2004, it restated the relevant part of article 2(1) of the ICCPR and continued, at para 10:

This means that a state party must respect and ensure the rights laid down in the Covenant to anyone within the power and effective control of that state party, even if not situated within the territory of that state party ... This principle “- of applicability to all individuals who may find themselves subject to the jurisdiction of the state party-” also applies to those within the power or effective control of the forces of a state party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a state party assigned to an international peace-keeping or peace-enforcement operation.¹³

The question why there is a problem of the application of the ECHR at all is to be answered by reference to the history of the institution which gave birth to it, the Council of Europe.

A. The Cold War Origins and Post-colonial Destiny of the Council of Europe

The Council of Europe (CoE), which now comprises 47 states (since Montenegro voted to separate from Serbia), with a total population of some 850 million people, exemplifies one of the most poignant ironies of history. It was founded in 1949 in London, by the 10 Western European states which signed its Statute, as, quite self-consciously, ‘a sort of social and ideological counterpart to the military aspects of European co-operation represented by the North Atlantic Treaty Organisation.’¹⁴ The three ‘pillars’ of the CoE, which are exemplified

⁹ Loucaides, Loukis ‘Determining the Extra-territorial Effect of the European Convention: Facts, Jurisprudence and the Bankovic Case’ (2006) 4 *European Human Rights Law Review* 391-407. At note 2, p.392, Loucaides cites the large number of scholarly articles strongly criticising the decision.

¹⁰ *R (Al-Skeini and others) v Secretary of State for Defence*, High Court 14 December 2004, Court of Appeal 21 December 2005, [2005] EWCA Civ 1609; [2006] HRLR 7, now pending in the House of Lords.

¹¹ *R (Hilal Abdul-Razzaq Ali Al-Jedda) v Secretary of State for Defence*, Court of Appeal 20 March 2006, C1/2005/2251, [2006] EWCA CIV 327

¹² Lowe, Vaughan ‘The Iraq Crisis: What Now?’ v.52 October, (2003) *International and Comparative Law Quarterly* 859-871, at 869

¹³ CCPR/C/21/Rev.1/Add.13, of 26 May 2004. See also the International Court of Justice in the recent Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (ICJ Reps, 9 July 2004) at paras 108 and 109.

¹⁴ These are the words of Professor Ian Brownlie, in Brownlie, Ian and Goodwin-Gill, Guy (2006) *Basic Documents on Human Rights* (5th edition, Oxford: Oxford University Press) at 609

in its more than 200 binding treaties are pluralist democracy, the rule of law, and protection of individual human rights. By promulgating the ECHR, and creating the ECtHR, the first international court with powers to interfere in the internal affairs of states and to render obligatory judgments against them, the CoE showed it was truly serious about the “first generation” of civil and political rights, especially personal liberty, freedom of expression, the right to compensation for deprivation of property, the right to free elections. It is notable that the list of rights contained in the ECHR does not depart significantly from the list in the French Revolution’s *Declaration of the Rights of Man and of the Citizen* of 1789. It contained no social, economic or cultural rights, largely at the insistence of the UK. The content of the ECHR contrasted strongly with the human rights guaranteed in the constitutions of the USSR and its subject states, all of which gave pride of place to the right to work, followed by rights to social security, healthcare, education and housing. These states could show that they were serious about the social and economic rights enshrined in their constitutions and, by and large, delivered them in practice. Indeed, not only did every person of working age have work, but it was a crime, the crime of ‘parasitism’, not to work.

It should be no surprise that the UK was strongly resistant to the principle of obligatory judicial decisions at the international level. It remained determined that even if there was to be a Convention, there would be no court, at least for the UK. Thus, when, on 7 August 1950, the Committee of Ministers adopted a draft convention, weakened as a result of UK pressure, it made the right of individual petition conditional on a declaration of acceptance by the State Party, and the jurisdiction of the ECtHR optional.¹⁵ The UK’s Attorney-General, Shawcross, stated on 4 October 1950 that ‘we should refuse to accept the Court or the Commission as a Court of Appeal and should firmly set our faces against the right of individual petition which seems to me to be wholly opposed to the theory of responsible government.’¹⁶ On 18 October 1950 there was a Ministerial Meeting of the ministers most directly concerned, and Shawcross advised that the ECHR was in essence a statement of the general principles of human rights in a democratic community, in contrast with their suppression under totalitarian government. There had been strong political pressure on the UK Government to agree to the Council of Europe Convention, and he felt that the wisest course was to accept it.¹⁷

Why was the UK so reluctant to submit to such interference? Part of the answer, still relevant for my purposes, lies in the concerns that the ECHR might bring colonial matters under international scrutiny. This was borne out in two of the first cases decided against the UK directly concerned its colonial past¹⁸.

One of the first such cases, decided in 1973, involved events taking place outside the UK, and indeed far from Europe.¹⁹ The UK’s East African colony Uganda had an Asian population of many thousands, the descendants of Asians who had been brought by the British Empire from India, and who served as civil servants and ran shops and businesses. Uganda was granted independence in 1962. However, in January 1971 the elected President, Apolo Milton Obote, was overthrown by his army commander, Idi Amin Dada. The following year, as part of a

¹⁵ Trav Prep (ibid) Vol V, p.56

¹⁶ LCO 2/5570 [3363/22]

¹⁷ CAB 130/64 [GEN. 337/1st Meeting]

¹⁸ See also the earlier case *Kingdom of Greece v United Kingdom* App.No. 176/56, Commission decision of 26 September 1958, rejecting the complaints by Greece arising out of the conflict in Cyprus. It will be noted that the complaint by Greece was made, and the Commission decided, before the UK recognised – in 1966 – the right of individual petition

¹⁹ *East African Asians v United Kingdom* App No. 4403/70 – 4429/70 and others, Commission Report adopted on 14 December 1973

policy of 'Africanisation', Amin gave all Asians in Uganda 90 days to leave the country, claiming that God had ordered him to do so in a dream.²⁰ The UK refused them entry. As the government advisers had feared, a number of the Asians complained to Strasbourg. They could not do so under Protocol 4, but, advised by Anthony Lester, argued that deprivation of their right of entry to the UK had caused them humiliation and distress amounting to 'inhuman and degrading treatment' in violation of Article 3. On 14 December 1973 the (former) European Commission on Human Rights found that the enactment of the *Commonwealth Immigrants Act 1968* had breached Article 3 of the Convention. The case did not have to go to the Court, since the UK conceded.

The second case was extraordinarily embarrassing for the UK: an interstate complaint brought by the Republic of Ireland, alleging that suspected terrorists held in administrative detention in Northern Ireland had been subjected to torture. The then Commission agreed; the Court held that the use by the UK of the methods of psychological pressure known as the 'five techniques' amounted to inhuman and degrading treatment, again a violation of Article 3.²¹

Both these cases therefore concerned the imperial – or at any rate colonial – past of the UK, in a way which threw into sharp relief the real reasons why the UK was so reluctant to make application to the ECtHR a reality (and in fact failed to incorporate the ECHR in domestic law until the *Human Rights Act 1998* came into force in 2000).

B. UK Occupation of Southern Iraq

The issue of extra-territorial jurisdiction arose has resurfaced in relation to the invasion and occupation of Iraq. On 7 April 2004 the Armed Forces Minister, Adam Ingram, stated that:

the ECHR is intended to apply in a regional context in the legal space of the Contracting States. It was not designed to be applied throughout the world and was not intended to cover the activities of a signatory in a country which is not signatory to the Convention. The ECHR can have no application to the activities of the UK in Iraq because the citizens of Iraq had no rights under the ECHR prior to the military action by the Coalition Forces.²²

This assertion has now been fully discredited. In October and December 2005 the Court of Appeal heard appeals in *Regina (Al-Skeini and others) v. Secretary of State for Defence (The Redress Trust and another intervening)*.²³ These were applications for judicial review brought by relatives of Iraqi citizens who had been killed in incidents in Iraq involving British troops. Five of the deceased had been shot by British troops, and a sixth, Baha Mousa, had died while being held in a British detention facility. The claimants sought judicial review of a failure by the Secretary of State for Defence to conduct independent inquiries into or to accept liability for the deaths and the torture. On the hearing of preliminary issues the Divisional Court declared that the ECHR and the Human Rights Act 1998 did not apply in the cases of the first five claimants, but that in the case of the sixth claimant the 1998 Act did apply and the United Kingdom's procedural duties under articles 2 and 3 of the Convention had been breached. The Court held that a state can be held to have 'effective control' of an area only where that area is within the territory or 'legal space' – *espace juridique* – of the Convention, and therefore only

²⁰ Wakabi, Wairgala "Idi Amin just won't go away", 30 April 1999, The Black World Today, www.blackworldtoday.com/views/feat/feat1142.asp

²¹ *Republic of Ireland v United Kingdom* App no. 5310/71, judgment of 18 January 1978

²² Rt Hon Adam Ingram MP, Ministry of Defence, Letter to Adam Price MP, 7 April 2004

²³ [2005] EWCA Civ 1609; [2006] 3 W.L.R. 508

where the area occupied was that of another State Party to the ECHR. Accordingly, since Iraq was not within the regional space of the ECHR, the claimants' cases were not within the jurisdiction of the UK.

The Court of Appeal dismissed the applicants' appeals, and held that the jurisdiction of a State Party to the ECHR was essentially territorial; that if a contracting state had effective control of the territory of another state, it had jurisdiction within that territory under Article 1 of the ECHR and an obligation to ensure Convention rights and freedoms; but that since none of the victims in the first five cases were under the actual control and authority of British troops at the time when they were killed, and since it was impossible to hold that the United Kingdom was in effective control of that part of Iraq which its forces occupied or that it possessed any executive, legislative or judicial authority outside the limited authority given to its military forces there, neither the Convention nor the 1998 Act applied. The government's appeal with respect to Mr Mousa was also dismissed. That decision was heard by the House of Lords in April 2007, and at the time of writing the decision is awaited.

Nevertheless, the Court of Appeal disagreed with the Divisional Court as to *espace juridique*. Lord Justice Brooke answered the question whether the ECHR could have extraterritorial effect as follows:

It was common ground that the jurisdiction of a contracting state is essentially territorial, as one would expect. It was also common ground that: (i) if a contracting state has effective control of part of the territory of another contracting state, it has jurisdiction within that territory within the meaning of article 1 of the ECHR, which provides that "the high contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of the Convention"; (ii) if an agent of a contracting state exercises authority through the activities of its diplomatic or consular agents abroad or on board craft and vessels registered in or flying the flag of the state, that state is similarly obliged to secure those rights and freedoms to persons affected by that exercise of authority.²⁴

The first of these he referred to as 'ECA' (effective control of an area) and the second 'SAA' (state agent authority). For the purposes of SAA he held that none of the first five claimants were under the control and authority of British troops at the time when they were killed.²⁵ For the purposes of ECA he asked '[w]as the United Kingdom in effective control of Basra City in August-November 2003?' He held that it was 'quite impossible to hold that the UK, although an occupying power for the purposes of the Hague Regulations and Geneva IV, was in effective control of Basra City for the purposes of ECHR jurisprudence at the material time.'²⁶

Philip Leach²⁷ argues (and Brooke LJ appears not to disagree) that until 28 June 2004 when the Iraqi Interim Government assumed full responsibility and control for governing Iraq²⁸ the UK was an occupying power as defined by the Hague Regulations of 1907 and the Fourth Geneva convention of 1949. Thus, in his view: 'it is very clear that the exercise of authority or control by the United Kingdom over parts of southern Iraq in 2003-4 was extensive. For

²⁴ Ibid para. 48

²⁵ Ibid para. 101

²⁶ Para. 124

²⁷ Leach (2005) op cit p.457

²⁸ UN Security Council Resolution 1546

the purpose of the Strasbourg “effective control” test, it cannot be sensibly or convincingly distinguished from the control which Turkey has been found to exercise over northern Cyprus.²⁹ Ralph Wilde has made similar arguments.³⁰ Loucaides cites with approval the words of Sedley LJ in *Al-Skeini*:

I do not accept Mr Greenwood’s submission that Bankovic is a watershed in the Court’s Jurisprudence. Bankovuis is more accurately characterised, in my view, as a break in the substantial line of decisions, nearly all of them relating to the Turkish occupation of northern Cyprus, which hold a member state answerable for what it does in alien territory following a de facto assumption of authority.³¹

That, in my view, is the correct approach.

3. TENSION BETWEEN INTERNATIONAL HUMANITARIAN LAW AND THE LAW OF INTERNATIONAL HUMAN RIGHTS

My starting point in this section is a history of struggle and of disputed doctrine. The anti-colonial struggles were largely aimed at securing independence within defined, overseas, territories – that is, the ‘salt-water self-determination’, in respect of territories separated from the colonial metropolis by seas and oceans to which the UN declaration of 1960 was directed.³² The non-state protagonists were the ‘national liberation movements’. The legal issues arising from the use of force by these movements, and the right or otherwise of other states to render support, including intervention, usually by the USSR, were explored in detail, almost at the end of the Cold War, by Julio Faundez, writing in the first issue of the first international law journal published in French and English and aimed at Africa,³³ and Heather Wilson, with a background in the US armed forces.³⁴ That was the period, up to the collapse of the USSR, when the use of force by self-determination movements – National Liberation Movements - was not, as is so often the case today, characterised as ‘terrorism’.

International humanitarian law had been substantially updated and codified following WWII, in the four Geneva Conventions, dealing with wounded and sick, shipwrecked, prisoners of war, and civilians in the power of an opposing belligerent and civilians in occupied territory. These conventions were adopted in 1949 at the initiative of a private organisation, the International Committee of the Red Cross.³⁵

As Hampson and Salama point out, there was no successful attempt to update the rules of conduct of hostilities until 1977, when two Additional Protocols were promulgated. They suggest that ‘this may have been partly attributable to the reluctance, after both the first and second world wars, to regulate a phenomenon which the League of Nations and later the United Nations were intended to eliminate or control.’³⁶ However, these distinguished authors appear to miss the significance of the two Additional Protocols to the Geneva Conventions,

²⁹ *Cyprus v Turkey* (2002) 35 E.H.R.R. 30

³⁰ Wilde, Ralph “The ‘Legal Space’ or ‘Espace Juridique’ of the European Convention on Human Rights: Is It Relevant to Extraterritorial State Action” part 2 (2005) *European Human Rights Law Review* pp.115-124

³¹ Loucaides, *ibid*, p.401; *Al-Skeini* *ibid* para.193

³² UN General Assembly Resolution 1514(XV)

³³ Faundez, Julio “International Law and Wars of National Liberation: Use of Force and Intervention” v.1 (1989) *African Journal of International and Comparative Law* pp.85-98

³⁴ Wilson, Heather Anne *International Law and the Use of Force by National Liberation Movements* (Oxford: Clarendon Press, 1990)

³⁵ For a useful brief summary of the history of IHL see note 16 in Hampson & Salama (2005) *op cit*, pp.25-6

³⁶ Hampson & Salama (2005) *op cit*, n.16, p.26

adopted in 1977. It is of course the case, as they note, that Protocol I dealt with international armed conflicts, up-dating provisions on the wounded and sick, and formulating rules on the conduct of hostilities, while Protocol II dealt, for the first time, with high-intensity non-international armed conflicts. In this, they follow Doswald-Beck and Vité, in whose view the most important contribution of Protocol I 'is the careful delimitation of what can be done during hostilities in order to spare civilians as much as possible.'³⁷

However, of a number of scholars recently publishing on the tension (or clash) between IHR and IHL, only William Abresch notes correctly that the Additional Protocols aimed to extend the reach of the existing treaties governing international conflicts to internal conflicts: 'thus, Protocol I deemed struggles for national liberation to be international conflicts'³⁸. In other words, if an armed conflict is a struggle for national liberation against 'alien occupation' or 'colonial domination' it is considered an 'international armed conflict' falling within Additional Protocol I.³⁹

This, I suggest, is the key to understanding the significance of both Additional Protocols. They were the response of the ICRC, and then the overwhelming majority of states which have ratified the Protocols, to the new world of 'internationalised' internal conflicts, in the context of armed struggle for self-determination by National Liberation Movements..

International Humanitarian Law and internal armed conflicts

Additional Protocol II provides for non-international internal armed conflicts in which the State Party is confronted by a well-organised armed group which controls part of its territory.⁴⁰ It therefore requires the existence of a high intensity civil war in which the armed groups are 'under responsible command' and 'exercise such control over a part of [the state's] territory as to enable them to carry out sustained and concerted military operations'.⁴¹

For this reason it could not apply to the conflict in Northern Ireland, but most certainly applied to the First Chechen War from 1994 to 1997. In the cases of the United Kingdom (Northern Ireland), Turkey (South-Eastern Turkey), and the Russian Federation (Chechnya), the state concerned has been at pains to deny the existence of an 'armed conflict', but has instead characterised the events as 'terrorism', 'banditry' or simply organised crime. However, it is also clear that for the purposes of Protocol I, the international community has given no shred of recognition to the situation of the Irish Republicans, the Turkish Kurds or the Chechens as involving 'alien domination' or 'colonial occupation', whatever the claims to self-determination of the Irish, Kurds and Chechens. The Irish and Kurds never exercised sufficient control over territory to justify the application of Additional Protocol II. The Irish Republicans for years demanded the ratification by the UK of the additional protocols, and UK ratification was delayed, despite the fact that, as pointed out, the protocols could have had no application. However, it should be noted that the Good Friday Agreement, which brought the Northern Irish conflict to an end, at least to the present day, recognised the 'right to self-

³⁷ Doswald-Beck, Louise and Vité, Sylvain "International Humanitarian Law and Human Rights Law" n.293 (1993) *International Review of the Red Cross* 94-119, at 9

³⁸ Abresch, William "A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya" v.16 n.4 (2005) *European Journal of International Law* 741-767, at 742

³⁹ Additional Protocol I, Article 1(4), and see Abresch (2005) op cit p.753

⁴⁰ See Bennoune, Karima "Toward a Human Rights Approach to Armed Conflict: Iraq 2003" 11 (2004) *University of California, Davis Journal of International Law and Policy*, 171-228, at 177, n.18

⁴¹ Additional Protocol II, Article 1(1), and see Abresch (2005) op cit p.753

determination of the people of the Island of Ireland', a long-standing demand of Sinn Fein. But this does not affect the general point made.

The Chechen exception

The conflict in Chechnya provides the essential context to the question of the tension between IHL and IHR. This was highlighted in a judgment of the Bow Street Magistrates Court in London.⁴² In his judgment of 15 November 2003 in the extradition case *Government of the Russian Federation v Zakayev*⁴³, Senior District Judge Timothy Workman held as follows:

The Government maintain that the fighting which was taking place in Chechnya amounted to a riot and rebellion, "banditry" and terrorism. The Defence submit that it is clear beyond peradventure that this was at the very least an internal armed conflict and could probably be described as a war... I am quite satisfied that the events in Chechnya in 1995 and 1996 amounted in law to an internal armed conflict... In support of that decision I have taken into account the scale of fighting - the intense carpet bombing of Grozny within excess of 100,000 casualties, the recognition of the conflict in the terms of a cease fire and a peace treaty. I was unable to accept the view expressed by one witness that the actions of the Russian Government in bombing Grozny were counter-terrorist operations. ... this amounted to an internal armed conflict which would fall within the Geneva Convention'.⁴⁴

Another relevant feature of the First Chechen War was highlighted in 1996 by Professor Paola Gaeta.⁴⁵ On 31 July 1995 the Constitutional Court of the Russian Federation delivered its decision on the constitutionality of President Yeltsin's decrees sending Federal forces into Chechnya.⁴⁶ The Court was obliged in particular to consider the consequences of Russia's participation in the 1977 Additional Protocol II (APII) to the 1949 Geneva Conventions.⁴⁷ As Gaeta pointed out:

The Court determined that at the international level the provisions of Protocol II were binding on both parties to the armed conflict and that the actions of the Russian armed forces in the conduct of the Chechen conflict violated Russia's international obligations under Additional Protocol II to the 1949 Geneva Conventions. Nonetheless, the Court sought to excuse this non-compliance because Protocol II had not been incorporated into the Russian legal system.

The Court clearly spelled out that the provisions of APII were binding upon *both* parties to the armed conflict, *i.e.* that it confers rights and imposes duties also on insurgents. This statement was, in Gaeta's view, all the more important in the light of the fact that, at the Geneva Conference, some States expressed the opposite view, since they were eager to keep rebels at

⁴² The author provided written expert evidence for this case, but not on the point of internal armed conflict

⁴³ full text at <http://www.hrvc.net/west/15-11-03.html>

⁴⁴ Transcript of the judgment on file with the author

⁴⁵ Gaeta, Paola 'The Armed Conflict in Chechnya before the Russian Constitutional Court' (1996) 7:4 *European Journal of International Law* 563-570

⁴⁶ An unofficial English translation of this judgement was published by the European Commission for Democracy through Law (Venice Commission) of the Council of Europe, CDL-INF (96) 1.

⁴⁷ The RF is a party to the 1949 Geneva Conventions. The Soviet Union ratified both the 1977 Additional Protocols on 29 September 1989 to become effective on 29 March 1990. The Russian Federation deposited a notification of continuation on 13 January 1992.

the level of criminals without granting them any international status.⁴⁸ This view had also found support in the legal literature.⁴⁹

Gaeta rightly emphasised the importance of the determination by the Court that the Russian Parliament had failed to pass legislation to implement AP II, and that this failure was one of the grounds - probably even the primary ground - for non-compliance by Russian military authorities with the rules embodied in the Protocol. In its determination of the case, the Court expressly directed the Russian Parliament to implement AP II in Russian domestic legislation, thus showing how much importance it attached to actual compliance with that treaty. Secondly, the Court underscored that according to the Russian Constitution and the UN's ICCPR victims of any violations, crimes and abuses of power shall be granted efficient remedies in law and compensation for damages caused.

The Second Chechen War and the Council of Europe

Russia's failure to obey the clear instructions of the Constitutional Court as to the implementation of APII has not been remedied to date, and the start of the Second Chechen War was accompanied by an equally egregious manifestation of non-concern by the Russian authorities in relation to compliance with the ECHR.

On 26 June 2000 the Council of Europe published the 'Consolidated report containing an analysis of the correspondence between the Secretary General of the Council of Europe and the Russian Federation under Article 52 of the ECHR'.⁵⁰ This report was prepared, at the request of the Secretary General, by three experts, Tamas Bán, Frédéric Sudre and Pieter Van Dijk, who were asked to analyse the exchange of correspondence between himself and the Russian Federation 'in the light of the obligations incumbent on a High Contracting Party which is the recipient of a request under Article 52 of the European Convention on Human Rights.' The first request was dated 13 December 1999. The experts were asked to focus in particular on the explanations that the Secretary General was entitled to expect in this case by virtue of Article 52 and to compare that with the content of the replies received. They concluded that the reply given by the Russian Federation did not even meet the minimum of the standard which must be considered to be implied in Article 52 in order to make the procedure effective, and remarked:

For example, it would have been legitimate to expect, as a minimum, that the replies would provide information, in a concrete and detailed manner, about issues such as the instructions on the use of force under which the Federal forces operated in Chechnya, reports about any cases under investigation concerning any human rights violations allegedly committed by members of the Federal forces, the detention conditions of persons deprived of their liberty by the Russian authorities and their possibilities for effectively enjoying the rights guaranteed by Article 5 of the Convention, the precise restrictions which have been put in place on freedom of movement in the area, et cetera. However, even after clarification by the Secretary General of what was expected, the replies lacked any such details... We conclude that replies given were not

⁴⁸ See Cassese, Antonio 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflict' (1981) 30 *International and Comparative Law Quarterly* 415

⁴⁹ On Protocol II see, among others, Dupuy R. J. and Leonetti, T. 'La notion de conflit armé à caractère non international', in Antonio Cassese (ed), *The New Humanitarian Law of Armed Conflict* Volume I, (1979) 272.

⁵⁰ Document SG/Inf(2000)24, at

<http://www.coe.int/T/E/Human%5Frights/cddh/2.%5FTheme%5Ffiles/03.%5FArticle%5F52/01.%5FDocuments/01.%5FChechnya/SG%20Inf%282000%2924%20E%20-%20SG%20report.asp#TopOfPage>

adequate and that the Russian Federation has failed in its legal obligations as a Contracting State under Article 52 of the Convention.⁵¹

The dubious role of the UK

The United Kingdom has played a questionable role in apparently assisting President Putin to deflect international condemnation of his actions in Chechnya, especially after 11 September 2001. Tony Blair visited Moscow on 4 October 2001, and Putin was especially grateful to him - for the fact that Blair was one of the few European leaders who had taken the initiative to assist Russia in April 2000, when Russia was coming under especially fierce criticism for its conduct of the war in Chechnya.

On 6 April 2000 the Parliamentary Assembly of the Council of Europe (PACE) received a report by its Rapporteur on Chechnya, Lord Frank Judd, condemning Russian actions⁵². PACE considered that ‘...that the European Convention on Human Rights is being violated by the Russian authorities in the Chechen Republic both gravely and in a systematic manner’, and voted to recommend to the CoE’s Committee of Ministers that ‘should substantial, accelerating and demonstrable progress not be made immediately in respect of the requirements set out in paragraph 19⁵³, [it should] initiate without delay, in accordance with Article 8 of the Statute, the procedure for the suspension of the Russian Federation from its rights of representation in the Council of Europe’.⁵⁴ Most painfully for Russia, it appealed for an inter-state complaint of human rights violations to the European Court of Human Rights by other Council of Europe members.⁵⁵

This vote did not affect the cordial relationship Blair and Putin had already established. Just 10 days later, on 16 April 2000 Putin visited London, despite the fact that he was still not formally President of Russia - he was only sworn in on 7 May 2000.⁵⁶ His programme included tea with the Queen at Buckingham Palace. At a joint press-conference on 17 April 2000, Blair welcomed Putin’s commitment that all reports of human rights violations would be looked into by Russia. Referring to Putin as ‘Vladimir’, he rejected suggestions that Britain should distance itself from Russia because of events in Chechnya. Putin in turn stated that they had agreed on joint responses to problems of organised crime and narcotics.

Thus, said Putin on 4 October 2001, Tony Blair had been instrumental in creating a new situation. He said:

it was just as important for us that the Prime Minister took his initial initiative and established his first contacts with the Russian leadership, with myself personally, we felt and we saw and we knew that our voice was being heard, that the UK wanted to

⁵¹ Document SG/Inf(2000)24, *ibid* – no page numbers in the web version

⁵² PACE Doc. 8697, 4 April 2000, ‘Conflict in Chechnya - Implementation by Russia of Recommendation 1444 (2000)’, Report, Political Affairs Committee, Rapporteur: Lord Judd, United Kingdom, Socialist Group, at <http://assembly.coe.int/main.asp?link=http://assembly.coe.int/Documents/WorkingDocs/doc00/EDOC8697.HTM>

⁵³ These included ‘... immediately cease all human rights violations in the Chechen Republic, including the ill-treatment and harassment of civilians and non-combatants in the Chechen Republic by Russian federal troops, and the alleged torture and ill-treatment of detainees’, and ‘seek an immediate cease-fire’

⁵⁴ Recommendation 1456 (2000)[1], ‘Conflict in the Chechen Republic - Implementation by the Russian Federation of Recommendation 1444 (2000)’, at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta00/erec1456.htm>

⁵⁵ Reuters, 6 April 2000; via Johnson’s Russia List

⁵⁶ See BBC ‘Putin flies into legal battle’ 16 April 2000 at <http://news.bbc.co.uk/2/hi/europe/714998.stm>

hear us and to understand us and that indeed we were being understood and this was a very good basis upon which together we managed to work jointly and quite effectively to neutralise international terrorism in this instance in Afghanistan.⁵⁷

He was referring to April 2000. Action against Russia could only have been taken by the Council of Europe's Committee of (Foreign) Ministers. Britain is a founder and leading member of the Council. Putin recognised, and expressed his gratitude, for the fact the the invitation extended to him so promptly made it absolutely clear that no action would be taken.

Thus, Russia has added a new dimension of obduracy, or even downright non-compliance, to the relationship between the Council of Europe and its mechanism for human rights protection – and one of its largest and newest members.

What really happened in Chechnya?

A sobering commentary on the situation in Chechnya was provided by the parallel session, co-sponsored by the International Federation for Human Rights (FIDH) and the International League for Human Rights (ILHR), which took place on 30 March 2005 during one of the last sessions of the UN Human Rights Commission.⁵⁸ Several of the authoritative opinions expressed, by leading Russian actors as well as NGO representatives, are of special note.

A Chechen victim of gross violations, Libkan Bazayeva (she was one of the applicants in the first six Chechen cases at the Strasbourg Court, referred to below), provided some striking casualty statistics. She used, for reference, the roughly 200,000 dead or missing after the Asian tsunami in December 2004. Not long before the start of the First Chechen War, Chechnya's population passed the one million mark. During the ten years of the two wars, she estimates that between 100,000 and 200,000 civilians have died, although she admitted that estimates vary considerably due to the difficulty getting accurate data. The official 2002 census claimed that the population was 1,088,000, which she called a blatant falsification. She believed that the current population is now less than 800,000.⁵⁹

There was further disturbing information, from an independent source. As of 31 March 2005, a total of 32,446 internally displaced persons (IDPs) from Chechnya (7,227 families) were registered for assistance in Ingushetia in the database of the Danish Refugee Council (DRC). Of this total, 12,064 persons (2,617 families) were in temporary settlements, and 20,382 persons (4,610 families) in private accommodation.⁶⁰

Anna Neistat, the Director of the Moscow office of Human Rights Watch, estimated that between 3,000 and 5,000 civilians had disappeared over the previous five years.⁶¹ Official Russian estimates of 2,000 for the same period, although more conservative, were still significant, she said. In the past, most abducted civilians were men between the ages of eighteen and forty and the abductions were usually carried out by Russian forces. That was changing: more women and elderly are being targeted. The 'Chechenization' of the conflict had transferred responsibility to the Chechen authorities and other Chechen groups that are

⁵⁷ <http://www.number-10.gov.uk/output/Page1679.asp>

⁵⁸ Record of the Parallel Session, at

http://www.ngochr.org/view/index.php?basic_entity=DOCUMENT&list_ids=378

⁵⁹ Presentation by Libkan Bazaeva, in the Record, *ibid* (no page numbers on the web site)

⁶⁰ <http://www.reliefweb.int/rw/RWB.NSF/db900SID/EGUA-6BLKXS?OpenDocument>

⁶¹ Presentation by Anna Neistat, in the Record, *ibid* (no page numbers on the web site)

pro-Moscow. With multiple groups involved in abductions, it was difficult to know where to inquire when a friend or relative disappears.

All participants were perturbed by the fact that the European Union, which had in previous years introduced a resolution on Chechnya at the Commission had declined to do so in 2005. Rachel Denber, acting executive director of Human Rights Watch's Europe and Central Asia Division said:

It is astounding that the European Union has decided to take no action on Chechnya at the Commission. To look the other way while crimes against humanity are being committed is unconscionable. Thousands of people have 'disappeared' in Chechnya since 1999, with the full knowledge of the Russian authorities. Witnesses now tell us that the atmosphere of utter arbitrariness and intimidation is 'worse than a war.'⁶²

Human Rights Watch had also published a 57-page briefing paper which documented several dozen new cases of 'disappearances' based on their research mission to Chechnya.⁶³

Many participants were frustrated by the apparent lack of interest by the international community. Tatyana Lokshina, founder of the Demos human rights information service, the best of its kind in Russia⁶⁴, accused organizations like the United Nations, the Commission on Human Rights and the Organization for Security and Cooperation in Europe (OSCE) of not taking adequate measures. Particularly disappointing was the absence of any resolution at the Commission in 2005 condemning human rights abuses in Chechnya, although in her view the absence did not come as a total surprise. The last resolution was tabled in 2001, before 9/11. Since then, Russia has been seen as a valuable partner in the war on terror. Therefore major players were looking the other way, and allowing Russia to claim that Chechnya was an internal matter, or that it was also another front in the war on terror.⁶⁵

Action of a different kind was, however, being taken at that time, with significant results later in 2005. Both Libkan Bazayeva and Tatyana Lokshina were part of it.

Making use of the Council of Europe's mechanism for protection of human rights

In early 2000 the author began to work with the Human Rights Centre of the leading Russian human rights NGO *Memorial*, preparing applications for the European Court of Human Rights (ECtHR) at Strasbourg. Russia had ratified the ECHR in 1998. One of the first applicants was Libkan Bazaeva. Her case is described below. In March 2001 the author applied for a grant from the European Commission's European Human Rights and Democracy Initiative to provide resources and support for the Strasbourg applications. In December 2002 a new litigation project, the European Human Rights Advocacy Centre (EHRAC), was founded with a grant of 1 million Euro from the EC. It works in partnership with *Memorial*, and with the Bar Human Rights Committee of England and Wales. The author is Chair of its International Steering Group, and Tatyana Lokshina is one of its members.⁶⁶ EHRAC is now assisting more than 100 Russian applicants, about half of them

⁶² Presentation by Rachel Denber, in the Record, *ibid* (no page numbers on the web site)

⁶³ <http://hrw.org/english/docs/2005/03/21/russia10342.htm>

⁶⁴ See www.demoscenter.ru

⁶⁵ Presentation by Tatyana Lokshina, in the Record, *ibid* (no page numbers on the web site)

⁶⁶ See, for full details, Bulletins, and case information, <http://www.londonmet.ac.uk/ehrac>; and the Russian site <http://www.ehracmos.memo.ru>

Chechen, before the Strasbourg Court; as well as conducting cases against Azerbaijan, Georgia, and Latvia. The project employs nine lawyers and support staff in Russia⁶⁷, including the Vice-Chair of the Steering Group, the Chechen lawyer Dokka Itslaev, who works with extraordinary courage from the Chechen town of Urus Martan.

On 24 February 2005 the First Section of the European Court of Human Rights delivered three resounding judgments in the first six cases to be brought against the Russian Federation in relation to the current conflict in Chechnya. On 6 July 2005 the Court rejected Russia's application to the Grand Chamber, and the judgments became final.⁶⁸

These applications were lodged at the Court in early 2000, and communicated to the Russian Government in April 2000. They were given 'fast track' status, but nonetheless it was six years before judgments became final.⁶⁹ This was not perhaps so surprising given the extraordinary load which Russian membership has now placed on the ECHR system.⁷⁰

All three of the judgments in the first six Chechen cases concern the deaths of the children and other relatives of the six applicants as a result of Russian military action at the end of 1999 and the beginning of 2000. The applicants argued that the Russian government had violated their rights under Article 2 (the Right to Life), Article 3 (the Prohibition on Torture) and Article 13 (the Right to an Effective Remedy) of the ECHR.

The bombing of the refugee column

The first case⁷¹ concerned three Chechen women, Medka Isayeva, Zina Yusupova and Libkan Bazayeva – mentioned above, who were victims of the bombing by the Russian airforce of the 1000-vehicle civilian convoy which had been given permission by the Russians to leave Grozny by a 'humanitarian corridor' on 29 October 1999. The Russian government did not dispute that its aircraft bombed and killed the applicants' children and relatives, but argued that its use of force was justified as 'absolutely necessary in defence of any person from unlawful violence' under paragraph 2(a) of Article 2. The Court doubted whether there was such 'defence', in the absence of any corroborated evidence that any unlawful violence was threatened or likely. The Court found that the applicants' right to life had been violated since, even if the Russian military were pursuing a legitimate aim in launching at least a dozen powerful S-24 missiles, the operation had not been planned and executed with the requisite care for the lives of the civilian population.

⁶⁷ As well as four staff in London, including the Director, Philip Leach, author of *Taking a Case to the European Court of Human Rights* (2006) 2nd edition Oxford: Oxford University Press

⁶⁸ See Bowring, Bill "Chechnya Justice" *Counsel* December 2005, 65-67

⁶⁹ A six year delay would in any domestic legal system constitute a violation of the Article 6 right to a judicial decision within a reasonable period. This is completely inexcusable in the context of the facts of the cases.

⁷⁰ On 21 April 2005 Anatolii Kovler, the Russian judge on the European Court of Human Rights, told a conference in Yekaterinburg that more than 22,000 Russian citizens have sent applications to the Court. This figure is now much larger (See www.rferl.org/newsline/2005/04/1-RUS/rus-210405.asp). According to the Court's Survey of Activities for 2004 (see [http://www.echr.coe.int/Eng/EDocs/2004SURVEY\(COURT\).pdf](http://www.echr.coe.int/Eng/EDocs/2004SURVEY(COURT).pdf)), just 13 judgments were delivered against Russia in 2004, and while 6691 applications were lodged, 374 were declared inadmissible, 232 were referred to the Government, and 64 were declared admissible. Statistics published on 25 January 2005 showed that the Court delivered 718 judgments in 2004, of which 588 gave rise to a finding of at least one violation of the Convention. The Court also declared inadmissible a total of 20,348 applications. The number of cases terminated increased by around 17.5% compared with 2003. In addition, it was estimated that the annual number of applications lodged with the Court rose to about 45,000 in 2004, an increase of approximately 16%. It is known that about 96% of all applications are declared inadmissible; this percentage rises to 99% in the case of Russia.

⁷¹ *Isayeva, Yusupova and Bazayeva v Russia*, Application nos. 57947/00, 57948/00 and 57949/00

Furthermore, the Court held that the Russian authorities should have been aware that they had announced a humanitarian corridor, and of the presence of civilians in the area. Consequently they should have been alerted to the need for extreme caution regarding the use of lethal force. The pilots' testimony, that they attacked two isolated trucks, did not explain the number of casualties and was inconsistent. The attack took place over a period of up to four hours and was not a single attack. The weapons used were extremely powerful in relation to whatever aims the military were seeking to achieve.

It is notable that the Russian judge, Anatoly Kovler, voted with the rest of the Court in these three cases. There was no dissent.

The massacre in a Grozny district

In the case of Magomed Khashiyev and Roza Akayeva⁷² the applicants' relatives were killed in disputed circumstances, while the Russian forces were in control of the Staropromyslovskiy district of Grozny, in which the applicants resided. At the end of January 2000 the applicants, who had fled, learned that their relatives had been killed. The bodies of the deceased showed signs that they had been killed by gunshots and stabbing.

The Court found that where such deaths lie wholly or mainly within the exclusive knowledge of the authorities, just as in the case of persons in detention, strong presumptions of fact will arise in respect of injuries and deaths occurring. The burden of proof is on the authorities to provide a satisfactory and convincing explanation. Despite its strongly worded request, the Court never received the full case files and no explanation was ever provided. The Court found that it could draw consequential inferences.

Although the government never concluded an investigation and those responsible were never identified, in fact the only version of events ever considered by the Russian investigators was that put forward by the applicants. The documents in the investigation file repeatedly referred to the killings as having been committed by military servicemen. The court concluded that, on the basis of the material in its possession, it was established that the victims had been killed by the Russian military. No ground of justification had been relied on by the government and accordingly there had been a violation of Article 2.

The bombing of a Chechen village

The case of Zara Isayeva⁷³ concerned the indiscriminate bombing of the village of Katyr-Yurt on 4 February 2000. The Russian government did not dispute that the applicant and her relatives were bombed as they tried to leave their village through what they perceived as a safe exit. It was established that a bomb dropped from a Russian plane exploded near the applicant's minivan killing the applicant's son and three nieces. The government again argued that the case fell within Article 2 paragraph 2(a). The Court accepted that the situation in Chechnya at the relevant time called for exceptional measures. However, the court noted that it was hampered in that no evidence had been produced by the government to explain what was done to assess and prevent possible harm to civilians in Katyr-Yurt. There was substantial evidence to suggest that the Russian military expected, and might even have incited, the arrival of a group of armed insurgents in Katyr-Yurt.

⁷² *Khashiev and Akayeva v Russia*, Application nos. 57942/00 and 57945/00

⁷³ *Isayeva v Russia*, Application no. 57950/00

The Court held that nothing was done to warn the villagers of the possibility of the arrival of armed insurgents and the danger to which they were exposed. The Russian military action against the insurgents was not spontaneous but had been planned some time in advance. The Russian military should have considered the consequences of dropping powerful bombs in a populated area. There was no evidence that during the planning stage of the operation any calculations were made about the evacuation of civilians. The use of FAB-250 and FAB-500 bombs in a populated area, without the prior evacuation of civilians is impossible to reconcile with the degree of caution expected from a law enforcement body in a democratic society.

No effective remedy in Russia

In all three cases the Court found that the Russian government had violated the applicants' rights under Article 13 (the right to an effective remedy). In cases, such as these, where there were clearly arguable violations of the applicants' rights under Article 2 and Article 3, the applicants were entitled to 'effective and practical remedies capable of leading to the identification and punishment of those responsible'. The criminal investigations into the suspicious deaths of the applicants' relatives had lacked 'sufficient objectivity and thoroughness'. Any other remedy, including civil remedies suggested by the Government, were consequently undermined and the government had failed in its obligations under Article 13.

Each of these cases was a microcosm of the large-scale violations of human rights committed by Russia in Chechnya. In each case the EHRAC lawyers argued that the use of force by the Russian government was disproportionate, and that there were no effective domestic remedies which the applicants could have pursued. Their arguments were founded exclusively on the principles of European Human Rights Law.⁷⁴

How the Chechen cases highlighted the tension between IHR and IHL

One striking difference between IHL and IHR which, for some reason, is not the subject of comment in the scholarly literature on the tension between them which I now review, is that while IHL deals with the personal responsibility and criminal liability – under domestic and international law – of military commanders and politicians, IHR is exclusively concerned with state responsibility.

That is, while the victims of violations of the laws of war, grave breaches of the Geneva Conventions – the relevant part of IHL for the purposes of my argument - may be individuals or groups, only individuals may be prosecuted and punished. In this regard, IHL is unique in international law, of which states are traditionally the only subjects. It may be asserted that while IHR is characterised by methodological individualism in that its subjects, even for minority rights law, are individuals, or the persons who make up relevant groups, it is rigorously collectivist when it comes to its objects. Whatever the post-modernist or "globalisation" arguments as to the weakening or disappearance of the state, the state must in every case answer to allegations of violations of IHR. This vitally important distinction, I would suggest, is the source of the many radical differences between IHL and IHR, manifested first of all in the many differences of terminology.

⁷⁴ These were the first six cases – the Russian counterpart of *Akdivar and others v Turkey* (App No. 21893/93, Decision of 19 October 1994), in view of the importance of these decisions as test cases - and there are many more. The Court's judgments provide a firm foundation for the work of EHRAC and others in enabling victims of gross violations of human rights to obtain an authoritative finding as to what befell them and their families, and to secure reparation.

As I noted above, William Abresch has analysed the implications of the Chechen judgments for the relationship between IHL and IHR.⁷⁵ As he points out, the generally accepted doctrine has been that in situations of armed conflict, humanitarian law serves as *lex specialis* to human rights law. He does not notice, apparently, that the consequences of the application of one regime or the other would be quite different.

This doctrine is apparently supported by the International Court of Justice in its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*⁷⁶. The Court stated that it

observes that the protection of the International Covenant on Civil and Political Rights (ICCPR) does not cease in time of war... 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... 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.⁷⁷

What is the meaning of the Latin maxim *lex specialis derogat lex generali*? In his paper analysing the 'fragmentation' of international law Martti Koskenniemi pointed out that the rule described by this maxim is usually considered as a conflict rule, where a particular rule is considered to be an exception to rather than an application of a general rule.⁷⁸ The point of the maxim is to indicate which rule should be applied. The other way in which such conflicts are dealt with, he continues, is through the 'doctrine of self-contained regimes.'⁷⁹ The latter is the situation in which a set of primary rules relating to a particular subject-matter is connected with a special set of secondary rules that claim priority to the secondary rules provided by general law.⁸⁰ He gives as an example the fact that human rights law contains well-developed systems of reporting and individual complaints that claim priority to general rules of State responsibility.⁸¹ For Koskenniemi, the rationale for the rule is that the *lex specialis* takes better account of the subject-matter to which it relates.

Nevertheless, he insists that '[a]ll rules of international law are applicable against the background of more or less visible principles of general international law.'⁸² These include 'sovereignty', 'non-intervention', 'self-determination', 'sovereign equality', 'non-use of

⁷⁵ Abresch, William "A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya" v.16 n.4 (2005) *European Journal of International Law* 741-767

⁷⁶ Advisory Opinion 8 July 1996, *ICJ Reports 1996*

⁷⁷ Advisory Opinion, para 24-25; see also *ICJ Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, paras 102, 105

⁷⁸ Koskenniemi, Martti "Fragmentation of International Law: Topic (a): The function and scope of the *lex specialis* rule and the question of 'self-contained regimes': An outline", prepared for the Study Group on Fragmentation of International Law of the International Law Commission, at http://www.un.org/law/ilc/sessions/55/fragmentation_outline.pdf p.4; and Koskenniemi, Martti *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission* (Helsinki: The Erik Castrén Institute Research Reports 21/2007)

⁷⁹ Koskenniemi *ibid* p.4

⁸⁰ Koskenniemi *ibid* p.8

⁸¹ Koskenniemi *ibid* p.10

⁸² Koskenniemi *ibid* p.7

force', the prohibition of genocide. The reader will recall my argument that the third of these, now recognised as part of *jus cogens*, acquired the status of such a principle, of a right in international law, as a consequence of the decolonisation struggles, of the national liberation movements. Thus, I have no argument with Koskeniemi's general statement. I maintain, however, that IHL and IHR inhabit quite different moral universes; IHL was historically and remains a limitation on the use of lethal force, irrespective of the legality of the use of force. I cannot agree with Hampson that 'the ultimate object of the two regimes is broadly similar, but they seek to attain that object in radically different ways', although she accurately distinguishes the vitally important differences of result.⁸³

Noam Lubell notices that IHL and IHR appear to be quite different languages: teaching IHL to human rights professionals or discussing human rights law to military personnel can seem like speaking Dutch to the Chinese or vice versa.⁸⁴ But he seems not to notice either that individuals or groups will rarely make claims under IHL; it is not that kind of procedure. But they are drawn, despite all the limitations, to seek to make use of human rights mechanisms.

However, Abresch is interested in which rules are being and will be followed in the European Court of Human Rights, which now, in his view, applies the doctrines it has developed on the use of force in law enforcement operations to high intensity conflicts involving large numbers of insurgents, artillery, and aerial bombardment.⁸⁵ He remarks that for IHL lawyers the law of international armed conflict would be the ideal for internal armed conflict. He calls this an 'internationalizing trajectory'.⁸⁶ However, the Strasbourg Court has broken from such a trajectory, in order to derive its own rules from the 'right to life' enshrined in Article 2 of the ECHR. Abresch's optimistic prognosis is that:

given the resistance that states have shown to applying humanitarian law to internal armed conflicts, the ECtHR's adaptation of human rights law to this end may prove to be the most promising base for the international community to supervise and respond to violent interactions between the state and its citizens.⁸⁷

This assessment differs sharply from that of Hampson, who clearly considers that the Strasbourg Court should take IHL into account, and believes that despite the fact that the Court has never referred to the applicability of IHL, 'there is an awareness of the type of analysis that would be conducted under IHL.'⁸⁸ In this she follows the 'classical' model of Doswald-Beck and Vité, who considered that 'the obvious advantages of human rights bodies using [IHL] is that [IHL] will become increasingly known to decision-makers and the public, who, it is hoped, will exert increasing pressure to obtain respect for it.'⁸⁹ Similarly, Reidy considered that in the Turkish cases the Strasbourg Court was 'borrowing language from [IHL] when analysing the scope of human rights obligations. Such willingness to use

⁸³ Hampson & Salama (2005) op cit p.13

⁸⁴ Lubell (2005) op cit p.744

⁸⁵ Abresch (2005) op cit p.742

⁸⁶ Abresch (2005) op cit p.742

⁸⁷ Abresch (2005) op cit p.743

⁸⁸ Hampson & Salama (2005) op cit p.18; see also Heintze (2004)

⁸⁹ Doswald-Beck & Vité (1993) op cit p.108

humanitarian law concepts is encouraging.’⁹⁰ She too saw this development as ‘certainly welcome in so far as it contributes to a stronger framework for the protection of rights.’⁹¹

Using the Chechen cases in which I participated as the centre-piece, I have sought to show that the European Court of Human Rights, despite the first generation limitations of the instrument it interprets and enforces, has been obliged to respond to circumstances in which applicants, representing themselves and groups of which they are part, have brought renewed symbolic and material content to human rights. I have insisted that IHL and IHR do indeed speak quite different languages, for reasons which are entirely obvious. IHL itself has been obliged to respond to the anti-colonial struggles and use of force by national liberation movements in the post-WWII period, but is extremely unlikely to find application in the strictly internal context of Northern Ireland, South-Eastern Turkey or Chechnya. In this regard, the Balkan conflicts are an exception, since the ICTY was able to treat them as international conflicts.

4. THE PROBLEM OF GROSS AND SYSTEMATIC VIOLATIONS

The final question concerns the scale of the potential violations committed by the United Kingdom in Iraq. Does the ECHR system have the capacity to deal with gross and systematic contraventions of human rights standards?

The first four decades of the work of the European Court of Human Rights, in the context of the member states of Western Europe, were for the most part concerned with mistaken or negligent government behaviour, even in the case of Northern Ireland. The conflict in Northern Ireland, including heinous acts of terrorism (rightly called by that name) by the IRA on the UK ‘mainland’, was always a conflict of relatively low intensity⁹², and the UK was clearly taking considerable trouble to combat terrorism and protect the lives and security of ordinary members of society without violating human rights. This, it is asserted, was not the case in Iraq. In my view, British actions in Iraq have considerably more in common with the campaigns conducted by Turkey against the Kurds, and Russia against the Chechens. What these two conflicts did not have in common with the UK in Iraq is that both took place within the territory of the state concerned. I have explored above the issue of extra-territoriality.

The focus of this section is, therefore, ‘systematic’ violations, or, rather, ‘gross and systematic violations’ – as they are described in Menno Kamminga’s 1994 article⁹³, to which I return below.

‘Gross and systematic violations’ should be distinguished from ‘systemic’ violations, which have been analysed by Philip Leach in the context of the recent practice of the European Court of Human Rights.⁹⁴ These are the ‘clone’ cases, the ‘repeat offenders’ which the Protocol 14 reforms to the European Convention on Human Rights are intended, in part, to address. In their Resolution of May 2004 the Council of Europe’s Committee of Ministers urged the European Court of Human Rights to take further steps to assist states by identifying

⁹⁰ Reidy, Aisling “The approach of the European Commission and Court of Human Rights to international humanitarian law” n.324 (1998) *International Review of the Red Cross* 513-529, at 521

⁹¹ Reidy (1998) op cit p.521

⁹² See Kitson, Frank *Low intensity operations: subversion, insurgency, peacekeeping* (Harrisburg PA: Stackpole Books, 1971)

⁹³ Kamminga, Menno “Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations?” v.12 n.2 (1994) *Netherlands Quarterly of Human Rights* 153-164

⁹⁴ Leach (2005) op cit

underlying problems – ‘as far as possible to identify... what it considers to be an underlying systemic problem’.⁹⁵

The issue of gross and widespread violations has been brought to a head by the conflict in Chechnya, and will without doubt rear its head in relation to Iraq, especially if cases like *Al-Skeini* find their way to Strasbourg; although it was noticed in the scholarly literature as a result of the cases decided by the Strasbourg Court from the early 1990s against Turkey.

It goes without saying that only a minimal range of – almost exclusively civil and political - rights are protected by the ECHR. And although both groups and individuals (as well as legal persons) may apply to the ECtHR, the Court has proved itself incapable of responding adequately to the claims made on it. This became starkly apparent in the 1990s, in relation to the Turkish Kurdish cases.

The Strasbourg Court’s inherent weakness in dealing with gross violations

The Kurdish cases exemplify the Strasbourg Court’s difficulty in engaging with circumstances of generalised armed conflict. During the early 1990s the conflict between the Turkish government and the Kurdish Workers Party (PKK) reached new levels of intensity. The government declared a state of emergency in South Eastern Turkey, in the course of which, in order to deny bases and territorial support to the PKK, state forces destroyed thousands of villages, and three and a half million rural Kurdish inhabitants became refugees in their own country. In 1993, the London-based *Kurdish Human Rights Project* (KHRP)⁹⁶, began sending an impressive series of test cases to Strasbourg. The most important of these, the basis for many of the later victories, *Akdivar and Others v Turkey*⁹⁷, was decided in 1994.

The problem inherent in bringing such cases was identified early on. In 1994, Professor Menno Kamminga warned that ‘[d]uring the past four decades, the Convention’s supervisory system has generally responded disappointingly to gross and systematic violations of human rights.’⁹⁸ He pointed out that ‘[t]he problem with gross and systematic violations is not so much that they are more complicated from a legal point of view. Rather, the problem is that their consideration tends to give rise to less cooperation from the offending state. This makes it more difficult to establish the facts.’⁹⁹

He foresaw that as a result of Protocol 11, which stipulated that inter-state applications go straight to the Grand Chamber, states might be even more reluctant than in the past to resort to the procedure. He therefore recommended reforms which would enable the Court to consider situations of gross and systematic violations of human rights *proprio moto*, that is, on information supplied by NGOs.

In 1997, Aisling Reidy, Françoise Hampson, and Kevin Boyle, all three of whom represented Kurdish clients through KHRP, published what was in effect a follow-up to Kamminga’s article.¹⁰⁰ They correctly pointed out that ‘[a] pattern of systematic and gross violation of

⁹⁵ Resolution Res(2004)3, May 12 2004

⁹⁶ founded by Professors Kevin Boyle and Françoise Hampson of Essex University

⁹⁷ App No. 21893/93, Decision of 19 October 1994

⁹⁸ Kamminga (1994) op cit p.153

⁹⁹ Kamminga (1994) op cit p.161

¹⁰⁰ Reidy, Aisling; Hampson, Françoise; and Boyle, Kevin “Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey” v.15 n.2 (1997) *Netherlands Quarterly of Human Rights* 161-173

human rights does not occur in a vacuum, or as a result simply of negligence or default on the part of governmental authorities. Rather such a pattern requires the sanction of the state at some level.’¹⁰¹ They posed the question which haunts EHRAC and its Chechen cases as well: ‘one can question whether the use of an individual petition mechanism is suited to addressing the nature of complaints arising out of such a conflict.’¹⁰²

Their answer was that recourse to international legal procedure can influence a political situation. They listed the ‘fruits’ of engaging legal proceedings: a determination of facts which are disputed or denied by the perpetrators; an objective assessment of the accountability of the perpetrators of the violations; the establishment of recommendations or steps (enforceable or otherwise) to be taken to remedy the situation; the determination of the legal standards being violated and therefore the identification of the standards of behaviour which a political resolution will be required to incorporate; the creation of an effective tool for political leverage; the prevention of the continuation of the scale of abuses as a result of the public and authoritative exposure of the situation:

They argued that

[b]y using legal methods to investigate a situation of gross violation the perpetrators’ ability to act with impunity can be limited. Those in authority can be exposed and held accountable for their actions and hindered in their ability to continue such practices.¹⁰³

They recognized of course that the extent of any impact would depend on the effectiveness of the legal norms and mechanisms engaged.

All of these considerations have of course informed the strategy of the partnership of EHRAC and *Memorial*. It was plain that the Chechen applicants in the first six cases were not interested in money, especially since the cases take so long. These extraordinarily courageous applicants were primarily interested in obtaining, from the highest court in Europe, an authoritative account of the events through which they lived (and their families died), and recognition of the gross violations they had suffered. In addition, they wanted to lay the basis for the prosecution of the individuals responsible. In their application for individual and general measures in the enforcement proceedings currently before the Committee of Ministers, they insist that the Russian Government should investigate with a view to the prosecution of Generals Shamanov and Nedobytko, in whose cases the Court’s findings of fact amount to the circumstances of war crimes.

The three authors also highlighted the difficulties individual applicants faced in proving gross and systematic violations, especially where they claim that there is no domestic remedy, and that there has been no effective internal investigation. In many of the Turkish Kurdish cases the Commission (later, the Court) was obliged to carry out fact-finding in Turkey. In January 1997 Mrs Thune, a member of the Commission, reported that there had already been 27 fact-finding investigations, involving 12 members of the Commission, hearing 216 witnesses over 39 days (302 hours) of hearings, generating 6,400 pages of transcripts.¹⁰⁴

¹⁰¹ Reidy et al (1997) op cit p.162

¹⁰² Reidy et al (1997) op cit p.162

¹⁰³ Reidy et al (1997) op cit p.163

¹⁰⁴ Verbatim Record, Case of *Mentes and Others v Turkey*, European Court of Human Rights, 22 January 1997. The author took part in two fact-finding hearings in Ankara, in the cases of *Aktas v Turkey* (App No. 24351/94, judgment of 24 April 2003) and *Ipek v Turkey* (App No. 25760/94, judgment of 17 February 2004)

Despite this extraordinary effort by the Commission and the Court, applicants found it impossible to establish an ‘administrative practice’ in which first, such violations frequently occur, and second, there is an absence of effective remedies, often coupled with impunity for offenders: a ‘practice’, in particular, of torture. This amounts to deliberate violation by the State, authorized at the highest levels, rather than mere inadvertence or a failure of discipline in an individual case.

It was the former European Commission of Human Rights which first coined the description “administrative practice” during its deliberations at the admissibility stage; this became “practice” at the merits stage. The Commission found the principle to be applicable in individual cases, for example in 1975 in *Donnelly & others v. UK*¹⁰⁵. The Court finally dealt with the issue at the merits stage in 1978 in the notorious inter-State case concerning violation of Article 3 of the ECHR, *Ireland v. UK*.¹⁰⁶

However, in *Aksoy v Turkey*¹⁰⁷ neither the Commission nor the Court addressed the question of the practice of torture, which had been pleaded by the applicant, citing the lack of evidence produced by them, despite the fact that the reports of the UN Committee Against Torture and the European Committee for the Prevention of Torture were before it. Reidy, Hampson and Boyle ask:

How then can an applicant adduce the kind of evidence required to establish practice?... a single applicant or group of applicants is put in a position of providing evidence they simply do not have the resources to deliver.¹⁰⁸

For obvious reasons, the issue of ‘administrative practice’ was raised by the individual applicants in many of the Kurdish cases from south-east Turkey. The Commission never found it necessary to deal with the issue. As a result, in not one of the Turkish cases was there a finding of fact on the basis of which the Court could decide that there had indeed been an “administrative practice”. This was despite the fact that in many of the decisions the Court found an absence of effective domestic remedies, thereby absolving the applicants from seeking to exhaust them, in circumstances which were tantamount to “administrative practice”, and otherwise inexplicable. ‘Administrative practice’ was also pleaded, using the same arguments, in the first six and subsequent Chechen cases, but has been similarly ignored by the Court.

In essence applicants face the problem of persuading the Court that the Government in question, Turkey or Russia, is guilty not only of individual violations, but also of ‘administrative practice’ as defined by the Court. Of course, the Court is reluctant to take such a bold step, since a finding of ‘administrative practice’ would amount to a finding that a state is deliberately violating human rights.

But then the evidence in the *Al-Skeini* case (and evidence adduced in the associated courts martial¹⁰⁹) tends to show that the decision to inflict such harsh treatment on Iraqi detainees, leading to the death of one of them, was taken at a much higher level than the soldiers who found themselves prosecuted.

¹⁰⁵ App No. 5577-5583/72, Admissibility Decision of 15 December 1975, 4 D&R 4

¹⁰⁶ Judgment of 18 January 1978

¹⁰⁷ 100/1995/606/694, judgment of 18 December 1996

¹⁰⁸ Reidy et al (1997) op cit p.171

¹⁰⁹ See The Guardian, Leader: ‘Army on trial’, 15 March 2007, at <http://www.guardian.co.uk/Iraq/Story/0,,2034335,00.html>

In her Study for the Council of Europe on human rights protection during situations of armed conflict¹¹⁰, Hampson also noted the fact that the former Commission had recognised that the issue of repeated violations – which could also properly be described as “systemic” violations - raised distinct issues apart from, although linked to, ‘administrative practice’. Amongst other things, the fact that repeated violations could only occur as a result of deliberate government policy meant that domestic remedies were necessarily ineffective.

It is highly likely that this will become an issue when Iraq cases against the UK begin to find their way to Strasbourg. I have already mentioned the sorry story of the courts martial following the murder of one Iraqi detainee and the systematic ill-treatment of others.

Conclusion

The Strasbourg Court is today in deep crisis, overwhelmed by the tidal wave of complaints coming from Russia.¹¹¹ Russia’s refusal on 20 December 2006 to ratify Protocol 14 of the Convention¹¹², on reform of the procedure of the Court, when every other Council of Europe member state has done so, appears to threaten the very future of the Court. The question posed by this chapter is whether the legitimacy of the Convention system is now in doubt. Will the Court have the capacity and intellectual resources to measure up to the challenge of cases relating to Iraq?

This chapter has answered with a qualified “yes”.

First, the Court has now, despite a set-back in the *Bankovic* case, developed a strong line of cases showing quite clearly that a member state can indeed be held responsible for violations of Convention rights committed outside its territory. This has now proved highly disagreeable for a number of states, especially those with a colonial past. There is an excellent recent example. On 11 January 2007 President Putin of Russia was asked by the former Constitutional Court judge and leading human rights promoter Tamara Morshchakova specifically about the refusal to ratify Protocol 14. Putin replied:

“Unfortunately, our country is coming into collision with a politicisation of judicial decisions. We all know about the case of *Ilascu*, where the Russian Federation was accused of matters with which it has no connection whatsoever. This is a purely political decision, an undermining of trust in the judicial international system. And the deputies of the State Duma turned their attention also to that....”

We can expect similar protests in future from the United Kingdom.

Second, the Chechen cases discussed in detail above show that the Court will refrain from applying IHL to complaints by civilians of violations by members of armed forces committed in the context of armed conflict. IHL is predicated upon the existence of a state of war, in

¹¹⁰ Hampson, Françoise “Study on Human Rights Protection During Situations of Armed Conflict, Internal Disturbances and Tensions” Council of Europe, Steering Committee for Human Rights (CDDH), Committee of Experts for the Development of Human Rights (DH-DEV), DH-DEV(2002)001

¹¹¹ Now some 25% of the Court’s case-load, 19,000 in all in the past year. See also Bowring, Bill (2005) “Russia in a Common European Legal Space. Developing effective remedies for the violations of rights by public bodies: compliance with the European Convention on Human Rights” in Hober, Kaj (ed) *The Uppsala Yearbook of East European Law 2004* (London: Wildy, Simmonds and Hill, 2005) 89-116

¹¹² ‘Russia ‘gives it’ to the European Court’ *Kommersant* daily newspaper at http://www.kommersant.com/p732043/r_500/State_Duma_European_Court

which casualties are inevitable, and it is to be expected that civilians will suffer. By applying to these cases the rich jurisprudence through which it explained and extended Article 2 (on the right to life), the Court has shown that states will be held to account under the very much more stringent standards according to which a state must show that it has taken every possible precaution to protect the lives and welfare of civilians.

Third, I have sought to answer the question whether the Court now shows itself to be paralysed in the face of gross and systematic violations of human rights, especially those committed in the context of armed conflict, of an internal or international nature. Again, the Chechen cases, despite the fact that decisions followed almost six years after the violations in question, show that the Court is capable of adjudicating in a decisive and creative manner.

Whether of course it will have the courage to do so in the case of the United Kingdom is an open question; but there are already a number of first-rate precedents.