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Observance of Neutrality Principle in Performing Humanitarian Activities

The notion of neutrality, i.e. a pledge not to take sides in conflict, as well as to evade any political or ideological controversies, is not a new phenomenon. A number of countries (most notably Switzerland) have been claiming neutrality long before universal principles have been elaborated and for the first time codified in the face of the 5th Hague Convention. Over a hundred years have now passed since the Hague conference of 1907, therefore it comes as no surprise that the principle of neutrality has evolved and shifted onto a new level in international law.

Today the tendency to keep a neutral attitude between the belligerent parties and to abstain from taking any part in the conflict is adopted not only by states, voluntary humanitarian movements like the International Society of the Red Cross and Red Crescent (which by the way proclaimed neutrality as its main principle right from the moment of its creation in 1876), but also by international organizations, which have the power and resolve to carry out operations which by their nature require impartiality and neutrality (e.g. the UNGA Resolution 46/182 lists neutrality as the guiding principle of humanitarian assistance). The principle of neutrality therefore exists in 3 forms – neutrality of an international organization, neutrality of a state and neutrality of an organization engaged in field-work. Humanitarian activities can be performed on any of these 3 levels.

As the most well-established organization in this field, the ICRC was the one to give a clear definition of what the principle of neutrality is. For the Red Cross, staying neutral means not taking sides in hostilities or engaging at any time in controversies of a political, racial, religious or ideological nature. It is a principle of abstention, as opposed to impartiality, a principle of action.

When talking about humanitarian activities, the latter – non-engagement in controversies is a mandatory condition, deviation from which leads to breach of neutrality, although it does not necessarily mean violation of humanitarian obligations.

The non-participation-in-hostilities condition, on the contrary, is now outdated, and cannot be anymore considered absolute. The most obvious example in this regard would be the UN peacekeeping troops, which come under hostile fire and must resort to self-defense. Convention on the Safety of United Nations and Associated Personnel guarantees a non-combatant status in such situations, therefore, by analogy neutrality remains intact. A similar right exists in customary law, which allows neutral states to evoke self-defense should they become object of attack, at the same time remaining compliant to the neutrality principle. Acts under Chapter VII of the UN Charter or other peace enforcement (e.g. NATO's pro-democratic interventions), however, go beyond this principle, though in theory, the incursions may be conducted for humanitarian reasons. A good example here would be the UN peace enforcement operation in Somalia, where humanitarian aid was constantly hindered by the fighting parties, therefore the delivery of such assistance had to be carried out by force. Military action took place against certain sides, thus humanitarian activities *de facto* no longer remained neutral.

But what are humanitarian activities *per se*? There is no common definition of the term, though a clear distinction between humanitarian activities and humanitarian assistance should be preserved. USSR used to supply AK-47's as "humanitarian assistance" to its allies, humanitarian activities are something different. In the context of this essay such activities will mean the following: medical aid to the sick and wounded, provision of water and food resources to the region torn by conflict, provision of logistical means to bring urgent assistance to those in need, and other acts designated to improve human welfare. As was stated above, customary law requires such acts to be carried out on impartial and independent basis, therefore observance of the neutrality principle for organizations / States, engaged in humanitarian activities is of highest importance.

Traditionally, voluntary humanitarian organizations like ICRC enjoyed bigger level of trust from both the fighting sides and civilians, than the UN, which in turn preceded individual states. This explains why remaining neutral is way more important to the voluntary movements – nobody is astonished by the fact that states tend to follow their interests or that United Nations, NATO or any other international organization may eventually relate differently towards different actors and adopt a certain political view, Red Cross, Red Crescent etc, on the other hand, have always pledged neutrality, thus, would they start being discriminatory on political, ideological, religious or racial grounds in their missions, the degree of confidence for the humanitarian cause will fall

and in the end lead to organizations' collapse. That means, that in order to adhere to the principle of neutrality, humanitarian actions should be transparent, in the first place to the belligerents concerned. There should be no obstructions in searching humanitarian transport by either side, humanitarian units should not suddenly appear on the battleground, they should be expected etc. The non-discriminatory approach can be achieved by providing all the necessary information to the wider public, i.e. to the world community (nowadays in the form of the UN). The same means can be used for observing the non-participation-in-hostilities condition, as the fear of shame of abusing humanitarian actions will hold off violations of neutrality.

Earlier it was said, that humanitarian actions are applicable on 3 levels – States, international organizations and field-organizations. The thing about today's world is that rather than being carried out individually on each level, the three pillars tend to cooperate. Therefore, coming back to the Somalia-example, enforcement of humanitarian aid can actually be done with neutrality, but for this 2 elements must be clearly distinguished – non-neutral enforcer and neutral assistance provider.

In conclusion, neutrality is an auxiliary, but a very important principle. Failure to observe it does not really shake the very foundations of humanitarian action, although it may lead to lack of reputation for the cause, which in turn cripples future attempts to deliver such aid. To avoid such closed circles, the principle of neutrality should be upheld and respected.

Chechen Cases in ECtHR: Prosecuting Russia

When Russia joined the Council of Europe in 1996, considerable skepticism was voiced about its ability to meet its obligations, particularly those under the ECHR if it were to become a party. Much of this skepticism centered on the ordinary courts, and their perceived inexperience or inability to apply effectively constitutional provisions dictating the direct applicability and direct effect of Russia's international human rights treaties.¹ Despite that, the ratification of ECHR in March, 1998 was overall met with much enthusiasm, as Russian Federation by joining the European system of human rights protection, not only obliged itself to maintain and guarantee the rights set out by the Convention, but also acknowledged the supreme jurisdiction of the European Court of Human Rights. 10 years later, however, previous skepticism echoes in form of direct accusations by ECtHR of systematic gross human rights violations, as “Russian cases” are now consuming a substantial part of the Court’s work. One of the most problematic group, from the viewpoint of international law are the so called Chechen cases.

Russia’s second armed conflict in Chechnya began in September 1999, just a few weeks after Vladimir Putin was named prime minister. Russia claimed it was a counterterrorism operation, aimed at liquidating terrorist groups that had found haven in the chaos in Chechnya following the end of the 1994-1996 Chechen war.² By doing so, Russia intentionally invoked its rights under the 1998 Law on the Fight against Terrorism,³ which gave extensive powers to anti-terrorist units, while at the same time limited unduly rights provided for in the ECHR, including the rights to liberty and security of person, to privacy, home, family and correspondence, to freedom of movement, and to the peaceful enjoyment of possessions. Under the anti-terrorist law, officials involved in anti-terrorist operations could perform random identification checks and detain indefinitely individuals without proper identity documents, were free to enter homes, search

¹ Krug, P.F. Internalizing European Court of Human Rights Interpretations: Russia’s Courts of General Jurisdiction and New Directions in Civil Defamation Law. *Bepress Legal Series*, 2006, paper 1175, p. 2. <http://law.bepress.com/expresso/eps/1175>

² Justice for Chechnya. *The European Court of Human Rights against Russia*. Human Rights Watch. 2007. http://www.hrw.org/eca/2007/justice_for_chechnya.pdf. p. 2.

³ Федеральный закон РФ "О борьбе с терроризмом", July 1998.

vehicles and perform body searches, as well prohibit the movement of persons and vehicles.⁴ Human Rights Watch reported arbitrarily detentions conducted by Russian forces, when suspected rebel fighters and collaborators were tortured to secure confessions or testimony. In some cases, the corpses of those last seen in custody were subsequently found, bearing marks of summary execution. More often, the detained had been forcibly “disappeared”. As open conflict between the Russian military and Chechen rebel fighters subsided, the nature of the conflict changed. Beginning in 2003, Russia adopted a policy known as “Chechenization,” under which law enforcement operations, including counterterrorism, increasingly became the responsibility of local Chechen forces loyal to Moscow and under the command of Ramzan Kadyrov,⁵ whose troops are allegedly responsible for the committed atrocities and who is now *de iure* president of Chechnya.

The world response has not been entirely harsh during the first years, mainly due to the 9/11 attacks and Bush administration’s ongoing “war on terror”. The situation was softened down even further, when USA declined to accept the International Criminal Court jurisdiction, thus sending a clear signal to its new anti-terrorist partner, that it could continue to ignore the atrocities committed by its troops in Chechnya without fear of international legal sanction.⁶ As Russia also did not sign the Rome Statute, and therefore cannot be prosecuted by ICC for the committed atrocities, ECtHR took up the job of prosecuting acts in Chechnya, which the Rome Statute would most likely define as war crimes. Similar 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, if one considers 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. However, since events in Northern Ireland and south-eastern Turkey did not actually constitute armed conflicts within the meaning of humanitarian law, such interpretation of case law has been foreclosed by the Chechen cases.⁷ Thus by adjudicating Chechen crimes, ECtHR

⁴ Background Note on the Russian Operation in Chechnya. Human Rights Watch. 2001. <http://www.hrw.org/reports/2001/chechnya/Disapfin-01.htm>

⁵ *Supra* note 2.

⁶ Evangelista, M. The Chechen Wars: Will Russia Go the Way of the Soviet Union? Brookings Institution. Washington D.C., 2002, p. 194.

⁷ Abresch, W. A Human Rights Law of International Armed Conflict: the European Court of Human Rights in Chechnya. Working Paper 4. Center for Human Rights and Global Justice, 2005, <http://>

has taken a revolutionary approach, in which 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.⁸ This was met with much criticism, as some scholars pointed out that the Court, in refusing to apply international humanitarian law, assumes a low-profile attitude towards the effective implementation of fundamental rights, just when they suffer the fiercest attack. A second criticism refers to the highly imprecise manner in which the Court treats incidents involving the right to life, which in its own words ranks as one of the most fundamental provisions in the Convention. Finally, by refusing to recognize a role for international humanitarian law in its jurisprudence, the Court is favoring new gray areas.⁹

The main issue of the very first judgment delivered on 24 February 2005 concerned the way in which operations were planned and conducted. In this case of *Isayeva, Yuzupova and Basayeva*,¹⁰ concerning the death of civilians during an air strike, the Russian Government held that the huge number of casualties caused by the attack launched by two fighter jets against a convoy of civilian vehicles, was unintended. In its statement the Government held the planes were conducting a reconnaissance mission and simply returned fire when attacked by a separatist formation hidden within the convoy. The Court, after considering that 12 non-guided missiles, which were the full load of the two planes, were shot, concluded that, even assuming the pilots were pursuing a legitimate aim in launching 12 air-to-ground missiles, it could not accept that the operation was planned and executed with the requisite care for the lives of the civilian population.

Several incidents concerning the violation of Article 2, which provides the right to life, in form of unlawful killings or presumed deaths after disappearance, occurred in and around Grozny, were addressed to the Court. In first such case *Khashiyev and Akayeva v. Russia*,¹¹ applicants

chrgj.org/publications/docs/wp/Abresch%20The%20Human%20Rights%20Law%20of%20Internal%20Armed%20Conflict%20-%20The%20European%20Court%20of%20Human%20Rights%20in%20Chechnya.pdf, p. 2.

⁸ *Ibid.* p. 28.

⁹ Sperotto, F. Violations of Human Rights during Military Operations in Chechnya. Working paper 41. <http://www.du.edu/gsis/hrhw/working/2007/41-sperotto-2007.pdf>, p. 9.

¹⁰ ECtHR, *Isayeva, Yuzupova and Bazayeva v. Russia*. 57947/00; 57948/00; 57949/00 [2005].

¹¹ ECtHR *Khashiyev and Akayeva v. Russia*. 57942/00; 57945/00 [2005].

submitted their relatives had been tortured and killed by federal servicemen. Criminal investigation files were opened before different criminal instances but failed to establish the servicemen responsible for the killings. The European Court concluded that it was undisputed that the applicants' relatives died in circumstances falling outside the exceptions set out in the second paragraph of Article 2. It established that the applicants' relatives were killed by servicemen and that their deaths should be attributed to the State, that no explanation was given from the Russian Government and that no justification with respect to the use of lethal force by its agents was provided.

In *Isayeva v. Russia*,¹² Federal forces shelled the village of Katyr-Yurt with high-explosive ammunition and air strikes. At that time in Katyr-Yurt there were up to 1000 rebel fighters hiding among the civilian population, totaling 25,000 inhabitants (including local residents and internally displaced persons from elsewhere in Chechnya). The Court, while observing that the presence of a large group of armed fighters in Katyr-Yurt may have justified the use of lethal force, nonetheless stated that a balance must be achieved between the aim pursued and the means employed. The massive use of indiscriminate weapons in a populated area, outside wartime and without prior evacuation of the civilians, sounded fully incompatible with the aim of protecting lives from unlawful violence.

Another important group of cases concerns forced disappearances in Chechnya, precedent-setting for that was the *Bazorkina v. Russia*¹³ case, in which the Court ordered Russia to pay 35 000 euros to the mother of Khadzhi-Murat Yandiyev for violating her son's "right to life" as well as failing "to conduct an effective investigation" into his February 2000 disappearance. As of now the Court has elaborated a standpoint that the forced disappearances victims are to be presumed dead, since they were abducted by unidentified Russian servicemen without any subsequent acknowledgement of detention and had not been seen in many years. The European Court repeatedly determined that Russian officials have been negligent in their investigations into victims' complaints regarding abuses committed by Russian servicemen. The authorities failed to promptly open investigations or conduct basic investigative steps, such as interrogating witnesses or potential perpetrators identified in video footage or other materials. Victims and their relatives most often received no information or only perfunctory letters about the investigations. Officials

¹² ECtHR, *Isayeva v. Russia*. 57950/00 [2005].

¹³ ECtHR, *Barozkina v. Russia*. 69481/01 [2006].

repeatedly suspended and reopened investigations for up to six years without producing any results. The court determined that the indifference demonstrated by the Russian government, as exemplified in the failed investigations, caused suffering of such gravity as to constitute inhuman treatment of victims' relatives.¹⁴

On January 8, 2007, the Court also condemned Russia in the first torture case so far of the ECtHR. In its judgment,¹⁵ the Court held that the applicants Adam and Arbi Chitayev's had been held in unacknowledged detention, that they had been subjected to torture, and that the Russian authorities have not properly investigated their allegations.

Coming back to the abovementioned criticisms, Federico Sperotto argues¹⁶ that in spite of the subdued sense of criticism, in the decisions concerning the war in Chechnya the Court has been exhaustive and persuasive. The provisions of the Convention have been interpreted and applied "so as to make its safeguards practical and effective." As seen above, the cases focus on the way in which hostilities have been conducted. Regarding the use of aviation equipped with heavy combat weapon in a populated area the Court observed that these methods invariably put civilians at risk, a circumstance which imposes serious scrutiny in implementing the operational plan. Furthermore, the Court affirmed that the use of free-falling high-explosion aviation bombs and other non-guided heavy combat weapons (as indiscriminate weapons) without prior evacuation of the civilians (who should be considered as hostages *de facto* of the rebel militias), instead of organizing an exodus or using localized fire, is inadmissible in a democratic society. In *Isayeva, Yusupova and Bazayeva*, the Court literally held that the Russian forces used an extremely powerful weapon *for whatever aims they were trying to achieve*. Intending to make an assessment of the legitimacy of the attack, it expressed significant doubt that the military was pursuing a legitimate goal in launching 12 S-24 non-guided air-to-ground missiles. In summarizing the outcomes of the Court's approach, some preliminary elements have to be considered. First, the European Court's role is essentially that which is imposed on the Member States: to secure the rights and freedoms defined in Section I of the European Convention. Second, the Court is sensitive to the subsidiary nature of its role, while humanitarian treaties specifically oblige the State to search for persons alleged to have committed, or to have ordered to be committed, grave breaches, and bring such persons, regardless of their nationality (universal jurisdiction), before its

¹⁴ *Supra* note 2, p. 4.

¹⁵ ECtHR, *Chitayev and Chitayev v. Russia*. 59334/00 [2007].

¹⁶ *Supra* note 9, p. 10.

own national courts. Third, talking about jurisdiction, but enunciating a general principle, the Court has held in *Banković*¹⁷ that had the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a text the same as or similar to the contemporaneous Article 1 of the four Geneva Conventions of 1949. In keeping with these premises, the Court's approach, while showing that the Convention is an instrument devoid of limitation *ratione materiae*, it actually provides an effective remedy to violations.¹⁸

In refusing to use international humanitarian law explicitly, the Court avoids fueling any criticism for applying that discrete body of law, which falls outside the scope of the Convention and which requires expertise some could sustain the Court does not master. Furthermore, by openly discussing issues traditionally belonging to international humanitarian law, the Court cannot be accused of regarding itself as *a separate little empire*. In short, while the Court retains its identity as a human rights court, it also contributes to enlarging the protection afforded by the European Convention beyond its original reach, firstly by removing any residual doubt on the applicability of the Convention in wartime and secondly, by granting an effectiveness which at present international humanitarian law cannot.¹⁹

One of the most important issues the Chechen applicants had to face when reaching the court was Article 26 of the Convention. In order for the European Court of Human Rights to admit a case for review, it must find that the applicant has exhausted domestic remedies, meaning that the applicant's attempts to seek justice within the domestic system can go no further. The situation in Chechnya - unstable security conditions and threat of violent retribution, lack of access to information on domestic and / or international remedies, lack of qualified lawyers in the region, general poverty, and lack of basic infrastructure such as telecommunications services, places almost insurmountable obstacles before those individuals who wish to pursue their cases before local judicial organs. Despite these obstacles, the applicants, usually immediate family members of the victims, have shown persistence and determination in appealing to local, regional, and federal authorities. In the majority of cases, local public prosecutors open criminal investigations into civilians' complaints of serious abuses, such investigations are routinely suspended for alleged lack of material evidence and witnesses. At the same time, investigators regularly fail to

¹⁷ ECtHR, *Banković and Others v. Belgium and 16 Other Contracting States*. 52207/99 [2001].

¹⁸ *Supra* note 9, p. 10.

¹⁹ *Ibid.*

take such basic steps as visiting the scene of the crime and collecting physical evidence. As a result, criminal prosecutions are extremely rare, even in straightforward cases.²⁰

Despite the fact that during the armed conflict, not a single high-ranking federal army commander had been brought to account for the gross violations of human rights in Chechnya, the effect of the ECtHR has been mostly positive for a few reasons. Russia cares about the European Court and the Council of Europe. One of the biggest organizations involved in the Chechen cases, The Russian Justice Initiative believes that the Russian authorities investigate a case more effectively when they learn that a victim has lodged an application with the court. Unanimous demands from the E.U. member states on the basis of decisions taken by the court will therefore be taken seriously by the Russian authorities and have the potential of having a real impact on the human rights situation in Chechnya.²¹ While a European Court finding in favor of an applicant cannot restore a loved one's life, a judgment that finds a substantive violation of one of the fundamental Convention rights serves to vindicate the applicants, who domestically sought, but never received, recognition that their rights or those of their relatives were violated. When the European Court makes a judgment in favor of the applicant, it may order the respondent government to pay the applicant's legal costs as well as pecuniary and non-pecuniary damages. Furthermore, the Chechnya Justice Project believes that bringing cases to Strasbourg will result in significant political pressure upon the Russian government to improve its record on investigating and prosecuting serious human rights violations in Chechnya, and undertaking necessary judicial and law enforcement reforms.²²

In conclusion, the judgements the Court issued since 2005 on Chechen cases are the result of an accurate and authoritative work. Calling the State to pay compensation, focusing on the importance of an investigation aimed at bringing abusers before criminal tribunals and insisting on the principle that a prompt response in investigating the use of lethal force may be regarded as essential in preventing any appearance of collusion in or tolerance of unlawful acts the Court have significantly reduced the width of those lawless areas.²³ Therefore the Chechen cases should to be considered, in the long run, useful not only for the inhabitants of the region themselves, but

²⁰ Russia and the European Court of Human Rights. Russian Justice Initiative. <http://www.srji.org/en/echr/russia/>.

²¹ Solvang, G. A European Justice for Chechnya's Victims. July 3, 2006. Worldpress. <http://www.worldpress.org/Europe/2403.cfm>.

²² *Supra* note 16.

²³ Sperotto, F. Law in Times of War: the Case of Chechnya. Working paper 47. <http://www.du.edu/gsis/hrhw/working/2007/47-sperotto-2007.pdf>, p. 11.

also valuable precedents in case of any future armed conflicts inside territory under ECtHR jurisdiction, population of which will face human rights violations.