# The approach of the European Commission and Court of Human Rights to international humanitarian law

**by Aisling Reidy**

The ever-increasing membership of the Council of Europe, and the accompanying growth in the number of States party to the European Convention on Human Rights (ECHR), promises to create fresh challenges for the new single European Court of Human Rights which will begin to sit full-time in Strasbourg as of 1 November 1998.[1] Speculation varies with regard to the type of challenges that the new Court will have to face, but one which cannot be ignored is the likelihood that the new Court will have to come to terms with more cases arising from situations of conflict. Judge Jambrek, urging judicial restraint and conservatism in a dissenting opinion, warned that the Court may have to look at what happened in the Croat Region of Kraijna, in the Republika Srpska, in other parts of Bosnia and Herzegovina or in Chechnya.[2] If the Court is so required, many cases

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[1] See Protocol 11 which replaces the current two-tiered system (Commission and Court) with a single full-time Court.

[2] Partly dissenting opinion of Judge Jambrek, *Loizidou v. Turkey*, judgment of 18 December 1996, European Human Rights Reports (EHRR), Vol. 23, p. 543. In view of the requirement that applications to the European Convention machinery must be submitted within six months of a final domestic remedy having been exhausted (Article 26 or Article 35 as amended by Protocol 11) or within six months of the alleged violation if there is no effective remedy, it is unlikely that Strasbourg will have to deal with events which happened at the height of hostilities in any of these regions. Pursuant to Annex 6 of the Dayton Agreement, the ECHR is applicable in Bosnia and Herzegovina and is subject to the supervision of the Human Rights Commission for Bosnia and Herzegovina.

may involve issues which call for consideration of international humanitarian law.

This article proposes to examine how the current European Commission and Court of Human Rights have addressed matters of international humanitarian law to date and to assess the legacy of jurisprudence in this regard which they will pass on to the new single Court.

## Invoking international humanitarian law within the European Human Rights Convention

As with similar human rights treaties, the ECHR is applicable with respect to the acts or omissions of any Contracting Party in any armed conflict where the State responsibility of the Contracting Party is engaged.[3] This includes responsibility for acts or omissions in an armed conflict within the national territory of the State Party as well as actions undertaken by its armed forces outside its national territory.[4] It is also part of the well-established case law of the Convention that the responsibility of a State can arise when, as the result of military action — whether lawful or unlawful — a State exercises effective control of an area outside its national territory.[5] In the foregoing situations, the guarantees provided by

[3] The debate concerning the applicability of human rights law in the context of an armed conflict has already been covered extensively in other literature. See in particular D. Weissbrodt and P. L. Hicks, "Implementation of human rights and humanitarian law in armed conflict", *IRRC*, January-February 1993, pp. 120-138, and L. Doswald-Beck and S. Vite, "International humanitarian law and human rights law", *ibid.*, pp. 94-119; F. J. Hampson, "Human rights and humanitarian law in internal conflicts", in M. Meyer (ed), *Armed conflict and the new law*, London, 1989, p. 55; G.I.A.D. Draper, "The relationship between the human rights regime and the law of armed conflicts," *Israeli Yearbook of Human Rights*, Vol.1, 1971, p. 191; K. Suter, "Human rights in armed conflicts", *Revue de droit pénal militaire et de droit de la guerre*, Vol. XV, 1976, p. 394.

[4] *Cyprus v. Turkey*, 6780/74 and 6950/75 (first and second applications), 2 D & R 125, pp. 136-137 (1975). The responsibility of a State Party can be engaged by acts and omissions of their authorities which produce effects outside their own territory. See *X & Y & Z v. Switzerland*, 7289/75 & 7349/76, 9 D & R 57 (1977); *Drozd and Janousek v. France and Spain*, ECtHR Series A 240, p. 29, para. 91. Application No. 31821/96, pending before the Commission, concerns allegations of unlawful killings by armed forces of the Republic of Turkey while on an operation in northern Iraq. Victims of acts committed by Italian or Belgian troops in Somalia could also have brought a complaint under the ECHR against the respective States for violations carried out during the UN operations in Somalia.

[5] *Cyprus v. Turkey, ibid.*; *Loizidou v. Cyprus* (preliminary objections), ECtHR Series A 310, para. 62 (1995), and *Loizidou v. Cyprus* (merits), ECtHR judgment of 18 December 1996, para. 52, reprinted in EHRR, Vol. 23, p. 513; most recently *Cyprus v. Turkey* 25781/94 (fourth application), 86 D & R 104 (1996).

the Convention under Article 2 (right to life), Article 3 (prohibition of torture), Article 4 (prohibition of slavery and forced labour) and Article 7 (no punishment without law), with the exception of deaths resulting from lawful acts of war, will apply to their full extent. However, should it be a time of war or other public emergency threatening the life of the nation, a State Party does have the right, by entering a derogation under Article 15, to limit its other obligations under the ECHR.[6] Nevertheless, any derogating measure must not be inconsistent with its other obligations under international law, including obligations under humanitarian law such as the 1949 Geneva Conventions on the protection of war victims.[7] The Court can examine, and has examined, *proprio motu* whether a derogation meets the requirement of consistency with other international legal obligations, but has never declared a derogation invalid for this reason.[8]

Where a State does not invoke Article 15,[9] Article 60 of the Convention also provides that nothing in the Convention shall be construed as

[6] To date there has never been a derogation in time of war, though Greece, Ireland, Turkey and the United Kingdom have sought to claim the existence of a public emergency. — On Article 15 in general, see P. van Dijk and G.J.H. Van Hoof, *Theory and practice of the European Convention on Human Rights*, 2nd ed., Kluwer, 1990, pp. 548-560; D. J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, Butterworths, 1995, pp. 489-507.

[7] P. van Dijk and G.J.H. Van Hoof, *ibid.*, p. 555. D.J. Harris, M. O'Boyle and C. Warbrick, *ibid.*, p. 502: "The obvious sources of treaty obligations are the [International Covenant on Civil and Political Rights] and the Geneva Red Cross Conventions". J. Pinheiro Farinha, "L'article 15 de la Convention", in Matscher and Petzold (eds), *Protecting Human Rights: The European Dimension*, Studies in honour of Gerard J. Wiarda, Carl Heymanns Verlag KG, 1989, pp. 521-529: "La solidarité internationale impose que les engagements des États soient toujours respectés - engagements découlant de traités, coutumes internationales ou de principes généraux de droit international. Parmi les engagements qui doivent être observés, même en cas de guerre, nous soulignerons ceux que le droit humanitaire (Conventions de Genève et de La Haye) établit." — All parties to the European Convention are also party to the 1949 Geneva Conventions.

[8] *Lawless v. Ireland*, ECtHR Series A 3, paras. 40-41. In the case of *Ireland v. United Kingdom*, the Irish Government did apparently raise the question of the compatibility of British legislation in Northern Ireland with the Geneva Conventions. See Harris, O'Boyle and Warbrick, *supra* (note 6), p. 502, footnote 4. However, the Court itself only held that there was nothing in the data before the Court to suggest the UK disregarded such obligations in that case. In particular, the Irish Government never supplied to the Commission or the Court precise details on the claim formulated in its pleadings. See *Ireland v. UK*, ECtHR Series A 25, para. 222 . In *Brannigan and McBride v. UK*, ECtHR Series A 258-B, 26 May 1993, the applicants had pleaded that the derogation was in violation of Article 4 of the International Covenant on Civil and Political Rights to which the UK was also a party, at paras. 67-73.

[9] The Commission has held that a State cannot rely on Article 15 in the absence of some formal and public declaration of the state of emergency. See *Cyprus v. Turkey*, Report of the Commission, 4 EHRR 482 and 556, para. 528.

limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Parties or under any other agreement to which it is a party.[10] The implementation of humanitarian law through the enforcement of the ECHR can therefore be examined at two levels: the enforcement of non-derogable and derogable rights in situations of armed conflict, and the extent to which restrictions on derogable rights are limited by reference to obligations of humanitarian law.

Despite the ample potential for enforcement of humanitarian law through the ECHR system, it could be said that this potential has not been fully exploited. One may only speculate why this is so. One obvious reason is that the Commission and Court have to date been called upon to examine very few situations where the law of armed conflict is applicable.[11] Most state-of-emergency situations have been internal and would only attract the application of Article 3 common to the 1949 Geneva Conventions or Additional Protocol II of 1977 (if ratified), and even then only if the respondent State acknowledged that the internal situation had crossed the threshold of applicability.[12] Yet it should also be noted that when the Commission was first given the opportunity to take account of humanitarian law, with the Turkish invasion of Cyprus, the majority of the Commission chose not to avail itself of it.[13]

The Commission and Court have had more opportunity in recent times to analyse situations where the existence of international humanitarian law norms may have been of assistance to that analysis and also where resolution of the complaints could contribute to their development. One situation is the continuing occupation of northern Cyprus,[14] the other being

[10] Articles 17 and 18 are also relevant with respect to limiting measures aimed at the restriction or destruction of rights.

[11] The only complaints arising out of an international armed conflict have been in the context of the Turkish invasion of Cyprus in 1974. Complaints from state-of-emergency regions include complaints from Northern Ireland and south-eastern Turkey.

[12] That is, that the situation was not one of isolated and sporadic acts of violence. For example, the UK has never accepted that common Article 3 or Protocol II applies to Northern Ireland. See F. Hampson, "Using international human rights machinery to enforce the international law of armed conflicts", *Revue de droit pénal militaire et de droit de la guerre*, Vol. XXXI, 1992, pp. 117 and 127.

[13] *Cyprus v. Turkey*, *supra* (note 9).

[14] In advocating a holistic approach to the jurisdiction issues which arose in cases from northern Cyprus, Judge Pettiti stated that "[a]n overall assessment of the situation ... would make it possible to review the criteria on the basis of which the UN has analysed both

the prolonged state of emergency in south-eastern Turkey. A note of warning should, however, be sounded with regard to the cases from south-eastern Turkey. The Court has noted in many of its judgments in cases stemming from the emergency regime in that area[15] that since approximately 1985 serious disturbances[16] or violent conflicts[17] have raged in the south-eastern regions of Turkey between the security forces and in particular the PKK (Workers Party of Kurdistan), and that 10 out of the 11 provinces of south-eastern Turkey have been subject to emergency rule for most of that period. However, at no stage has the Court commented on whether the situation in the region is of the type which would attract the application of common Article 3 or Additional Protocol II, nor does the Turkish government recognize the applicability of common Article 3 to the region.[18] Whilst these constraints need to be borne in mind, the jurisprudence from these cases provides a significant marker for the use of the Convention in the enforcement of international humanitarian law.

## Applying international humanitarian law

From the beginning the Commission and Court have made it clear that, in assessing the legitimacy of derogations entered by States in times of war or other public emergency, they would leave a wide margin of

the problems whether to recognise northern Cyprus as a State and the problem of the application of the UN Charter (occupation, annexation, territorial application of the Geneva Conventions in northern Cyprus, conduct of international relations)." See *Loizidou v. Turkey* (preliminary objections), 23 March 1995, ECtHR Series A 310.

[15] Excluding complaints concerning freedom of expression, there are, at the time of writing, nine judgments from the Court in which the violations involved stem from the emergency regime in south-eastern Turkey: *Akdivar and others v. Turkey*, judgment of 18 September 1996, 23 EHRR 143, and *Aksoy v. Turkey*, judgment of 18 December 1996, 23 EHRR 553, both in *Reports of Judgments and Decisions*, 1996-IV; *Aydin v. Turkey*, judgment of 25 September 1997, 25 EHRR 251, and *Mentes v. Turkey*, judgment of 28 November 1997, both in *Reports of Judgments and Decisions*, 1997-IV; *Kaya v. Turkey*, judgment of 19 February 1998; *Selcuk and Asker v. Turkey*, judgment of 24 April 1998; *Gundem v. Turkey*, judgment of 25 May 1998; *Kurt v. Turkey*, judgment of 25 May 1998, and *Tekin v. Turkey*, judgment of 9 June 1998 — all to be reproduced in *Reports of Judgments and Decisions*, 1998.

[16] *Mentes*, para.12, *Aydin*, para. 14, *Selcuk and Asker*, para. 9: *supra* (note 15).

[17] *Akdivar*, paras. 13-14, *Aksoy*, paras. 8-9, *Gundem*, para. 9: *supra* (note 15).

[18] Turkey has not ratified Additional Protocol II (on non-international armed conflict).

appreciation[19] to States to determine whether or not there is a public emergency threatening the life of the nation.[20] On only one occasion has the Commission determined that a public emergency did not exist.[21] However, some members of the Commission did provide hope earlier on that the rules of humanitarian law could be given a robust role to play. In the context of the Turkish invasion of Cyprus, Mr G. Sperduti, joined by Mr S. Trechsel, stated in his opinion that:

> "It is to be noted that the rules of international law concerning the treatment of the population in occupied territories (contained notably in The Hague Regulations of 1907 and the Fourth Geneva Convention of 12 August 1949) are undeniably capable of assisting the resolution of the question whether the measures taken by the occupying power in derogation from the obligations which it should in principle observe — by virtue of the European Convention — where it exercises (*de jure* or *de facto*) its jurisdiction, are or are not justified according to the criterion that only measures of derogation strictly required by the circumstances are authorized .... It follows that respect for the same rules by a High Contracting Party during the military occupation of the territory of another State will in principle assure that the High Contracting Party will not go beyond the limits of the right of derogation conferred on it by Article 15 of the Convention."[22]

This may have given grounds for suggesting that use of humanitarian law as a guideline could lead to a situation where derogations resulting from a domestic state of emergency would be permissible only where the

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[19] For the margin of appreciation concept see W. J. Ganshof van der Meersch, "Le caractère "autonome" des termes et la "marge d'appréciation" des gouvernements dans l'interprétation de la Convention européenne des Droits de l'homme", in Matscher and Petzold (eds), *supra* (note 7), pp. 201-220; P. Mahoney, "Judicial activism and judicial self-restraint in the European Court of Human Rights: Two sides of the same coin", *Human Rights Law Journal*, Vol. II, 1990, pp. 57-88.

[20] It falls in the first place to each contracting State, with its responsibility for the life of its citizens, to determine whether their life is threatened by a public emergency and if so how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15(1) leaves the authorities a wide margin of appreciation. *Ireland v. UK*, ECtHR Series A 25, para. 207 (1978).

[21] *Denmark, Norway, Sweden and the Netherlands v. Greece*, Report of the Commission of 5 November 1969, Yearbook, Vol. 12, 1969, p. 113, para. 229.

[22] *Cyprus v. Turkey*, *supra* (note 9).

derogating State acknowledged that common Article 3 of the Geneva Conventions was applicable to the situation.[23] However, this has not been the case and the failure of the Commission and Court to scrutinize more closely situations where derogations have been entered has been criticized.[24] Certainly neither Convention body has engaged in an extensive examination of the characterization of any public emergency in terms of humanitarian law (internal disturbances and tensions versus internal armed conflict) as was carried out recently by the Inter-American Commission on Human Rights in the *Abella* case.[25] Rather the usual question facing the Commission and Court has been whether a derogating measure was strictly required by the exigencies of the situation. This notwithstanding, one does find examples of the use of humanitarian law, whether explicitly in terms of, for example, the Geneva Conventions or by use of language drawn from humanitarian law (protection of the civilian population, disproportionate use of a combat weapon).

The remainder of this article will examine examples of the implementation of international humanitarian law through the ECHR under the following headings:

— Destruction of property and displacement of the civilian population

— Detention and treatment of detainees

— Conduct of military operations and unlawful killings

*Destruction of property and displacement of the civilian population*

In northern Cyprus, the rules regarding protection of the civilian population in occupied territory have been of most relevance.[26] In the first Cypriot case the Commission found violations arising from the eviction

[23] F. Hampson, *supra* (note 12), pp. 125 and 6.

[24] The low point of the Court and Commission in this regard is widely considered to be *Brannigan and McBride v. UK*, ECtHR Series A 258-B (1993). See dissenting opinion of Judge Makarczyk.

[25] *Abella v. Argentina* , 18 November 1997, I-AmCHR, Report 55/97, Case 11, p. 137, para. 149.

[26] The Republic of Cyprus has brought four inter-State cases against Turkey, arising out of the situation in northern Cyprus: Application Nos. 6780/74, 6950/75, 8007/77 and 25781/94. There are also a number of individual cases which have been heard by or are pending before the Commission and Court, the first of which was *Loizidou*, see *supra* (note 5). In the most recent inter-State case (No. 25781/94, 86 D & R 104) and in the individual cases, it would seem that no pleas in terms of humanitarian law have been submitted to the Commission.

of Greek Cypriots from their homes and their transportation to other places,[27] the confinement of civilian persons to detention centres and within private homes, and the deprivation of possessions of Greek Cypriots on a large scale.[28] The majority of the Commission did not use humanitarian law as a frame of reference, though Mr Sperduti noted the availability of appropriate humanitarian law obligations to address these issues: "One can cite, for example, Article 49 of the Fourth Geneva Convention, which article related to the prohibition of forced transfers in the occupied territories whether *en masse* or individually, and also to other obligations on the occupying power in relation to the displacement of persons."[29]

In the third Cyprus case,[30] Mr G. Tenekides, again in a separate opinion, stated that persons have been installed "by the occupation forces in the north of the island in violation of Article 49(6) of the Geneva Convention of 12 August 1949 on the protection of civilian persons in time of war ...".[31] He also noted that it was regrettable that the Commission did not refer to the destruction of cultural property in Cyprus. He stated that the Commission was under a duty to apply Article 1 of Protocol 1 in view of the numerous conventions and agreements relating to the protection of cultural property, first and foremost the Hague Convention of 1954 for the protection of cultural property in the event of armed conflict.[32]

Similar issues concerning the destruction of property and the transfer and eviction of civilians have arisen in the context of internal conflict too. In three cases from south-eastern Turkey, the Court has found that security forces in the context of military operations were responsible for the destruction of the applicants' homes and that the applicants as a result had to leave their villages.[33] However, the Court did not raise any questions

[27] *Supra* (note 9), paras. 208-211.

[28] *Ibid.*, para. 486.

[29] *Ibid.*

[30] *Cyprus v. Turkey*, Application No. 8007/77, Report of 4 October 1983, Resolution DH (92) 12, 2 April 1992, reprinted in 5 EHRR 509.

[31] *Ibid.*, p. 557.

[32] *Ibid.*, pp. 557 and 558.

[33] *Akdivar and others v. Turkey, Mentes and others v. Turkey, Selcuk and Asker v. Turkey — supra* (note 15).

as to whether this was the type of situation to which common Article 3 or Additional Protocol II would apply, and as there was no derogation with respect to Article 8 (right to respect for family life and the home) or Article 1 of Protocol 1 (right to peaceful enjoyment of property),[34] the Court's analysis of the acts of the security forces were confined to finding violations of Article 8 and Article 1 of Protocol 1, without any regard to whether there was compatibility with other international obligations.[35] In one case, however, the Court agreed to consider the complaint under Article 3 (prohibition of inhuman treatment).[36] It found that the acts of the security forces, involving as they did the destruction of the homes of elderly applicants in a premeditated and contemptuous manner, resulting in their forced eviction from their village, should be categorized as inhuman treatment.[37] The Court also went on to say that " ... [e]ven if it were the case that the acts in question were carried out without any intention of punishing the applicants, but instead to prevent their homes being used by terrorists or as a discouragement to others, this would not provide a justification for the ill treatment".[38]

The reference to justification for the ill-treatment would appear anomalous, given that the prohibition of inhuman treatment is absolute, permitting of no derogation or justification, even in armed conflict, a point which the Court emphasized four paragraphs earlier.[39] In the context of an internal or international armed conflict, the acts of the security forces would be in violation of humanitarian law,[40] and it is clear that such acts

[34] By letter dated 6 August 1990 to the Secretary-General of the Council of Europe, Turkey entered a derogation to Articles 5, 6, 8, 10, 11 and 13 of the Convention. By letter of 5 May 1992, Turkey informed the Secretary-General that the derogation continued to apply only in respect of Article 5.

[35] *Akdivar,* paras. 83 - 87; *Mentes,* paras. 70 - 73; *Selcuk and Asker,* paras. 83 - 87 — *supra* (note 15). As in the case of *Mentes and others,* only Article 8 had been raised by the applicants, there was no finding of a violation of Article 1 of Protocol 1.

[36] In the oral submissions to the Court, the applicants submitted that the acts of the security forces were in violation of humanitarian law. See *Selcuk and Asker,* Verbatim Record of the hearing, 26 January 1998.

[37] Judgment of 24 April 1998, paras. 77 and 78.

[38] *Ibid.*, para. 79.

[39] *Ibid.*, para. 75.

[40] E.g. Arts. 32, 33 and 49 of the Fourth Geneva Convention; Art. 51 of Additional Protocol I; Art. 3 common to the four Geneva Conventions; Arts. 13 and 17 of Additional Protocol II.

of the security forces will always be incompatible with the Convention, contravening as they do a non-derogable provision. It is also noteworthy that, in this case, the Court found a violation of the right to an effective remedy, in particular specifying that the commanding officer who had been identified as being in charge of the impugned operation had not been questioned.[41] The emphasis which the Court places on the need to investigate violations of this nature and gravity,[42] and to identify and punish the perpetrators, echoes the obligations existing in humanitarian law to suppress war crimes and grave breaches of the Geneva Conventions.[43]

*Detention and treatment of detainees*

In times of armed conflict there are two aspects of detention which need to be addressed separately, the first being the grounds for deprivation of liberty. The permissible grounds for detention, set out as they are in Article 5 of ECHR, may be varied in time of armed conflict by way of derogation, and humanitarian law permits a wider range of justifications for the deprivation of liberty than does human rights law. On the other hand, the treatment of detainees, governed by Articles 2 and 3, is not subject to differential treatment in times of armed conflict or otherwise,[44] and this relationship between Articles 2, 3 and 5 has implications for the rights of detainees during armed conflict. It is worth noting that, in times

[41] *Supra* (note 37), paras. 97 and 98.

[42] *Ibid.*, para. 96.

[43] See Arts. 49 and 50, First Geneva Convention; Arts. 50 and 51, Second Geneva Convention; Arts. 129 and 130, Third Geneva Convention; Arts. 146 and 147, Fourth Geneva Convention; Arts. 85 and 86, Additional Protocol I. — On the obligation to prosecute for violations of the laws of armed conflict, see T. Graditzky, "Individual criminal responsibility for violations of international humanitarian law committed in non-international armed conflict," *IRRC*, No. 322, March 1998, p. 29; W.G. Sharp, Sr., "International obligations to search for and arrest war criminals: government failure in the former Yugoslavia?", *Duke Journal of Comparative and International Law*, Vol. 7, 1997, p. 411; D. Plattner, "The penal repression of violations of international humanitarian law applicable in non-international armed conflict", *IRRC*, No. 278, September-October 1990, p. 409.

[44] This is on the basis that Articles 2 and 3 are non-derogable provisions. It does not mean that, when evaluating whether a particular act or omission would violate either article, the differing circumstances — peacetime, state of emergency, or war — could not be taken into account to see whether the threshold of severity to attract the application of either article had been met. This could conceivably be the case with regard to certain conditions of detention, but there is less scope for flexibility in determining whether positive obligations to protect the right to life differ for detainees in times of war or peace. International humanitarian law, in particular the Third Geneva Convention, includes specific protection against exposure of detainees to life-threatening measures.

of armed conflict, the primary European institution for the protection of detainees, the Committee for the Prevention of Torture,[45] is excluded from visiting places of detention which representatives or delegates of Protecting Powers or of the ICRC effectively visit on a regular basis by virtue of the Geneva Conventions and their Additional Protocols.[46] In the Cypriot cases, when the Commission had to consider the detention of POWs by the Turkish army, it took "account of the fact that both Cyprus and Turkey are Parties to the [Third] Geneva Convention of 12 August 1949, relative to the treatment of prisoners of war, and that, in connection with the events in the summer of 1974, Turkey in particular assured the International Committee of the Red Cross (ICRC) of its intention to apply the Geneva Convention and its willingness to grant all necessary facilities for humanitarian action ...".[47]

The Commission therefore did not find it necessary to examine the question of a breach of Article 5 of the European Convention with regard to persons accorded the status of prisoners of war.[48] Nevertheless, they did find a violation of Article 5 (1), as Article 5 does not include detention as a POW as a legitimate ground for detention. However, as Mr Sperduti again pointed out, "measures which are in themselves contrary to a provision of the European Convention but which are taken legitimately under the international law applicable to armed conflict, are to be considered as legitimate measure of derogation from the obligations following from the Convention".[49]

It follows from that observation that the detention *per se* of the Greek soldiers may indeed have been lawful under humanitarian law. The conditions of their detention, however, do not benefit from reliance on humanitarian law. The treatment of the prisoners in Cyprus, their subjection to inhuman treatment including rape,[50] the withholding of adequate

[45] See the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987.

[46] *Ibid.*, Article 17(3).

[47] *Cyprus v. Turkey*, *supra* (note 9), para. 313.

[48] *Ibid.*

[49] *Ibid.*, p. 564, para. 7.

[50] In the case of *Aydin v. Turkey*, *supra* (note 15), the Court found that the rape of the applicant in detention was torture (para. 86), a finding which has implications for the prosecution of persons for violation of the laws of armed conflict or persons indicted for war crimes.

supplies of food and drinking water and of adequate medical treatment, was indeed considered to be a violation of Article 3 of the ECHR. Yet no reference was made to the law on the treatment of prisoners of war except by Mr Ermacora, who in his separate opinion did note that "I consider that such treatment, apart from obligations under the Third Geneva Convention, is also not normal behaviour of soldiers and that military ethics prohibit this form of violence against prisoners". [51]

As mentioned above, the application of Articles 2 and 3 of the ECHR to situations of conflict has certain implications, not least of which is that there are limits on the extent to which States can derogate from their obligations under Article 5, obligations that in principle are subject to limitation or partial suspension. The Court clarified this much in a case where it had to determine whether, in view of the fact that the respondent State had entered a derogation to Article 5, the detention of the applicant for at least 14 days without being brought before a judicial officer was permitted.[52] The Court, agreeing with the Commission, held that the measures permitting prolonged, unsupervised detention, particularly where there was the absence of safeguards such as access to a lawyer, doctor, relative or friend, left detainees vulnerable, not only to arbitrary interference with their right to liberty, but also to torture.[53] There was therefore a violation of Article 5 of the Convention, notwithstanding the derogation.

In a separate case the Court also emphasized that to ensure the existence of holding data, recording such matters as the date, time and location of detention, the name of the detainee as well as the reasons for detention, and the name of the person effecting it was part of the very purpose of Article 5.[54] These obligations owed to detainees are therefore

[51] *Supra* (note 49), p. 565, para. 2.

[52] *Aksoy v. Turkey*, *supra* (note 15), Commission Report of 23 October 1995 and judgment of 18 December 1996. On the derogation, see note 34.

[53] See Commission Report, para. 182, and Court judgment, para. 78. Both the Commission and Court already confirmed that Zeki Aksoy, having been subjected to such treatment as suspension in the form of Palestinian hanging, had been tortured in violation of the Convention. See Commission Report, para. 169 and Court judgment, para. 64. In the later case of *Kurt v. Turkey*, judgment of 25 May 1998, which concerned a disappearance, the Court spoke of prompt judicial intervention leading to the detection and prevention of life-threatening measures or serious ill-treatment which violate the fundamental guarantees contained in Articles 2 and 3 of the Convention (para. 123).

[54] *Kurt v. Turkey*, *supra* (note 53), para. 125.

clearly not capable of being suspended in times of an armed conflict. The judgments do therefore go some way towards setting boundaries for the measures regarding detention which can be taken in times of armed conflict. It is hoped that further examination of a number of cases where persons have disappeared, allegedly after being detained in a military operation, may also contribute towards delineating those core responsibilities under the Convention, owed by State Parties to detainees in times of armed conflict.[55]

*Conduct of military operations and unlawful killings*

The situation in south-eastern Turkey has also required the Commission to consider a number of cases where military operations have resulted in considerable injury to or in the death of civilians.[56] In this context the test laid down by the Court in *McCann and others v. UK* — that the planning and control of an operation must be so as to minimize, to the greatest extent possible, recourse to lethal force,[57] and that deaths not justified by reference to the second paragraph of Article 2[58] or resulting other than from lawful acts of war are a violation of the European Convention — provides a secure framework for assessing whether killings are illegal under the laws of armed conflict. Two of the cases to come before the Commission — one concerning an allegation that security forces had used, *inter alia,* a tank to conduct a bombardment in a civilian environment

[55] E.g. *Akdeniz and others v. Turkey,* Application No. 23954/94, Decision on admissibility of 3 April 1995; *Cakici v. Turkey,* Application No. 23657/94, Decision on admissibility of 15 May 1995; *Timurtas v. Turkey,* Application No. 23531, Decision on admissibility of 11 September 1995; *Tas v. Turkey,* Decision on admissibility of 14 March 1996.

[56] *Gulec v. Turkey,* No. 21593/93, Decision on admissibility of 30 August 1994, Commission Report of 17 April 1997; *Cagirge v. Turkey,* No. 21895/93, Decision on admissibility of 19 October 1994, Commission Report of July 1995, 82 D & R 20; *Isiyok v. Turkey,* No. 22309/93, Decision on admissibility of 3 April 1995, Commission Report of 31 October 1997; *Ergi v. Turkey,* No. 23818/94, Decision on admissibility of 2 March 1995, 80 D & R 157, Commission Report of 20 May 1997.

[57] *McCann and others v. UK,* ECtHR Series A 324, para. 194. This test has been employed by the Commission and Court in several cases since, e.g., *Andronicou and Constantinou v. Cyprus,* No. 25052/94, judgment of 9 October 1997, 25 EHRR 491, para. 171.

[58] Deprivation of life is not regarded as inflicted in contravention of Article 2 when it results from the use of force which is no more than absolutely necessary in defence of any person from unlawful violence, or in order to effect a lawful arrest, or to prevent the escape of a person lawfully detained, or in action lawfully taken for the purpose of quelling a riot or insurrection.

resulting in death and injury,[59] and the other concerning an aerial bombardment resulting in widespread damage and injury to civilians and civilian property in a village[60] — were terminated by way of friendly settlement. In a third case, the Commission and the Court had to examine a military operation in which a woman, standing in the doorway of her home, had been killed in the course of an alleged ambush operation.[61]

The Commission considered that the planning and control of the operation needed to be assessed "... not only in the context of the apparent targets of an operation but, particularly where the use of force is envisaged in the vicinity of the civilian population, with regard to the avoidance of incidental loss of life and injury to others".[62] It went on to find that the ambush operation was not implemented with the requisite care for the lives of the civilian population, that there was significant evidence that misdirected fire from the security forces had killed a civilian, and that steps or precautions were not taken to minimize the development of a conflict over the village.[63] — The Court explicitly noted that the responsibility of the State "may also be engaged where [the security forces] fail to take all feasible precaution *in the choice of means and methods* of a security operation mounted against an opposing group with a view to avoiding or, at least, minimising incidental loss of civilian life".[64] The Court's reference to means and methods in the conduct of a military operation is one of the clearest examples of the Court borrowing language from international humanitarian law when analysing the scope of human rights obligations. Such willingness to use humanitarian law concepts is encouraging.

These findings, and the language used by the Court and the Commission, can easily be viewed in terms of violations of humanitarian law: it could be said that the Convention bodies examined the operation to see,

[59] *Cagirge, supra* (note 56).

[60] *Isiyok, supra* (note 56).

[61] *Ergi v. Turkey, supra* (note 56). Commission Report, paras. 145-149.

[62] *Ibid.*, para. 145.

[63] *Ibid.*, pp. 145 and 149. The applicant also submitted that the rules of engagement and training of the security forces violated Article 2 (para. 140), but the Commission did not address this point. The same submissions were made to the Court (see Verbatim Record of the hearing on 21 April 1998, p.17).

[64] *Ergi v. Turkey*, judgment of 28 July 1998 (not yet published), para. 79, emphasis added.

*inter alia*, whether there was a lawful target, whether the attack on the lawful target was proportionate and whether there was a foreseeable risk of death to non-combatants that was disproportionate to the military advantage.[65] The analysis of the operation in these terms illustrates clearly that humanitarian law can be validly enforced through human rights norms.

In another case pending before the Court, the Commission found that the security forces had killed a civilian through the manifestly disproportionate use of a combat weapon, in violation of Article 2 of the European Convention.[66] Whilst this killing took place in the context of the efforts to disperse a demonstration and consequently the laws of armed conflict did not apply, one can interpret the findings of the Commission as describing an unlawful killing on the grounds that this was

— an attack with a lawful weapon used in an unlawful way, or

— an unlawful killing due to a disproportionate use of force,

both of which are unlawful killings under the laws of armed conflict.[67] Given that the Commission also found that the area was in a region under a state of emergency, that civil disturbances were frequent and popular unrest could be expected at any moment,[68] this indicates that the basic principles of humanitarian law may indeed be applicable to the situation. Significantly, the Commission also held the training and resources of the security forces to be inadequate[69] — thus presumably implying, at least, improper rules of engagement, or insufficient training in those rules.

Finally and significantly, both the Commission and Court have stated explicitly that the existence of an armed conflict does not exempt killings from scrutiny and investigation to assess their lawfulness. In a case where the applicant's brother was killed in the course of a military operation and

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[65] Lawful and unlawful killings in international and non-international conflict are very helpfully categorized by F. Hampson, *supra* (note 12), pp. 128-130. At its most basic, the author indicates two criteria which can be used to determine the unlawfulness of a killing: (a) the unlawfulness of the target, and (b) absence of proportionality, whether of the attack itself, the weapon used or the manner of its use (*loc. cit.*, p. 128).

[66] *Gulec v. Turkey*, *supra* (note 56), paras. 235-236. Heard by the Court on 25 March 1998.

[67] *Supra* (note 65).

[68] *Supra* (note 66), para. 235.

[69] *Ibid.*

it was a subject of dispute whether he had been a combatant in the clash or not, the Court made it clear that there was a procedural requirement to investigate the killing to establish whether his killing had been lawful: "Neither the prevalence of violent armed clashes nor the incidence of fatalities can displace the obligation under Article 2 to ensure that an effective independent investigation is conducted into deaths arising out of clashes involving the security forces."[70]

## Conclusion

It is clear from the range of recent cases which are being brought to Strasbourg that the overlap between international humanitarian law and the European Convention on Human Rights is becoming a significant issue for the Court. The Convention bodies are therefore having to become adept at examining issues in a humanitarian law context, while they may still be reluctant to invoke explicitly the law of armed conflict or to use it as a tool of analysis. Also, when one seeks to evaluate the scope of the European Convention to enforce rules of humanitarian law, the area which should not be overlooked is the jurisprudence of the Court concerning the right of a victim to an effective remedy for a violation. Now, in the context of grave and serious violations of Articles 2,[71] 3,[72] 5,[73] 8 of the Convention and Article 1 of Protocol 1,[74] the Court has stated on numerous occasions that the notion of an effective remedy entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure. The importance of this obligation, especially in a case where a particular breach of any of the foregoing articles also constitutes a breach of international humanitarian law, must not be underestimated. Demanding accountability and requiring effective remedies — from investigation to prosecution and payment of compensation — is the key to domestic implementation of human rights and humanitarian law.

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[70] *Kaya v. Turkey*, judgment of 19 February 1998, para. 91. The Court reiterated this jurisprudence in its judgment in *Ergi v. Turkey*, *supra* (note 64), paras. 85 and 98.

[71] *Ibid.*, para. 107.

[72] *Aksoy*, para. 98; *Aydin*, para. 103; *Tekin*, para. 66 - *supra* (note 15).

[73] *Kurt*, para. 140, *ibid.*

[74] *Mentes*, para. 81; *Selcuk and Asker v. Turkey*, para. 96 - *ibid.*

This development is certainly welcome in so far as it contributes to a stronger framework for the protection of rights, particularly in armed conflict, and provides a powerful weapon in the enforcement of humanitarian law, at a time when the establishment of an international criminal court is poised to become a reality. Indeed, of all the component parts of the legacy which the new European Court of Human Rights will inherit from its predecessors, the beginnings of significant case law in the area of international humanitarian law may prove to be one of the most useful.