**BA Degree in Economic Development, International Social and Health Cooperation and Conflict Resolution**

**Course on “Human Rights and Armed Conflicts” 2019/2020 (Prof. Antonio Bultrini)**

**Complementary elements**

**IMPORTANT NOTE:** complementary elements update or complete/modify the relevant materials’ contents and are an integral part of the programme for the exam.

**DISCLAIMER:** the following complementary elements have been edited by Professor Bultrini and have not been approved by the authors of the relevant materials. Therefore, apart from those including factual elements, they express solely Professor Bultrini’s views.

1. **Definition of *internal* self-determination**

«Internal self-determination means the right to authentic self-government, that is, the right for a people really and freely to choose its own political and economic regime – which is much more than choosing among what is on offer perhaps from one political or economic position only» (from Antonio Cassese, *Self-Determination of Peoples*, Cambridge University Press, 1995).

1. **“Remedial secession”**

The concept of “remedial secession” implies a right of *external* self-determination under the following conditions: only in extreme circumstances, when the people concerned is continuously subjected to most severe forms of oppression (such as gross human rights violations and segregation), that endanger its very existence. It is thus conceived as an extraordinary measure, applied when further coexistence within a single State has become impossible *and* after all attempts to negotiate a settlement have failed. However, as was also noted by the International Court of Justice in its opinion of 22 July 2010 on the unilateral declaration of independence by Kosovo, within the international community still persist «radically different views» on the concept, so that it can, at least for the time being, hardly be considered as a customary norm.

1. **Positive obligations (and the horizontal dimension)**

Most human rights protection instruments (and their related mechanisms) no longer confine themselves to imposing negative obligations upon States (e.g. the prohibition of torture), but now entail positive obligations as well (for example those arising with regard to the right to life and the prohibition of torture; see the relevant slides).

Such positive obligations now cover also the horizontal dimension, i.e. acts that are imputable to non-State actors. In this area too States are obliged to take the necessary (positive) legislative and administrative measures aimed at protecting individuals under their jurisdiction from human rights violations by non-State actors. States are also obliged to adopt effective protection measures whenever individuals complain of a serious danger for their safety or life and to carry out an effective investigation if a violation of human rights has occurred. In this regard see among others the following leading cases decided by the European Court of Human Rights: *X. and Y. v. the Netherlands*, judgment of 27 February 1985 ( https://hudoc.echr.coe.int/eng#{"fulltext":["x and y netherlands"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-57603"]} ) , *M.C. v. Bulgaria*, judgment of 4 December 2003 (<https://hudoc.echr.coe.int/eng-press#{"fulltext":["39272/98"],"itemid":["003-883968-908286"]}> ) , *Maiorano and Others* *v. Italy*, judgment of 15 December 2009 ( <https://hudoc.echr.coe.int/eng-press#{"fulltext":["maiorano"],"itemid":["003-2969914-3270642"]}> ).

1. **Right to life**

Key principles, from the case-law of the European Court of Human Rights, concerning the scope of the right to life (Article 2 of the European Convention on Human Rights) and the meaning of the limitation according to which nobody can be deprived of one’s life unless the use of lethal force is “absolutely necessary” (the other international human rights courts and treaty-bodies apply analogous criteria in this area).

«Article 2 covers not only intentional killing but also the situations where it is permitted to “use force” which may result, as an unintended outcome, in the deprivation of life. The deliberate or intended use of lethal force is, however, only one factor to be taken into account in assessing its necessity. Any use of force must be no more than “absolutely necessary” for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c). (…) Consequently, the force used must be strictly proportionate to the achievement of the permitted aims.

(I)n determining whether the force used was compatible with Article 2 (art. 2), the Court must carefully scrutinise, as noted above, not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force», including the information and the instructions given to the soldiers.

(*McCann and Others v. the United Kingdom* judgment of 27 September 1995, concerning an anti-terrorist operation in Gibraltar, paras. 192-194 and 201; read the summary at: <https://hudoc.echr.coe.int/eng#{"itemid":["002-10101"]}> ; full text at https://hudoc.echr.coe.int/eng#{"fulltext":["\"CASE OF McCANN and others v. THE UNITED KINGDOM\""],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-57943"]} ).

Corollaries:

The authorities must take appropriate care to ensure that any risk to life (also as a result of collateral damage) is minimised. This implies assessing whether the authorities were not negligent in their choice of action and weapons.

In the *Isayeva and Others v. Russia* judgment of 24 February 2005 (summary of the judgment at file:///C:/Users/Papi/Downloads/Chamber%20judgments%20concerning%20Russia%2024.02.05.pdf ), concerning one of the military operations in Chechnya, twelve S-24 *non-guided* air-to-ground missiles were fired (six by each plane, which is a full load) against a convoy of civilians, who were attempting to flee Grozny, with a view to hitting a single truck allegedly operated by rebels. On explosion, each missile creates several thousand pieces of shrapnel and its impact radius exceeds 300 metres (or 600-800 metres, as suggested by some documents ). There were thus several explosions on a relatively short stretch of the road filled with civilian vehicles.

As in the *Isayeva* case, in the *Tagayeva and Others v. Russia* case (concerning the events in Beslan; judgment of 13 April 2017 available at <https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22\%22CASE%20OF%20TAGAYEVA%20AND%20OTHERS%20v.%20RUSSIA\%22%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-172660%22]}>, paras. 609 and 599; summary of the judgment at <https://hudoc.echr.coe.int/eng-press#{%22fulltext%22:[%2226562/07%22],%22itemid%22:[%22003-5684105-7210070%22]}> ), the Court found that the primary aim of the operation should have been to protect lives from unlawful violence. «The massive use of indiscriminate weapons stands in flagrant contrast with this aim and cannot be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents. It is not for the Court, with detached reflection, to substitute its own opinion of the situation for that of security officers who were required to intervene to save human lives, in an extremely tense situation, facing armed and dangerous individuals. While errors of judgment or mistaken assessments, unfortunate in retrospect, will not in themselves entail responsibility under Article 2, such use of explosive and indiscriminate weapons» (including forty charges for a portable flame-thrower, at least twenty‑eight charges for grenade launchers and eight high-fragmentation shells for a tank cannon), with the attendant risk for human life, could not be regarded as absolutely necessary in the circumstances.

Furthermore, the domestic legal framework failed to set the most important principles and constraints of the use of force in lawful anti-terrorist operations, including the obligation to protect everyone’s life by law, as required by the European Convention. Coupled with wide-ranging immunity for any harm caused in the course of anti-terrorist operations, this situation resulted in a dangerous gap in regulating situations involving deprivation of life – the most fundamental human right under the Convention. In view of the inadequate level of legal safeguards, Russia had failed to set up a “framework of a system of adequate and effective safeguards against arbitrariness and abuse of force”.

1. **Death penalty/Europe**

It can be argued, in the light of the practice of the Council of Europe and of the European Union, that in Europe death penalty is now prohibited by virtue of a regional customary norm. See for example, among many others, the Joint Declaration by the European Union and the Council of Europe on the occasion of the European and World Day against the Death Penalty, on 10 October 2019: <https://www.consilium.europa.eu/en/press/press-releases/2019/10/09/joint-declaration-by-the-eu-high-representative-for-foreign-affairs-and-security-policy-and-the-secretary-general-of-the-council-of-europe-on-the-european-and-world-day-against-the-death-penalty/> . Furthermore, it is worth noting that Belarus, the only European State that still uses the death penalty, abstained (instead of voting against) on the occasion of the adoption in 2018, by the General Assembly of the United Nations, of the latest resolution calling for a moratorium on the use of the death penalty: <http://research.un.org/en/docs/ga/quick/regular/73> (A/RES/73/175).

1. **On lethal injection as a method of execution**

The reference to the case *Kindler v. Canada* in the essay on the death penalty (p. 57) is of limited significance, since in that case the complainant’s claim was dismissed for the reason that his counsel had not made any submission in this regard (see para. 15.3 of the Human Rights Committee’s views released on 11 November 1993).

The issue of lethal injection has nevertheless been subsequently raised by several international human rights bodies. Among others, the Human Rights Committee itself, in its latest concluding observations on the United States (adopted in 2014), expressed its concern with regard to the use of untested lethal drugs to execute prisoners and the withholding of information about such drugs. In the *Bucklew* case, the Inter-American Commission of Human Rights concluded that taking account of the complainant’s rare medical condition, execution of Russel Bucklew by lethal injection risked causing excessive suffering. He was eventually executed on 1st October 2019 (sedation was used, certain specific precautions were adopted, but the supplier of the lethal drug was not revealed).

1. **Extradition to States that still use the death penalty**

Note that the prohibition to extradite a person to States that still use the death penalty, unless adequate/serious assurances are provided that any death sentence will not be carried out, concerns not only States parties to the European Convention on Human Rights, but also States parties to the United Nations Covenant on Civil and Political Rights *that have abolished the death penalty* (see the essay on the death penalty, at p. 57).

1. **HRC/no veto**

Unlike the voting procedure in the Security Council of the United Nations (see article 27 of the Charter of the United Nations), no veto power exists with regard to the decision-making process of the Human Rights Council.

1. **Special procedures/key features**

With reference to p. 233 f. of the relevant material (Chapter 6 of M. Shaw’s International Law textbook), it is necessary to add that the (now) Human Rights Council’s special procedures (thematic mandates and country mandates) are entrusted to unpaid independent experts, that act in their individual capacity. Special procedures can be entrusted either to individuals (typically called “Special Rapporteur”, but other denominations – such as “Representative of the Secretary-General” – are also used) or to a working group. Depending on the scope of the mandate, their work can lead to a public report, which is then addressed to the Human Rights Council and/or the competent committee of the General Assembly, to dealing with specific cases/situations and sending communications or appeals to States, and/or to carrying out on-the-spot visits with the concerned State’s consent.

1. **Definition of an international armed conflict**

The relevant chapter (p. 913) states that one of the two elements that distinguish international and internal armed conflicts is a foreign state directly intervening within a civil conflict. However, account must be taken of the recent practice with regard to the conflict between the Iraqi Government and the international coalition on one side and ISIS insurgents on the other. In fact, several intervening states expressed the view that the conflict should still be considered as internal, the crucial criterion being the two warring sides’ identities: if one of them is a non-State actor, then the conflict would be internal.

1. **Crime of aggression**

The ICC (International Criminal Court) Review Conference on the crime of aggression (in Kampala) was actually held in 2010 (this corrects the wrong date that appears at p. 327 of the chapter on “Individual Criminal Responsibility”). The definition of aggression (embodied in art. 8 *bis* of the ICC Statute) has for the time being ratified by 37 of the States Parties to the ICC Statute (this updates the information provided in footnote no. 292 of the said chapter). The decision of the States Parties to activate the jurisdiction of the ICC with regard to the crime of aggression, referred to in footnote no. 292, was made (by consensus) at the December 2017 session of the Assembly of States Parties.

1. **Situations investigated by the ICC**

Georgia was the first non-African situation investigated by the ICC (with regard to the alleged crimes against humanity and war crimes committed in the context of the international armed conflict that took place in 2008 and in which Russia was also involved). Afghanistan may soon follow if the Prosecutor’s request to be authorised to commence an investigation into the situation of Afghanistan is accepted by the ICC (this can be followed on the International Criminal Court’s website).