CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE WORKING PAPER
EXTRAJUDICIAL EXECUTIONS SERIES
NUMBER 4, 2005

WILLIAM ABRESCH

A HUMAN RIGHTS LAW OF INTERNAL ARMED CONFLICT: THE EUROPEAN COURT OF HUMAN RIGHTS IN CHECHNYA*

NYU School of Law • New York, NY 10012

*This paper is a draft of an article which is forthcoming in the European Journal of International Law.

A HUMAN RIGHTS LAW OF INTERNAL ARMED CONFLICT: THE EUROPEAN COURT OF HUMAN RIGHTS IN CHECHNYA

© WILLIAM ABRESCH
William.Abresch@nyu.edu
Director, Project on Extrajudicial Executions
Center for Human Rights and Global Justice
NYU School of Law
Author email: william.abresch@nyu.edu

The Center for Human Rights and Global Justice was established in 2002 to stimulate cutting edge scholarship and to make original and constructive contributions to on-going policy debates in the field of human rights. By emphasizing interdisciplinary analyses, the Center's programs seek to situate international human rights law in the broader context of the political, jurisprudential, economic, sociological, historical, anthropological and other influences that shape it and determine its impact. The Center's Faculty Director is Philip Alston, its Executive Director is Smita Narula, and its Research Director is Margaret Satterthwaite.

Abstract

The cases on Chechnya recently decided by the European Court of Human Rights (ECtHR) force us to reevaluate the relationship between human rights law and humanitarian law. Since the International Court of Justice held that humanitarian law is lex specialis *to human rights law in 1996 — if not since the Tehran Conference of 1968 — it has been widely accepted that 'human rights in armed conflict' refers to humanitarian law. The ECtHR has directly applied human rights law to the conduct of hostilities in internal armed conflicts. The rules it has applied may prove controversial, but humanitarian law's limited substantive scope and poor record of achieving compliance in internal armed conflicts suggest the importance of this new approach.*

A HUMAN RIGHTS LAW OF INTERNAL ARMED CONFLICT: THE EUROPEAN COURT OF HUMAN RIGHTS IN CHECHNYA

by William Abresch*

1 Introduction

In February 2005, the European Court of Human Rights (ECtHR) issued its first judgments on claims arising out of the armed conflict in Chechnya. Two of the judgments dealt with the conduct of hostilities, an issue that has generally been seen as the exclusive province of humanitarian law.[1] These judgments draw on and further develop the ECtHR's case law on the use of force in law enforcement operations. This jurisprudence has previously been applied to incidents involving the Irish Republican Army (IRA) and the Workers Party of Kurdistan (PKK), and the Chechen cases break no new ground on a narrow, doctrinal level. On the other hand, when we consider their relationship to humanitarian law, they mark a paradigm shift in the approach of international law to regulating internal armed conflicts.

The accepted doctrine has been that, in situations of armed conflict, humanitarian law serves as a *lex specialis* to human rights law. If, for example, a state were to launch artillery into a gathering of its citizens, it has been generally accepted that the legality of the attack under human rights law — was anyone's right to life violated? — would be determined not by interpreting human rights law, as such, but by applying the relevant rules of humanitarian law. This was considered both the proper manner in which to reconcile the two bodies of law and all but necessary given the lack of guidance human rights treaties provide with respect to the conduct of hostilities. While the ECtHR has not openly relied on humanitarian law its decisions, it has long been possible to argue that the *lex specialis* approach was being followed. Either the ECtHR was, *sub silentio*, applying the rules and principles of humanitarian law, or the events in Northern Ireland and southeastern Turkey did not actually constitute armed conflicts within the meaning of humanitarian law. These interpretations of the case law have been foreclosed by the Chechen cases.

The Chechen cases force us to reevaluate both the ECtHR's past jurisprudence on the use of lethal force and the future of the *lex specialis* approach to reconciling human rights law and humanitarian law in internal armed conflicts. It is now clear that the ECtHR will apply the doctrines it has developed on the use of force in law enforcement operations even to large battles involving thousands of insurgents, artillery attacks, and aerial bombardment. It is also clear that it will do so by directly applying human rights law, not

---

* Director, Project on Extrajudicial Executions, Center for Human Rights and Global Justice at New York University School of Law. J.D. (New York University School of Law). I would like to thank Philip Alston, Nehal Bhuta, James Cockayne, Lisa Genn, and Antonios Tzanakopoulos for many helpful comments and conversations.

[1] *Isayeva, Yusupova and Bazayeva v. Russia*, ECtHR, App. Nos. 57947–49/00 (Feb. 24, 2005) [hereinafter *Isayeva I*]; *Isayeva v. Russia*, ECtHR, App. No. 57950/00 (Feb. 24, 2005) [hereinafter *Isayeva II*].

only without reference to humanitarian law but also in a manner that is at odds with humanitarian law.

While the humanitarian law treaties governing internal armed conflicts are largely silent on the conduct of hostilities, lawyers have generally borrowed from the law of humanitarian law of international armed conflict to fill this gap. This borrowing has taken three basic forms. One method has been to interpret broad rules provided in Common Article 3 and Protocol II in light of the detailed rules provided in the Geneva Conventions of 1949 and Protocol I. Another method has been to argue that internal conflicts are governed by customary international law rules paralleling the treaty law rules governing international conflicts. A third method has been to extend the reach of treaties governing international conflicts to apply to internal conflicts; thus, Protocol I deemed struggles for national liberation to be international conflicts, and the International Criminal Tribunal for the Former Yugoslavia (ICTY) construed foreign support and control over a rebel group to 'internationalize' an otherwise internal armed conflict. While opinions differ as to when the rules of international armed conflict apply to internal armed conflicts as a matter of binding law (*lex lata*), there is little question but that most humanitarian lawyers consider the law of international armed conflicts to be an ideal — the *lex ferenda* — toward which the law of internal armed conflicts should be developed.

The rules regulating the use of lethal force that the ECtHR has derived from the 'right to life' provision of the European Convention on Human Rights (ECHR) break with this internationalizing trajectory. First, the rules espoused by the ECtHR are not limited by any conflict intensity threshold; they form a single body of law that covers everything from confrontations between rioters and police officers to set-piece battles between rebel groups and national armies. Second, while in humanitarian law, the independence of the *jus in bello* from the *jus ad bellum* is axiomatic, the ECtHR's approach to evaluating the lawfulness of armed attacks assesses the means used within the terms of the justified grounds for employing lethal force. Third, in contrast to humanitarian law's principle of distinction, the ECHR permits the use of lethal force only where capture is too risky, regardless whether the target is a 'combatant' or a 'civilian.' These rules are not perfect, but given the resistance 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 basis for the international community to supervise and respond to violent interactions between the state and its citizens.

2 Bypassing the *lex specialis* application of humanitarian law to directly apply human rights law to internal armed conflicts

Two bodies of international law govern internal armed conflicts, such as civil wars and revolutions.[2] Humanitarian law, or 'the law of armed conflict', applies to the parties to a

[2] This is affirmed in both the preamble to Protocol II and the derogation clause of the ECHR. *See* Protocol II, Preamble, ¶ 2 ('Recalling furthermore [in addition to Common Article 3] that international instruments relating to human rights offer a basic protection to the human persons.'); ECHR, art. 15(1) (providing for derogation '[i]n time of war.').

conflict, laying down certain rules for the conduct of hostilities (combat), detaining prisoners, etc. The rules provided by humanitarian law are typically fairly specific, as they are designed to be interpreted and applied by military commanders. Human rights law applies to interactions between a state and its citizens, requiring the government to respect rights to life, liberty, etc. In a typical internal armed conflict, the government is one party to the conflict and some of the citizens, banded together as, say, a revolutionary army, are the other party to the conflict. The rules provided by human rights law are often rather vague, as they are designed to be interpreted and elaborated by courts and diplomatic discussion. Often the rules provided by human rights law and humanitarian law are harmonious or even redundant, but sometimes they appear to conflict. This is especially so with respect to the conduct of hostilities.

The leading theory among publicists[3] and advocates[4] is that humanitarian law is *lex specialis* to human rights law in situations of armed conflict. The most influential statement of this doctrine was given by the International Court of Justice (ICJ) in its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*:

> The Court observes that the protection of the International Covenant of Civil and Political Rights [ICCPR] does not cease in times 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, 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.[5]

Confronted with two legal regimes — human rights law and humanitarian law — containing rules on the taking of lives, the ICJ resorted to the principle that *lex specialis derogat lex generali* to reconcile them, holding that the ICCPR provision on the right to life must be construed by making a *renvoi* to humanitarian law. *Lex specialis derogat lex*

---

[3] An International Committee of the Red Cross (ICRC) summary of the conclusions reached at a gathering of humanitarian law experts, states that '[T]he great majority of participants simply recalled that IHL represented a special law in as much as it has been specifically framed to apply in a period of armed conflict. They noted that, in offering ground rules adapted to this particular context of violence, this body of law makes it possible — in many cases — to specify the precise content of the non-derogable human rights. In this regard, many references were made to the reasoning followed by the International Court of Justice in its advisory opinion [on] the *Legality of the Threat or Use of Nuclear Weapons*.' ICRC, 'International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence' (November 2003).

[4] Human Rights Watch and Amnesty International have increasingly applied humanitarian law rather than human rights law in reports on armed conflicts. See Bennoune, 'Toward a Human Rights Approach to Armed Conflict: Iraq 2003', 11 *U.C. Davis J. Int'l L. & Pol'y* (2004) 171, 216–219.

[5] ICJ, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (8 July 1996), ¶¶ 24–25; *see also* ICJ, Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (9 July 2004), ¶¶ 102, 105.

generali, or, that the specific provision overcomes the general provision, is a canon of construction that is widely considered a general principle of law, as applicable in the international legal system as it is in national legal systems.[6] Koskenniemi provides the principle's rationale: a 'special rule is more to the point ("approaches more nearly the subject in hand") than a general one and it regulates the matter more effectively ("are ordinarily more effective") than general rules do.'[7] The thinking goes that because many of the same states have negotiated and acceded to the human rights law and humanitarian law treaties, we should presume that these treaties are consistent with one another.[8] We should not think, for example, that it violates the right to liberty under the ICCPR or ECHR to hold a combatant as a prisoner of war until the end of active hostilities when, after all, the same states that negotiated the ICCPR and ECHR also negotiated an entire treaty on prisoners of war that allows exactly that. Because general rules ('No one shall be subjected to arbitrary arrest or detention.'[9]) may be interpreted in more than one way, we should interpret them in light of specific rules ('Prisoners of war shall be released and repatriated without delay after the cessation of hostilities.'[10]) rather than vice versa.

The case for the *lex specialis* approach to reconciling the conduct of hostilities with the right to life would appear even stronger under the ECHR than under the ICCPR.[11] This is due to unique characteristics of the ECHR's derogation regime. Most human rights treaties provide that the right to life is non-derogable, leaving the word 'arbitrary' as the only hook for humanitarian law. In contrast, the ECHR permits derogation from Article 2, the right to life, 'in respect of deaths resulting from lawful acts of war', so long as it is '[i]n time of war or other public emergency threatening the life of the nation', the measures leading to such deaths are 'strictly required by the exigencies of the situation', and the state has formally availed itself of this right of derogation. The drafters of the

---

[6] Koskenniemi, '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, *available at* http://www.un.org/law/ilc/sessions/ 55/fragmentation_outline.pdf, § 2.2.

[7] *Ibid*., § 2.2 (internal quotations are from Grotius).

[8] Jenks surveys the various principles available to resolve conflicts among law-making treaties, helpfully emphasizing their heuristic character and the importance of a pragmatic approach. He concludes that: 'A solution to a conflict deduced from abstract legal principles is always possible when no alternative is available, but in the interest of developing a coherent body of law fully adjusted to changing practical needs recourse to such a process of abstract reasoning should always be regarded as a last resort.' Jenks, 'The Conflict of Law-Making Treaties', 30 *Brit. Y.B. Int'l L.* (1953) 401, 450.

[9] ICCPR, art. 9(1).

[10] Geneva (III), art. 118.

[11] The approach outlined here is that taken by Draper, who wrote that '[U]nder article 15 of the European Convention, the whole of the Law of War as to killing has been incorporated by reference. . . . [A]rticle 15 is here spelling out the new philosophy of the essential relationship between the Law of Armed Conflicts and that of Human Rights. The latter is the normal ordering of civil society. The Law of War, international or internal, is the exceptional situation derogating from the full application of the Human Rights system. The two systems are essentially complementary, and that is an end to the old dichotomy between the Law of War and the Law of Peace into which International Law was traditionally divided.' Draper, 'Human Rights and the Law of War', 12 *Va. J. Int'l L.* (1972) 326, 338. See also Bruscoli, 'The Rights of Individuals in Times of Armed Conflict', 6 *International Journal of Human Rights* (2002) 45.

ECHR presumably envisioned that states involved in armed conflicts would derogate to humanitarian law with respect to the right to life, effectively incorporating humanitarian law as a *lex specialis* regulating the conduct of hostilities. However, no derogation from Article 2 'in respect of deaths resulting from lawful acts of war' has ever been made.[12] Russia, Turkey, and the United Kingdom have all defended their conduct in internal armed conflicts within the terms of Article 2(2)(a), which permits recourse to lethal force when 'absolutely necessary . . . in defence of any person from unlawful violence.'[13]

Despite the decisions of states not to derogate to humanitarian law, has the ECtHR gone ahead and applied humanitarian law as *lex specialis*? Those who believe that it has point to its use of words that are terms of art in humanitarian law — *e.g.*, 'incidental loss of civilian life',[14] 'legitimate military targets',[15] 'disproportionality in the weapons used.'[16] The ECtHR has never stated that it applies humanitarian law, but this vocabulary has been taken as evidence that the ECtHR applies humanitarian law principles and concepts when dealing with cases arising out of armed conflicts, that it applies, *sub silentio*, humanitarian law as a *lex specialis*.[17] This vocabulary is not, however, unique to

[12] All of the ECtHR's jurisprudence on the conduct of hostilities could be dismissed as an anomaly created by states' failure to derogate. This would be a mistake. In *Isayeva II*, the ECtHR explained that the Russian operation had to be 'judged against a normal legal background' because no derogation had been made. *Isayeva II*, ¶ 191. If a state did derogate to humanitarian law 'in respect of deaths resulting from lawful acts of war', the ECtHR would presumably take the *renvoi* to humanitarian law, but the legal implications of this should not be overestimated. The ECtHR could simply apply humanitarian law, but it would not be difficult for it to continue to apply essentially the same doctrine it has already developed in *McCann*, *Ergi*, *Isayeva*, etc. In her study of the *travaux*, Svensson-McCarthy notes, *inter alia*, that all derogations are subject to the Article 15(1) requirement that they be limited 'to the extent strictly required by the exigencies of the situation' and concludes that, 'In interpreting the derogation provisions of human rights treaties in *armed conflicts*, international humanitarian law should not be ignored, because it provides an *absolute minimum level of protection* beyond which no interpretation of the human rights treaties could possibly ever be allowed to go. On the other hand, whilst this absolute minimum level *may perhaps* in certain particularly severe circumstances be allowed to guide the interpretation of the aforementioned derogation provisions, *it is in no way of any conclusive importance for the interpretation of these provisions*, which may in many respects provide a higher and more general level of protection. These derogation provisions do thus have a life of their very own, and they should in all circumstances be interpreted with due respect for the object and purpose of the treaties within which they are contained, so as to preserve to a maximum degree the full enjoyment of the rights and freedoms guaranteed therein.' Svensson-McCarthy, *The International Law of Human Rights and States of Exception: With Special Reference to the Travaux Preparatoires and Case-Law of the International Monitoring Organs* (1998) 378. It would also be regrettable were the ECtHR were to give broad effect to a derogation from Article 2 inasmuch as this would allow states to pick and choose among the standards provided in the two legal regimes.

[13] Article 2(2)(c), 'in action lawfully taken for the purpose of quelling a riot or insurrection', has also been invoked with respect to riots. See *Güleç v. Turkey*, ECtHR, App. No. 21593/93 (July 27, 1998).

[14] *Ergi v. Turkey*, ECtHR, App. No. 23818/94, ¶ 79 (July 28, 1998); *Isayeva II*, ¶ 176.

[15] *Isayeva I*, ¶ 175.

[16] *Ibid.*, ¶ 197.

[17] Heintze, 'On the Relationship Between Human Rights Law Protection and International Humanitarian Law', 86 *IRRC* (2004) 789; Heintze, 'The European Court of Human Rights and the Implementation of Human Rights Standards During Armed Conflicts', 45 *GYIL* (2002) 60; Reidy, 'The Approach of the

humanitarian law. Terms like 'civilian' and 'the civilian population' are part of the general discourse on war. And words like 'proportionality' belong as much to human rights law as to humanitarian law. The use of a vocabulary that overlaps with the vocabulary of humanitarian law tells us little. The important question is whether the ECtHR has adopted the legal rules and standards of humanitarian law. Comparison between the ECtHR's holdings and the rules of humanitarian law reveals that if the ECtHR is attempting to apply humanitarian law, it is doing so in a highly imprecise manner.

After the Chechen cases, the better question is whether the ECtHR has made a mistake in disregarding humanitarian law. Construing humanitarian law as a *lex specialis* to human rights law has lent some unity and coherence to the otherwise fragmented standards governing armed conflicts. Does the ECtHR's approach return us to confusion and conflicting legal requirements? The answer would be yes if the ECtHR were to directly apply human rights law to the conduct of hostilities in *international* armed conflicts. The Geneva Conventions of 1949, Protocol I, and the Hague Convention provide detailed rules on distinguishing civilians from combatants and for selecting the targets, weapons, and methods of armed attacks. For the ECtHR to simply invent a new set of rules would be to flout the express intention of states. But if we understand the ECtHR's jurisprudence on the conduct of hostilities to be limited to *internal* armed conflicts, it is much harder to argue that the ECtHR has overreached. The ECtHR has, however, shown great caution in applying the ECHR to a state's actions outside of its territory.[18]

The rationale that makes resort to humanitarian law as *lex specialis* appealing — that its rules have greater specificity — is missing in internal armed conflicts. While the humanitarian law of international armed conflicts is copious and sometimes painstakingly detailed, the humanitarian law of internal armed conflicts is vanishingly slight and seldom specific. In most internal conflicts, the only applicable treaty law is Common Article 3 of the Geneva Conventions of 1949, a legal regime that consists of 263 words. With respect to the taking of lives, Common Article 3 provides that:

> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; . . .

European Commission and Court of Human Rights to International Humanitarian Law', 80 *IRRC* (1998) 513.

[18] *Bankovic v. Belgium*, ECtHR, App. No. 52207/99 (2001).

> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. . . .

In comparison, Article 2 of the ECHR provides that:

> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.[19]

When it is considered that other human rights law provisions lay out detailed due process guarantees[20] and require that rights be respected 'without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status',[21] it is difficult to see how Common Article 3 is 'more specific', 'more to the point', or 'more effective' than the ECHR or other human rights instruments. While still quite brief, Protocol II is more extensive than Common Article 3. In addition to further developing Common Article 3's guarantees for the humane treatment of persons not taking part in hostilities, it protects medical and relief efforts, and it provides that civilians shall not be targeted and shall 'enjoy general protection against the dangers arising from military operations.' With respect to the provisions on humane treatment, humanitarian law and human rights law are consistent, often redundant. However, Common Article 3 does not regulate the conduct of hostilities at all,[22] and Protocol II only does so with respect to civilians, and

---

[19] The other principal human rights instruments have provisions similar to that in Article 6(1) the International Covenant on Civil and Political Rights (ICCPR): 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.' See American Convention on Human Rights, art. 4(1) [hereinafter ACHR]; African Charter on Human and Peoples' Rights, art. 4 [hereinafter African Charter].

[20] *See* ECHR, art. 6; ICCPR, art. 14; ACHR, art. 8; African Charter, art. 7.

[21] ECHR, art. 14; *see also* ICCPR, art. 2(1); ACHR., art. 1(1); African Charter, art. 2.

[22] While the text of Common Article 3 will sustain the interpretation that it prohibits the targeting during combat of persons not taking active part in hostilities, most experts consider its field of application limited to persons within the power of a party to the conflict. In any case, Common Article 3 clearly does not regulate the conduct of hostilities in any other aspect. ICRC, *Commentary: I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1952) 52–57 [hereinafter *ICRC Commentary on Geneva I*]; ICRC, *Commentary on the Additional Protocols of 8 June*

then only in general terms.[23] Neither instrument, for example, provides any guidance on the legality of attacks that are likely to unintentionally kill persons not taking part in hostilities. The innovation of the ECtHR is filling this gap in humanitarian law by beginning to develop a human rights law of the conduct of hostilities in internal armed conflicts.[24]

The treaty law of internal armed conflict is not the only possible point of comparison for the ECtHR's jurisprudence. There is a broad consensus that Common Article 3 and Protocol II fail to effectively regulate many aspects of those conflicts, but some lawyers and advocates look to customary international law — unwritten rules that states consider to be legally binding — to fill the gaps. This approach has received a major boost with the publication, in early 2005, of an extensive study by the International Committee of the Red Cross (ICRC) on the current state of customary international humanitarian law.[25] This study identified 161 customary rules, many of which purportedly apply to internal armed conflicts. The authors concluded that 'the gaps in the regulation of the conduct of hostilities in Additional Protocol II have largely been filled through State practice, which has led to the creation of rules parallel to those in Additional Protocol I, but applicable as customary law to non-international armed conflicts.'[26] It is impossible to evaluate the ECtHR's jurisprudence on the conduct of hostilities without considering its relationship to customary humanitarian law as discerned by the ICRC's study. On the one hand, if there were a substantial body of customary humanitarian law that applied to internal conflicts, the case for applying humanitarian law as *lex specialis* to human rights law would be stronger. On the other hand, if human rights law could effectively regulate such conflicts, the case for promoting the acceptance of customary rules would be weaker. The dilemma could be finessed if the rules provided in the ICRC study and the

---

1977 to the Geneva Conventions of 12 August 1949 (1987) 1325 [hereinafter *ICRC Commentary on Additional Protocols*]; Bothe, *et al., New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (1982) 667, n. 1.

[23] Protocol II includes the 'principle of distinction' but regulates the conduct of hostilities only insofar as they are implicit in the "general protection against the dangers arising from military operations" accorded the civilian population in Article 13(1). Early drafts of Protocol II did regulate the conduct of hostilities, but the negotiating states became uneasy with the draft's scope, and 'the provisions on means of combat were . . . among the first provisions to fall beneath the guillotine.' Cassese, 'Means of Warfare: The Traditional and the New Law', in Cassese (ed), *The Humanitarian Law of Armed Conflict* (1979) 191, 195. The exclusion of these provisions from Protocol II has led one scholar to characterize the means and methods of warfare in internal conflict as "at the 'vanishing point' of international humanitarian law." Turns, 'At the "Vanishing Point" of International Humanitarian Law: Methods and Means of Warfare in Non-international Armed Conflicts', 45 *GYIL* (2002) 115, 116. See also discussion *infra* in Part 3(C).

[24] The argument can, of course, be made in the other direction. Gasser notes the substantial overlap between the humane treatment provisions of the ICCPR and Protocol II but suggests that it is Protocol II that fills the conduct of hostilities gap in the ICCPR. Gasser, 'International Humanitarian Law and Human Rights Law in Non-international Armed Conflict: Joint Venture or Mutual Exclusion', 45 *GYIL* (2002) 149. In the final instance, there is a strategic choice to be made as to whether it is more legitimate for advocates to broadly construe Protocol II or for courts to extensively develop human rights standards.

[25] Henckaerts & Doswald-Beck (eds), *Customary International Humanitarian Law, Vol. 1: Rules* (2005) [hereinafter *ICRC Customary Humanitarian Law Study*].

[26] *Ibid.*, at xxix.

rules given by the ECtHR were the same, but, as shown in Part 3, they are quite different and by no means parallel those in Protocol I. As a practical matter, 'the customary humanitarian law of internal armed conflicts' and 'the human rights law of internal armed conflicts' are competing projects.

The pressing question regarding the ICRC's study is whether states do, in fact, consider the rules it enumerates to be legally binding. In international armed conflicts, customary law has a long and relatively uncontroversial history, but in internal armed conflicts, it has generally been assumed to play only a minor role. When Protocol II was concluded two and a half decades ago, it was impossible for states to reach consensus even on the *existence* of a customary humanitarian law of internal armed conflicts. This is reflected in Protocol II's truncated rendition of the Martens Clause: '[I]n cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of public conscience.'[27] In contrast, Protocol I provides that 'In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.'[28] The contrast is indicative of 'the insistence by states that non-international armed conflicts are, except upon recognition of belligerency, governed by national rather than international law.'[29] In order to arrive at a customary humanitarian law of internal armed conflicts, the ICRC study typically infers that military manuals and declarations by states are (a) intended as statements of international law, rather than domestic law or policy, and (b) apply to internal armed conflicts unless explicitly limited to international armed conflicts. These assumptions appear unwarranted. When, as discussed in Part 3(A), states are reluctant to acknowledge the applicability of treaty-based humanitarian law, it is difficult to credit that they consider themselves bound under customary humanitarian law.[30]

---

[27] Protocol II, Preamble, ¶ 5.

[28] Protocol I, art. 1(2).

[29] Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989) 73–74. Meron argues that other features of Protocol II 'strengthen the proposition that beyond the express provisions of Protocol II, regulation of internal armed conflicts is relegated to the domestic law of states.' Meron points in particular to the failure of Protocol II, art. 13(1) to include the reference to 'other applicable rules of international law' in contrast to Protocol I, art. 51(1), the absence of an obligation for other states to 'ensure respect' for Protocol II in contrast to Protocol I, art. 1(1)), and the 'especially strong prohibition of intervention in the affairs of the state in whose territory the conflict occurs' in Protocol II, art. 3. Bothe explains the exclusion of customary law from Protocol II's Martens Clause 'by the fact that the attempt to establish rules for a non-international conflict only goes back to 1949 and that the application of common Art. 3 in the practice of States has not developed in such a way that one could speak of "established custom" regarding non-international conflicts.' Bothe, *supra* note 22, at 620 . The ICRC commentary interprets the omission of customary law as due to a 'cautious point of view' on the development of state practice, and argues that 'the existence of customary norms in internal armed conflicts should not be totally denied. An example that might be given is the respect for and protection of the wounded.' *ICRC Commentary on Additional Protocols*, at 1341.

[30] See also discussion on deriving custom from military manuals in Turns, *supra* note 23, at 138–43,and Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989) 41.

The same states that refused to acknowledge any customary humanitarian law of internal conflicts expressly recognized in Protocol II that 'international instruments relating to human rights offer a basic protection to the human person.'[31] While they did not anticipate the application of human rights law to the conduct of hostilities, this preambular invocation does indicate that human rights law is broadly accepted as a legitimate basis on which the international community can supervise and respond to interactions between a state and its citizens. In some regions, including much of Europe, a practice of routine compliance with international human rights law has been achieved.[32] This legitimacy and pattern of compliance may be less entrenched with respect to the violent interactions of armed conflict, but states reluctant to acknowledge that more than 'law enforcement' in a 'stable country and healthy society' is underway may be unlikely to affirmatively renounce the binding character of human rights law in times of conflict. There is no place for great optimism regarding what, for example, the ECtHR might achieve in Chechnya, but given that Russia at least accepts that the ECHR is a relevant source of law, its direct application to the conduct of hostilities must be considered a promising strategy.

It is not enough for the direct application of human rights law to internal armed conflicts to be appropriate and desirable; it must also be possible. The challenge is to apply the broad principles of human rights law to the conduct of hostilities in a manner that is persuasive and realistic. Human rights law must be realistic in the sense of not categorically forbidding killing in the context of armed conflict or otherwise making compliance with the law and victory in battle impossible to achieve at once. These realistic rules must be persuasively derived from the legal standards of human rights law. Many have thought these goals unrealistic, maintaining that human rights law is simply inadequate to the task of regulating the conduct of hostilities. In *Abella*, the Inter-American Commission on Human Rights was asked to resolve claims arising out of a pitched battle. An armed group had seized a military base from which it believed a *coup d'état* was to be launched. The base was promptly surrounded by Argentine armed forces, and a thirty hour battle ensued. After characterizing that these events as an armed conflict, the Commission concluded that its

> ability to resolve claimed violations of [the right to life] arising out of an armed conflict may not be possible in many cases by reference to . . . the American Convention alone. This is because the American Convention contains no rules that either define or distinguish civilians from combatants and other military targets, much less, specify when a civilian can be lawfully attacked or when civilian casualties are a lawful consequence of military operations. Therefore, the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its

[31] Protocol II, Preamble, ¶ 3.

[32] For an attempt to explain the success of the European Court of Human Rights and developed strategies for other bodies to become more effective, see Helfin & Slaughter, 'Toward a Theory of Effective Supranational Adjudication', 107 *Yale L.J.* (1997) 273.

> resolution of this and other kinds of claims alleging violations of the American Convention in combat situations.[33]

The Commission then turned to Common Article 3 and to two United Nations General Assembly Resolutions that it found to reflect customary international law.[34] The ECtHR has now done exactly what the Inter-American Commission avoided, by directly applying human rights law rather than turning to humanitarian law. Its jurisprudence must be judged by whether it provides satisfactory rules to 'specify when a civilian can be lawfully attacked or when civilian casualties are a lawful consequence of military operations' and resolve the other issues routinely confronted in armed conflict.

3 New Rules on the Conduct of Hostilities in Internal Armed Conflicts

Article 2(2) of the ECHR permits no more use of force 'than absolutely necessary' to achieve a permitted aim, such as the 'defence of any person from unlawful violence.' The ECtHR has held that

> the use of the term 'absolutely necessary' in Article 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 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2(a), (b) and (c) of Article 2. In keeping with the importance of this provision in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly 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.[35]

---

[33] Case of Juan Carlos Abella (Argentina), Inter-Am. C.H.R., Case 11.137 (1997), ¶ 161.

[34] *Ibid.*, ¶ 177. The Inter-American Court of Human Rights has thus far rejected the *lex specialis* application of humanitarian law on jurisdictional grounds, but continues to refer to and consider humanitarian law provisions. Las Palmeras (Colombia), Preliminary Objections, Inter-Am. Ct. H.R. (Ser. C) No. 67, ¶ 33 (2000); Bámaca Velásquez (Guatemala), Judgment, Inter.-Am. Ct. H.R. (Ser. C) No. 70, ¶ 209 (2000). The Commission continues to apply humanitarian law as *lex specialis*. Ltr. From Juan E. Méndez, President of the Commission, to attorneys for those requesting provisional measures (Mar. 13, 2002) (quoting letter notifying United State of the imposition of provisional measures), *available at* http://www.ccr-ny.org/v2/legal/september_11th/docs/3-13-02%20IACHRAdoptionofPrecautionaryMeasures.pdf. See also Zegveld, 'The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case', 80 *IRRC* (1998) 505.

[35] *McCann and Others v. United Kingdom*, ECtHR, App. No. 18984/91, ¶¶ 149–150 (Sept. 27, 1995). The ECtHR has repeated this passage nearly verbatim in subsequent cases concerning armed conflicts. *Ergi*, ¶ 79; *Isayeva I*, ¶ 169; *Isayeva II*, ¶ 173.

Most of what follows unpacks this passage and compares its implications to those of the humanitarian law of internal armed conflicts. The latter is discussed both as it is (*de lege lata*) and in the form to which it aspires (*de lege ferenda*).

Four comparisons are drawn. In Part 3(A) the ECtHR's application of a single set of rules to all uses of lethal force is contrasted with humanitarian law's multiple regimes. In Part 3(B) the requirement under the ECHR that any use of lethal force be 'absolutely necessary' is contrasted with humanitarian law's acceptance that states may choose to shoot rather than capture combatants, even when the latter would not be especially difficult or dangerous. Part 3(C) argues that, in effect, the ECtHR's jurisprudence extends the rules requiring military operations to be planned and conducted so as to minimize loss of life incidental to their objective from the humanitarian law of international conflicts to that of internal conflicts. Finally, Part 3(D) asks whether the ECHR invites the entangling of *jus in bello* and *jus ad bellum*. The differences between the human rights and humanitarian law regimes prove more subtle than the passage suggests. The differences are not a matter of degree — 'strict proportionality' versus 'proportionality' — but of normative architecture. Human rights law is not simply, or even necessarily, more humane, and humanitarian law is not inherently better suited to achieving military victories.

A Replacing Conflict Qualification with Unified Rules for the Use of Lethal Force

Discussing a battle between the Russian armed forces and more than one thousand armed insurgents, the ECtHR described the insurgents as manifesting 'active resistance to . . . law-enforcement bodies'[36] and criticized the armed forces for not showing 'the degree of caution expected from a law-enforcement body in a democratic society.'[37] Euphemism? Or paradigm shift? Regulating 'law enforcement operations' leads to a very different kind of law than regulating 'armed conflicts.' Under humanitarian law, the rules applicable in a given situation depend on the 'characterization' or 'qualification' of the conflict as a whole. In contrast, the rules espoused by the ECtHR have no 'triggers' or 'thresholds' but form a single body of law that covers everything from confrontations between rioters and police officers to pitched battles between rebel groups and national armies. Under humanitarian law, the rules apply to all parties to a conflict — government forces and dissident armed groups alike. Under human rights law, the rules apply only to the government.[38]

The ECtHR has analyzed the conduct of hostilities in three conflicts — those between the UK and IRA, between Turkey and the PKK, and between Russia and the separatists in

[36] *Isayeva II*, ¶ 180.

[37] *Isayeva II*, ¶ 191; see also *McCann*, ¶ 212.

[38] As compared to humanitarian law, the relevance of human rights law to the behavior of non-state armed groups is quite limited. However, groups that claim to govern a state or aspire to soon govern a state may be responsive to human rights law arguments even if they are not subject to the jurisdiction of any judicial or quasi-judicial human rights body. Zegveld, *Accountability of Armed Opposition Groups in International Law* (2002); Matas, 'Armed Opposition Groups', 24 *Man. L.J.* (1997) 621.

Chechnya. It has applied the same body of doctrine, grounded in Article 2 of the ECHR, to the use of lethal force in each of these conflicts. A small ambush in a relatively low-intensity conflict (*Ergi*), a major battle in a high-intensity conflict (*Isayeva II*), and a confrontation between a handful of plainclothes special forces officers and several IRA members (*McCann*) were all subjected to the same basic rules. This does not mean that the same conduct was permitted and prohibited in each situation. For example, one basic rule that has been derived by the ECtHR from Article 2 of the ECHR, and which is discussed further in Part 3(B), is that the use of lethal force is prohibited unless, *inter alia*, capture would be too risky to bystanders or the forces involved. In form, the rule is invariant; in application, it varies according to the risks of a particular situation. The risk posed by attempting to capture a group of thousands of heavily armed insurgents holed up in a village is clearly different than that posed by attempting to capture three possibly armed terrorists walking on a sidewalk, and what the rule requires varies accordingly.

Rather than human rights law's single regime of flexible rules, humanitarian law has several different regimes of relatively rigid rules. Which set of rules governs a particular armed conflict depends on the conflict's characteristics. If it is a struggle for national liberation against 'alien occupation' or 'colonial domination', it is considered an 'international armed conflict' and thus falls under Protocol I and the Geneva Conventions of 1949.[39] If it is 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', then it is governed by Protocol II.[40] If it is a civil war of lower intensity, then it is governed by Common Article 3.[41] If it consists only of riots or other internal disturbances and strife, then it is not governed by humanitarian law at all,[42] although a number of proposals have been made for a new humanitarian law instrument to be adopted for that purpose.[43] Each of the conflicts analyzed by the ECtHR would be governed by a different body of humanitarian law.

---

[39] Protocol I, art. 1(4).

[40] Protocol II, art. 1(1).

[41] The text of Common Article 3 refers to 'armed conflict not of an international character', without defining 'armed conflict' as such. Proposals to include a definition of armed conflict within Common Article 3 tended to provide criteria similar to those triggering Protocol II, but ultimately no definition was included. *ICRC Commentary on Geneva I*, at 49–50. Today, it seems to be widely accepted in principle that Common Article 3 will be triggered at a much lower threshold of violence, as attested by Protocol II, art. 1(2). The International Criminal Tribunal for the Former Yugoslavia has held that 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.' *Tadic*, Case No. IT-94-1-AR72 (Appeals Chamber), ¶ 70 (Oct. 2, 1995).

[42] Protocol II, art. 1(2) states that the Protocol 'shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, *as not being armed conflicts*' (emphasis added).

[43] Meron, *Human Rights in Internal Strife: Their International Protection* (1987).

The Russian government has refused to recognize the existence of an armed conflict in Chechnya, characterizing the events there as terrorism and banditry.[44] *Isayeva I* and *Isayeva II* concern the siege of Grozny and its immediate aftermath.[45] Most of the insurgents who held Grozny apparently belonged to an organization styled 'the Chechen Republic of Ichkeria', which, somewhat paradoxically, characterized the situation as an internal armed conflict subject to Common Article 3 and Protocol II.[46] The facts amply support a Protocol II characterization. Journalistic accounts strongly suggest that the insurgents were 'under responsible command': while they held Grozny, the insurgents employed a centralized communication system,[47] and they retreated from Grozny through Katyr-Yurt *en masse* under military command and the ultimate leadership of President Aslan Maskhadov.[48] During the siege, the insurgents exercised sufficient territorial control to carry out sustained and concerted military operations: besides holding absolute control over Grozny,[49] they routinely attacked Russian outposts in groups of 15–20.[50]

Even at its peak in the early 1990s, the conflict between Turkey's government and the Workers Party of Kurdistan (PKK) probably would not have qualified as a Protocol II conflict — even had Turkey acceded to Protocol II.[51] There is little question but that the highly-centralized PKK was under 'responsible command.' It demonstrated the capacity to declare and hold cease fires, and when its captured leader, Abdullah Öcalan, instructed his followers to end the insurgency and enter normal politics, this order was largely

---

[44] Russia acceded to the Geneva Conventions of 1949 on May 10, 1954; Protocols I & II on September 29, 1989. See http://www.icrc.org/ihl. In 2000 the Russian Minister of Justice informed the then UN High Commissioner for Human Rights Mary Robinson that Russia regards 'the events in Chechnya not as an armed conflict but as a counter-terrorist operation.' 'The Russian Authorities Regard the Events in Chechnya not as an Armed Conflict but as a Counter-Terrorist Operation', *RIA Novosti* (Apr. 4, 2000). And in 2004 Russia succeeded in getting a report of the United Nations Secretary-General amended to state that Chechya 'is not an armed conflict within the meaning of the Geneva Conventions' and to refer to 'Chechen illegal armed groups' rather than 'Chechen insurgency groups.' Lederer, 'U.N. Seeks to Stop Use of Child Soldiers', *AP* (Apr. 23, 2004). During the First Chechen War, in 1995, the Russian Constitutional Court indicated that the conflict was governed by Protocol II; however, inasmuch as the Court found that it lacked competence to apply Protocol II, the view of the executive is here more important than that of the judiciary. See Paola Gaeta, 'The Armed Conflict in Chechnya before the Russian Constitutional Court', 7 *EJIL* (1996) 563.

[45] *Isayeva I* deals with civilians escaping the city during the siege. *Isayeva II* deals with the Russian attack on an outlying village as insurgents retreated through it from Grozny. A thorough exploration of the attack on another such village can be found in Meier, *Chechnya: To the Heart of a Conflict* (2005).

[46] 'A Forgotten Conflict' (Mar. 21. 2005) at http://www.chechnya-mfa.info/print_press.php?func=detail&par=12765.

[47] Thomas, 'Grozny 2000: Urban Combat Lessons Learned', *Military Review* (July-Aug. 2000); Bagrov, 'Chechen Rebels Put Up Tough Fight', *AP* (Jan. 25, 2000).

[48] Thomas, *supra* note 47; Cockburn, 'Chechen Leader Pledges to Retake Grozny', *The Independent* (London), Foreign News, Page 15 (Feb. 8, 2000); Alkhan-Kala, 'Russian Troops Advance as Chechens Flee Capital', *St. Louis Post-Dispatch* (Missouri), A5 (Feb. 4, 2000).

[49] Thomas, *supra* note 47; Bagrov, Chechen Rebels Put Up Tough Fight, *AP* (Jan. 25, 2000).

[50] Bagrov, Russians Encircle Chechen Rebels, *AP* (Feb. 27, 2000).

[51] Turkey acceded to the Geneva Conventions of 1949 on February 10, 1954; it has never acceded to Protocol I or II. See http://www.icrc.org/ihl

obeyed.[52] However, the PKK's territorial control was quite limited. It was never capable of holding towns, and its reliance on bases in Syria and northern Iraq suggest the limits of its control over even rural areas.[53] The numerous violent engagements between the Turkish military and the PKK[54] do indicate the existence of an armed conflict, but one subject only to Common Article 3. This characterization was not accepted by either party. Öcalan declared in 1995 that the PKK would adhere to Protocol I and the Geneva Conventions;[55] however, the legal effect of this declaration was undercut by the PKK's failure to formally accede to Protocol I following the procedures of Article 96,[56] and it is doubtful that Turkey was exercising 'colonial domination [or] alien occupation.' The Turkish government, on the other hand, denied the existence of an armed conflict, characterizing its operations instead as domestic counter-terrorism.[57]

The United Kingdom treated the events in Northern Ireland as terrorism to be met with law enforcement operations and, while receptive to its regulation as a state of emergency under the ECHR, denied that it was an armed conflict.[58] While the Irish Republican Army (IRA) at one point expressed the intention of acceding to Protocol I, it never did so. The IRA had insufficient territorial control to warrant the application of Protocol II: while exercising considerable power in some neighborhoods, it never succeeded in ousting the government's authority.[59] The guerrilla warfare between the IRA and government forces that continued at the time of the *McCann* case[60] points toward the application of Common Article 3. On the other hand, the IRA then numbered in the

---

[52] Kinzer, 'Rebel Kurds Back Leader In Peace Offer To the Turks', *NYT* (June 3, 1999) A7.

[53] Kocher, 'The Decline of PKK and the Viability of a One-state Solution in Turkey', 4 *International Journal on Multicultural Societies* (2002) 5.

[54] Cowell, 'Turks' War With Kurds Reaches a New Ferocity', *NYT* (Oct. 18, 1993) A3.

[55] Veuthey, 'Learning from History: Accession to the Conventions, Special Agreements, and Unilateral Declarations', 27 *Collegium* 139, 144 (Bruges 2002).

[56] Protocol I, art. 96(3) provides that a people engaged in a national liberation struggle 'may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary.'

[57] Turns, *supra* note 23, at 133: 'The Turkish Foreign Ministry expressly denies the suggestion that the insurgency in south-eastern Turkey can be regarded as an armed conflict, however characterized, within the meaning of the Geneva Conventions, on the following grounds: [1] the PKK does not respect the rules of war; [2] the PKK's unilateral declaration of a 'cease-fire' in September 1999 has no effect on the organization's legal status; [3] the PKK does not control territory in the sense of being able to conduct sustained and concerted military operations and to implement humanitarian law; [4] the PKK's attacks occur all over Turkey and also in foreign States, thereby negating the concepts of civil war and armed conflict as such.' The first, second, and fourth points are irrelevant; the third point would go to the applicability of Protocol II were Turkey a party to that treaty.

[58] See Meron, 'The Humanization of Humanitarian Law', 94 *AJIL* (2000) 239, 272. The United Kingdom acceded to the Geneva Conventions of 1949 on September 23, 1957 and to Protocols I & II on January 28, 1998 (but with a reservation undercutting Protocol I's application to national liberation movements). See http://www.icrc.org/ihl

[59] See, e.g., Shawn Pogatchnik, 'Harsh Brand of Justice in Belfast: IRA Gun Squads Mete Out Punishment for "Anti-Social Behavior"', *San Francisco Chronicle* (Dec. 5, 1990) A6.

[60] See, e.g., Steve Lohr, 'I.R.A. Shifts Tactics, and the Results Are Deadly', *NYT* (Aug. 23, 1988) A3.

hundreds and the conflict remained of a relatively low intensity,[61] suggesting that the official position that Common Article 3 did not apply was at least tenable.

Russia, Turkey, and the United Kingdom all denied that they faced internal armed conflicts and, consequently, all denied that international humanitarian law applied. At one level, this should not be surprising: states routinely reject the application of the humanitarian law instruments to violence within their borders. In situations that objectively constitute armed conflicts, the application of Common Article 3 is frequently rejected, the application of Protocol II has been accepted by only a handful of states, and the application of Protocol I to a conflict against a national liberation movement has never been acknowledged by the state involved.

States refuse to apply humanitarian law to internal armed conflicts for reasons that are more political than legal. Humanitarian law's substantive requirements are, after all, far less onerous in internal conflicts than in international conflicts. The problem is that to apply humanitarian law is to tacitly concede that there is another 'party' wielding power in the putatively sovereign state.[62] The political consequences of acknowledging that Common Article 3 applies include conceding the inability of the government to stop large-scale violence, facilitating rebel claims that they have the requisite international personality to carry on diplomacy and participate in 'peace conferences', and allowing rebels to insist that, pursuant to Common Article 3's injunction that '[t]he Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention', the rebels merit prisoner-of-war status and immunity from criminal prosecution. Conceding the applicability of Protocol II further entails acknowledging that a group other than the government exercises control over portions of the state's territory. Applying Protocol I to an internal conflict constitutes the government's admission that it is exercising alien occupation or colonial domination against the will of the people. When states compare the costs and benefits of applying humanitarian law to an internal conflict, they often decide that following the law is not worth appearing weak.

While states should be encouraged to deal candidly with their internal conflicts, the ECtHR's jurisprudence on the conduct of hostilities is so interesting and important precisely because it has unfolded in the context of officially unacknowledged armed conflicts. The ECtHR's approach has the potential to induce greater compliance, because it applies the same rules to fights with common criminals, bandits, and terrorists as to

[61] *Ibid*.

[62] While Common Article 3 specifies that its application 'shall not affect the legal status of the Parties to the conflict', *see also* Protocol II, art. 3 (affirming the sovereignty of the state), it does in fact carry both legal and political implications for the status of the rebels. As Abi-Saab notes, 'common article 3 does confer a certain *objective legal status* on "rebels."' *Meron, Human Rights in Internal Strife: Their International Protection* (1987) 38 (quoting Abi-Saab, 'Wars of National Liberation and the Laws of War', 3 *Annals Int'l L. Studies* (1972) 93, 96) (emphasis added). Meron points out that, while Common Article 3 does not make rebels 'privileged combatants' and impede their prosecution under criminal law, 'the reluctance of States to acknowledge the applicability of Article 3 demonstrates the cogency of Abi-Saab's analysis.'

fights with rebels, insurgents, and liberation movements. To apply human rights law does not entail admitting that the situation is 'out of control' or even out of the ordinary.

B Recognizing the Right to Life of Civilians . . . and Combatants

The 'principle of distinction' is fundamental to humanitarian law, but its precise content varies according to the kind of conflict. In national liberation struggles — and international armed conflicts — the distinction is between 'civilians' and 'combatants.' Combatants have no right to life under humanitarian law. Every individual is classified as either a combatant or as a kind of protected person, such as a prisoner of war (a captured combatant) or a civilian. An individual's rights change when his classification changes. A civilian has the right not to be targeted for attack and the right to receive some protection from attack. If the civilian joins the armed forces, he *exchanges* the rights of a civilian for the rights of a combatant. A combatant has the right to take part in hostilities. On the one hand, this means that if he is captured a combatant may not be prosecuted as a murderer for killing enemy combatants; instead, he becomes a prisoner of war, held only until the end of active hostilities. On the other hand, as a combatant, the individual also loses any right not to be attacked. As W. Hays Parks notes, while surrender must be accepted and those who are *hors de combat* may not be executed, 'neither proscription precludes the attack of enemy combatants with the intent to kill rather than capture.'[63] Loosely, the combatant trades his right to life for the right to kill.

Neither Common Article 3 nor Protocol II recognizes the status of 'combatant.' This omission is due to the great reluctance of states to accept that domestic insurgents ever have any *right* to attack government forces.[64] Instead, states have generally treated insurgents as criminals. A combatant who kills a soldier is guilty of nothing; an insurgent who kills a soldier is guilty of murder. Even with respect to targeting in combat, the principle of distinction has been moderately controversial. This is because states have feared that, for example, prohibiting attacks on civilians under international law lends 'an aura of legitimacy for acts of violence against the military personnel . . . of the *de jure* Government' despite the fact that such acts could still be criminalized under national

---

[63] Parks, 'Memorandum of Law: Executive Order 12333 and Assassination', 1989 *Army Lawyer* (December 1989) 4, 5.

[64] Solf, who was a member of the United States delegation to the 1974–1977 Diplomatic Conference that produced Protocols I & II, has attempted to convey 'the concrete objections' that the delegations from 'newer third world states' had with extending international armed conflict concepts of 'combatant status' and 'distinction between combatants and civilians' to internal armed conflicts. Solf, 'Problems with the Application of Norms Governing Interstate Armed Conflict to Non-International Armed Conflict', 13 *Ga. J. Int'l & Comp. L.* (1983) 291. 'Do you really think', such a delegate asks, 'that we would concur in any treaty that would grant immunity from our treason laws to our domestic enemies, and by doing so grant them a license to attack the government's security personnel and property, subject only to honorable internment as prisoners of war for the duration of the conflict?' *Ibid.*, at 292. In a state already 'plagued with ideological and ethnic rivalries, aided and abetted by external states', this would only "encourage[] rebellion by reducing the personal risk of "the rebels."' *Ibid*. Under Common Article 3 and Protocol II, it is absolutely permissible to treat an insurgent as a criminal. *ICRC Commentary on Geneva I*, at 39. By unabashedly treating rebels as criminals — who, like other criminals, have rights — the ECtHR's approach avoids implying that rebels have any status above — or below — that of other citizens.

law.[65] These concerns have not, however, prevented the principle of distinction from being incorporated into the humanitarian law of internal armed conflict.

In the humanitarian law of internal armed conflicts, the distinction is between 'civilians' and persons who are 'taking a direct part in hostilities.'[66] The latter may be targeted; the former may not. If Common Article 3 is understood to regulate only the treatment of persons who are within the power of party to the conflict, then its protection of '[p]ersons taking no active part in the hostilities' does not speak to the principle of distinction in the conduct of hostilities.[67] Nevertheless, the applicability of the principle of distinction to low-intensity internal conflicts is widely acknowledged.[68] The consensus that there is a principle of distinction in internal conflicts may be due partly to its ambiguity. While the conditions for receiving combatant status are relatively well-defined in Protocol I and the Third Geneva Convention of 1949, debate continues over what it means to take a direct part in hostilities.[69] For purposes of comparison with the doctrine of the ECtHR, however, the important point is that taking a direct part in hostilities subjects an individual to armed attack even if he could be captured instead.

Even with respect to persons taking an active part in hostilities, the ECHR only permits the use of lethal force when capture is too risky.[70] For killing a person to be 'absolutely necessary' under Article 2(2) means that attempting to capture him would be too dangerous for the government officers involved or for other citizens. In *McCann*, the ECtHR found that the United Kingdom (UK) had violated the right to life of three members of the IRA who were on a terrorist mission in Gibraltar. The ECtHR held that the decision of the soldiers to shoot the suspects when they made sudden movements complied with the ECHR, because the soldiers had been informed that at least one of the IRA members possessed a push-button remote control detonator that would set off a car bomb. Killing the suspects had appeared 'absolutely necessary in order to safeguard innocent lives.'[71] However, the plot had yet to reach that stage — no car bomb had been put in place — and the ECtHR held that the actions of the officials running the operation had breached the ECHR. Given the consequences of communicating to the soldiers that

[65] Bothe, *supra* note 22, at 669. With respect to the principle of distinction in the conduct hostilities, Solf's delegate says, 'My government knows that needlessly attacking *innocent* civilians tends to strengthen dissident movements and we will take strong measures against such misbehavior by our armed forces. But to prescribe an international norm prohibiting attacks against civilians and civilian objects implicitly suggests that it is permitted to attack security personnel and objects.' Solf, *supra* note 64, at 292. These objections were overcome, but the attitudes remain. By affirming everyone's right to life, the ECtHR's approach avoids any implication that attacks on government forces are permitted.

[66] Protocol II, art. 13(3): 'Civilians shall enjoy the protection afforded by this Part [not to be an object of attack], unless and for such time as they take a direct part in hostilities.'

[67] See text of note 22, *supra*.

[68] Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?', 16 *EJIL* (2005) 171, 197–200.

[69] *Ibid*., at 189–201.

[70] See also *Ibid*., at 177–183; Watkin, *supra* note **Error! Bookmark not defined.**, at 32–33.

[71] *McCann*, ¶ 200.

a car bomb had been deployed and that one of the IRA members had a push-button remote control detonator, 'the authorities were bound by their *obligation to respect the right to life of the suspects* to exercise the greatest care in evaluating the information at their disposal before transmitting it to the soldiers whose use of firearms automatically involved shooting to kill.'[72] By hastily — in the view of the ECtHR — jumping to the conclusion that a parked car was a car bomb, the officials had failed to exercise adequate care, thus violating the suspects' rights to life.

McCann dealt with an attempted arrest involving a small number of soldiers — acting essentially as plainclothes police officers — and three terrorism suspects. In the higher-intensity engagements presented by the Chechen cases, the ECtHR *has* sometimes singled out the right to life of 'civilians.'[73] Does this imply that the existence of an armed conflict or presence in a combat zone triggers a categorically different body of doctrine? At this point, the ECtHR does not appear to be using the word 'civilian' as a term of art. Even in the Chechen cases, the ECtHR cited to *McCann* for the applicable law.[74] The case law is best interpreted as providing the same rule for battles as for arrests, and for civil wars as for riots. This does not mean that the intensity of conflict is legally immaterial. Resort to lethal force is more likely to be lawful if the insurgent is actively participating in battle, because then he poses an actual or imminent threat to others and capturing him would more likely unreasonably endanger government soldiers. But there is no *per se* rule that insurgents may be targeted with lethal force.[75]

Does recognizing the right to life of insurgents endanger the lives of civilians? The debates over Protocol I and the principle of distinction in international armed conflicts have often focused on this very issue, but the arguments in those debates do not transfer well to the non-international context. In the law of international armed conflict, the principle of distinction is twinned with an incentive — immunity from prosecution — for persons taking part in hostilities to play the role of 'combatants' by, most notably,

---

[72] *McCann*, ¶ 211 (emphasis added).

[73] *See Ergi*, ¶ 79 ('[State responsibility] may also be engaged where [agents of the state] fail to take all reasonable 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.'); *Isayeva II*, ¶ 183 (inquiring 'whether the operation was planned and conducted in such a way as to avoid or minimise, to the greatest extent possible, harm to civilians, as is required by Article 2 of the [ECHR].'); *Isayeva I*, ¶¶ 177, 199.

[74] *Isayeva I*, ¶ 171; *Isayeva II*, ¶ 175; see also *Ergi*, ¶ 79.

[75] See also the position of the *amici* in *Isayeva I*. *Isayeva I*, ¶ 167: 'The submission argued that the law of non-international armed conflicts as construed by international human rights law established a three-part test. First, armed attacks on mixed combatant/civilian targets were lawful only if there was no alternative to using force for obtaining a lawful objective. Second, if such use of force was absolutely necessary, the means or method of force employed could only cause the least amount of foreseeable physical and mental suffering. Armed forces should be used for the neutralization or deterrence of hostile force, which could take place by surrender, arrest, withdrawal or isolation of enemy combatants — not only by killing and wounding. This rule required that States make available non-lethal weapons technologies to their military personnel. Furthermore, the authorities should refrain from attacking until other non-lethal alternatives could be implemented. Third, if such a means or method of using force did not achieve any of its lawful objectives, then force could be incrementally escalated to achieve them.'

wearing uniforms. It unquestionably helps protect civilians when people who are legitimate military targets make themselves easy to identify. However, in the law of internal armed conflict, the principle of distinction is not accompanied by any incentive for persons taking part in hostilities to wear uniforms. The customary rules advanced in the ICRC study do not, in this respect, go any further than Protocol II and Common Article 3. The ECtHR's rule should not, then, make targeting mistakes more likely, but there is also a danger that the fact-specific nature of the ECtHR's rule will make it easier for states to justify the intentional targeting of people who are not playing a direct part in hostilities. Governments conducting counter-insurgency campaigns often target 'sympathizers' as well as insurgents. This is understood to violate the humanitarian law of internal armed conflict, but could it be rationalized in the ECtHR's framework? That danger and others like it inhere in the ECtHR's approach, but these can be overcome if the case law is developed with care. In the course of continuing to resolve cases arising out of armed conflicts, the ECtHR will presumably refine its balancing test and, even, derive some *per se* rules. There is the potential for the ECtHR to actually improve on the protection of civilians, as well as combatants, in internal conflicts. We should not, however, assume that the ECtHR will — or should — mimic the combatant–civilian distinction of the humanitarian law of international armed conflict.

C Rigorous Scrutiny of Operational Planning and Proportionality in Attack

While humanitarian law prohibits the intentional targeting of civilians in internal as well as international armed conflicts, the danger posed to civilians by attacks on military targets are adequately accounted for only in international conflicts. Protocol I prohibits attacks that 'strike military objectives and civilians or civilian objects without distinction' (indiscriminate attacks),[76] prohibits attacks that may be expected to lead to a loss of civilian life excessive in relation to the value of the military target (proportionality),[77] and requires that attacks be planned and executed so as to minimize civilian casualties (precautionary measures).[78] The precautionary measures required are elaborated in some detail. At the planning stage, Protocol I requires 'all feasible precautions' in vetting targets[79] and choosing the means and methods of attack.[80] At the operational stage,

[76] Protocol I, art. 51(4) ('Indiscriminate attacks are prohibited. Indiscriminate attacks are: [list] and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.').

[77] Protocol I, art. 57(2)(a) ('[T]hose who plan or decide upon an attack shall: . . . refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.').

[78] Protocol I, art. 57(2)(a) ('[T]hose who plan or decide upon an attack shall: . . . take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.'); Protocol I, art. 57(2)(c) ('[E]ffective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.').

[79] Protocol I, art. 57(2)(a)(i).

[80] Protocol I, art. 57(2)(a)(ii).

Protocol I 'reasonable precautions' against civilian losses,[81] cancellation of attack if the planning assumptions prove faulty,[82] and advance warning to the civilian population if circumstances permit.[83]

Humanitarian law leaves the planning and execution of attacks essentially unregulated in internal conflicts. Protocol II provides only that '[t]he civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations.'[84] It does not include any provisions on indiscriminate attacks, proportionality in attack, and precautionary measures. Unfortunately, these omissions were not inadvertent or, primarily, to simplify the text. A ban on indiscriminate attacks had been included in an early draft of Protocol II but was deleted. The Canadian delegation claimed that indiscriminate methods were both inevitable (on the rebel side) and necessary (on the government side).[85] With respect to precautionary measures and the principle of proportionality, the ICRC proposed a short provision and Finland proposed a provision based on that of Protocol I.[86] Both of these proposals were rejected.[87] Bothe, *et al.*, observe that this 'virtually invites' the argument that much conduct prohibited in international conflicts is permitted in internal conflicts.[88] To rescue the text, they argue that the 'principles of humanity' mentioned in the preamble include the principle of proportionality[89] and that the 'general protection' accorded the civilian population in Protocol II may be interpreted to proscribe some indiscriminate attacks,[90] but they conclude that there is no textual basis for requiring precautionary measures in attack.[91] The ICRC's commentary sounds a more optimistic note by construing Article

[81] Protocol I, art. 57(4).

[82] Protocol I, art. 57(2)(b).

[83] Protocol I, art. 57(2)(c).

[84] Protocol II, art. 13(1).

[85] See Cassese, *supra* note 23, at 194–95; but see Bothe, *supra* note 22, at 677 ('It is certainly arguable that attacks against densely populated places which are not directed at military objectives, those which cannot be so directed, and the area bombardments prohibited by para. 5(a) of Art. 51 [of Protocol I] are inferentially included within the prohibition against making the civilian population the object of attack. Their deletion may be said to be part of the simplification of the text.').

[86] Bothe, *supra* note 22, at 670.

[87] *Ibid.*, at 671.

[88] *Ibid.*

[89] *Ibid.*, at 677–78.

[90] *Ibid.*, at 677

[91] *Ibid.*, at 670–71, 677 (arguing that because Protocol II, art. 13(1) tracks the language of Protocol I, art. 51(1) except to exclude the clause specifying that the rules given 'are additional to other applicable rules of international law', it is difficult to argue that precautionary measures or proportionality are implicit in the phrase 'general protection.'); but see *ICRC Commentary on Additional Protocols*, at 1450–51 ('The question may well be asked whether the reference to international law was intentionally omitted in order to suggest that customary law is deemed not to apply to situations of non-international armed conflict. It would seem that this is not the case. The discussions in Conference do not indicate that any doubt was cast on the applicability of customary law. The reference to other rules of international law was probably omitted because it was not considered necessary, given that the only rule explicitly laid down for non-

13 to codify in general terms customary law requiring the protection of civilians against attacks.[92] Of course, Protocol II's text itself reflects a lack of consensus regarding any customary law on the conduct of hostilities in internal conflicts, and the value of law that is not accepted as such by states is limited. The *travaux préparatoire* inflict a heavy burden on anyone arguing for strong customary protections for civilians against the incidental effects of hostilities.[93]

The ECtHR has developed a vigorous jurisprudence on the planning and execution of military operations in internal conflicts. Here the rules it has promulgated largely track those humanitarian law provides for international conflicts. While the ECtHR refers to 'strict proportionality' rather than 'proportionality', the most significant difference lies in the protection accorded non-civilians rather than in the calculus of proportionality itself. Similarly, while the idea of an 'indiscriminate attack' loses some of its precision when even persons taking part in hostilities are not categorically subject to attack, the ECtHR shares humanitarian law's attention to careful targeting and the avoidance of incidental losses.

The ECtHR's approach to precautionary measures in attacks is grounded in Article 2 read in conjunction with Article 1.[94] While Article 2 defines the right to life and specifies the legitimate grounds for its deprivation, Article 1 provides that states 'shall *secure* to everyone within their jurisdiction the rights and freedoms defined [in the ECHR].' This affirmative obligation of states to protect the lives of their residents extends to the planning and execution of military operations. This textual foundation has given the ECtHR a broad mandate to scrutinize military practices.

The ECtHR's case law on proportionality, indiscriminate attacks, and precautionary measures is highly fact-specific.

- In *Isayeva I*, the ECtHR found that the use of twelve missiles with impact radii exceeding 300 meters was disproportionate to the destruction of two insurgent vehicles given that they — assuming they existed at all — were part of a civilian convoy.[95] In *Isayeva II*, it found the use of 'free-falling high-explosion aviation

---

international armed conflicts is common Article 3 of the 1949 Conventions, which does not contain provisions relating to the protection of the civilian population as such.').

[92] *ICRC Commentary on Additional Protocols*, at 1448–1450.

[93] Protocol II's unusual drafting history does, however, leave at least some room for disagreement regarding the state of customary law even as of 1977. As negotiations came to a close, a text elaborated in private, mainly by the Canadian and Pakistani delegations, supplanted the text negotiated in committee and was adopted without extensive discussion or modification. Eide, 'The New Humanitarian Law in Non-International Armed Conflict', in Cassese (ed), *The New Humanitarian Law of Armed Conflict* (1979) 277, 277–78. The resulting record casts less light on the legal views of each state than would otherwise be the case.

[94] *Ergi*, ¶ 79.

[95] *Isayeva I*, ¶¶ 195–197.

bombs . . . with a damage radius exceeding 1,000 metres' on targets within a village disproportionate.[96]

- In *Isayeva I*, the ECtHR indicated that operations should be conducted pursuant to planning that includes 'assessment of the perceived threats and constraints' and of the available weapons and tactics.[97] The large convoy of civilians was present because a 'humanitarian corridor' had been arranged, apparently by the Russian government, to allow people to leave Grozny.[98] Moreover, Russian soldiers were manning the roadblock that controlled the administrative border through which safe passage was being assured.[99] The ECtHR noted the failure of any organ of the Russian government to communicate this 'safe passage' to persons planning military operations in the area.[100] The ECtHR also noted the absence of 'forward air controllers' to evaluate the pilots' targeting choices.[101] These factors led the ECtHR to conclude that civilians had been put 'at a very high risk of being perceived as suitable targets by the military pilots.'[102]

- In *Ergi*, the ECtHR found that Turkey had failed to secure the right to life because its forces had organized an ambush 'without the distance between the village and the ambush being known'[103] and with the Turkish forces positioned such that 'the villagers had been placed at considerable risk of being caught in the cross-fire between security forces and . . . PKK terrorists.'[104] The ECtHR noted that '[e]ven if it might be assumed that the security forces would have responded with due care for the civilian population in returning fire against terrorists caught in the approaches to the village, it could not be assumed that the terrorists would have responded with such restraint.'[105]

- The ECtHR found a similar violation in *Isayeva II*, where the Russian military had devised a ruse by which to entice rebels to leave Grozny through what they were lead to believe would be a 'safe passage.'[106] Given the route of the corridor opened to the rebels, the military should have expected a large number of rebels to enter the village of Katyr-Yurt and should have foreseen the danger this posed

---

[96] *Isayeva II*, ¶ 190.

[97] *Isayeva I*, ¶ 175.

[98] *Isayeva I*, ¶ 183.

[99] *Isayeva I*, ¶ 187.

[100] *Isayeva I*, ¶ 186.

[101] *Isayeva I*, ¶ 188.

[102] *Isayeva I*, ¶ 189.

[103] *Ergi*, ¶ 80.

[104] *Ergi*, ¶ 80.

[105] *Ergi*, ¶ 80.

[106] *Isayeva II*, ¶¶ 13, 185, 187.

> to the village's residents.[107] Despite this knowledge, there was 'no evidence that at the planning stage of the operation any serious calculations were made about the evacuation of civilians, such as ensuring that they were informed of the attack beforehand, how long such 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 etc.'[108] The ECtHR found the absence of any attempt to consider the risks the plan posed to civilians a violation of Article 2.

As the ECtHR's jurisprudence in this area begins to crystallize into more definite rules, it has the potential to drive military reform and improvement at an institutional level.

D Beyond Military Necessity? Evaluating Tactics in Light of the Permitted Aims of Law Enforcement in a Democratic Society

The ECtHR's approach to the proportionality of attacks is generally quite similar to that of humanitarian law — *de lege ferenda* if not always *de lege lata* — but there are points in which the two regimes are in tension. With respect to the principle of distinction, this tension has already ripened into contradiction. With respect to humanitarian law's axiomatic separation of the *jus in bello* from the *jus ad bellum* — of humanitarian law from the law on going to war — the tension thus far remains latent.

Two steps in the ECtHR's analysis of an attack's proportionality may be distinguished. First, the means must be proportionate to the end. Second, the ends must be justified by the collective defense of society and its laws. These steps are derived directly from Article 2(2) of the ECHR, which requires the use of potentially lethal force to be '[First] no more than absolutely necessary [Second] in defence of any person from unlawful violence [or to make an arrest or quell a riot or insurrection].' In other words, unless the force employed is 'strictly proportionate *to the achievement of the permitted aims*', an attack violates the right to life.[109]

This two-step analysis is most fully displayed in *Isayeva II*, in which Russia defended its bombardment of a town under Article 2(2)(a) of the ECHR. The Court agreed that '[t]he presence of a very large group of armed fighters in Katyr-Yurt, and their active resistance to the law enforcement bodies . . . may have justified use of lethal force by the agents of

---

[107] *Isayeva II*, ¶ 187.

[108] *Isayeva II*, ¶ 189.

[109] *McKerr v. United Kingdom*, ECtHR, App. No. 28883/95, ¶ 22 (May 4, 2001) (emphasis added); see also *Isayeva II*, ¶ 181 ('Accepting that the use of force may have been justified in the present case, it goes without saying that a balance must be achieved between the aim pursued and the means employed to achieve it. The Court will now consider whether the actions in the present case were no more than absolutely necessary for achieving the declared purpose.'); *Güleç*, ¶ 16 ('The Court, like the Commission, accepts that the use of force may be justified in the present case under paragraph 2 (c) of Article 2, but it goes without saying that a balance must be struck between the aim pursued and the means employed to achieve it.').

the state.'[110] The Court found a violation of the right to life, however, in part because the operation's planning was inconsistent with its putative Article 2(2)(a) justification: 'Even when faced with a situation where, as the Government submits, the population of the village had been held hostage by a large group of well-equipped and well-trained fighters, the primary aim of the operation should be to protect lives from unlawful violence.'[111] The operation's design prioritized killing the insurgents over protecting the town's residents, evincing an aim inconsistent with the justification pleaded by Russia.

The humanitarian law analysis includes only the first step of the human rights law analysis. Protocol I applies the principle of 'military necessity', requiring that acts of war be 'useful and proportionate to the victory being sought.'[112] This principle is invoked, for example, in the Protocol I rule that attacks 'shall be limited to military objectives [which are] objects . . . whose total or partial destruction, capture or neutralization . . . *offers a definite military advantage*.'[113] It is invoked again in the rule that attacks on military objectives are prohibited when they 'may be expected to cause incidental loss of civilian life which would be *excessive in relation to the concrete and direct military advantage anticipated*.'[114] To assess the magnitude of the military advantage an attack will confer requires reference to the strategic aims of the attacking party, but humanitarian law is agnostic regarding the legality of the aims themselves.[115] While 'aims' are relevant to its application, humanitarian law has no concept of 'permitted aims' precisely because it has no concept of illegitimate aims. To take the second step of the ECtHR's analysis would be to trespass on the *jus ad bellum*.

Does the ECtHR's inquiry into whether attacks are proportionate to a 'permitted aim' threaten to erode the separation of the *jus in bello* from the *jus ad bellum*? With respect to international conflicts, the *jus ad bellum* is identified mainly with the United Nations Charter. Whether there is really any such body of law as the '*jus ad bellum* of internal conflict' may be doubted. Nevertheless, concepts of self-determination, the right of rebellion, secession, constitutional succession, etc., play an analogous role. The danger of conflating issues like these with humanitarian law is that the ends will be used to justify the means. The permitted aims enumerated in Article 2(2) may be too limited and banal for the ECtHR's approach to go beyond the analysis in *Isayeva II*, which was indistinguishable in its result from an analysis of indiscriminate attacks and precautionary

---

[110] *Isayeva II*, ¶ 180.

[111] *Isayeva II*, ¶ 191.

[112] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (3rd ed. 2000) 132–133.

[113] Protocol I, art. 52(2) (emphasis added).

[114] Protocol I, art. 51(5)(b).

[115] See Eide, 'The Laws of War and Human Rights — Differences and Convergences', in Swinarski (ed), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (1984) 675, 681: 'It is beyond the laws of war to determine whether it is necessary, or legitimate, for a State to bend another's will, or to conquer. Thus, the question of what is necessary is left completely to each State concerned. Their own, subjective discretion in determining what is necessary, is a key factor in this law.'

measures. However, the potential for the doctrine's further development is worth exploring.

Eide has persuasively identified the idea of limitation necessary in a democratic society as the human rights law correlate of the humanitarian law concept of military necessity.[116] All of the principal human rights instruments — and, more generally, the *jus commune* of the human rights regime — allow the enjoyment of individual rights to be limited only in the general interest of society. This principle originates in the Universal Declaration of Human Rights, which declared that the free exercise of rights may be limited only to meet 'the just requirements of morality, public order and the general welfare in a democratic society.'[117] With shifts of emphasis and wording, the idea that state interests must meet stringent requirements when they limit or endanger human rights has been incorporated into the limitation clauses and derogation regimes of subsequent human rights conventions. The effect is to permit only the general interest of society, rather than the interests of the state *per se*, to weigh against the individual's unfettered enjoyment of his or her rights, including the right to life.

The permitted aims clause, Article 2(2) of the ECHR, should be understood in light of the limitation clauses used in other human rights instruments and in other provisions of the ECHR. This approach is suggested by the ECtHR's conclusion that 'the use of the term 'absolutely necessary' in Article 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 [the limitation clause] of Articles 8 to 11 of the Convention.'[118] Articles 8 (privacy), 9 (religion), 10 (expression), and 11 (assembly) all contain a generally-worded limitation clause similar to that provided for the right to privacy:

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In the midst of a civil war, insurrection, or terrorist campaign, it would be very tempting for a state to justify summary executions and lax rules of engagement as 'necessary in a democratic society in the interests of national security, public safety, [or] for the prevention of disorder and crime.' Given the singular importance of the right to life, the drafters of the ECHR apparently elected to cabin states' powers of appreciation with respect to the social interests justifying deprivations of life by providing an exhaustive list.

---

[116] *Ibid*., at 681–82.

[117] Universal Declaration of Human Rights, art. 29(2).

[118] *McCann*, ¶ 149.

This may not, however, push the limitation clause origin of Article 2(2) from the ECtHR's view. Situations in which it might be tempting to construe Article 2(2) in light of the interests of a democratic society, more broadly construed, are easy to imagine.[119] If a state were to plead that an attack was taken 'for the purpose of quelling a riot or insurrection', the ECtHR could inquire as to whether the 'insurrection' was an attempt to restore constitutional government. If a state were to plead that force was used 'in order to effect a lawful arrest', the ECtHR could inquire as to the democratic provenance of the 'law' underpinning the arrest. Given the wide variety of events that might be termed internal conflict and the broad subject matter regulated by the ECHR, this kind of analysis cannot be rejected in absolute terms, but its drawbacks are similar to those of mixing *jus ad bellum* with *jus in bello*.

4 Conclusion

The case law of the ECtHR on Chechnya and, in retrospect, on southeastern Turkey and Northern Ireland is likely to be received by specialists in humanitarian law with some disquiet. The ECtHR's disregard for the principle of distinction, its attention to military aims as well as methods, and its failure to distinguish between riots and full-blown civil wars may all appear as grave errors or amateur blunders. But the ECtHR has taken a new approach, and one that shows great promise. It is providing rules for the conduct of hostilities where, as it applies to internal armed conflicts, the humanitarian law that is accepted as legally binding is inadequate and seldom obeyed. Moreover, with rules that treat armed conflicts as law enforcement operations against terrorists, the ECtHR has begun to develop an approach that may prove both better protective of victims and more politically viable than that of humanitarian law.

[119] See also Haßenpflug, 'Comment' (on paper by Heintze), 45 *GYIL* (2002) 78, 80–81: 'The proportionality test as enshrined in many IHL provisions . . . seeks to maintain a careful balance between standards of humanitarian law and objectives of military necessity, whereas the proportionality test to be applied in human rights cases envisages restrictions of individual rights for the necessary safeguard of public interests. The concept of public interest may in some situations prove to be broader than that of military necessity, *e.g.*, the use of certain weapons may fail the proportionality test of Article 35 Additional Protocol I but still meet the proportionality requirement of Article 2 para. 2 lit. c ECHR. On the other hand, situations are thinkable where the military necessity would justify the infringement of humanitarian standards although the public interest justifying the violation of those standards is rather low. Additionally, it could be argued that in armed conflict situations where the right to life has been violated (Article 2 para. 2 lit. c ECHR), the IHL proportionality test should prevail because of the 'lex specialis' character of IHL. At least, it should be taken into consideration that the proportionality tests as applied in human rights and IHL are based on different criteria (*i.e.*, notions of public interest and military necessity).'