Collective punishment and human rights - from Israel to Russia

Collective punishment and human rights – from Israel to Russia

Cornelia Angela Klocker

A thesis submitted to Birkbeck, University of London
for the degree of Doctor of Philosophy

2018

Declaration

I hereby declare that the work presented in this thesis is my own, except where explicit reference is made to the work of others.

Abstract

This thesis analyses collective punishment in the context of human rights law from a New Legal Realist perspective. Collective punishment is a concept deriving from the law of armed conflict. It describes the punishment of a group for an act allegedly committed by some of its members and is prohibited in times of armed conflict by treaty and customary international law.

Recently, the imposition of collective punishment has been witnessed in situations outside armed conflict. This means that the applicable legal framework is human rights law and not the law of armed conflict. Human rights instruments do not explicitly address collective punishment. Consequently, there is a genuine gap in the protection of groups affected by collective punishment in situations outside of or short of armed conflict.

Supported by two case studies on collective punishment in the Occupied Palestinian Territories and in Chechnya, the thesis examines potential options to close this gap in human rights law in a way contributing to the empowerment of affected groups. This analysis will focus on the European Convention on Human Rights due to its relevance to the situation in Chechnya.

The protection and empowerment of groups necessitates a reconsideration of group rights under the human rights framework and challenges the traditionally individual focus of human rights law. By questioning whether human rights instruments can encompass such rights and adapt to the changing circumstances, the thesis contributes to the broader academic debate on rights held by collectivities in general and on collective human rights in particular.

The thesis is therefore centred on the following research question: What is the relationship between the legal regulation and state policies on collective punishment under the law of armed conflict and human rights law and what effects does this relationship have on the protection and empowerment of affected groups?

Acknowledgement

I am deeply indebted to my supervisor, Professor Bill Bowring. His expertise on the subject and the way in which he communicates his knowledge were not only highly engaging, but very influential on my research and the way I understand the deeper connections between group rights and human rights law as well as between the Chechens and the Russian state. Despite his more than busy schedule, he always found time for me and my project and made sure all administrative issues were taken care of as well. I never felt lost because of his continuing support. Thank you.

Furthermore, I would like to thank my two examiners, Dr Shane Darcy and Dr Daniela Nadj for their valuable comments which improved my thesis and reaffirmed its originality.

In addition, I would like to thank Dr Michael Kearney, who introduced me to the concept of collective punishment in the law of armed conflict during my studies at the University of Sussex. He is a great lecturer who can inspire students to embark on their own projects and goes to great lengths to support them in doing so.

My thanks also go to Dr Victoria Biggs for proofreading and to the Women in Academia Support Network for bringing us together.

And last but not least, I would like to thank my family and my partner for their support which enabled me to pursue this degree in the first place.

Contents

Ruins of the Saleh family home, Deir Abu Mash'al, B'Tselem, Iyad Hadad (photo),
http://www.btselem.org/sites/default/files/styles/original_size/public/2017_demolitions_photoblog_3.jpg?itok=

Ruins of the Baidulaev family home, Yandi, Human Rights Watch, Memorial Human Rights Centre (photo),
https://www.hrw.org/news/2014/12/10/dispatches-burning-down-house-chechnya

1 Introduction

Shown on the previous page are two images of destroyed houses. The house shown in the first picture is in the village of Deir Abu Mash'al in the Occupied Palestinian Territories (OPT) and belonged to the Saleh family. The house shown in the second picture is in the village of Yandi in Chechnya and belonged to the Baidulaev family. The house of the Saleh family was destroyed due to the involvement of a family member in an attack on the border police. The house of the Baidulaev family was destroyed due to the alleged insurgent ties of a family member after insurgents attacked the Chechen capital Grozny.[1]

There are similarities between these two cases. In both, a group or collectivity is punished for the act or the alleged act of an individual member of the group. Yet this group is not confined to the family, but encompasses the community to which they belong, the Palestinians on one hand, and the Chechens on the other on a broader level. These groups are targeted by the Israeli and Russian authorities. They punish these groups collectively for acts committed or allegedly committed by one or some of their members for which the other group members do not bear individual responsibility. Under the law of armed conflict, this is known as collective punishment.

Collective punishment is prohibited in times of armed conflict under treaty as well as customary international law. It is not explicitly prohibited in situations outside armed conflict. The house of the Saleh family in the OPT was destroyed in 2017 during the ongoing Israeli occupation. The occupation means that the law of armed conflict is applicable in this context and for this reason the demolition of the house violated the prohibition of collective punishment.

The house of the Baidulaev family in Chechnya was destroyed in 2014, in the aftermath of the second non-international armed conflict between Chechnya and Russia. Large-scale fighting ceased over a decade ago, yet sporadic confrontations between the military

[1] B'Tselem (2017). Innocents punished: Israeli military demolishes three homes and seals another, Ramallah District, online available at: http://www.btselem.org/photoblog/innocents-punished-israeli-military-demolishes-three-homes-and-seals-another-ramallah-dist (accessed on 15/04/18); Human Rights Watch (2014). Dispatches: Burning Down the House in Chechnya, online available at: https://www.hrw.org/news/2014/12/10/dispatches-burning-down-house-chechnya (accessed on 15/04/18); Memorial Human Rights Centre (2014). Чечня: силовики сожгли дома родственников боевиков, online available at: https://memohrc.org/ru/news/chechnya-siloviki-sozhgli-doma-rodstvennikov-boevikov (accessed on 15/04/18).

and insurgents have continued. It is unclear, whether Chechnya is still in the state of a non-international armed conflict or not. Given this uncertainty, it is not clear whether the destruction of the Baidulaev home was prohibited under the law of armed conflict. If one reaches the conclusion that the non-international armed conflict is over, the prohibition of collective punishment does not apply to the destruction of their home.

A law that makes family members bear financial responsibility for damages arising from terrorist attacks involving their relatives exacerbates the situation. This law was passed by the Russian State Duma in 2013 and is applicable across Russia. It does not specifically address the current status in Chechnya. Crucially, that means the applicable international legal framework would be human rights law and not the law of armed conflict. Furthermore, the Putin-loyal head of the Chechen Republic Ramzan Kadyrov is pursuing a relentless policy of collective responsibility which has led to house burnings, ill-treatment, public humiliation and collective expulsion of people associated with the insurgent movement.

Punishing a group for acts committed or allegedly committed by some of its members in this way is prohibited under the law of armed conflict, but not under human rights law. Current international human rights instruments do not explicitly address collective punishment. Consequently, the house destructions in the OPT are in breach of the prohibition of collective punishment, whereas house destructions in Chechnya are not. The drastic split in the legal assessment between those two very similar cases highlights a genuine gap in human rights law.

The comparison of these two cases prompts the following question: What is the relationship between the legal regulation and state policies on collective punishment under the law of armed conflict and human rights law and what effects does this relationship have on the protection and empowerment of affected groups? In other words, the imposition of collective punishment is not limited to situations of armed conflict but has expanded to situations governed by human rights law. If there is no prohibition of collective punishment in human rights law, there is no express international rule that a national law introducing collective punishment, such as the Russian law on compensation for terrorist attacks, would violate. Furthermore, without a prohibition of collective punishment under human rights law, affected groups have no substantive rule they can base their claims against the perpetrators on.

The thesis is divided into six substantive chapters grouped in three parts. The first part is devoted to the legal regulation of collective punishment under the law of armed conflict and a case study on the OPT. The second part addresses the legal regulation, or rather non-regulation of collective punishment under human rights law, and a case study on Chechnya. The third part brings these findings together by assessing the theoretical debate on group rights as human rights and the viability of prohibiting collective punishment under the European Convention on Human Rights (ECHR). The focus on the ECHR stems from the cases already brought before this Court by Chechens regarding other aspects resulting from the two non-international armed conflicts fought against Russia.

This substantive analysis is preceded by a short methodology chapter outlining the theoretical approach and methods applied throughout the thesis; namely New Legal Realism and case studies. As the images above have shown, the analysis undertaken in this thesis is not limited to a theoretical assessment. It goes beyond this by emphasising the ways in which the law of armed conflict and human rights law obtain their meaning, are practised, and change over time. Adopting the New Legal Realist approach, the chapters are rooted in a positivist analysis of the law as it stands, but this analysis is taken only as the starting point for further enquiry. The emphasis of the New Legal Realist approach on empiricism and pragmatism facilitates this enquiry and allows for practice-oriented suggestions based on real life experience highlighted by the two case studies. Mindful of the tension between reason and power, the New Legal Realist approach also accommodates the struggle of groups such as the Palestinians or the Chechens and supports their proactive role in their pursuit of justice.

Following this methodology chapter is the substantive part on collective punishment and the law of armed conflict (part 3 of the thesis). It is divided into two chapters dealing with the legal regulation of collective punishment under the law of armed conflict (chapter 3.1) and the case study on the Occupied Palestinian Territories (chapter 3.2).

The first chapter (chapter 3.1) examines the legal regulation of collective punishment under the law of armed conflict based on international treaties as well as customary international law. Although collective punishment is prohibited under the 1949 Geneva Conventions and their 1977 Additional Protocols, the drafting history of these documents reveals a certain unwillingness or reluctance of state parties to concede rights to actors other than states. For this reason, the customary international law status

of the prohibition of collective punishment is crucial, as it proves this opposition to be a minority opinion.

Apart from prohibiting collective punishment, the law of armed conflict does not say much about the nature and scope of the act itself. This leads to a problem of defining collective punishment. The Special Court for Sierra Leone has dealt with the war crime of collective punishment as enshrined in its statute and defined its elements as 'indiscriminate punishment imposed collectively on persons for omissions or acts some or none of them may or may not have been responsible' with 'the specific intent of the perpetrator to punish collectively'.[2] The first substantive chapter concludes with a working definition of the act of collective punishment as the punishment of a group as such for an act committed by one or some of its members for which they do not bear individual responsibility.

The group referred to is understood in a broad sense; meaning an "identifiable group" such as the family of an alleged terrorist whose house is demolished and is not related to any additional criteria such as a broader discriminatory intent. However, in practice the groups targeted by collective punishment might also exhibit those broader characteristics as the family of a Palestinian whose house is demolished also belongs to this broader group, the Palestinians. The same goes for alleged members of the Chechen insurgent movement. Yet the group envisaged in the definition of collective punishment does not include a discriminatory element based for example on ethnicity, religion or sex.

However, in practice the groups targeted by collective punishment are likely to be subject to discriminatory treatment in addition to collective punishment. This again leads back to the broader struggle for justice of these groups (the Palestinians and the Chechens) and the ways in which a prohibition of collective punishment can contribute to those efforts. Although the cases on punitive house demolitions deal with families of persons who have (allegedly) committed certain acts and not with the Palestinians or the Chechens per se, these cases shine a light on the broader situation in the OPT and in Chechnya. To sum up, the term group unless otherwise stated should be understood in a broad and neutral manner but these groups do not exist in a vacuum and it is very likely, as the two case studies show, that those groups also carry other characteristics based on a shared identity. Yet these overlaps do not influence the criteria for assessing

[2] *Fofana and Kondewa* (SCSL-04-14-A) Judgment, Appeals Chamber (28 May 2008) para.224.

whether collective punishment was imposed on a group. What it does change however, is the broader picture: In both case studies, the groups affected by collective punishment also belong to a bigger community, namely the Palestinians and the Chechens. And the imposition of collective punishment on families belonging to those groups exposes their treatment by the respective state in general. By documenting violations of the prohibition of collective punishment, these groups draw attention to the broader implications and therefore contribute to the struggle for justice of the Palestinians and the Chechens. This interconnection explains the overlap of the groups affected by collective punishment in each instance (for example a family) and simultaneously the effect this act has on the larger community they belong to (for example the Palestinians).

The second chapter in the first substantive part of the thesis (chapter 3.2) examines the legal regulation of collective punishment under the law of armed conflict and its use in practice, with a case study looking at punitive house demolitions in the OPT. After confirming the status of the OPT as still occupied, and therefore demonstrating the applicability of the law of armed conflict, the case study focuses on one specific form of house demolitions practised by Israeli forces, punitive house demolitions. These are based on outdated Defence (Emergency) Regulations adopted by the British in 1945 during their administration of Palestine. Israel still relies on these provisions even though they have been repealed. Broadly speaking, the regulation provides for the destruction of homes connected to offences against Israeli forces, including buildings from which firearms have been launched or buildings in which perpetrators have been living.

Local non-governmental organisations have filed numerous cases on behalf of Palestinians against such demolitions and one of them, the *HaMoked* case brought by the non-governmental organisation of the same name, is of particular interest as it attacked this Defence (Emergency) Regulation itself. The chapter argues that the prohibition of collective punishment under the law of armed conflict supports the Palestinians in their struggle for justice as the substantive prohibition can act as a tool contributing to their empowerment in a broader sense Relying on the prohibition, they filed cases against Israeli forces destroying their homes documenting Israel's long history of non-compliance with its international obligations in this regard. Furthermore, the international prohibition of collective punishment denies legality to any local law like the Defence (Emergency) Regulations and prevents the attempted legalisation of collective punishment. Seen from this angle, the prohibition of collective punishment can

support the empowerment of the Palestinians by enabling them to call out Israel's violations of the law of armed conflict. Although the prohibition of collective punishment under the law of armed conflict alone will not bring about empowerment of the Palestinians and Israel's state practice has still to change to compliance, it is an important piece in their broader struggle for justice and in particular regarding punitive house demolitions.

In sum, the first part of the thesis provides the foundational understanding of the origin and meaning of collective punishment under the law of armed conflict and sheds light on the ways in which a prohibition of collective punishment can contribute to the empowerment of the Palestinians.

The second substantive part of the thesis (part 4) situates collective punishment in human rights law. The first chapter examines the legal regulation of collective punishment under human rights law (chapter 4.1) while the second chapter is devoted to a case study on collective punishment in Chechnya (chapter 4.2).

Highlighting the fluid transition between the law of armed conflict and human rights law, the first chapter of this part (chapter 4.1) starts with a short analysis of states of emergency. Most international human rights instruments such as the ECHR include derogation mechanisms which will apply during a state of emergency. This means that states can temporarily suspend some of their human rights obligations. Given the direct reference to collective punishment in the General Comment to the state of emergency provision in the International Covenant on Civil and Political Rights (ICCPR), this treaty will be used to outline the concept of states of emergency. The General Comment states that derogations in times of a state of emergency cannot be used to justify collective punishment.[3] A short look at how the Turkish authorities have used declarations of a state of emergency to pursue a policy of village destruction in the Kurdish dominated south of the country, sheds light on the position of states of emergency between armed conflict and peace, resulting gaps in protection and their dangers.

In order to close this gap, the existing human rights framework – in particular the ECHR, but also the African Charter on Human and Peoples' Rights (ACHPR) and the ICCPR – are examined for any rights or principles related to the substance of the act of collective punishment. Related rights are mainly those that are violated in the course of collective

[3] CCPR/C/21/Rev.1/Add.11 General Comment No.29: States of Emergency (Article 4) (31 August 2001) para.11.

punishment. Taking the example of house destruction, violations of the right to private and family life and the right to property are involved. Depending on the treatment of the inhabitants, the right to life as well as the prohibition of torture are engaged too. All these violations have to be seen in conjunction with the prohibition of discrimination. Furthermore, the principle of individual responsibility is a core value undermined by collective punishment. In addition to these related rights and principles, the group rights in the ACHPR and minority rights are briefly mentioned to foreshadow the theoretical debate on group rights as human rights in the last part of the thesis. At this point however, they are only examined for their substantive connection to collective punishment. The European Framework Convention on the Protection of National Minorities (FCNM) and the European Social Charter (ESC) which support a prohibition of collective punishment under the ECHR on a more theoretical and procedural level, are analysed in the last part of the thesis as well.

Collective punishment is the imposition of sanctions on a group as such for acts committed or allegedly committed by one or some of its members for which the other members do not bear individual responsibility. These criteria are not present in any existing article of the human rights instruments reviewed in this thesis. Although several rights are violated in the course of collective punishment, the specific wrong done by collective punishment as such remains unaddressed. Neither the prohibition of torture, the right to property or the prohibition of discrimination require the punishment of a group for an act committed by one of its members. These related rights violations only confront the side effects or the symptoms of collective punishment and not the cause.

Drawing on this assessment, human rights law and the ECHR in particular are currently unable to encompass collective punishment. The human rights framework does not address the particular wrong done by this act. Nevertheless, the last section of this chapter emphasises that although collective punishment as such is not prohibited under current human rights treaties, the European Court of Human Rights (ECtHR) has already referred to this term in over forty cases, some of them even in the Chechen context. This means that the Court is familiar with the term and its use and more importantly, it has not rejected the reference being made to collective punishment either. Admittedly, this might be a small step, but seeing collective punishment feature in the Court's own cases might contribute to a sense of urgency in dealing with collective punishment outside the context of armed conflict.

This sense of urgency is reinforced by the case study on Chechnya following in the second chapter (chapter 4.2) of this part. Owing to the complex turn of events on the ground, the current situation in Chechnya is analysed first. In the early 1990s the dissolution of the Soviet Union precipitated the first non-international armed conflict in Chechnya between the Chechen independence movement and Russian forces. After a short interim period, the second non-international armed conflict was triggered by Jihadist fighters from Chechnya attacking villages in neighbouring Dagestan, and allegations that Chechen insurgents were responsible for apartment block bombings in several Russian cities – a claim that has never been proved. The second non-international armed conflict was portrayed as a counter-terrorist operation by Russian authorities and officially declared to be over in 2009. However, the continuation of fighting between security and insurgent forces has cast doubts on an end to this conflict. For this reason, the first section of this chapter addresses the question on how to determine the end of an armed conflict. The range of different approaches to this question indicates that this area of the law of armed conflict is still not settled and therefore, the question as to the current status in Chechnya remains uncertain. This uncertainty can lead to gaps in protection and one of them is related to collective punishment.

The chapter continues with an assessment of practised forms of collective punishment in Chechnya. During the early years of the second non-international armed conflict, *zachistkas* were a common form of collective punishment. *Zachistkas* are sweeping operations. A whole village is sealed off for several days while the military is carrying out searches for insurgents which often result in extrajudicial killings, torture, looting and property destruction. Some of these sweeping operations were already subject of cases brought before the ECtHR. Whereas the use of *zachistkas* declined after 2004, house burnings became more common with Ramzan Kadyrov becoming president of Chechnya in 2007. The destruction of homes of persons with alleged insurgent ties is facilitated by Kadyrov's open support for family responsibility. In addition, he started a campaign of public humiliation against alleged insurgents or sympathisers, sometimes resulting in the collective expulsion of entire families and called for family ties to be included in identity documents. As numerous examples from colonial as well as post-conflict contexts show, the use of collective punishment was often associated with the aftermath of hostilities and therefore the imposition of collective punishment in Chechnya does not represent a departure from previous practice. Yet what is different in this case study, is that in addition to collective punishment imposed on Chechens by

the local government, Russian-wide legislation has introduced collective punishment. This law is not in any way connected to the existence or prior existence of an armed conflict or state of emergency as in the case of colonies or post-conflict situations, this law is designed for peacetime.

In 2013 the Russian State Duma adopted a law making it the responsibility of family members to pay for damages arising from terrorist attacks involving their relatives. Not only does this law go against the principle of individual responsibility, but it punishes a group for an act allegedly committed by one or some of its members. Being a law applicable across Russia with no mention of the current situation in Chechnya, it has to be assessed against the background of human rights law. As shown, human rights law does not prohibit collective punishment as such. This case study highlights the effects of such a gap in protection in practice, leaving the Chechens without legal tools to actively engage in their struggle and confront the perpetrators of collective punishment. Finally, at the end of the chapter, ECtHR cases referring to or dealing with collective punishment in the Chechen context are reviewed to strengthen the claim of the Court's familiarity with the concept.

In conclusion, this second substantive part of the thesis looks at collective punishment in the context of human rights law. As collective punishment as such is currently not prohibited under human rights instruments such as the ECHR, there is a genuine gap in protection. The effects of this gap are illustrated by the case study on Chechnya. To give the Chechens a chance to actively engage in their struggle for justice, they need tools to hold the authorities to account. A prohibition of collective punishment could be such a tool.

The question of group rights as human rights and the viability of a prohibition of collective punishment under the ECHR form the last substantive part of the thesis (part 5). The first chapter of this part (chapter 5.1) deals with the theoretical underpinnings of group rights and of group rights as human rights in particular. The second chapter of this part (chapter 5.2) looks at practice-oriented solutions to address collective punishment under the ECHR.

Before delving into the group rights debate, the first chapter of this part (chapter 5.1) starts with some clarifications on the relationship between the law of armed conflict and human rights law as understood in this thesis. Much has been written about the applicability of human rights law in times of armed conflict and in particular about the

lex specialis approach. The principle of *lex specialis* means that any specific law applicable to a situation overrides a more general law which would be applicable as well. In the current context, it has been suggested that the law of armed conflict might be the specific law and human rights law the general law. However, as will be shown in this chapter, these discussions miss the broader point. The question most relevant to the relationship between the law of armed conflict and human rights law in this thesis concerns their underlying structure. Whereas human rights law traditionally confers rights onto individuals, rights and obligations under the law of armed conflict are conditional on membership in a certain group such as prisoners of war or civilians. This group dimension facilitates the prohibition of collective punishment under the law of armed conflict and simultaneously shows why such a prohibition might prove difficult to "translate" into human rights law. This translation does not mean that the prohibition of collective punishment will simply be taken from the law of armed conflict and pasted into human rights law; it means that the act of collective punishment needs to be considered in the context of human rights law and with the means available to human rights law. For this reason, the theoretical foundation of group rights in human rights law is examined for ways on how to encompass this group dimension.

Two representatives of the group rights debate, Will Kymlicka and Dwight Newman, are singled out and their approaches compared. Whereas Kymlicka argues for 'group-differentiated rights' held by individual members of a group, Newman proposes 'collective rights' held by groups as such.[4] With some additions, the thesis favours Newman's argument for groups as right-bearing entities that derive those rights from collective interests, interests that cannot be reduced to their individual members. This stands in contrast to Kymlicka's idea of liberal group-differentiated rights, which ultimately concerns the individual rights of group members. The understanding of group rights as human rights is further strengthened by the ontological interdependence between an individual and her group or community. Furthermore, the claim for group rights as human rights is reinforced by the empowerment aspect. Groups such as the Chechens need tools to hold the perpetrators of collective punishment to account. This active assertion of their rights could be realised by providing means such as a prohibition of collective punishment referring to groups as rightholders.

[4] Kymlicka, W. (1996). *Multicultural Citizenship: A Liberal Theory of Minority Rights.* Oxford, Clarendon Press; Newman, D. (2011). *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups*. Oxford, Hart.

The second chapter of the last substantive part of the thesis (chapter 5.2) assesses the viability of such a prohibition in practice. Owing to the focus on the ECHR, two other Council of Europe (CoE) human rights instruments, the FCNM and the ESC, are examined in more detail. Although neither of them addresses collective punishment in its substantive context, they highlight the acceptance of CoE member states of human rights with a group dimension. The ESC is of special interest in this regard, as under the collective complaints mechanism devised in the Charter, its rights can only be claimed by collectivities such as non-governmental organisations or trade unions. Together with a short look at the ACHPR and the way in which non-governmental organisations can file cases on behalf of communities asserting their group rights, this illustrates the viability of adjudicating group rights in practice. The ECHR's own application procedure allows non-governmental organisations to submit applications, and in consequence the ECHR could encompass group rights from a procedural perspective.

Whether the ECHR can also encompass a prohibition of collective punishment on a substantive level is a different question. Support can be found in the references made to the FCNM and ESC, as it indicates that the ECtHR is taking the broader social context of cases into account. However, broader interpretations of the existing ECHR framework are not sufficient to deal with collective punishment. Even a collective right to non-discrimination would not encompass the specific wrong done by collective punishment, the punishment of a group for an act committed by one of its members. For this reason, a new rule is proposed. Acknowledging that any new addition to the ECHR requires political support, the broad acceptance of the prohibition of collective punishment under the law of armed conflict could be useful in illustrating a pre-existing common understanding.

In trying to devise a prohibition of collective punishment under the ECHR, the chapter will address earlier attempts to include rights of national minorities and social and economic rights into the ECHR by adopting additional protocols. All these attempts were turned down. However, a prohibition of collective punishment does not face the same impediments. An additional protocol on rights of national minorities was turned down due to its limitation to a specific group. A prohibition of collective punishment would not be limited to national minorities but open to any identifiable group without requiring an additional discriminatory element – with the groups described in the prohibition of non-discrimination only acting as possible examples of groups that might be affected by collective punishment in practice to illustrate the scope of the new rule. An additional

protocol on social and economic rights was turned down due to the "second generation" character of these rights, whereas the ECHR is centred on civil and political and therefore "first generation" rights. However, the prohibition of collective punishment does fit in the civil and political remit of the ECHR, addressing a fundamental right that is well-recognised (in the law of armed conflict at least) and sufficiently precise in its wording. In sum, the establishment of a prohibition of collective punishment under the ECHR appears feasible.

As this thesis will show, a prohibition of collective punishment under human rights law is possible, and it could support groups such as Chechen families and the Chechens more broadly in actively pursuing their struggle for justice. As rightholders they would be able to assert their freedom from collective punishment and to hold the perpetrators to account.

2 Methodology

2.1 Introduction

Before starting with the substantive part of the thesis, it is necessary to outline the theoretical approach and the methods used. The thesis examines the relationship between the law of armed conflict and human rights law with regards to collective punishment as well as case studies dealing with the imposition of collective punishment under both frameworks. The findings on state policies on collective punishment gathered from the case studies and on the regulation of collective punishment in international law describe how law is practised and how it changes over time and adjusts to other circumstances. These are core questions asked by the New Legal Realist approach.

New Legal Realism as referred to in this thesis describes a contemporary theoretical movement.[1] According to Shaffer, it is distinguished by questions of how law obtains its meaning, how it is practised, and how it changes. The particular appeal of this approach lies in its orientation to practice, here understood as a way of problem-solving based on knowledge gathered from real life experience. These features are refined by several key attributes, namely empiricism, philosophical pragmatism, transnationalism and reason-giving in tension with power.[2]

New Legal Realism has taken over the concepts of empiricism and pragmatism from the legal realists of the 1920s such as Karl Llewellyn. New Legal Realism differs from the 'old' or American Legal Realism developed at the beginning of the twentieth century in the United States by its emphasis on empirical work in international law, as opposed to national judges' decisions and the changed factual context.

New Legal Realism reinforces the underlying reasons for embarking on the present thesis. The impetus was a gap in human rights law, caused by changed circumstances on the ground. This called for an examination of the interplay between law and its social

[1] The inaugural New Legal Realism conference was held in 2004 at the University of Wisconsin Law School: Garth, B. & Mertz, E. (2016). Introduction: New Legal Realism at Ten Years and Beyond, *UC Irvine Law Review*, 6, pp.121-136, p.121.
[2] Shaffer, G. (2015). The new legal realist approach to international law, *Leiden Journal of International Law*, 28 (2), pp.189-210, pp.196; Macaulay, S. (2005). The New versus the Old Legal Realism: 'Things Ain't What They Used to Be', *Wisconsin Law Review*, 2005 (2), pp.365-403, pp.385ff.

context, and between law and its application in practice. This will not only lead to a better understanding of the current situation, but also to potential solutions or ways to approach the situation on the ground through law informed by experience.

Similarly, the case study method used to investigate two different state policies on collective punishment provides an understanding of collective punishment's social contexts and its interaction with the legal regulation thereof on the international level. Case studies enable the assessment of particular phenomena, in the present instance collective punishment, in real life contexts; and they generate knowledge which could be of value in comparable future situations. The historical background of the case studies might also enable the indication of trends and a test of proposed theories.

The following chapter starts with remarks on how New Legal Realism developed from American Legal Realism and its underlying pragmatist philosophy. The relationship between New Legal Realism and positivism, natural law and idealism are then discussed. These two parts are important in situating New Legal Realism and delineating it from other theoretical approaches. Core features of New Legal Realism according to Shaffer are outlined in order to define the approach's scope and its advantages. Finally, the case study method and its value for the present thesis are highlighted.

2.2 The development of New Legal Realism and its underlying principles

In the following, the origins of New Legal Realism and its basic tenets are discussed. It will be argued that New Legal Realism endorses several ideas of American Legal Realism such as the idea of law in action and the consideration of law's context, but that the overall situation and the social context today is not comparable. The reasons why its problem-solving oriented stance and its fallibility considerations appear to be particularly useful in a combination with empiricism are outlined in terms of philosophical pragmatism. In the end, both stances emphasise the importance of law in context and of reflexivity in order to create solutions for ends-in-view.

2.2.1 'Old' legal realism

As the name indicates, 'New' Legal Realism as understood by Shaffer is built on a predecessor that could be named 'old' or American Legal Realism. This stream of legal realism was developed in the early twentieth century through the work of prominent representatives such as Karl Llewellyn (1893-1962), Underhill Moore (1879-1949) or

Walter Wheeler Cook (1873-1943).[3] After a short introduction on legal realism in general, Llewellyn's work will be discussed in more detail below. This focus is due to Shaffer's emphasis on Llewellyn, which singled him out as 'arguably the central figure in legal realism'.[4] In addition, the focus on Llewellyn as one figure in legal realism stems from the heterogeneity of legal realists. As Llewellyn himself argued, they did not constitute a unified group and therefore an outline of the differing tenets of several legal realists besides their common features would be too space-consuming.[5]

A claim made by early legal realists was that law was indeterminate, meaning that legal reasons alone could neither justify unique decisions nor explain why judges decided in the way they did. Legal reasons were seen as insufficient to explain the decision-making process. Llewellyn addressed this issue by his take on precedents. He argued that precedents could be interpreted in many different ways, each of which would be 'legitimate'. In distinguishing those different ways, he separated 'strict' from 'loose' readings of precedents, whereby the strict reading focusses on the facts of the case and the loose reading abstracts a case from its facts in order to extract a general rule.[6]

This indeterminacy has influenced legal realism's core claim that law on its own is insufficient to explain the decision-making process – one has to look further to explore the underlying facts of a case. The legal realism of the 1920s was concerned with national law and the decisions of courts made by judges – however, the finding that one has to take other sources in addition to law into account when reviewing decisions and how they were made, could be seen as an assumption valid in the international law context as well.[7]

Amongst others, Llewellyn has written on the discrepancies between law and the outcome of decision-making in practice. He asked for the consideration of the influence of other factors of society on this process and on judges' behaviour: 'The question is how, and how much, and in what direction, do the accepted rule and the practice of decision diverge? More: how, and how much, in each case? You cannot generalize on this, without

[3] Leiter, B. (2005). American Legal Realism, in Golding, M.P. & Edmundson, W. A. (eds.). *The Blackwell Guide to the Philosophy of Law and Legal Theory*. Oxford, Blackwell, pp.50-66, pp.50ff.
[4] Shaffer, G. (2015) *supra* note 2, p.192.
[5] Tamanaha, B.Z. (2009). Understanding Legal Realism, *Texas Law Review*, 87, pp.731-785, pp.737f, 780f; Llewellyn, K.N. (1931). Some Realism About Realism - Responding to Dean Pound, *Harvard Law Review*, 44, pp.1222-1264, pp.1233ff.
[6] Leiter, B. (2005) *supra* note 3, pp.51f; Llewellyn, K.N. (1960). *The Bramble Bush: The Classic Lectures on the Law and Law School*. Oxford, Oxford University Press, pp.55ff.
[7] Leiter, B. (2005) *supra* note 3, pp.52f; Shaffer, G. (2015) *supra* note 2, pp.196ff.

investigation.' [8] Llewellyn was referring to empirical studies of behaviour: '[T]he significance of the particular rule will appear only after the investigation of the vital, focal, phenomenon: the behavior. And if an empirical science of law is to have any realistic basis, any responsibility to the facts, I see no escape from moving to this position.'[9] In pointing to other important considerations on which judicial decisions are built, legal realists were recognising the causal importance of underlying extra-legal factors. These are used to explain and justify judicial decisions.[10]

As discussed above, 'old' legal realism was mainly concerned with judicial decision-making. This limited scope separates it from New Legal Realism according to Shaffer. New Legal Realism, in particular regarding international law, is not confined to national judicial decisions, but encompasses a broad range of factual contexts and actors. It includes not only judicial decision-making on the international level via international courts and tribunals, but also acts carried out by states, international organisations or groups outside the court-context. For this reason, New Legal Realism enables the study of policy approaches in relation to international legal provisions and their mutual impact on each other seen from the angle of the different actors involved.[11]

Although legal realism is considered American, Llewellyn was influenced in developing this approach by European thinkers such as Rudolf von Jhering (1818-1892) and Eugen Ehrlich (1862-1922). Llewellyn's theoretical work was written under the influence of Eugen Ehrlich and his sociology of law and his German and Austrian influences are due to several visits to Germany where he first travelled as a student and later to teach at universities.[12]

Before Llewellyn refined his theory in the 1920s and 1930s, von Jhering published the work *Der Kampf ums Recht (The Struggle for Law)* in 1872.[13] His view represented a break from the prevailing historical school of law under Savigny. After stating in *The Struggle for Law* that law should be seen as a conflict, a struggle between real interests,

---

[8] Llewellyn, K.N. (1930). A Realistic Jurisprudence – The Next Step, *Columbia Law Review*, 30 (4), pp.431-465, p.444.
[9] Llewellyn, K.N. (1930) *supra* note 8, p.444.
[10] Leiter, B. (2005) *supra* note 3, pp.56ff; Llewellyn, K.N. (1960) *supra* note 6, pp.70f; Llewellyn, K.N., Adler, M.J. & Cook, W.W. (1931). Law and the Modern Mind: A Symposium, *Columbia Law Review*, 31 (1), pp.82-115, pp.83f.
[11] Shaffer, G. (2015) *supra* note 2, pp.197f.
[12] Grise, J.E., Gelter, M. & Whitman, R. (2012). Rudolf von Jherings's influence on Karl Llewellyn, *Tulsa Law Review*, 48 (1), pp.93-116, pp.98ff.
[13] Von Jhering, R. (1915). *The Struggle for Law*. 2nd edition. Translated from the 5th German edition by Lalor, J.J. Chicago, Callaghan and Company.

von Jhering completed his philosophy with the work *Der Zweck im Recht (Law as a Means to an End),* which interprets law as a tool for reconciling conflicting interests by studying law in practice.[14] As Seagle said about von Jhering's approach: 'The world of legal concepts was not self-contained. Society would not wait for the jurist to "construe" its needs.'[15] In addition to von Jhering's impact on Llewellyn, his broader influence is going to be discussed later on in relation to New Legal Realism's key attributes.[16]

2.2.2 Philosophical pragmatism

Pragmatism is a philosophical tradition developed in the United States around the late nineteenth and the early twentieth century. Major figures representing the stream are Charles Sanders Peirce (1839–1914), William James (1842–1910) and John Dewey (1859–1952).[17] Shaffer's account of New Legal Realism is based on philosophical pragmatism, and Dewey in particular appears to have been of considerable influence on his approach.

According to Shaffer, New Legal Realism is 'empirical and problem-centred in the Deweyan tradition of legal pragmatism'.[18] The combination of, as Shaffer calls it, 'backward-looking' empiricism and 'forward-looking' problem-solving enriches understanding of the operation of law and the experience gathered from it in order to approach new and changing factual settings.[19] As Dewey put it: 'The maintenance of life is a continuous affair. It involves organs and habits acquired in the past. Actions performed have to be adapted to future conditions or death will speedily ensue.'[20]

Philosophical pragmatism in this sense means discussing law in its social context guided by the idea of solving encountered problems not in a final way, but in a way suitable for

---

[14] Von Jhering, R. (1913). *Law as a Means to an End*. Translated by Husik, I. and edited by Drake, J.H., Lamm, H. & Geldart, W.M. Boston, Boston Book Company; Grise, J.E., Gelter, M. & Whitman, R. (2012) *supra* note 12, pp.107ff.
[15] Seagle, W. (1945). Rudolf von Jhering: Or Law as a Means to an End, *University of Chicago Law Review,* 13 (1), pp.71-89, p.83, pp.81ff.
[16] Grise, J.E., Gelter, M. & Whitman, R. (2012) *supra* note 12, pp.114ff; Whitman, J. (1987). Commercial Law and the American Volk: A Note on Llewellyn 's German Sources for the Uniform Commercial Code, *Yale Law Journal*, 97, pp.156-175, p.59; Shael, H. (1982). Llewellyn the Civilian: Speculations on the Contribution of Continental Experience to the Uniform Commercial Code, *Tulane Law Review*, 56 (4), pp.1125-1170, pp.1162f; Seagle, W. (1945) *supra* note 15, pp.87ff.
[17] Hookway, C. (2013). Pragmatism, Stanford Encyclopedia of Philosophy, online available at: http://plato.stanford.edu/entries/pragmatism/ (accessed at 22/02/2016).
[18] Shaffer, G. (2015) *supra* note 2, pp.189; Hildebrand, D. (2013). Dewey's pragmatism: instrumentalism and meliorism, in Malachowski, A. (ed.). *The Cambridge Companion to Pragmatism*. Cambridge, Cambridge University Press, pp.55-82, pp.58ff.
[19] Shaffer, G. (2015) *supra* note 2, pp.194; Dewey, J. (1916). *Essays in Experimental Logic*. Chicago, University of Chicago Press, pp.343ff.
[20] Dewey, J. (1938). *Logic – The Theory of Inquiry*. New York, Henry Holt and Company, p.150.

the present situation and open to revision if required by changing circumstances. It supports a view of law as ongoing process instead of irrefutable and final.[21] As Tamanaha said about James' and Dewey's stance: 'There is no absolute'.[22] This statement underlines the pragmatist idea of fallibilism – the acceptance that "truths" gathered from experience today can be changed and replaced by another "truth" suitable for a new situation in the future.[23] Reflecting on legal concepts in light of their social context could prove useful in refining and developing ideas, which means challenging their validity in their fluid environment.[24]

In addition to the relative understanding of "truths", Dewey pointed at the complex relationship between empirical and scientific thinking. He acknowledged the risks of empirical inquiry, as it could lead to false beliefs and it lacks capacity to accommodate new situations. However, by combining empirical work with a forward-looking problem-solving aspect, these impasses can be overcome. For this reason, reflexivity on the interaction between those two strands could lead to fruitful outcomes.[25] As Lang has argued: 'In this context, reflexivity includes the recursive process of monitoring the effects of the law, and continually calling into question the law itself in light of these observations - not just to increase its effectiveness, but much more importantly to constantly rethink the law's underlying objectives, values, techniques and institutional architecture.'[26]

2.3 The relation between New Legal Realism and other theoretical approaches to law

Choosing any theoretical approach means simultaneously excluding others, which makes it necessary to briefly explain the delineation of New Legal Realism from other approaches and the reasons why it appears to be better suited. As with every legal theory, there are many different streams within one approach, each having their own core features and emphases.[27] Therefore, positivism, natural law and idealism are discussed

[21] Shaffer, G. (2015) *supra* note 2, pp.193ff.
[22] Tamanaha, B.Z. (1997). *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law*. Oxford, Oxford University Press, p.26.
[23] Hookway, C. (2012). *The Pragmatic Maxim: Essays on Peirce and Pragmatism*. Oxford, Oxford University Press, pp.39ff; Thomas, E.W. (2005). *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles*. Cambridge, Cambridge University Press, pp.308f.
[24] Tamanaha, B.Z. (1997) *supra* note 22, pp.29ff.
[25] Dewey, J. (1910). *How we think*. New York, D.C. Heath and Company, pp.145ff.
[26] Lang, A. (2015). New legal realism, empiricism, and scientism: the relative objectivity of law and social science, *Leiden Journal of International Law*, 28 (2), pp.231-254, p.240, pp.233ff.
[27] On positivism see eg: Schauer, F. (2015). The Path-Dependence of Legal Positivism, *Virginia Law Review*, 101, pp.957-976; Priel, D. (2015). Toward Classical Legal Positivism, *Virginia Law Review*, 101, pp.978-1022; on natural law see eg: George, R.P. (1999). *In Defense of Natural Law*.

focussing mainly on one of their proponents – Hans Kelsen (1881-1973), Ronald Dworkin (1931-2013) and Immanuel Kant (1724–1804) respectively. This limitation is intended to outline basic features of each approach while enabling a slightly deeper exploration of one variant.

The choice of positivism, natural law and idealism is based on Tamanaha's concept of 'three pillars of jurisprudence' and on the notable idealism-realism divide.[28]

2.3.1 Positivism

On the international level, a positivist view conceives law as comprehensive system of rules deriving from state will.[29] This system separates 'law as it is from law as it ought to be'.[30] As Kelsen put it: '[T]he specific science of law, the discipline usually called jurisprudence, must be distinguished from the philosophy of justice, on the one hand, and from sociology, or cognition of social reality, on the other.'[31] Kelsen called the examination of law separate from all other disciplines 'pure theory of law' and focused on the analysis of law in a general and abstract mode.[32] The causes for the adoption of legal provisions or their effects in particular cases are excluded from this view, even though Kelsen identifies such research as 'legal sociology'. Nevertheless, he insisted on a strict differentiation between law and nature.[33]

Clearly, as acknowledged by Shaffer, a review of positive rules will build the starting point for much New Legal Realist research as well. Since their meaning, application and change is at stake their current content has to be evaluated. However, New Legal Realism does not stop after this evaluation but rather uses it as the impetus to discuss law's

---

Oxford, Oxford University Press; Finnis, J. (1980). *Natural Law and Natural Rights*. Oxford, Clarendon Press; Fuller, L. (1969). *The Morality of Law*. New Haven, Yale University Press; on idealism see eg: Hume, D. (2000). *An Enquiry concerning Human Understanding*. Edited by Beauchamp, T.L. Oxford, Clarendon Press; Berkeley, G. (1948–1957). *The Works of George Berkeley*. Edited by Luce, A.A. & Jessop, T.E. (9 Volumes). London, Thomas Nelson and Sons.

[28] Tamanaha, B.Z. (2015). The Third Pillar of Jurisprudence: Social Legal Theory, *William & Mary Law Review*, 56 (6), pp.2235-2277 (Shaffer is referring to this theory: Shaffer, G. (2015) *supra* note 2, pp.190f).

[29] Simma, B. & Paulus, A.L. (1999). The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View, *American Journal of International Law*, 93, pp.302-316, p.304.

[30] Hart referring to Austin and Bentham: Hart, H.L.A. (1958). Positivism and the Separation of Law and Morals, *Harvard Law Review,* 71 (4), pp.593-629, p.594.

[31] Kelsen, H. (1941). The Pure Theory of Law and Analytical Jurisprudence, *Harvard Law Review*, 55 (1), pp.44-70, p.44.

[32] Priel, D. (2015) *supra* note 27, pp.1011f; Kelsen, H. (1992). *Introduction to the Problems of Legal Theory: The Pure Theory of Law*. Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law by Litschewski Paulson, B. & Paulson, S.L. with an Introduction by Paulson, S.L. Oxford, Oxford University Press.

[33] Kelsen, H. (1992) *supra* note 32, pp.7ff.

development and adaptation to changing social contexts. In this regard it differs from the traditional positivist approach as it is concerned with the effects of law in practice.[34]

2.3.2 Natural Law

According to George, natural law theories propose 'to identify principles of right action – moral principles – specifying the first and most general principle of morality, namely, that one should choose and act in ways that are compatible with a will towards integral human fulfillment.'[35] Human fulfilment defined as goods such as life, knowledge, or friendship, guides human actions. Human actions, in turn, are manifestations of human capacities pre-determined by human nature.[36] The human goods pursued by human action are defined by their value and their significance for human fulfilment is determined by an essentially moral decision. Consequently, morality is part of law, as law aims to make legal provisions for basic human goods.[37]

One famous as well as disputed figure linked to natural law theories by his account on morality is Ronald Dworkin.[38] In his interpretive theory he defined his understanding of law as follows: 'In my view, legal argument is characteristically and pervasively moral argument. Lawyers must decide which of competing sets of principles provide the best – morally most compelling – justification of legal practice as a whole.'[39] Even though Dworkin's theory is about understanding what 'best justifies' legal practice, it describes the – as he calls it – 'philosophical' decision a judge has to make when evaluating competing legal arguments and their abstract foundations.[40]

Again, similarly to positivism, New Legal Realism differs from natural law theories in its orientation to practice. Experience gathered from empirical research forms the basis for potential problem-solving approaches. It is not about the significance of moral values for

---

[34] Shaffer, G. (2015) *supra* note 2, pp.190ff.
[35] George, R.P. (2008). Natural Law, *Harvard Journal of Law and Public Policy*, 31 (1), pp.171-196, p.172; George, R.P. (1999) *supra* note 27, pp.102ff.
[36] Finnis, J. (2012). Natural Law Theory: Its Past and its Present, *American Journal of Jurisprudence*, 57, pp.81-102, pp.84ff.
[37] Finnis, J. (2011). *Natural Law and Natural Rights.* 2nd edition. Oxford, Oxford University Press, pp.23ff.
[38] Letsas, G. (2007). Monism, Interpretivism, and Law's Aim, in Freeman, M. & Harrison, R. (eds.). *Law and Philosophy*. Oxford, Oxford University Press, pp.49-59, pp.49ff.
[39] Dworkin, R. (2006). Justice in Robes. London, Harvard University Press, p.144; Green, M.S. (2007). Dworkin v. the Philosophers: A Review Essay on Justice in Robes, *University of Illinois Law Review*, 5, pp.1477-1504, pp.1480ff.
[40] Dworkin, R. (1986). *Law's Empire*. Cambridge, Harvard University Press, pp.90ff; Donnelly-Lazarov, B. (2012). Dworkin's Morality and its Limited Implications for Law, *Canadian Journal of Law and Jurisprudence*, 25 (1), pp.79-95, p.82.

law creation, or any philosophical decisions made by judges built on *a priori* or pre-determined attitudes of what is morally right or valid.[41]

2.3.3 Idealism

Shaffer argues that realism should not be reduced to 'universalist reason of ideal liberalist theories'.[42] The realist-idealist divide is not limited to New Legal Realism but concerns the basic foundation of both approaches. Whereas realism is predicated on the assumption that the world exists independently from our knowledge of it as an objective reality that can be studied and known by experience, idealism is concerned with abstract ideas and concepts based on the mind independent from the outside world but rather constituting it.[43]

Kant's transcendental idealism represents one variety of the latter idea. Kant saw the outside world as perceived by the mind, as existing only because of the knowledge of it. In support for *a priori* knowledge of the world, he assumed that this world would conform to abstract non-empirical concepts developed in the mind.[44] Therefore, the appearance of things is emphasised instead of the things in themselves – an assumption that is also applied to time and space: 'If, therefore, space (and time as well) were not a mere form of your intuition that contains *a priori* conditions under which alone things could be outer objects for you, which are nothing in themselves without these subjective conditions, then you could make out absolutely nothing synthetic and *a priori* about outer objects.'[45]

In Dewey's words: 'Those who come in direct contact with things and have to adapt their activities to them immediately are, in effect, realists ; those who isolate the meanings of these things and put them in a religious or so-called spiritual world aloof from things are, in effect, idealists.'[46] This separation or deliberate abstraction from the real world and social contexts in idealist thinking could lead to blind spots as identified by Olkowski:

---

[41] Shaffer, G. (2015) *supra* note 2, pp.190f.
[42] Shaffer, G. (2015) *supra* note 2, p.206.
[43] Leiter, B. (1996). Legal realism, in Patterson, D. (ed.). *A Companion to Philosophy of Law and Legal Theory.* Oxford, Blackwell, pp.261-279, pp.262ff; Somek, A. (1996). German legal philosophy and theory in the nineteenth and twentieth century, in Patterson, D. (ed.). *A Companion to Philosophy of Law and Legal Theory.* Oxford, Blackwell pp.343-354, pp.343ff.
[44] Dicker, G. (2004). *Kant's Theory of Knowledge: An Analytical Introduction*. Oxford, Oxford University Press, pp.31ff.
[45] Kant, I. (2009). Critique of Pure Reason. Translated and edited by Guyer, P. & Wood, A.W. Cambridge, Cambridge University Press, p.171.
[46] Dewey, J. (1930). *Democracy and Education*. New York, Macmillan, p.401.

'[A]s an idealism … liberalism seriously underestimates the realities of power and social determination.'[47]

The present thesis addresses a gap in human rights law and its effects in social context. The examination of state policies in relation to the relevant international law and the various actors involved could not be undertaken without the consideration of the outside world; therefore, New Legal Realism appears to be better suited than idealist approaches to examine the questions posed here.

2.4 Shaffer's key attributes of New Legal Realism

Shaffer highlights six key features that define New Legal Realism: Empiricism, philosophical pragmatism, processualism, transnationalism, conditional theorising and reason-giving in tension with power. In outlining each of them, he emphasises that they constitute a movement and are not limited to a particular school.[48] These six attributes are discussed below in order to define the content and scope of New Legal Realism.

It will be argued that the attribute of processualism is better understood as a subordinate feature of pragmatism, and that mentioning it separately distracts from the core argument of New Legal Realism. In addition, even though conditional theorising as an attribute seems appropriate in terms of its content, it could be understood as a feature of pragmatism as well. Finally, the attribute 'reason-giving in tension with power' primarily points to the problematic relationship of idealism with this issue, not with critical theories.

2.4.1 Empiricism

According to Shaffer and Ginsburg, 'social scientists view method as the use of methodological tools to assess how, and under what conditions, international law works in practice'.[49] Empirical work is defined as using qualitative and quantitative methods systematically.[50] While quantitative methods are testing hypotheses against statistical data, qualitative methods are concerned with specific social contexts, making the

[47] Olkowksi, D. (2005). The Myth of the Individual, *Dialogue and Universalism*, 15 (3/4), pp.9-18, p.15 (Olkowski is referring here to MacKinnon's work: MacKinnon, C. (1989). *Toward a Feminist Theory of the State*. Cambridge, Harvard University Press).
[48] Shaffer, G. (2015) *supra* note 2, pp.200f; Llewellyn, K.N. (1931) *supra* note 5, p.1225 ('We are no spokesmen for a school.').
[49] Shaffer, G. & Ginsburg, T. (2012). The Empirical Turn in International Legal Scholarship, *American Journal of International Law*, 106, pp.1-46, p.3.
[50] Shaffer, G. & Ginsburg, T. (2012) *supra* note 49, pp.3ff; on the differences between empirical legal studies and New Legal Realism in terms of qualitative and quantitative research see: Mertz, E. & Suchman, M. (2010). Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism, *Annual Review of Law and Social Science*, 6, pp.555-579.

research outcomes less easy to generalise but involving an in-depth analysis of the situation at hand, which is often not possible with quantitative methods. Qualitative methods are suitable to explore behavioural changes and ways in which people and other relevant actors are affected by rules applicable to them.[51]

Shaffer and Ginsburg's study of the empirical turn in international legal scholarship highlights the importance and usefulness of empirical work in this area of law, adding to the reasons for choosing this approach for the present thesis. Furthermore, empirical research contributes to the evaluation of experience gathered from social context and its application to law and legal development – core concepts of New Legal Realism.[52] In addition, they refer to case studies as method of qualitative empirical research which conforms with the structure of the thesis and its significant reliance on two different case studies in order to explain how law develops and changes over time.[53] The nature of case studies as empirical research method will be discussed in more detail below.

2.4.2 Philosophical pragmatism

As already mentioned above, New Legal Realism is based on philosophical pragmatism, particularly Dewey's understanding of the concept. According to Dewey, '[f]or the purposes of a logic of inquiry into probable consequences, general principles can only be tools justified by the work they do. They are means of intellectual survey, analysis, and insight into the factors of the situation to be dealt with. Like other tools they must be modified when they are applied to new conditions and new results have to be achieved.'[54] The fallibilist take on the empirical study of law in social context is aimed at resolving current problems. As admitted by this approach, the solutions proposed are

---

[51] Epstein, L. & Martin, A.D. (2010). Quantitative Approaches to Empirical Legal Research, in Cane, P. & Kritzer, H.M. (eds.). *The Oxford Handbook of Empirical Legal Research*. Oxford, Oxford University Press, pp.902-925; Webley, L. (2010). Qualitative Approaches to Empirical Legal Research, in Cane, P. & Kritzer, H.M. (eds.). *The Oxford Handbook of Empirical Legal Research*. Oxford, Oxford University Press, pp.927-950; Lawless, R.M., Robbennolt, J.K. & Ulen, T.S. (2009). *Empirical Methods in Law*. New York, Aspen.

[52] Nourse, V. & Shaffer, G. (2014). Empiricism, Experimentalism, and Conditional Theory, *Southern Methodist University Law Review*, 67, pp.141-184, pp.153ff; Nourse, V. & Shaffer, G. (2009). Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory, *Cornell Law Review*, 95, pp.61-138, pp.79ff.

[53] Shaffer, G. & Ginsburg, T. (2012) *supra* note 49, pp.26f: For example, they refer to historical qualitative case studies such as Michel Veuthey, M. (2003). From Solferino to Kosovo: The Contribution of International Humanitarian Law to International Security, in Carey, J., Dunlap, W.V. & Pritchard, R.J. (eds.). *International Humanitarian Law: Origins*. Leiden, Martinus Nijhoff, pp.207-238.

[54] Dewey, J. (1924). Logical Method and Law, *Cornell Law Quarterly*, 10 (1), pp.17-27, p.26.

not final, but have to be reconsidered alongside changing circumstances and changing social contexts.[55]

The gap in human rights law highlighted in the present thesis by reference to case studies and their different social contexts corresponds with the philosophical pragmatists' notion of fallibility and reflexivity that underpin New Legal Realism.[56]

2.4.3 Processualism

A criterion related to the reflexivity of pragmatism is processualism. Shaffer understands legal processes as 'viewed not in ideal terms, but rather empirically and pragmatically in their imperfect and dynamic actuality'.[57] However, as shown by this quote, Shaffer himself does not seem to attach much distinct meaning or content to processualism. In my opinion, processualism does not constitute a separate key attribute of New Legal Realism. It is rather a feature of philosophical pragmatism and empiricism expressed in the reflexivity of law in accordance with changing social contexts and knowledge that evolves steadily through experience, not being rigid and final. In addition, the mention of legal process theory appears to create rather more confusion than clarification in that it refers to several different strands of legal theory,[58] which in my opinion do not advance the aims of New Legal Realism, such as constructivism.[59]

2.4.4 Transnationalism

Transnationalism represents the key feature of New Legal Realism to which the movement owes much of its name. In other words, New Legal Realism differs from American Legal Realism due to the different social contexts and challenges that

---

[55] Shaffer, G. (2015) *supra* note 2, pp.201ff; Lang, A. (2015) *supra* note 26, pp.232ff.
[56] Erlanger, H. et al (2005). New Legal Realism Symposium: Is it Time for a New Legal Realism?: Foreword, *Wisconsin Law Review*, 2005 (2), pp.335-364, pp.356ff; McEvoy, A.F. (2005). A New Legal Realism for Legal Studies, *Wisconsin Law Review*, 2005 (2), pp.433-454, pp.434ff.
[57] Shaffer, G. (2015) *supra* note 2, p.204.
[58] Duxbury describes legal process as a reaction to realism and the orientation of two of its main proponents, Hart and Sacks as 'utilitarian *laissez-faire* liberalism': Duxbury, N. (1997). *Patterns of American Jurisprudence*. Oxford, Oxford University Press, pp.257, 233ff; Hart, H.M. Jr. & Sacks, A.M. (1994). *The Legal Process: Basic Problems in the Making and Application of Law*. New York, Foundation Press; for reference to liberalism in legal process theory in contrast to Shaffer's stance against ideal liberal theory see eg: Eskridge, W.N. Jr. (1994). *Dynamic Statutory Interpretation.* London, Harvard University Press; Bix, B.H. (2015). *Jurisprudence: Theory and Context*. 7th edition. London, Sweet & Maxwell, pp.281f.
[59] Shaffer refers to social constructivism as demonstrated by Brunée and Toope: Brunée, J. & Toope, S.J. (2010). Legitimacy and Legality in International Law: An International Account. Cambridge, Cambridge University Press; Brunée, J. & Toope, S.J. (2013). Constructivism and International Law, in Dunoff, J.L. & Pollack, M.A. (eds.). *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*. Cambridge, Cambridge University Press, pp.119-145; for a critique of this stance see eg: Kurki, M. & Sinclaire, A. (2010). Hidden in plain sight: Constructivist treatment of social context and its limitations, *International Politics*, 47, pp.1-25.

dominate the twenty-first century, as opposed to issues that were of concern almost a hundred years ago. American Legal Realism was mainly concerned with the decision-making of judges on the national level, and since the international legal institutions such as international courts and tribunals as well as international organisations only emerged in full force later, they were not so much concerned with the international level.[60]

However, today even national law could benefit from a transnational perspective since cooperation with other states and international organisations is influencing the states' legal regimes as well. For this reason, national and international law are mutually affecting each other in a transnational context.[61] As Shaffer says: '[I]nternational law is best viewed in transnational terms because one cannot understand international law empirically outside of the interaction of international, transnational, and national institutions and actors, be they public or private.'[62]

This emphasis on the interaction of actors on the national and international level fits well with the thesis' interplay of case studies located in two different states, their national situation and the international legal regulations applicable to them.

2.4.5 Conditional theorising

New Legal Realism undertakes empirical research in order to explore the conditions under which law – in this case international law – shapes the behaviour of its addressees and has an impact on their decision-making. From this standpoint, New Legal Realism understands law's normativity in a conditional sense.[63] Furthermore, conditional theorising allows for a more context-related and open perspective on law, as it dismantles "either-or" debates in favour of a more nuanced consideration of several overlapping areas of concern, such as the intersection of law and politics.[64]

Nourse and Shaffer ascribe two aspects to conditional theory, an immediate rational aspect on facts and a deeper and cognitive aspect regarding concepts. The rational aspect

---

[60] Shaffer, G. (2015) *supra* note 2, pp.196ff; Merry, S.E. (2006). New Legal Realism and the Ethnography of Transnational Law, *Law & Social Inquiry,* 31 (4), pp.975-995, pp.977ff; Alter, K.J. (2014). *The New Terrain of International Law: Courts, Politics, Rights.* Princeton, Princeton University Press, pp.3ff.
[61] Shaffer, G. (2015) *supra* note 2, pp.204f; Shaffer, G. (2013). Transnational Legal Ordering and State Change, in Shaffer, G. (ed.). *Transnational Legal Ordering and State Change*. Cambridge, Cambridge University Press, pp.1-22, pp.3ff.
[62] Shaffer, G. (2015) *supra* note 2, p.204.
[63] Shaffer, G. (2015) *supra* note 2, pp.205f; Holtermann, J.V.H. & Madsen, M.R. (2015). European New Legal Realism and international law: how to make international law intelligible, *Leiden Journal of International Law*, 28 (2), pp.211-230, pp.227f.
[64] Nourse, V. & Shaffer, G. (2014) *supra* note 52, pp.151ff.

asks when law matters and what conditions have led to this effect. This question is addressed by empirical research on the specific context underlying the application or non-application of law and its resulting importance and behaviour-shaping ability. In addition, the experience gathered from the empirical data could be used in order to develop strategies adapted to the context as well as tools to modify the context responsible for a certain effect of law.[65] The cognitive aspect relates to concepts developed from empirical findings. However, as concepts could constrain and limit the scope of actions and available alternatives, they have to be reviewed in light of the social contexts they address and be aware of their own fallibility.[66]

Building on the above, conditional theorising is based on the philosophical pragmatist idea of 'ends-in-view'.[67] As put by Dewey: 'Only recognition in both theory and practice that ends to be attained (ends-in-view) are of the nature of hypotheses and that hypotheses have to be formed and tested in strict correlativity with existential conditions as means, can alter current habits of dealing with social issues.'[68]

Recognising that law and legal concepts are in simultaneous development in the context they address fits well with the thesis' presentation of case studies involving state behaviour's departure from law and ways in which international law could tackle such a gap. However, as already mentioned with reference to the key attribute processualism, conditional theorising might as well be considered as an aspect already included in philosophical pragmatism. Although I generally agree with the tenets of conditional theorising seen in this pragmatic way, it does not seem necessary to add it as an explicit separate feature of New Legal Realism.

2.4.6 Reason-giving in tension with power

The assumption that law operates in isolation, guided neither by power nor by reason, is based on the relation between those two factors and their influence on law. In this regard, New Legal Realism supports an approach situated in the middle ground between universalist ideas of reason guiding decisions and critical ideas reducing law to an instrument of politics.[69]

---

[65] Nourse, V. & Shaffer, G. (2014) *supra* note 52, pp.152f.
[66] Nourse, V. & Shaffer, G. (2014) *supra* note 52, pp.153f.
[67] Nourse, V. & Shaffer, G. (2014) *supra* note 52, pp.153; Dewey, J. (1930) *supra* note 46, pp.117ff; Dewey, J. (1938) *supra* note 20, pp.487ff.
[68] Dewey, J. (1938) *supra* note 20, p.497.
[69] Shaffer, G. (2015) *supra* note 2, pp.206f; regarding critical perspectives I am not as concerned as about the issue of universalist reason: For instance, bear in mind New Legal Realism's relationship to critical perspectives, in particular regarding empirical research see eg: Shaffer,

Addressing universalist approaches to power and reason in a liberal and idealist manner, MacIntyre has identified the following line of thought deriving from the period of Enlightenment: 'So, it was hoped, reason would displace authority and tradition. Rational justification was to appeal to principles undeniable by any rational person and therefore independent of all those social and cultural particularities which the Enlightenment thinkers took to be the mere accidental clothing of reason in particular times and places.'[70] However, he continued in saying that these thinkers, such as Rousseau and Kant, were not able to define what these undeniable principles were and therefore 'the legacy of the Enlightenment has been the provision of an ideal of rational justification which it has proved impossible to attain.'[71] These short passages indicate the difficulties liberal idealist approaches encounter in terms of the tension between reason and power. According to Hurrell, this problem might stem additionally from a neglect of the power debate both in general and in particular on the international level.[72]

Amongst others, Shaffer refers to von Jhering's *Struggle for Law* to approach the tension between reason and power. Von Jhering conceives law as the product of a constant struggle between parties with different interests and rights conceptions. Interestingly, the English translation of von Jhering's work opens with the statement that '[t]he life of the law is a struggle,—a struggle of nations, of the state power, of classes, of individuals.'[73] In its original German version however, the term 'nation' understood as state is not used (*Nation/Staat*), but the term 'peoples' (*Völker*) and he refers to the struggle of peoples as well as individuals for their rights several times throughout the text: '[A]nd every legal right — the legal rights of a whole nation [*people/Volk*] as well as

G. (2015) *supra* note 2, p.196; Wynn, D. Jr. & Williams, C.K. (2012). Principles for Conducting Critical Realist Case Study Research in Information Systems, *MIS Quarterly*, 36 (3), pp.787-810; Trubek, D. (1984). Where the Action Is: Critical Legal Studies and Empiricism, *Stanford Law Review,* 36, pp.575-622; Trubek, D. & Esser, J. (1989). Critical Empiricism in American Legal Studies: Paradox, Program or Pandora's Box?, *Law and Social Inquiry,* 14, pp.3-52; Harrington, C. & Yngvesson, B. (1990). Interpretive Sociolegal Research, *Law and Social Inquiry,* 15 (1), pp.135-148; Holtermann, J.V.H. & Madsen, M.R. (2015) *supra* note 63; Dezalay, Y. & Madsen, M.R. (2012). The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law, *Annual Review of Law and Social Science*, 8, pp.433-452. 436.

[70] MacIntyre, A. (1988). *Whose Justice? Which Rationality?.* Notre Dame, University of Notre Dame Press, p.6.

[71] MacIntyre, A. (1988) *supra* note 70, p.6.

[72] He says that this neglect has led to a 'strikingly apolitical and far too cosy a view of institutions and global governance' (p.33): Hurrell, A. (2005). Power, institutions and the production of inequality, in Barnett, M. N. & Duvall, R. (eds.). *Power in Global Governance*. Cambridge, Cambridge University Press, pp.33-58.

[73] Von Jhering, R. (1915) *supra* note 13, p.1.

those of individuals —supposes a continual readiness to assert it and defend it. The law is not mere theory, but living force.'[74]

If these statements are translated in today's situation, the mention of group rights in combination with von Jhering's exhortation not to repeat the mistakes of history again, could be interpreted as a call to consider groups as actors on the international plane and their interests as contributing to the shaping of social context. Von Jhering's *Struggle for Law* is guided by existing social forces, by group interests and competing powers. With his call to everyone to actively participate in the acquisition and enforcement of rights he sees law in the light of social change.[75] The active participation in social change, this struggle for justice, could be used to address issues of power and balance competing interests.[76]

Groups and collective rights constitute a major part of the thesis since the case studies are based on the collective punishment of particular groups – Palestinian and Chechen families. Consequently, the consideration of their ability to act, to participate in social change and have their rights enforced and strengthened corresponds well with the awareness of the tension between power and reason, in particular on the international level.

2.5 Case studies as legal research method

Yin defines case study as 'an empirical inquiry that investigates a contemporary phenomenon (the "case") in depth and within its real-world context, especially when the boundaries between phenomenon and context may not be clearly evident'.[77] Case studies are employed for describing, analysing or explaining one or several phenomena and can be used for theory-building as well as theory-testing.[78] According to Patton and

[74] Von Jhering, R. (1915) *supra* note 13, pp.1f; Jhering von, R. (1997). *Der Kampf um's Recht.* (The Struggle for Law). 18th edition. Edited and introduction by Ermacora, F. Wien, Propyläen Verlag, p.61; however, von Jhering's use of the terms 'Staat' and 'Nation' elsewhere, supports the interpretation that where he uses 'Völker', he means peoples and not states or nations.
[75] Schelsky, H. (1980). *Die Soziologen und das Recht. (The Sociologists and the Law).* Wiesbaden, Springer, pp.149ff; however, I disagree with Schelsky's limitation of von Jhering's struggle to the confines of the existing system or order, since the state itself could be seen as constituted by its people and therefore determined by its people (Von Jhering, R. (1997) *supra* note 74, pp.123ff; Von Jhering, R. (1915) *supra* note 13, pp.98ff). ('The very fact that their law does not fall to the lot of nations [peoples] without trouble, that they have had to struggle, to battle and to bleed for it' Von Jhering, R. (1915) *supra* note 13, p.18).
[76] Von Jhering, R. (1997) *supra* note 74, pp.69ff; Von Jhering, R. (1915) *supra* note 13, pp.13ff.
[77] Yin, R. K. (2014). Case Study Research: Design and Methods. 5th edition. Thousand Oaks, Sage, p.16.
[78] Flyvbjerg, B. (2011). Case study, in Denzin, N. K. & Lincoln, Y. S. (eds.). *The SAGE Handbook of Qualitative Research.* 4th edition. Thousand Oaks, Sage, pp. 301-316.

Appelbaum case studies are useful 'to uncover patterns, determine meanings, construct conclusions and build theory'.[79] The method of case studies could be used for descriptive and explanatory purposes and in particular for the examination of dynamic processes.[80]

Case studies appear to be a viable instrument to highlight shortcomings of legal systems – in this respect human rights law – as they indicate factual developments and expose gaps.[81] This method offers a sound starting point for the present thesis as the changing situation on the ground and the imposition of collective punishment in situations governed by human rights law and not by the law of armed conflict represents the very impetus for the thesis.

The case studies used in the thesis could be understood as explanatory and theory-testing. They are concerned with varying state policies regarding collective punishment in two states and under different conditions. The theory that state policies on collective punishment can be influenced by relevant international law and vice versa leading to a gap in human rights law is going to be tested against the case studies and subsequently, the theory will be approved, modified or rejected. In terms of data analysis, the case studies will rely on documents and archival material, including primary sources such as judgments of international and national courts, government statements before international bodies, parliamentary meeting protocols and transcripts, national legislation and government statements and explanatory remarks to national legislation. These data sets are empirical in nature as they are based on experience and observation in the relevant field, meaning at the level of international bodies, governments and state policy creation.[82] In addition, relevant legal, historical and political secondary literature

[79] Patton, E. & Appelbaum, S. H. (2003). The case for case studies in management research, *Management Research News*, 26 (5), pp.60-71, pp.66f.
[80] Yin, R. K. (2014) *supra* note 77, pp.15ff; Yin, R. K. (2012). *Applications of Case Study Research*. 3rd edition. Thousand Oaks, Sage, pp.4ff.
[81] Partington, M. (2010). Empirical Legal Research and Policy-making, in Cane, P. & Kritzer, H.M. (eds.). *The Oxford Handbook of Empirical Legal Research*. Oxford, Oxford University Press, pp.1003-1024, pp.1003ff; Flyvbjerg, B. (2006). Five misunderstandings about case-study research, *Qualitative Inquiry*, 12 (2), pp.219-245, pp.224ff.
[82] Kothari, C.R. (2004). *Research Methodology: Methods and Techniques*. 2nd edition. New Delhi, New Age, p.4; Spencer, M. (2008). Excavating Official Archives: The Separation of Powers and Policy Advice from Judges, *Journal of Law and Society,* 35, pp.167-182, pp.169ff; Smith, K.J.M. & McClaren, J.P.S. (2001). History's living legacy: an outline of "modern" historiography of the common law, *Legal Studies*, 21 (2), pp.251-324, pp.317ff; Amodu, T. (2008). 'For the Record'? Understanding Regulatory Processes through Archival Materials: The Example of Planning Agreements, *Journal of Law and Society*, 35, pp.183-200, pp.184ff; Gidley, B. (2012). Doing Historical and Documentary Research, in Seale, C. (ed.). *Researching Society and Culture*. 3rd edition. London, Sage, pp.263-282, pp.266ff.

will be referred to in order to explain the circumstances surrounding the case studies' settings.

2.6 Conclusion

To sum up, New Legal Realism represents a movement in legal theory which focuses on how law obtains its meaning, how it is practised and how it changes. All these questions are best answered by a look at law in its social context, supported by empiricist and pragmatist considerations. This combination of empirical research and experience gained from real life situations with pragmatic fallibilist problem-solving represents a sound approach to tackle the issues at hand. Furthermore, since the thesis' impetus stems from changing social contexts influenced by state policies and international law, the emphasis of New Legal Realism on practice corresponds well with the case studies and examined potential solutions.

New Legal Realism is preferred here to positivism and natural law and also to idealist conceptions. With regards to positivism, New Legal Realism does not object to the evaluation of the current legal situation as a starting point for further research, however, it should be the starting point and not the aim in itself. Likewise, moral considerations as purported by natural law are not going to advance the present subject. In addition, New Legal Realism differs from these two approaches in its orientation to practice and its emphasis of law in social context. When it comes to idealism, New Legal Realism does not support the idea of an outside world only existing because of our knowledge of it. On the contrary, New Legal Realism holds the view that the world and its social contexts are independent from mind conceptions and that it is a valuable endeavour to study it and learn from it.

The key attributes of New Legal Realism guiding the present thesis are empiricism, philosophical pragmatism, transnationalism and reason-giving in tension with power. Together, they enable the examination of social contexts from a view of experience and practical problem-solving, combined with transnational dynamics of various actors on different levels and an awareness of actors participating in social change and its balancing effect on power. New Legal Realism's attention to social context is reinforced by the case studies. Case studies as a method of empirical and qualitative research are a viable instrument to focus on particular real-life situations and their indication of gaps, in this case in legal regulation.

These considerations represent a sound guide to state policies on collective punishment and its international legal regulation – a topic with transnational outlook, benefitting from empirical evaluation and potential pragmatist solutions including all actors involved. After setting out the theoretical approach and methods used, the following part on collective punishment and the law of armed conflict will start the substantive analysis.

3 Collective punishment, state policies and the law of armed conflict

3.1 Collective punishment and the law of armed conflict

3.1.1 Introduction

The following chapter outlines the legal regulation of collective punishment under the law of armed conflict, starting with treaty law provisions on international armed conflicts, focussing on the 1949 Geneva Conventions. Subsequently, the regulation of collective punishment in non-international armed conflicts, particularly Common Article 3 of the Geneva Conventions and Additional Protocol II will be discussed, followed by an account of customary international law on the issue, encompassing both forms of armed conflict and some brief remarks on collective punishment in international criminal law. The chapter will be completed by an attempt to define the act of collective punishment.

Collective punishment can be understood as the imposition of sanctions on a group as such for acts one of their members has allegedly committed and they bear no individual responsibility for. It represents an act contradicting the fundamental principle of individual responsibility as it deliberately targets the innocent. As will be shown, collective punishment is prohibited in international and non-international armed conflicts by treaty as well as customary international law.[1] The most important treaty regulations on collective punishment are enshrined in the 1949 Geneva Conventions and their Additional Protocols from 1977.[2]

These findings constitute an important preparation for the ensuing case study on the Occupied Palestinian Territories in order to assess Israel's behaviour and policy in this regard. The policies of certain states concerning the prohibition of collective punishment were already visible during the codification process of the Geneva Conventions and their

[1] Darcy, S. (2015). The Prohibition of Collective Punishment, in Clapham, A., Gaeta, P. & Sassòli, M. (eds.). *The 1949 Geneva Conventions: A Commentary*. Oxford, Oxford University Press, pp.1155-1171.

[2] 75 UNTS 135, Convention (III) relative to the Treatment of Prisoners of War, Geneva (12 August 1949) Articles 87 (3), 26 (6); 75 UNTS 287, Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva (12 August 1949) Article 33; 1125 UNTS 3, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva (8 June 1977) Article 75 (2)(d); 1125 UNTS 609, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva (8 June 1977), Article 4 (2)(b).

Additional Protocols. The records show an emerging hostility of states against rules they considered to protect "terrorists", resulting from the debates around non-international armed conflicts during the negotiations on the Geneva Conventions and national liberation movements and guerrilla fighters during the drafting of the Additional Protocols.[3] These issues laid bare the unwillingness of some states to cede parts of their powers in order to protect groups they did not support or even recognise. Nevertheless, in the end rules on collective punishment were adopted, with policies against such prohibitions being the minority opinion. In light of states' policies only reluctantly giving up collective punishment, the establishment of a prohibition appears to be crucial in order to protect groups and ultimately contribute to the empowerment of the Palestinians on a broader level by documenting and challenging Israel's collective punishment policy.[4]

However, the prohibition of collective punishment in the law of armed conflict rarely includes a definition of the very act prohibited. The variety of forms collective punishment can take has made this concept easy to confuse with other prohibited acts such as belligerent reprisals. For this reason, particular emphasis will be placed on the definition of collective punishment at the end of the chapter. One institution that has tried to define the war crime of collective punishment in more detail is the Special Court for Sierra Leone – its statute encompasses collective punishment as a war crime. In the Court's case law, two defining elements for collective punishment as a war crime are singled out, namely the 'indiscriminate punishment imposed collectively on persons for omissions or acts some or none of them may or may not have been responsible' and 'the specific intent of the perpetrator to punish collectively'.[5] However, this interpretation has to be seen in context.[6] It will be argued, that the law of armed conflict as a system based on specific groups does not address the collective character of its provisions in much depth. It is rather assuming the group-based notion of its rules. Nevertheless, this group-based character plays a significant role as potential ways to translate the act of collective punishment into human rights law are at the core of the thesis.

---

[3] Suter, K. (1984). *An International Law of Guerrilla Warfare: The Global Politics of Law-Making*. London, Frances Pinter.
[4] Malloy, T.H. (2014). National Minorities between Protection and Empowerment: Towards a Theory of Empowerment, *Journal on Ethnopolitics and Minority Issues in Europe*, 13 (2), pp.11-29, pp.15ff.
[5] *Fofana and Kondewa* (SCSL-04-14-A) Judgment, Appeals Chamber (28 May 2008) para.224.
[6] Provost, R. (2002). *International Human Rights and Humanitarian Law*. Cambridge, Cambridge University Press.

Going back to the research question about the relationship between the legal regulation of collective punishment in the law of armed conflict and human rights law and state policies thereon and the effects this relationship has on the empowerment and protection of groups, this chapter on the origins and scope of collective punishment represents the foundation for an understanding of the act in question and its connection to state policies and group empowerment under different legal frameworks.

It will be argued that the hostility of states towards providing protection and standing to parties other than themselves, already shown during the negotiations of the Geneva Conventions and the Additional Protocols, could be seen as a link between the legal regulation and policy development regarding collective punishment. The groups involved in non-international armed conflicts and the decolonisation process are already close to those groups targeted more broadly by collective punishment in situations governed by human rights law. Although the definition of collective punishment as such does not require any discriminatory element, the groups affected in practice are often subject to a broader discriminatory policy. The groups directly affected by collective punishment are the families whose houses are demolished, but it is peoples and minorities who are affected in a broader sense, as shown in the case of the Palestinians and the Chechens.

The evaluation of the drafting histories of the Geneva Conventions and in particular the Additional Protocols reveals a shift for and against certain policies and preferences and it connects the law of armed conflict as the origin of the concept of collective punishment to human rights law. The transition between times of armed conflict and peace is fluid and the shift in attitude of states regarding internal issues indicates support for a limitation of interference in those affairs. However, when it comes to times of armed conflict, affected groups such as civilians have a protection they can raise; when it comes to the imposition of collective punishment in situations governed by human rights law, they have not. This lack and the broadening of collective punishment's scope of application, perhaps enabled by a certain hostility already visible in the codification process of the relevant treaties, constitutes the foundation of the present thesis and will be explored further in the following chapters.

For this reason, the origins and scope of collective punishment will be outlined first, representing the basis for an understanding of the concept under the law of armed conflict and its effects on state policies and groups. Consequently, the legal regulation of collective punishment in treaty and customary international law regarding armed

conflicts will be addressed, supported by accounts of the drafting history of the Geneva Conventions and their Additional Protocols and followed by a definition of the act of collective punishment.

3.1.2 The legal regulation of collective punishment under the law of armed conflict

3.1.2.1 Treaty law

3.1.2.1.1 International armed conflicts

Collective punishment encompasses 'penalties of any kind inflicted on persons or entire groups of persons, in defiance of the most elementary principles of humanity, for acts that these persons have not committed.'[7] This statement made by the first but still frequently cited commentary on the Geneva Conventions has lost nothing in its validity.[8] The treaty law regulating collective punishment in international armed conflicts will be outlined below. Although efforts to address collective punishment under the law of armed conflict reach back a long way in history, the discussion here will start with the Hague Regulations from 1899 and 1907, when provisions on collective punishment gained binding force for the first time. Subsequently, the focus will be on the 1949 Geneva Conventions and their Additional Protocols from 1977. The section concludes that today collective punishment is prohibited in international armed conflicts.

However, the final versions of these treaties do not give a complete account of the states' understanding of collective punishment. Although prohibitions of collective punishment were included in the instruments, they did not go down undebated. Their drafting history reveals that several states tried to retain their ability to impose collective punishment and were disinclined to limit their means of warfare. Yet in the end, states agreed to limit the imposition of collective punishment in international armed conflicts – a measure to protect themselves from other states, opponents seen as on the same level. A decreasing willingness to cede powers in favour of parties not seen as on the same level will be witnessed regarding non-international armed conflicts discussed in the next section. Consequently, the drafting history serves as an important indicator of state policies on collective punishment in relation to its legal regulation and the broader effect on groups and will be mentioned in the following whenever relevant.

---

[7] Uhler, O.M. & Coursier, H. (eds.) (1958). *IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*. Geneva, International Committee of the Red Cross, p.225.
[8] See eg Darcy, S. (2015) *supra* note 1, pp.1155-1171 and Darcy, S. (2007). *Collective Responsibility and Accountability under International Law*. Leiden, Martinus Nijhoff referring to its provisions.

The prohibition of collective punishment is enshrined in various treaties regarding the law of armed conflict. The Hague Regulations refer to a prohibition of 'general penalty' imposed on a population for individual acts not attributable to the population collectively.[9] The first Hague Peace Conference took place in 1899 and ended with the adoption of a set of rules governing the conduct in armed conflict. Article 50 of the Regulations concerning the Laws and Customs of War on Land (Hague Regulations) addresses the issue of collective punishment: 'No general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible.'[10]

However, a closer look at Article 50 exposes its shortcomings. It limits the application of collective penalties but does not prohibit them completely – their imposition is still allowed in cases where the population can be regarded as collectively responsible. According to the commentary on Article 50, this collective responsibility could even be seen as established if the population bears passive responsibility.[11] This concept does not correspond to principles of joint or vicarious responsibility as known for instance under tort law but is much broader. Rolin, the drafter of the commentary to the Hague Regulations understood passive responsibility to be established by the population's permission or passive support of violations of the laws and customs of armed conflict. With group solidarity triggering the permissibility of collective penalties, the threshold of the prohibition is relatively low – at least seen from today's perspective. At the time of its codification, any limitation of collective penalties represented an improvement on the regulation of conduct in armed conflict, since collective fines and penalties were widely used.[12]

Following this first binding attempt to limit collective punishment, the Convention relative to the Treatment of Prisoners of War was adopted in 1929. It similarly included a provision on collective penalties.[13] More specifically, the Convention included a prohibition of 'collective disciplinary measures affecting food' – a rule owing to the camp

[9] Regulations concerning the Laws and Customs of War on Land, annexed to Convention (II) with Respect to the Laws and Customs of War on Land, The Hague (29 July 1899) Article 50; Regulations concerning the Laws and Customs of War on Land, annexed to Convention (IV) respecting the Laws and Customs of War on Land, The Hague (18 October 1907) Article 50.
[10] Hague Regulations 1907 *supra* note 9, Article 50; Darcy, S. (2007) *supra* note 8, pp.16ff.
[11] The Proceedings of the Hague Peace Conferences, translation of the official texts under the supervision of Scott, J.B. (1920). New York, Oxford University Press, Annex 1 to the Minutes of the Fifth Meeting, Report to the Conference by Edouard Rolin, pp.64f.
[12] Darcy, S. (2007) *supra* note 8, pp.23ff.
[13] 118 LNTS 343, Convention relative to the Treatment of Prisoners of War, Geneva (27 July 1929) Article 46 (4).

situation and the power of the capturers prisoners of war were exposed to.[14] In contrast to the Hague Regulations, this Convention prohibited collective penalties regarding a specific group of people. The vast number of captured soldiers in the First World War and the 'convenient' nature of collective punishments in camps represented the main impetus for the provision on collective penalties.[15]

The Second World War highlighted the persisting shortcomings of the current system regulating collective punishment. The Hague Regulations did not prohibit but only limit the imposition of collective punishment with a very low threshold and the Convention on Prisoners of War was only applicable to this specific group of people. However, even these provisions were seemingly ignored when Nazi forces destroyed entire villages and deported whole families in response to hostile acts.[16] Reacting to this gruesome experience, the four Geneva Conventions on wounded and sick members of the armed forces on land and at sea, prisoners of war and civilians were adopted in 1949. Absorbing the provisions of the 1929 Convention on Prisoners of War, the Third Geneva Convention prohibits 'collective punishment for individual acts' and 'collective disciplinary measures affecting food'.[17] The change in wording from the prohibition of collective penalties in the 1929 Convention to collective punishment in the Third Geneva Convention represents a broadening of this rule.[18] The term punishment is preferred to penalty since penalties are seen as more related to penal sanctions, whereas punishment includes a wider range of measures such as actions taken by camp commanders.[19]

The Fourth Geneva Convention on the protection of civilians in war included a substantially wider provision on collective punishment than the Hague Regulations.[20] It states in Article 33 (1): 'No protected person may be punished for an offence he or she has not personally committed. Collective penalties … are prohibited.'[21] First of all, Article 33 (1) endorses the principle of individual responsibility, outlawing the vague concept

[14] Prisoners of War Convention 1929 *supra* note 13, Article 11 (4).
[15] Darcy, S. (2007) *supra* note 8, pp.32ff.
[16] Darcy, S. (2007) *supra* note 8, pp.34ff.
[17] Convention (III) relative to the Treatment of Prisoners of War, *supra* note 2, Articles 87 (3), 26 (6).
[18] Levie, H.S. (1977). *Prisoners of War in International Armed Conflict.* Newport, Naval War College Press, p.130.
[19] Darcy, S. (2007) *supra* note 8, pp.47f; De Preux, J. (ed.)(1960). *III Geneva Convention relative to the Treatment of Prisoners of War.* Geneva, International Committee of the Red Cross, pp.431f.
[20] Darcy, S. (2007) *supra* note 8, pp.48ff.
[21] Convention (IV) relative to the Protection of Civilian Persons in Time of War, *supra* note 2, Article 33. In addition, Article 33 prohibits pillage and reprisals against protected persons and their property.

of collective responsibility seen in the Hague Regulations.[22] Furthermore, the prohibition of collective penalties is not limited to court sentences, 'but penalties of any kind', considering potential gaps in protection.[23]

However, in order to understand the importance of the inclusion of collective punishment in the Third and Fourth Geneva Conventions, one has to take a look at the negotiation process. This process reveals that there has not been a common understanding of the issue from the start, with some states still favouring an approach similar to Article 50 Hague Regulations. For instance, India backed by the United Kingdom proposed an amendment to the Third Geneva Convention that '[c]ollective hunger strikes and political propaganda in the camps shall be subject to punishment of a disciplinary nature' – an amendment which was denounced by the Conference as effectively permitting collective punishment and in the end rejected.[24] Nevertheless, India backed by the United Kingdom kept trying to include a provision permitting collective punishment, in even more explicit terms: '[C]ollective punishment is permitted where the offence is not entirely limited to a particular individual and other prisoners of war are implicated by connivance or otherwise.'[25] With no member of the Sub-Committee being in favour of the proposal, it was rejected – as were following attempts by India to introduce collective 'disciplinary penalties'.[26]

Addressing collective punishment in the Fourth Geneva Convention, the Italian delegation proposed that collective penalties – which it changed later to 'collective punishments' – should be included in the list of 'grave breaches' mentioned in the Convention. However, the United Kingdom and the United States opposed the amendment by arguing that 'such penalties are not always illegal'. Following a debate and the Netherlands' reassurance to Italy that collective punishment was prohibited under the Fourth Geneva Convention anyway, the amendment was rejected.[27]

These excerpts from the negotiations preceding the adoption of the four Geneva Conventions show the controversies surrounding the issue of collective punishment.

---

[22] Darcy, S. (2007) *supra* note 8, p.53; Von Glahn, G. (1957). *The Occupation of Enemy Territory.* Minneapolis, University of Minnesota Press, p.234.
[23] Uhler, O.M. & Coursier, H. (eds.) (1958) *supra* note 7, pp.225, 227ff; Darcy, S. (2007) *supra* note 8, p.55.
[24] Final Record of the Diplomatic Conference of Geneva of 1949, Volume II, Section A, pp.499f.
[25] Final Record Volume II, Section A *supra* note 24, pp.501f.
[26] Final Record Volume II, Section A *supra* note 24, p.523.
[27] Final Record Volume II, Section A *supra* note 24, pp.648f; Final Record of the Diplomatic Conference of Geneva of 1949, Volume II, Section B, pp.89ff.

Although the prohibition prevailed in the final draft, states were concerned about limiting their means of warfare.[28]

In comparison to the negotiations surrounding the Additional Protocols to the Geneva Conventions of 1977, the drafting process of the four Conventions could be described as straightforward and uncomplicated. Interestingly, while not discussing the substantial provisions on collective punishment extensively, the conference meetings did show a certain change in tone. While the negotiations on the four Geneva Conventions have been objective and calm overall, the negotiations on the Additional Protocols were surrounded by political statements and heated arguments. Preceding conferences on the law of armed conflict were attended by a rather modest number of mostly Western states. However, around 700 delegates from all parts of the world participated in the negotiations on the Additional Protocols, including not only newly independent states but also national liberation movements. As this list of attendees already indicates, one impetus of initiating a reform of the law of armed conflict was the decolonisation process and wars of national liberation calling for a revision of fundamental principles of this legal regime, including the situation of guerrilla fighters in the context of the definition of combatants and prisoners of war.[29]

With both Israel and the Palestine Liberation Organisation sitting at one table, the mood was rather tense. Israel used several chances to remind the international audience of the persecution of Jewish people during the Second World War – an undisputable and gruesome history. However, it used it as part of an argument regarding Israel's fight for self-determination on Palestinian territory, while at the same time, calling the Palestine Liberation Organisation a 'terrorist group' which 'was not striving to liberate anyone' but 'to destroy the Jewish people's right of self-determination'. Inevitably, reactions from Israel's Arab neighbour states in favour of the Palestinian people and from the Palestine Liberation Organisation followed suit and fuelled the dispute, with the President of the Conference finally calling for order and to 'avoid any political polemics'.[30]

---

[28] Wallace, G. (2012). Regulating Conflict: Historical Legacies and State Commitment to the Laws of War, *Foreign Policy Analysis,* 8, pp.151-172, pp.153ff.
[29] Alexander, A. (2015). A Short History of International Humanitarian Law, *European Journal of International Law*, 26 (1), pp.109-138, pp.124ff; Harroff-Tavel, M. (2014). The International Committee of the Red Cross and the promotion of International Humanitarian Law: Looking back, looking forward, *International Review of the Red Cross*, 96 (895/896), pp.817-857, pp.826f.
[30] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977), Volume VII, pp.256ff, see also pp.215ff.

A more substantive discussion was held about the permissibility of reprisals as documented by Volume 9 of the records of the Additional Protocol's drafting negotiations.[31] Although about reprisals and not about collective punishment, the debate highlights the decolonisation context and the different agendas pursued by states and serves as an indicator for broader policy stances encompassing collective punishment as well.

A French amendment argued for the inclusion of a provision governing the permissibility of reprisals under certain conditions.[32] However, other states such as the German Democratic Republic and Norway rightly addressed the faults of such a provision - civilians would have to bear the brunt of such reprisals, which were also prone to misuse; they could trigger counter-reprisals and, as mentioned by Norway, a minority regime fighting against a national liberation movement would hardly care about civilian losses and would therefore not be forced to adhere to its international obligations by reprisals, calling into doubt the effectiveness of such an endeavour.[33] The delegate of the German Democratic Republic rightfully asked: 'Were some delegations prepared to allow, for a grave violation, the collective punishment of a civilian population, without any procedural guarantees, instead of the prosecution, under a universal jurisdiction, of those responsible?'[34] The British delegation countered this harsh condemnation by pointing to a 'mischievous tendency of artificiality' in international law-making and noted that 'false expectations of high standards in war could only lead to bitter disappointment'.[35] In the end, the French proposal was withdrawn. However, it was not replaced by a stricter prohibition of reprisals as some delegates might have hoped, but it was decided to omit a general prohibition of reprisals and to keep some specific prohibitions instead, eventually giving in to state pressure on retaining reprisals as a form of enforcement.[36]

The importance some states attached to their means of warfare could be well illustrated by the decolonisation process. France and the United Kingdom had been recently

[31] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977), Volume IX, pp.70ff.
[32] For the text of the amendment see: Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977), Volume III, p.323.
[33] Official Records Volume IX *supra* note 31, pp.75f.
[34] Official Records Volume IX *supra* note 31, p.71.
[35] Official Records Volume IX *supra* note 31, p.73.
[36] Official Records Volume IX *supra* note 31, pp.92f; see also the withdrawn Polish amendment: Official Records Volume III *supra* note 32, p.313.

involved in conflicts in their colonies – the French in Algeria and the British in Kenya – and they used collective punishment as a measure to contain the rebellious populations.[37] In addition, both states denied the existence of a non-international armed conflict on these territories, calling the situation an "emergency" instead. With regards to the parties involved, neither the British nor the French did consider the fighters opposing the colonial regime as prisoners of war or combatants, but as criminals or terrorists to be dealt with under national criminal law.[38]

Debates in the British House of Lords on collective punishment and its imposition in Kenya reveal a strong inclination towards keeping the policy despite some criticism. An example for justifying this policy by simply renaming it to counter the criticism could be found in the Earl of Listowel's statement in 1952. He considered the term 'a little misleading' and favoured the term 'collective inducement' or 'collective deterrent' instead: '[C]ollective inducement to help the Administration in the restoration of law and order, and collective deterrent to people who would otherwise throw in their lot with the terrorists and co-operate with them.'[39] This line of argument might look familiar, as it is being used by Israel to justify its actions in the Occupied Palestinian Territories discussed in the next chapter. However, already at this stage, it is useful to point at this contingency of reasoning, based on aversion to certain groups and movements and a strategic use of terminology in order to avoid situations conferring rights or protection onto them – as seen here with the British and French denying the existence of an armed conflict, just as Israel is denying the application of the law of armed conflict in its full extent to the situation on the Palestinian territories.

Still, when faced with strong policy resentments as witnessed in the drafting history of the Geneva Conventions and their Additional Protocols, the fact, that ultimately, a prohibition of collective punishment was achieved, appears the more important.

---

[37] Whittaker, H. (2015). Legacies of Empire: State Violence and Collective Punishment in Kenya's North Eastern Province, c. 1963–Present, *Journal of Imperial and Commonwealth History*, 43 (4), pp.641-657, pp.643ff; Elkins, C. (2005). *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya*. New York, Holt, pp.70ff; Anderson, D. (2005). *Histories of the Hanged: Britain's Dirty War in Kenya and the End of Empire*. London, Weidenfeld & Nicolson, pp.45f, 90ff; Klose, F. (2009). *Menschenrechte im Schatten kolonialer Gewalt: Die Dekolonisierungskriege in Kenia und Algerien 1945-1962*. München, Oldenbourg Wissenschaftsverlag, pp.29ff, 78ff, 171ff.

[38] Klose, F. (2011). The Colonial Testing Ground: The International Committee of the Red Cross and the Violent End of Empire, *Humanity: An International Journal of Human Rights, Humanitarianism, and Development,* 2 (1), pp.107-126, pp.109ff.

[39] HL Deb 26 November 1952 vol 179 cc586-634, Collective Punishment in Kenya, Earl of Listowel, para.608f, online available at: http://hansard.millbanksystems.com/lords/1952/nov/26/collective-punishment-in-kenya#S5LV0179P0_19521126_HOL_90 (accessed on 15/04/18).

Similarly, these policy choices make such a prohibition necessary and, as will be seen in the case study on the Occupied Palestinian Territories, the prohibition of collective punishment offers a tool to affected groups to highlight violations of the law of armed conflict and file court cases in this regard. Although the debates surrounding the adoption of the Geneva Conventions and the Additional Protocols revolved not so much around the groups directly affected by collective punishment such as civilians or prisoners of war, they touched upon the groups which are affected by it in the broader sense, namely national liberation movements or peoples. And although this additional discriminatory element is not required by the prohibition of collective punishment, it highlights the broader policy choices of states and the importance of having a substantive rule challenging state behaviour and documenting state practice.

Following this account of the negotiation process of the Additional Protocols, the prohibition of collective punishment adopted in Additional Protocol I regulating international armed conflicts is addressed briefly. The explicit prohibition of collective punishment[40] was included to clarify that collective punishment can be imposed by a variety of means which are not confined to judicial procedures, covered elsewhere in the Protocol.[41] Its commentary states that 'the concept … covers not only legal sentences but sanctions and harassment of any sort, administrative, by police action or otherwise.'[42] Furthermore, the Protocol reaffirms the principle of individual responsibility. [43] Underlying this provision was the condemnation of 'convictions of persons on account of their membership of a group or organization' in particular regarding collective punishment of families, or inhabitants of specific districts or buildings.[44] Furthermore, the replacement of acts 'committed' as in Article 33 (1) Fourth Geneva Convention with acts for which persons 'bear responsibility' does justice to vicarious liability and instances of complicity, since a prohibition of collective punishment should not be used

[40] 1125 UNTS 3, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva (8 June 1977) Article 75 (2)(d).
[41] Sandoz, Y., Swinarski, C. & Zimmermann, B. (eds.)(1987). *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Geneva, Martinus Nijhoff, p.874, para.3054.
[42] Sandoz, Y., Swinarski, C. & Zimmermann, B. (eds.)(1987) *supra* note 41, p.874, para.3055.
[43] Protocol Additional to the Geneva Conventions (Protocol I) *supra* note 2, Article 75 (4)(b).
[44] Sandoz, Y., Swinarski, C. & Zimmermann, B. (eds.)(1987) *supra* note 41, pp.880f, para.3098.

in order to avoid responsibility resulting from such acts, but rather to protect the innocent.[45]

To sum up, collective punishment is prohibited by treaty law in international armed conflicts. The most important provisions today are encompassed in the Geneva Conventions and their Additional Protocol I. However, the decision to adopt a prohibition of collective punishment in international armed conflicts was preceded by debates showing the different policy stances of states on the issue and an increasing hostility towards the protection of groups other than states participating in armed conflict in general. Nevertheless, as far as international armed conflicts are concerned, states were finally able to agree on a prohibition of collective punishment. In particular the broadening of the prohibition regarding civilians in armed conflict represents an important feature for the present thesis, keeping in mind the examples of house destruction and family responsibility focussed on in the case studies and the possibility for affected groups to use the prohibition to draw attention to such violations.

3.1.2.1.2 Non-international armed conflicts

After this analysis of the regulation of collective punishment in international armed conflicts, the concept will subsequently be examined under the framework for non-international armed conflicts. For instance, collective punishment in the form of house destruction harming innocent civilians is being used and has been used during international and non-international armed conflicts. For this reason, treaty provisions regulating the conduct in non-international armed conflicts have to consider the notion of collective punishment as well. Non-international armed conflicts were conceived as an internal matter not suitable to be regulated internationally for a long time – not at least because states preferred to treat insurgents as criminals, sceptical about any rules that would protect them. Still, the four Geneva Conventions include a rule on conflicts not of an international character, Common Article 3. This provision and the subsequent developments in Additional Protocol II are discussed in the following, leading to the conclusion that collective punishment is prohibited in non-international armed conflicts as well.

This formal conclusion will be accompanied by a look at the drafting process of relevant instruments regulating the law of armed conflict, exposing state policies favouring the

[45] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977), Volume VIII, p.348.

possibility to resort to collective punishment whenever they considered necessary. This discussion was held in the context of non-international armed conflicts and the decolonisation process, where several states remained suspicious towards outside interference, as already mentioned in the section above. However, whereas the preceding section showed that states agreed on more substantive prohibitions of collective punishment in international armed conflicts, they did not show the same willingness concerning non-international armed conflicts – not least due to the changing parties involved. While opponents in international armed conflicts were considered on eye level, the groups involved in non-international armed conflicts were often not recognised by states. Therefore, the establishment of a prohibition of collective punishment applicable in non-international armed conflicts proved to be more difficult, with some states openly opposing any measures protecting non-state actors.[46] Given these policy tendencies of retaining collective punishment for internal situations, the adopted prohibition can support affected groups by providing them with the legal tools to make their case.

Although the four Geneva Conventions represent a cornerstone in the development of the law of armed conflict, they still left some important questions unanswered and some issues untouched. Amongst them, the most pressing is the consideration of armed conflicts not of an international character and their parties – only addressed in Common Article 3 of the Geneva Conventions.[47] Common Article 3 includes some basic guarantees for non-international armed conflicts to ensure the humane treatment of the groups protected under the Conventions.[48]

Although Common Article 3 does not include a rule on collective punishment, its paragraph 1 (d) on judicial guarantees could potentially be seen as slightly more than a fair trial provision.[49] According to its commentary, Common Article 3 (1) (d) opposes 'summary justice' because 'it adds too many further innocent victims to all the other

[46] Chadwick, E. (1996). *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict*. Leiden, Martinus Nijhoff, pp.81f; Fryer, E.D. (1977). Applicability of International Law to Internal Armed Conflicts: Old Problems, Current Endeavors, *The International Lawyer*, 11 (3), pp.567-572, pp.569f; Yingling, R.T. & Ginnane, R.W. (1952). The Geneva Conventions of 1949, *American Journal of International Law*, 46 (3), pp.393-427, pp.395ff.
[47] Darcy, S. (2015) *supra* note 1, pp.1164ff.
[48] Convention (IV) relative to the Protection of Civilian Persons in Time of War, *supra* note 2, Article 3 (1).
[49] See for a similar argumentation regarding the war crime of collective punishment: Schabas, W.A. (2006). *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone.* Cambridge, Cambridge University Press, p.279.

innocent victims of the conflict.'[50] In addition, collective punishment taking the form of any act mentioned in Common Article 3 such as violence to life, hostage-taking, outrages on personal dignity or refusal of fair trial rights is prohibited. However, collective punishment as such is not listed as a prohibited act under the article.[51] Even though many acts of collective punishment might be covered by the other prohibited acts mentioned in Common Article 3, the specific and independent character of collective punishment fails to be recognised.

Fortunately, explicit provisions on collective punishment in non-international armed conflicts appeared with the Additional Protocols in 1977. Additional Protocol II is applicable to non-international armed conflicts between state armed forces and 'dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.'[52] Article 1 (2) explicitly excludes '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' from the scope of the Protocol.

Additional Protocol II includes the prohibition of collective punishment in its fundamental guarantees in Article 4 informed by 'the intention to give the rule the widest possible scope'.[53] Collective punishment 'shall remain prohibited at any time and in any place whatsoever'.[54] In addition, threats of any act mentioned in the foregoing list are prohibited, therefore including collective punishment.[55] The scope of the prohibition encompasses not only civilians but also persons who are *hors de combat* and not participating in hostilities anymore.[56] Furthermore, the Protocol includes a provision

[50] Uhler, O.M. & Coursier, H. (eds.) (1958) *supra* note 7, p.39; see also: International Committee of the Red Cross (2016). *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.* 2nd edition, online version available at: https://ihl-databases.icrc.org/ihl/full/GCI-commentary (accessed on 15/04/18) para.675.
[51] Darcy, S. (2015) *supra* note 1, p.1164f.
[52] Protocol Additional to the Geneva Conventions (Protocol II) *supra* note 2, Article 1 (1).
[53] Sandoz, Y., Swinarski, C. & Zimmermann, B. (eds.)(1987) *supra* note 41, p.1374; Bothe, M., Partsch, K.J. & Solf, W.A. (2013). *New rules for victims of armed conflicts: commentary on the two 1977 protocols additional to the Geneva Conventions of 1949*. 2nd edition. Leiden, Martinus Nijhoff, pp.520, 736.
[54] Protocol Additional to the Geneva Conventions (Protocol II) *supra* note 2, Article 4 (2)(b).
[55] Protocol Additional to the Geneva Conventions (Protocol II) *supra* note 2, Article 4 (2)(h).
[56] Darcy, S. (2015) *supra* note 1, pp.1164ff; Bothe, M., Partsch, K.J. & Solf, W.A. (2013) *supra* note 54, p.734; Protocol Additional to the Geneva Conventions (Protocol II) *supra* note 2, Article 4 (1).

reaffirming the principle of individual responsibility building on the same deliberation as the respective rule in Additional Protocol I.[57]

Another important link between Additional Protocol I and II is the classification of certain armed conflicts. Armed conflicts between a state and organised armed groups are non-international armed conflicts.[58] However, as Article 1 (4) of Additional Protocol I sets out, conflicts 'in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination' are considered international armed conflicts.[59] This categorisation is of importance since the case studies address groups such as minorities and peoples in their broader context – in particular regarding the case of the Occupied Palestinian Territories.

In the final stages of the negotiations of the Additional Protocols, Israel was the only state to vote against Article 1 Additional Protocol I – 87 states in favour and 11 abstentions, amongst them the United Kingdom, Canada, Spain, France and the United States.[60] In the explanation of its vote, Israel made clear that it had no issue with the first three paragraphs of the Article, but 'totally objected' to paragraph four.[61] It argued that 'any reference to the motives and cause for which belligerents were fighting was in clear contradiction to the spirit and accepted norms of international humanitarian law' and therefore, Article 1 (4) was 'not a legal norm', but rather 'a carefully drafted condemnation of a well-deserved benediction'. Furthermore, Israel objected to a system giving rights and obligations to non-state entities, arguing that they would not be able to comply with their obligations before concluding that 'the Conference had attempted to introduce political resolutions' which would damage the law of armed conflict in the long term.[62]

In the following explanation of votes, several states in favour of Article 1 (4) refuted Israel's objections in more or less harsh contributions, amongst them the Soviet Union,

---

[57] Bothe, M., Partsch, K.J. & Solf, W.A. (2013) *supra* note 54, pp.743ff; Sandoz, Y., Swinarski, C. & Zimmermann, B. (eds.)(1987) *supra* note 41, pp.1398f, para.4603.
[58] Protocol Additional to the Geneva Conventions (Protocol II) *supra* note 2, Article 1; Protocol Additional to the Geneva Conventions (Protocol I) *supra* note 2, Articles 1 & 2.
[59] Protocol Additional to the Geneva Conventions (Protocol I) *supra* note 2, Article 1 (4); Darcy, S. (2007) *supra* note 8, p.65; Moir, L. (2002). *The Law of Internal Armed Conflict.* Cambridge, Cambridge University Press, pp.89ff, 263ff.
[60] Official Records of the Diplomatic Conference on the Reaffirmation and Development of The law of armed conflict Applicable in Armed Conflicts, Geneva (1974–1977), Volume VI, p.41.
[61] Official Records Volume VI *supra* note 61, p.41.
[62] Official Records Volume VI *supra* note 61, pp.41f; see also Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977), Volume VII, pp.215ff.

Egypt and of course, the Palestine Liberation Organisation with the most thorough rebuttal coming from Georges Abi-Saab speaking for Egypt. He even questioned whether Israel objected to the universally recognised right to self-determination of peoples in general. Regarding Israel's point that paragraph four reflected a negative politicisation of the Additional Protocol, Egypt countered: 'Struggles against colonial domination, alien occupation and racist régimes were, however, specific applications of the principle of self-determination, which was unquestionably a legal principle: was it political to take into consideration some of the atrocious and murderous armed conflicts being waged in the present-day world?'[63]

The Observer for the Palestine Liberation Organisation welcomed the vote as well, expressing satisfaction that an overwhelming majority of states had supported Article 1. Regarding the Palestinians' struggle for self-determination, the delegate saw the Palestinian people as falling under all three categories of Article 1 (4) Additional Protocol I: '[T]hey were under colonial domination; their territory was under foreign occupation, despite the assertions of the terrorist Begin; and they were suffering under a racist régime, since Zionism had been recognized in a United Nations resolution as a form of racism.'[64]

On this mention of Begin, Israel stated later on that it considered him a 'a leader of an underground guerrilla movement fighting for the self-determination and independence of Israel'.[65] The debate between Israel and Palestine went on over the Deir Yassin massacre and Palestinian attacks on Israeli civilians.[66] As one might deduce from these statements, the negotiations on such sensitive issues were stirring emotions on all sides.[67] However, except for Israel, other states with objections decided to abstain. Still, the abstentions were interpreted by the delegate of the Zimbabwe African National Union in the following way: 'The truth was that the United Kingdom, the United States of America and others did not wish to offend South Africa, Portugal and Israel, who were their agents in the perpetual exploitation of colonial peoples.'[68] While the groups directly affected by collective punishment such as families whose houses are demolished (which

[63] Official Records Volume VI *supra* note 61, pp.43f.
[64] Official Records Volume VI *supra* note 61, p.53.
[65] Official Records Volume VII *supra* note 63, p.261.
[66] Official Records Volume VII *supra* note 63, pp.312f.
[67] Suter, K. (1984) *supra* note 3, pp.128ff.
[68] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977), Volume VIII, p.45.

means civilians) do not need to exhibit particular shared characteristics, those families belong to a larger group, namely the Palestinians and therefore, the debate on those broader issues matters for the empowerment of the Palestinians in their struggle for justice.

The often political significance of international treaty regulations has been visible in the course of the negotiations of the Geneva Conventions as well as their Additional Protocols and offers important insights into the states' understanding of their range of powers and obligations, highlighting the significance of a prohibition of collective punishment. However, when researching on provisions on collective punishment in academic literature, less explicit tendencies are visible as well. Apart from obvious cases for or against a particular side such as Meir Shamgar's defence of Israel's stance in the present context,[69] silences in relevant textbooks or commentaries are more problematic. In this regard, the recent commentary from Partsch, Bothe and Solf *New rules for victims of armed conflicts: commentary on the two 1977 protocols additional to the Geneva Conventions of 1949* from 2013 has to be mentioned. The elaboration on collective punishment is limited to one sentence on the provision in Additional Protocol I and three sentences on Additional Protocol II. In addition, it is not referred to the 1987 Commentary but only once to a short paragraph included in a report to Committee III during the negotiations on Additional Protocol I.[70]

Darcy on the other hand refers to a broad range of sources in his 2007 monograph *Collective Responsibility and Accountability under International Law*, including the 1987 Commentary and offers a comprehensive and very useful account of collective punishment. However, the Partsch, Bothe and Solf commentary – being a commentary on the entire Additional Protocols, a discussion of collective punishment as detailed as Darcy's would not have been expected – appears to almost neglect the issue. This silence could be problematic as it does not draw the reader's attention to the concept of collective punishment, not doing justice to its relevance today and its ongoing imposition on innocent people. Having read solely their commentary, one would not be aware of the significance of the prohibition of collective punishment or of its implications in practice.

[69] Look eg at: Shamgar, M. (1971). The Observance of International Law in the Administered Territories, reprinted in Dinstein, Y. & Domb, F. (eds.)(2011*). The Progression of International Law: Four Decades of the Israel Yearbook on Human Rights – An Anniversary Volume*. Leiden, Martinus Nijhoff, pp.429-446.
[70] Bothe, M., Partsch, K.J. & Solf, W.A. (2013) *supra* note 54, pp.520, 736.

Interestingly enough, both, Partsch and Bothe, were themselves involved in the negotiation of the Additional Protocols as part of the German Federal Republic's delegation, where their contributions to the debate on collective punishment were rather modest.[71] While it is true that it is up to the author to set priorities and discuss them in more detail, this should not be at the cost of other similarly important areas. To balance these decisions, the commentary could have at least referred to a broad list of further readings to mention the collective punishment debate. With the Additional Protocols being the most recent treaties regulating the law of armed conflict including a prohibition of collective punishment, it might be hoped that the next commentary would consider the concept accordingly.

In conclusion, this part has shown that collective punishment is prohibited in non-international armed conflicts. Although it took longer to reach an agreement on this issue than with international armed conflicts, the prohibition of collective punishment is now part of the fundamental guarantees. However, the threshold to trigger the application of Additional Protocol II limits the number of non-international armed conflicts including an explicit prohibition of collective punishment, except for conflicts falling under Article 1 (4) Additional Protocol I. For this reason, the consideration of collective punishment in customary international law, irrespective of the type of armed conflict discussed below represents a sound addition to those treaty provisions, covering existing gaps in protection.

3.1.2.2 Customary international law

Article 1 (2) of Additional Protocol I states that '[i]n 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.'[72] This statement highlights the recognition and importance of customary international law. Subsequently, the customary rules on collective punishment are going to be outlined based on a comprehensive study on customary international law undertaken by the International Committee of the Red Cross, ultimately outlawing collective punishment in international and non-international armed conflicts.

[71] See Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977), Volume II, List of Participants, pp.36f.
[72] Protocol Additional to the Geneva Conventions (Protocol I) *supra* note 2, Article 1 (2).

As mentioned above, the treaty provisions on collective punishment are only applicable to state parties to the relevant instrument and if the situation in question meets the required criteria. These preliminary questions could pose particular difficulties in relation to non-international armed conflicts due to the high threshold applied by Additional Protocol II. Furthermore, as will be seen in the case study in the next chapter, Israel is neither party to Additional Protocol I nor Additional Protocol II.[73] Under such circumstances, the examination of customary international law in search of common safeguards and fundamental guarantees can offer another way of protecting affected groups from collective punishment.

The study on customary international law conducted by the International Committee of the Red Cross contains two rules relating to collective punishment: 'No one may be convicted of an offence except on the basis of individual criminal responsibility.[74] Collective punishments are prohibited.'[75] According to the study, the prohibition of collective punishment and the principle of individual criminal responsibility are linked, with collective punishment being broader in scope as it covers not only criminal sanctions.[76]

The general acceptance of the prohibition of collective punishment could be supported by the practice of courts on national and international level and of international organisations. In the aftermath of the Second World War, several national courts were dealing with cases on collective punishment. The Military Tribunal of Rome ruled in the *Priebke* case that the killing of 335 people as response to the killing of several German officers was in violation of the rules on collective punishment.[77] The Dutch Special Court of Cassation ruled that the imposition of fines by Nazi Germany on a part of the Dutch population sufficed to trigger the prohibition of collective punishment and that Germany

---

[73] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f3586 (accessed on 15/04/18); Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II) https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f3cb8 (accessed on 15/04/18).
[74] Henckaerts, J.M. & Doswald-Beck, L. (eds.) (2005). *Customary International Humanitarian Law*. Volume 1. Cambridge, Cambridge University Press, p.372 (Rule 102).
[75] Henckaerts, J.M. & Doswald-Beck, L. (eds.) (2005) *supra* note 75, p.374 (Rule 103).
[76] Henckaerts, J.M. & Doswald-Beck, L. (eds.) (2005) *supra* note 75, p.374 (Rule 103); Sandoz, Y., Swinarski, C. & Zimmermann, B. (eds.)(1987) *supra* note 41, pp.874, 1374.
[77] *Priebke case* (Judgment) Military Tribunal of Rome, Cassazione penale [1998] 668 (22 July 1997); Marchisio, S. (1998). The Priebke Case before the Italian Military Tribunals: A Reaffirmation of the Principle of Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, *Yearbook of International Humanitarian Law*, 1, pp.344-353, p.350.

could not refer to Article 50 of the Hague Regulations to justify its actions based on an alleged passive responsibility of the Dutch population if it had provoked the attacks by 'deliberate acts of injustice'.[78] Aside from cases originating from the Second World War, a case of collective punishment was discussed by a United States' Army Court. Considering the killing of South Vietnamese civilians, it found that 'slaughtering many for the presumed delicts of a few is not a lawful response to the delicts'.[79]

Turning to the international level, the International Criminal Tribunal for the Former Yugoslavia has ruled in the case *Mucić et al.* on confinement measures regarding civilians. Such acts had to be subjected to individual evaluation, outlawing any collective imposition.[80] Furthermore, the Special Court for Sierra Leone has dealt with collective punishment in several cases. In the *Brima, Kamara and Kanu* judgment the Court adopted a broad approach, highlighting the nature of collective punishment as an independent war crime: 'The Trial Chamber considers that collective punishments and acts of terror pursuant to Articles 3 (b) and 3 (d) both require a specific purpose - either to terrorise or to punish. These crimes do not necessarily require evidence of violence to life, health and physical well-being of persons ….'[81]

In addition, the customary character of the prohibition is backed by national regulations. Amongst others, Israel's Manual of the Laws of War includes an absolute prohibition of the collective punishment of prisoners of war.[82] The Russian Military Manual bans the collective punishment of 'war victims' by reference to the Geneva Conventions and Additional Protocol I.[83]

---

[78] Darcy, S. (2007) *supra* note 8, pp.41; Trial of Hans Albin Rauter, Netherlands Special Court in 's-Gravenhage (The Hague) (4 May 1948) and Netherlands Special Court of Cassation (12 January 1949) reprinted in United Nations War Crimes Commission (1949). *Law Reports of Trials of War Criminals*. Volume 14. London, His Majesty's Stationery Office, pp.89ff.
[79] *United States v First Lieutenant William L. Calley, Jr*. (Judgment) 46 Court of Military Review 1131 (16 February 1973); Henckaerts, J.M. & Doswald-Beck, L. (eds.) (2005). *Customary International Humanitarian Law.* Volume 2. Cambridge, Cambridge University Press, pp.2508f.
[80] *Mucić et al. "Čelebići Camp"* (Judgment) IT-96-21-T, Trial Chamber (16 November 1998) para.578.
[81] *Brima, Kamara and Kanu* (SCSL-2004-16-PT) Judgment, Trial Chamber II (20 June 2007) para.2108; see also *Fofana and Kondewa* (SCSL-04-14-T) Judgment, Trial Chamber I (2 August 2007) para.176ff.
[82] Israel, Laws of War in the Battlefield, Manual, Military Advocate General Headquarters, Military School, 1998, p.53; Henckaerts, J.M. & Doswald-Beck, L. (eds.) (2005) *supra* note 79, p.2504.
[83] Russia, Instructions on the Application of the Rules of International Humanitarian Law by the Armed Forces of the USSR, Appendix to Order of the USSR Defence Minister No. 75, 1990, § 8 (b); Henckaerts, J.M. & Doswald-Beck, L. (eds.) (2005) *supra* note 79, p.2505.

However, the question of whether the prohibition of collective punishment amounts to jus cogens as well, is still open to debate. Referring to a study on jus cogens by Hannikainen, Darcy mentioned that there might be caveats regarding the level of severity of the collective punishment imposed, meaning that particularly harsh measures for instance relating to death sentences might have this peremptory character, whereas milder collective punishments have not.[84]

To sum up the observations made above, collective punishment is prohibited under the law of armed conflict and customary international law concerning international as well as non-international armed conflicts.[85] This finding represents an important backup of existing treaty regulations in cases which are not covered by them or concerning states which are not party to the relevant treaties. The reaffirmation of the prohibition of collective punishment in customary international law creates another layer of protection and stands against opposite state policies, in particular when it comes to non-international armed conflicts.

3.1.2.3 International Criminal Law

Collective punishment is not only prohibited under the law of armed conflict but has been considered a war crime by two international criminal tribunals. The war crime of collective punishment is explicitly enshrined in the Statute of the Special Court for Sierra Leone and the Statute of the International Criminal Tribunal for Rwanda and its formulation is based on Article 4 of Additional Protocol II to the 1949 Geneva Conventions.[86] The Special Court for Sierra Leone has ruled on the war crime of collective punishment in its Trial and Appeals Chamber in the case *Fofana and Kondewa* in 2007 and 2008.[87] However, the definition of the war crime of collective punishment the Special Court has developed in this case is discussed in the next section in more detail as it is useful for the analysis of the act of collective punishment in general.

However, collective punishment is not explicitly mentioned as a war crime in the Rome Statute of the International Criminal Court. Article 8 of the Rome Statute encompasses

---

[84] Darcy, S. (2007) *supra* note 8, pp.73f; Hannikainen, L. (1988). *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status*. Helsinki, Finnish Lawyers' Publishing Company, pp. 489ff.
[85] Henckaerts, J.M. & Doswald-Beck, L. (eds.) (2005) *supra* note 75, p.374.
[86] Statute of the Special Court for Sierra Leone, Article 3 (b), annexed to the Special Court Agreement (16 January 2002) in accordance with S/RES/1315 (2000); see also S/RES/955 Statute of the International Tribunal for Rwanda (8 November 1994) Article 4 (b) (containing an explicit reference to collective punishment).
[87] *Fofana and Kondewa* (SCSL-04-14-T) *supra* note 81; *Fofana and Kondewa* (SCSL-04-14-A) *supra* note 5.

an exhaustive list of war crimes and although collective punishment was mentioned in earlier proposals, it was not included in the final version of the Statute.[88] After providing a convincing account of the standing of the war crime of collective punishment in customary international law, Darcy argues for the inclusion of collective punishment as a war crime in the Rome Statute by way of an amendment. Given the limited scope of ad hoc international criminal tribunals such as the Special Court for Sierra Leone, the International Criminal Court, having jurisdiction over international crimes not limited to specific circumstances would be well placed to deal with such a war crime and he makes the practical point on the Court's potential ability to decide on collective punishment in the Occupied Palestinian Territories.[89]Although it remains to be seen whether the state parties to the International Criminal Court will adopt an amendment for the inclusion of the war crime of collective punishment into the Rome Statute, the surrounding debate pointing to evidence of such a war crime under customary international law highlights the seriousness of acts of collective punishment. The definition and scope thereof are discussed in the following.

3.1.3 Definition and scope of collective punishment

As the evaluation of treaty and customary international law has shown, the prohibition of collective punishment in times of armed conflict is a well-established principle. However, most treaties solely prohibit collective punishment without defining it. The lack of a definition poses difficulties in particular regarding the delineation of collective punishment from other acts such as belligerent reprisals. For this reason, the section will start with a short description of belligerent reprisals before discussing the act of collective punishment in more detail.

Belligerent reprisals are aimed at the restoration of lawful behaviour of the opposing party in an armed conflict and the enforcement of compliance with the applicable rules. Although this definition seems to clarify the distinction between collective punishment and belligerent reprisals, a look at their use in practice tells a different story. These concepts have been confused in the past due to the widespread use of the term "reprisal" in a broader, non-legal sense.[90] Furthermore, collective punishment and belligerent

[88] A/51/22 Report of the Preparatory Committee on the Establishment of an International Criminal Court (13 September 1996) Volume II, pp.61, 63.
[89] Darcy, S. (2010). Prosecuting the War Crime of Collective Punishment: Is it Time to Amend the Rome Statute?, *Journal of International Criminal Justice*, 8, pp.29-51, pp.46ff.
[90] See eg Mitchell, A.D. (2001). Does one illegality merit another? The law of belligerent reprisals in international law, *Military Law Review*, 170, pp.155-177, pp.160f; see also Martines, F. (1998). The Defences of Reprisals, Superior Orders and Duress in the Priebke Case before the Italian

reprisals have taken various similar forms in the past, such as attacks against civilians or civilian property.[91]

Belligerent reprisals are acts contrary to the law of armed conflict, undertaken in response to a prior serious violation thereof by the other party, in order to restore compliance with those rules. Since it might be difficult to identify the motivation behind such an act as securing respect for the law of armed conflict and not only revenge or punishment, the nature of such acts has to be distinguished from collective punishment in practice.[92] To distinguish these two notions, Rabbat and Mehring hold that '[b]elligerent reprisals need not target a group as such, whereas the collective nature of the sanction is crucial for the classification of an act as collective punishment.'[93]

Coming to examples for acts of collective punishment, Darcy mentions Germany's actions against the Russian population during the Second World War, including mass executions and property destruction, intensified by the 'scorched-earth policy' during its retreat. Regarding colonial conflicts, British emergency regulations and ordinances provided for the imposition of collective punishment in Palestine, Cyprus, Nigeria and Kenya, just to name a few.[94] Practices such as the levying of collective fines, the destruction or closing of shops and dwellings or the use of curfews as punishment were commonly used in such cases.[95] A more recent example of collective punishment in international armed conflicts could be provided by the United States' invasion of Iraq in

---

Military Tribunal, *Yearbook of International Humanitarian Law,* 1, pp.354-361, pp.354ff; Henckaerts, J.M. & Doswald-Beck, L. (eds.) (2005) *supra* note 79, p.2508.

[91] Garner, J.W. (1917). Community Fines and Collective Responsibility, *American Journal of International Law*, 11 (3), pp.511-537, p.514 (see eg the destruction of the town Fontenoy in France by German troops during the First World War after a railroad bridge was blown up and it was unclear whether civilians or the military was responsible); Kwakwa, E. (1990). Belligerent Reprisals in the Law of Armed Conflict, *Stanford Journal of International Law*, 27, pp.49-81, pp.54ff (see eg the burning of the Belgian University of Louvain by Germans during the First World War as reprisals for alleged civilian attacks against German troops).

[92] De Hemptinne, J. (2015). Prohibition of Reprisals, in Clapham, A., Gaeta, P. & Sassòli, M. (eds.). *The 1949 Geneva Conventions: A Commentary*. Oxford, Oxford University Press pp.575-596, pp.580ff; Darcy, S. (2015) *supra* note 1, pp.1163f.

[93] Rabbat, P. & Mehring, S. (2011). Collective Punishment, *Max Planck Encyclopedia of Public International Law*, para.3.

[94] Darcy, S. (2015) *supra* note 1, p.1161; Lemkin, R. (1944). *Axis Rule in Occupied Europe.* Washington, Carnegie Endowment for International Peace, pp.236f.

[95] Simpson, A.W.B. (2004). *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*. revised edition. Oxford, Oxford University Press, pp.940ff, 955ff; on Cyprus see eg: HC Deb 21 December 1956 vol 562 cc1609-40, Cyprus (Emergency Regulations) Mr.Robinson, para.1613, online available at: http://hansard.millbanksystems.com/commons/1956/dec/21/cyprus-emergency-regulations (accessed on 15/04/18).

2003 when they besieged Fallujah or, as described in more detail in the next chapter, Israel's continuing actions in the Occupied Palestinian Territories.[96]

One basic principle almost always referred to in the course of collective punishment is the principle of individual liability – punishment is personal. However, there is more to collective punishment than a violation of this principle. The intent behind it is the punishment of a certain distinguished group – to impose harm on a group of people collectively for acts they have not committed and they bear no responsibility for otherwise.[97] This group-based nature appears to be always assumed or taken for granted in the law of armed conflict, since this framework is tailored to groups such as civilians.[98] This might be one of the reasons why this characteristic of collective punishment has not received much attention in the context of the law of armed conflict so far.

However, in the context of the present thesis this matter is of utmost importance. Therefore, the act of collective punishment has to be defined in order to understand the criteria to which a potential prohibition of collective punishment under human rights law needs to respond to. This does not include any attempt to apply the law of armed conflict outside of its scope, but rather means that this area of law represents the starting point for the analysis of collective punishment and its origins. This undertaking should finally lead to an understanding of the act of collective punishment in order to define its effects and potential regulation in situations governed by human rights law. It is not the legal regulation of the law of armed conflict on collective punishment that has to be translated, but the act itself and a regulation under human rights law has to be found separately. This translation is necessary due to the imposition of collective punishment outside of its original domain – in situations governed by human rights law instead of by the law of armed conflict.

Rabbat and Mehring define collective punishment as 'a form of sanction imposed on persons or a group of persons in response to a crime committed by one of them or a member of the group'.[99] Punishment is imposed on them due to their identification with a certain group. As Rabbat and Mehring state: 'The persons protected against collective

[96] Darcy, S. (2015) *supra* note 1, p.1161; Shehata, S. (2005). Losing Hearts and Minds: Understanding America's Failure in Iraq, *Georgetown Journal of International Affairs*, 6 (1), pp.71-80, pp.77f.
[97] See the *Fofana and Kondewa* judgment of the Appeals Chamber of the Special Court for Sierra Leone below.
[98] Provost, R. (2002) *supra* note 6, pp.34ff.
[99] Rabbat, P. & Mehring, S. (2011) *supra* note 93, para.1.

punishment are those vulnerable groups who are dependent on an adversary, namely prisoners of war and civilian population in armed conflict.'[100] Even though Rabbat and Mehring do not explicitly address the affiliation with a certain group in their definition of collective punishment, this element is inherent in the concept of the law of armed conflict. It is useful to highlight this characteristic at this point as it foreshadows the debate on group rights in human rights law later in the thesis. In the context of international criminal law, a mental element has been added to the definition in order to encompass the independent nature of the war crime of collective punishment. This mental element is the punisher's intent to punish this specific group collectively for acts its members bear no individual responsibility for as discussed by the Special Court for Sierra Leone.

The Appeals Chamber of the Special Court for Sierra Leone elaborated on the war crime of collective punishment in its *Fofana and Kondewa* judgment. After several prior attempts to define the war crime of collective punishment in the Trial Chambers, the Appeals Chamber defined it as 'indiscriminate punishment imposed collectively on persons for omissions or acts some or none of them may or may not have been responsible' with 'the specific intent of the perpetrator to punish collectively'.[101] The Appeals Chamber expanded on this definition by distinguishing the act of targeting civilians from collective punishment:

> 'Thus, the *mens rea* element of collective punishments represents the critical difference between this crime and the act of targeting. While targeting takes place on account of who the victims are, or are perceived to be, the crime of collective punishments occurs in response to the acts or omissions of protected persons, whether real or perceived.'[102]

The emphasis on a different *mens rea*, on a different intention behind the act, represents a significant element of the war crime of collective punishment.[103] The judgment goes on, emphasising the different characteristics and material elements of each war crime under the Special Court's statute:

> 'The crime of collective punishment requires proof of an intention to punish collectively, which murder, pillage and cruel treatment do not. In addition,

[100] Rabbat, P. & Mehring, S. (2011) *supra* note 93, para.1.
[101] *Fofana and Kondewa* (SCSL-04-14-A) *supra* note 5, para.224.
[102] *Fofana and Kondewa* (SCSL-04-14-A) *supra* note 5, para.223.
[103] Darcy, S. (2015) *supra* note 1, pp.1168f; Darcy, S. (2010) *supra* note 89, pp.40ff.

murder requires the death of the victim, which collective punishment does not and pillage requires proof of appropriation which the crime of collective punishment does not.'[104]

The *Fofana and Kondewa* judgment contributes in a significant way to a definition of the war crime of collective punishment. Still, the difficulties in establishing a general definition of the act of collective punishment as such might not end with the Special Court for Sierra Leone, as international jurisprudence on the issue is scarce.[105] On the other hand, this lack in turn encourages the attempt in the present thesis to contribute to this endeavour. Collective punishment is the punishment of a group as such for an act committed by one or some of its members for which the remaining members of the group do not bear individual responsibility. The different aspects of the act of collective punishment highlighted above indicate the challenges that lie ahead for a prohibition of collective punishment under human rights law. The ways in which this framework might respond to the collective nature of the act itself and the intent behind it are addressed in the relevant chapters to follow.

3.1.4 Conclusion

This chapter examined the legal regulation of collective punishment in the law of armed conflict. As shown by treaty law and custom, collective punishment is prohibited in international and non-international armed conflicts, with the most important instruments being the Geneva Conventions from 1949 and their 1977 Additional Protocols. Their adoption represents a major step towards the protection of civilians from collective punishment, especially if one thinks about the permissive Article 50 of the Hague Regulations applicable around a century ago.

Still, the drafting process of the Geneva Conventions and their Additional Protocols revealed state policies favouring the imposition of collective punishment and a general reluctance or even unwillingness to cede powers in order to protect parties to a conflict other than states. Seen from a broader perspective, the debates surrounding non-international armed conflicts, national liberation movements and their status under the law of armed conflict are exemplary of this policy stance.

Collective punishment is the punishment of a group as such for an act allegedly committed by one of its members for which they bear no individual responsibility. While

[104] *Fofana and Kondewa* (SCSL-04-14-A) *supra* note 5, para.225.
[105] Sivakumaran, S. (2010). War Crimes before the Special Court for Sierra Leone, *Journal of International Criminal Justice*, 8, pp.1009-1034, pp.1020ff.

establishing the foundation for the discussion of collective punishment under human rights law, the definition of collective punishment has also foreshadowed some challenges a prohibition of collective punishment under human rights law might face such as the group-based character of the act itself.

This theoretical account of the legal regulation of collective punishment under the law of armed conflict will be complemented by the ensuing case study on the OPT looking at collective punishment in practice.

3.2 Case study on the Occupied Palestinian Territories

3.2.1 Introduction

The following chapter examines Israel's punitive house demolition policy in the Occupied Palestinian Territories (OPT) in relation to the prohibition of collective punishment under the law of armed conflict and group empowerment. To start with, the overall situation in the Occupied Palestinian Territories will be assessed in order to define the applicable legal framework. Subsequently, punitive house demolitions are discussed in more detail, starting with an overview of the general proceedings via the emergency regulation Israel is relying on, combined with judgments of the Israeli Supreme Court on the issue. These decisions will be analysed with regard to aspects of the prohibition of collective punishment under the law of armed conflict and broader justice and empowerment aspects regarding the role of international law in relation to groups. As Malloy holds in the context of minority empowerment: '[W]hen minorities mobilize on the basis of protection schemes by claiming their rights and calling on duty-bearers to take responsibility, they move towards the goal of empowerment.'[1] It will be argued that the prohibition of collective punishment under the law of armed conflict fulfils a twofold task – on one hand, it contributes to the empowerment of the Palestinians and on the other hand, it denies legality to Israel's collective punishment policy.

Owing to the chosen methodology, law has to be seen in relation to practice – how it is applied and what effects it has on real life situations. Therefore, the following case study illustrates the theoretical underpinnings of the previous chapter and links the legal regulation of collective punishment to state policies on it. In order to examine the actual effect of the relationship between the legal regulation of collective punishment and state policies thereon on the protection and empowerment of groups, examples from practice such as the situation in the OPT represent an essential component to understand law in context and deduce comparable standards and potential solutions for similar situations.

The Israeli occupation of the Gaza Strip and the West Bank is now in its fifth decade. Palestinian homes continue to be destroyed as part of a punitive house demolition policy pursued by the Israeli government. According to the government line, the demolitions

[1] Malloy, T.H. (2014). National Minorities between Protection and Empowerment: Towards a Theory of Empowerment, *Journal on Ethnopolitics and Minority Issues in Europe*, 13 (2), pp.11-29, p.21.

are not measures of punishment, but of deterrence, compelling potential suicide bombers to think again. Notwithstanding all the debate as to whether or not punitive house demolitions are in fact an effective deterrent, their character remains unchanged – they represent measures of collective punishment inflicted upon innocent members of a certain group, on Palestinian families whose relatives have allegedly committed an offence against the occupying power. Such acts are expressly prohibited under the law of armed conflict as discussed in the preceding chapter.

However, in order to establish if the prohibition of collective punishment is applicable in the West Bank and the Gaza Strip, their status as occupied has to be confirmed first. For this reason, the present chapter will start with an overview of the situation in the Palestinian territories and the arguments brought for and against a still ongoing occupation thereof.

Having the status of occupation confirmed, Israel's policy of punitive house demolitions – which represent only one particular type of house demolitions carried out by Israel in the OPT – will be examined in more detail. Israel is relying on an outdated emergency regulation as basis for these extrajudicial demolitions and its Supreme Court has supported their application in a number of cases. Similarly to the Israeli government, the Supreme Court focusses on issues of effective deterrence, combined with proportionality and military discretion considerations – avoiding an assessment of the emergency regulation's compatibility with the law of armed conflict. The statements delivered by the government in court together with the Court's affirmative reasoning represent helpful indicators in exploring Israel's policy and its underlying intentions. Some of these have already been exposed by statements made during the codification process of the relevant instruments of the law of armed conflict as explored in the previous chapter. Furthermore, the acceptance of collective punishment supported by a mixture of a sense of collective guilt, biblical parables and desensitization caused by a certain routine might have had its impact on government officials, judges as well as the public.[2]

However, international law has to rise to this challenge, and the prohibition of collective punishment under the law of armed conflict is making efforts towards that. It fulfils the important role of blocking Israel from justifying its policy under the law of armed conflict, thereby denying it legality. Furthermore, it provides legal tools for affected Palestinians

[2] Fletcher, G.P. (2004). Collective Guilt and Collective Punishment, *Theoretical Inquiries in Law*, 5, pp.163-178.

to make their case in court and actively engage in their struggle for justice. The Palestinians have proved that they can use international law as a means of empowerment. By becoming party to the Geneva Conventions and their Additional Protocols and to the Rome Statute of the International Criminal Court as well as by receiving the non-member observer State status in the United Nations, they have raised awareness for the situation in the OPT on international level.[3] In addition, moves like that enable them to present their case themselves and establish their position. In this sense, the way in which the Palestinians make use of international law enables them to play a more active role in changing their own living conditions and to engage in their struggle for justice. Yet what this also reaffirms is that the prohibition of collective punishment alone is not enough to ensure the empowerment of Palestinians but plays only a part in a concerted effort with other international and domestic mechanisms working towards that goal.

The chapter will conclude that punitive house demolitions represent measures of collective punishment in contravention of Israel's obligations under the law of armed conflict and that although this prohibition could not prevent Israel from demolishing homes at the moment, it blocks any justification of the measure under its framework and offers a tool as well as a platform for Palestinians to get their case heard.

3.2.2 Setting the scene – Israeli occupation of Palestinian territories

This section outlines the situation in the Occupied Palestinian Territories in order to assess their status under international law. This analysis represents an important part of the case study as it determines whether the prohibition of collective punishment under the law of armed conflict is applicable to these territories or not. Consequently,

[3] Fourth Geneva Convention: Accession of the State of Palestine and entry into force on 2 April 2014, online available at: https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280158b1a (accessed on 15/04/18); Additional Protocol I to the Geneva Conventions: Accession of the State of Palestine and entry into force on 2 April 2014, online available at: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f3586 (accessed on 15/04/18); Additional Protocol II to the Geneva Conventions: Accession of the State of Palestine on 4 January 2015, entry into force on 4 July 2015, online available at: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f3cb8 (accessed on 15/04/18); Rome Statute of the International Criminal Court: Accession of the State of Palestine on 2 January 2015, entry into force on 1 April 2015, online available at: https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280025774 (accessed on 15/04/18); A/RES/67/19 Status of Palestine in the United Nations (4 December 2012); for the debate around Palestine's non-member observer status see eg Goodwin-Gill, G. (2011). Palestine, Statehood and the Challenges of Representation, EJIL: Talk!, online available at: http://www.ejiltalk.org/palestine-statehood-and-the-challenges-of-representation/ (accessed on 15/04/18).

the question whether the Palestinians could use the prohibition of collective punishment to raise awareness for the situation in the OPT in general, can only be answered by knowing the relevant framework. In other words, the assessment of the legal situation in the OPT is a precondition for the analysis of punitive house demolitions and the resulting reactions in terms of Israeli state policy and Palestinian empowerment.

In the course of the Six-Day War in 1967, Israel occupied territories belonging to Palestine under the British Mandate – the West Bank including East Jerusalem and the Gaza Strip.[4] However, from the beginning of the occupation the status of the Palestinian territories has been heavily disputed, not least because of the duties and obligations associated with being an occupying power. The status of occupation would provide permanent protection under the law of armed conflict outlawing amongst others the imposition of collective punishment, which is relevant for the punitive house demolitions witnessed in the Gaza Strip and the West Bank.

An occupying power has to follow the rules of belligerent occupation. The main focus here will be placed on the provisions in the law of armed conflict due to its explicit regulation of collective punishment. However, human rights instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights are considered applicable as well.[5] An example of the way in which Palestinians facilitate international human rights instruments in their struggle for justice could be the recent inter-state complaint the State of Palestine launched against Israel under the International Convention on the Elimination of All Forms of Racial Discrimination.[6]

[4] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p.136, para.73ff.
[5] Tilley, V. (ed.) (2009). *Occupation, Colonialism, Apartheid? A re-assessment of Israel's practices in the occupied Palestinian territories under international law*. Cape Town, Middle East Project of the Democracy and Governance Programme, Human Sciences Research Council of South Africa, pp.33ff, online available at: http://www.alhaq.org/attachments/article/236/Occupation_Colonialism_Apartheid-FullStudy.pdf (accessed on 15/04/18).
[6] Keane, D. (2018). ICERD and Palestine's Inter-State Complaint, EJIL Talk!, online available at: https://www.ejiltalk.org/icerd-and-palestines-inter-state-complaint/ (accessed on 15/07/18); Bader, M. (2018). The State of Palestine Lodges an Interstate Complaint against Israel under the Convention on the Elimination of All Forms of Racial Discrimination, Ministry of Foreign Affairs of the State of Palestine, online available at: http://www.mofa.pna.ps/en/2018/04/24/the-state-of-palestine-lodges-an-interstate-complaint-against-israel-under-the-convention-on-the-elimination-of-all-forms-of-racial-discrimination/ (accessed on 15/07/18).

Although aware of the discussion of apartheid and colonialism in relation to the OPT, this debate would go beyond the scope and emphasis of the present chapter.[7]

Whether or not a state can be considered an occupying power, is determined by Article 42 of the 1907 Hague Regulations: 'Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.'[8] In addition to the Hague Regulations, the Fourth Geneva Convention includes provisions on the protection of the civilian population during occupation such as the prohibition of collective penalties in Article 33 as discussed in the previous chapter. Furthermore, the scope of the Fourth Geneva Convention is broader than the Hague Regulations'. The commentary to Article 6 Fourth Geneva Convention considers the Convention already applicable during the advance of troops, without having to wait for the establishment of an occupation regime in order to provide protection for the civilian population.[9] Besides the protection of basic rights such as the right to life or freedom from genocide, collective penalties or deportation, the status as occupying power includes additional obligations such as to provide food and medical supplies to the population if the resources of the occupied territory are inadequate.[10]

Given the variety of obligations of an occupying power, the arguments brought forward by Israel aimed at refuting any allegations of occupation – starting with calling the OPT 'administered' or 'disputed' instead of occupied.[11] Although the Israeli authority issued

---

[7] See eg: Tilley, V. (ed.) (2009) *supra* note 5; Tilley, V. (ed.)(2012). *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories.* London, Pluto Press; Dugard, J. & Reynolds, J. (2013). Apartheid, International Law, and the Occupied Palestinian Territory, *European Journal of International Law*, 24 (3), pp.867-913;

[8] Regulations concerning the Laws and Customs of War on Land, annexed to Convention (IV) respecting the Laws and Customs of War on Land, The Hague (18 October 1907) Article 42.

[9] Darcy, S. & Reynolds, J. (2010). An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law, *Journal of Conflict & Security Law*, 15 (2), pp.211-243, pp.216ff; Uhler, O.M. & Coursier, H. (eds.) (1958). *IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*. Geneva, International Committee of the Red Cross, pp.59ff.

[10] Darcy, S. & Reynolds, J. (2010) *supra* note 9, p.228; Dinstein, Y. (2009). *The International Law of Belligerent Occupation.* Cambridge, Cambridge University Press, pp.146ff, 180ff; Gasser, H.P. & Dörmann, K. (2013). Protection of the Civilian Population, in Fleck, D. (ed.). *The Handbook of International Humanitarian Law*. 3rd edition. Oxford, Oxford University Press, pp.231-320, pp.237ff; on the additional obligations see eg: 75 UNTS 287, Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva (12 August 1949) Article 55 and the less extensive provisions in Article 23.

[11] Tilley, V. (ed.) (2009) *supra* note 5, p.67; Shamgar, M. (1971). The Observance of International Law in the Administered Territories, reprinted in Dinstein, Y. & Domb, F. (eds.)(2011*). The Progression of International Law: Four Decades of the Israel Yearbook on Human Rights – An Anniversary Volume*. Leiden, Martinus Nijhoff, pp.429-446; Israel Ministry of Foreign Affairs

an order in the West Bank that the Fourth Geneva Convention should apply to the present situation in the aftermath of the armed conflict in 1967, Israel afterwards claimed that the Palestinian territories could not be occupied since there was no legitimate sovereign which it could have ousted.[12] This was named the 'missing reversioner' argument.[13] The argument goes on that Egypt and Jordan invaded Israel in 1948, thereby taking the territory by force themselves. For this reason, neither of these states had a legitimate title to the territory and consequently Israel could not be an occupying power if there is no ousted sovereign whose reversionary rights it has to protect. Nevertheless, Israel conceded that although it would not apply the Fourth Geneva Convention in full it would apply its 'humanitarian provisions'.[14]

Secondly, Israel put forward a formal interpretation of Article 2 Fourth Geneva Convention concerning its application. Regarding occupation, the Article states that '[t]he Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party'.[15] Here now, Israel argued that the OPT did not constitute a High Contracting Party to the Fourth Geneva Convention, therefore excluding them from its scope of application.[16]

However, the International Court of Justice dismissed Israel's arguments altogether in its *Advisory Opinion on the Legality of the Construction of a Wall in the Occupied Palestinian Territory*. It stated that Israel itself and the Israeli Supreme Court have recognised the applicability of the Fourth Geneva Convention to the OPT and that subsequent claims to the contrary were not tenable. On the 'missing reversioner' argument, the Court stated that the 'great majority of other participants in the proceedings' did not confer any significance to the question whether Jordan had claimed

---

(2003). Forgotten Facts About the West Bank and Gaza Strip, online available at: http://mfa.gov.il/MFA/MFA-Archive/2003/Pages/DISPUTED%20TERRITORIES-%20Forgotten%20Facts%20About%20the%20We.aspx (accessed on 15/04/18).

[12] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory supra* note 4, para.93.

[13] For a supportive view on the 'missing reversioner' argument see the analysis in Shamgar, M. (1971) *supra* note 11, pp.430ff.

[14] Tilley, V. (ed.) (2009) *supra* note 5, pp.67ff; see also Regulations concerning the Laws and Customs of War on Land *supra* note 8, Article 43; Qupty, M. (1992). The Application of International Law in the Occupied Territories as Reflected in the Judgments of the High Court of Justice in Israel, in Playfair, E. (ed.). *International Law and the Administration of Occupied Territories*. Oxford, Oxford University Press, pp.87-124, pp.101ff.

[15] Convention (IV) relative to the Protection of Civilian Persons in Time of War *supra* note 10, Article 2.

[16] Tilley, V. (ed.) (2009) *supra* note 5, p.68.

any rights with respect to the Occupied Palestinian Territories before 1967.[17] The formal point on Article 2 Fourth Geneva Convention was invalidated by an interpretation of the Convention in good faith and according to its object and purpose, which was confirmed by a review of the Convention's travaux préparatoires indicating an extensive interpretation in favour of the protection of civilians.[18]

In recent years, Israel has again made several attempts to distance itself from the role as occupying power, with the most prominent development being the unilateral disengagement of Israeli troops from the Gaza Strip. In September 2005, the Israeli Defence Force declared the end of military rule in the Gaza Strip and withdrew its ground troops and the 1967 declaration forming the basis for their deployment and Israeli settlements from the territory.[19] In addition, the Israeli Security Cabinet declared the Gaza Strip 'hostile territory' in 2007.[20] This stance was later confirmed by the Israeli Supreme Court sitting as the High Court of Justice in a case concerning the electricity and gas supply to the territory from Israel. The Court held the position that Israel had no longer effective control over the Gaza Strip because the military rule ended and 'Israeli soldiers are no longer stationed in the territory on a permanent basis, nor are they in charge of what happens there'.[21]

---

[17] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory supra* note 4, para.93; Darcy, S. & Reynolds, J. (2010) *supra* note 9, pp.223f; Dinstein, Y. (1978). The International Law of Belligerent Occupation and Human Rights, *Israel Yearbook on Human Rights*, 8, pp.104-143, p.107; Roberts, A. (1992). Prolonged Military Occupation: The Israeli-Occupied Territories since 1967, in Playfair, E. (ed.). *International Law and the Administration of Occupied Territories*. Oxford, Oxford University Press, pp.25-85, pp.44ff; Kretzmer, D. (2002). *The Occupation of Justice*. Albany, State University of New York Press, pp.32ff.

[18] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory supra* note 4, para.95; Avocats Sans Frontières (2011). Enforcing Housing Rights: The Case of Sheikh Jarrah – Report of the fact-finding mission to Israel and the Occupied Palestinian Territory, pp.68ff, online available at: http://www.asf.be/wp-content/publications/ASF%20Housing%20Rights%20Report%20(May%202011).pdf (accessed on 15/04/18).

[19] Scobbie, I. (2004/05). An Intimate Disengagement: Israel's Withdrawal from Gaza, the Law of Occupation and of Self-Determination, *Yearbook of Islamic and Middle Eastern Law*, 11, pp.3-31; Aronson, G. (2005). Issues Arising from the Implementation of Israel's Disengagement from the Gaza Strip, *Journal of Palestine Studies*, 34 (4), pp.49-63; Mustafa, M. (2005). The Israeli Disengagement from the Gaza Strip: An End of the Occupation?, *Yearbook of International Humanitarian Law*, 8, pp.356-368.

[20] Tilley, V. (ed.) (2009) *supra* note 5 pp.81ff; Israel Ministry of Foreign Affairs (2007). Security Cabinet Declares Gaza Hostile Territory, online available at: http://www.mfa.gov.il/mfa/pressroom/2007/pages/security%20cabinet%20declares%20gaza%20hostile%20territory%2019-sep-2007.aspx (accessed on 15/04/18).

[21] HCJ 9132/07 *Al Basyouni et al v The Prime Minister et al* (Judgment) 30 January 2008, para.12, 11ff, unofficial English translation online available at: http://www.hamoked.org/items/9862_eng.pdf (accessed on 15/04/18).

However, the argument that Israel was no longer in effective control of the Gaza Strip was disputed internationally as demonstrated by continuing statements of United Nations bodies still considering it occupied territory.[22] Israel based its understanding of effective control on the very formal interpretation that occupation has to do with land warfare and for this reason, there could be no occupation if there are no soldiers on the ground. Yet Israel is still controlling the airspace above Gaza, its coastal waters and its borders in addition to means of remote surveillance, which Aronson aptly described as a 'security envelope'.[23] Currently, Israel remains in a position able to reimpose control over the Gaza Strip almost instantly, impeding any exercise of sovereignty by the Palestinian Authority and retaining ultimate control.[24] Given this substantial territorial control combined with control over public institutions such as tax and the population registry, a powerful argument can be made for an ongoing occupation of the Gaza Strip by Israel.[25]

Concluding from the observations made above, the Gaza Strip and the West Bank could still be considered occupied by Israel. Neither the 'missing reversioner' and other formal arguments nor the unilateral disengagement have changed the situation created in 1967 – a statement supported by the United Nations and the International Court of Justice. This finding represents an important precondition for the assessment of punitive house demolitions in these territories under the prohibition of collective punishment in relation to state policy and group empowerment. This means that Palestinians affected by punitive house demolitions can use the prohibition of collective punishment under the law of armed conflict to advance the Palestinians' broader struggle for justice and raise awareness for the situation in the OPT. Before evaluating the legal side of punitive

[22] See eg: A/HRC/31/73 Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 (11 January 2016); A/HRC/12/37 Human Rights Situation in Palestine and Other Occupied Arab Territories (19 August 2009); S/RES/1860 Middle East, including the Palestinian question (8 January 2009); A/HRC/12/48 Report of the United Nations Fact-Finding Mission on the Gaza Conflict (25 September 2009) para.276; A/RES/63/96 Operations of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (18 December 2008); A/RES/62/181 Permanent sovereignty of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab population in the occupied Syrian Golan over their natural resources (31 January 2008).
[23] Aronson, G. (2005) *supra* note 19, p.51; Tilley, V. (ed.) (2009) *supra* note 5, pp.83ff.
[24] A/HRC/12/48 *supra* note 22, para.276ff; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory supra* note 4, para.78.
[25] A/HRC/7/17 Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard (21 January 2008) para.25ff; Darcy, S. & Reynolds, J. (2010) *supra* note 9, pp.235ff; Dinstein, Y. (2009) *supra* note 10, pp.276ff.

house demolitions, a general overview on how and when such demolitions are conducted will be provided.

3.2.3 Punitive house demolitions

3.2.3.1 Overview

This section outlines the ways in which Israel employs punitive house demolitions in the Occupied Palestinian Territories. To understand the scope of Israel's policy on collective punishment, the measures and procedures taken in this regard must be considered. In addition, the manner in which Israel imposes collective punishment already reveals traits of its policy and enables an analysis of punitive house demolitions in light of the prohibition of collective punishment later on.

Although the explicit policy of punitive house demolitions emerged with the occupation of the Palestinian territories in 1967, Israel's retaliation policy was formed already in the 1950s. Palestinian villages linked to attacks against Israelis were targeted and those acts were justified by the authorities with deterrence considerations.[26] According to the Israeli non-governmental organisation B'Tselem, the Israeli Defence Forces have partially or completely demolished around 2467 houses and partially or completely sealed around 395 from the beginning of the occupation in 1967 to October 2004.[27] Another more recent study of B'Tselem accounts for 683 house demolitions for punitive purposes between January 2001 and February 2016, rendering 4394 people homeless.[28] The number of house demolitions increased during the First Intifada from 1987 to 1991, the Second Intifada from 2000 to 2005 and during the outbreak of violence in 2014.[29]

Punitive house demolitions are only one particular form of house demolitions carried out in the OPT. According to the local non-governmental organisation Al-Haq, the Israeli Defence Forces have destroyed more than nine thousand homes from the beginning of the occupation until 2003. The other instances where houses are demolished are related

---

[26] Kuperman, R.D. (2001). The impact of internal politics on Israel's reprisal policy during the 1950s, *Journal of Strategic Studies*, 24 (1), pp.1-28.
[27] Shnayderman, R. (2004). Through no fault of their own - Punitive House Demolitions during the al-Aqsa Intifada, B'Tselem Information Sheet, p.17, online available at: http://www.btselem.org/download/200411_punitive_house_demolitions_eng.pdf (accessed on 15/04/18).
[28] B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories (2016). Statistics on punitive house demolitions, online available at: http://www.btselem.org/punitive_demolitions/statistics (accessed on 15/04/18).
[29] Shnayderman, R. (2004) *supra* note 27, p.17; Harpaz, G. (2015). When Does a Court Systematically Deviate from its Own Principles? The Adjudication by the Israel Supreme Court of House Demolitions in the Occupied Palestinian Territories, *Leiden Journal of International Law*, 28, pp.31-47, pp.33f.

to the establishment of 'no-go areas' around Israeli settlements, the clearing of settler roads and borders, the construction of homes contrary to Israeli housing permit policy and for military purposes, whereas the military necessity of such actions is mostly insufficiently proven if at all. However, due to the focus on collective punishment, the demolition of homes of persons who have carried out attacks against Israelis or are suspected of having done so, is discussed in more detail.[30]

As Darcy argues, these other instances of house demolitions are of a punitive character as well.[31] However, the decision to focus on those house demolitions which are explicitly carried out for punitive purposes stems not only from the government's characterisation thereof, but also from a point of terminology. Collective punishment is the punishment of a group of persons for an act committed by one or some of its members for which they do not bear individual responsibility. Apart perhaps from the construction of homes contrary to Israeli housing permit policy, in the case of house demolitions for the establishment of 'no-go areas', the clearing of settler roads and borders, or for military purposes the punishment for an act allegedly committed by one or some of the members of a group for which the members of the group bear no individual responsibility for, might be in question. Certainly, the broader perspective around all house demolitions is the punishment of a certain group in a broader sense, the Palestinians. But whether the act of collective punishment as defined here can or should encompass acts based on very remote 'acts committed by one or some of its members' and how much it overlaps with the discriminatory treatment of the Palestinians in general might be open to debate. It could be possible to refer to the general struggle of the Palestinians against Israeli occupation as that 'act committed by one or some of its members', but questions surrounding these particular instances might divert attention from the general discussion of the definition of collective punishment in the present thesis. Therefore, and for the reasons already put forward above, the following analysis focuses on punitive house demolitions in reaction to attacks carried out or allegedly carried out by one or some of its residents.

Punitive house demolitions are most common after suicide attacks, but they can also result from the commission of less severe crimes or the mere suspicion thereof. In any case, the perpetrator's or alleged perpetrator's family is effectively rendered homeless

[30] Darcy, S. (2003). *Israel's Punitive House Demolition Policy: Collective Punishment in Violation of International Law*. Ramallah, Al-Haq, pp.4f.
[31] Darcy, S. (2003) *supra* note 30, p.5.

as a result, making them pay for a crime they bear no individual responsibility for. Although homes sealed with concrete blocks or metal sheets are not demolished, the effect stays the same as the former inhabitants can no longer use their home. And while sealings would be reversible in theory, sealed homes are rarely reopened in practice. The partial demolition or sealing of houses involves only rooms, usually used by the perpetrator, whereas the rest of the building remains intact to be used by the family. Demolitions and sealings are ordered by the Military Commander, in combination with a curfew imposed on the surrounding area. Subsequently, bulldozers arrive to carry out the demolition or explosives are installed to blow up the building. In many reported cases, the families were given only short notice of the imminent demolition of their home, leaving not enough time to evacuate their belongings or even actively preventing them from taking their furniture and other valuables with them.[32]

To sum up, homes in the OPT are partially or completely sealed with concrete blocks or metal sheets, or partially or completely demolished by bulldozers or with explosives. The Israeli government has brought several arguments in support of punitive house demolitions, most prominently the justification that such measures would have a deterrent effect on potential attackers. However, if house demolitions are an effective deterrent or not does not change the punitive nature of this practice and therefore its prohibition under the law of armed conflict.[33] As will be outlined below, the demolition or sealing of homes for crimes allegedly committed by one of its inhabitants fulfils the basic criteria of collective punishment. Consequently, the depiction of how punitive house demolitions and sealings are carried out represents an essential precondition for this assessment. Another precondition could be found in Israel's legal argumentation on the matter. For this reason, the legal basis Israel is relying on for the demolitions will be examined in the ensuing section.

3.2.3.2 Legal basis of punitive house demolitions

In order to justify its punitive house demolitions, Israel is relying on an emergency regulation issued by the British during their administration of Palestine. The content and context of this regulation will be discussed in the following. The use of another legal regulation to counter the prohibition of collective punishment under the law of armed conflict supports the presumption that Israel is aware of this violation and willing to

[32] Darcy, S. (2003) *supra* note 30, pp.5ff; 29f; Breaking the Silence (2012). *Our Harsh Logic: Israeli Soldiers' Testimonies from the Occupied Territories, 2000-2010.* New York, Metropolitan Books, pp.17ff, 93ff.
[33] Darcy, S. (2003) *supra* note 30, pp.5ff.

defend its policy. In this sense, the law of armed conflict has put Israel in the position of having to justify its actions – effectively denying legality to its collective punishment policy. Therefore, the examination of Israel's reasoning sheds light on the relationship between law and policy on collective punishment.

The legal basis for the house demolitions carried out since the beginning of the occupation derives from Article 119 (1) Defence (Emergency) Regulations (Article 119). These regulations were adopted by the British in 1945 during their time administering Palestine in accordance with their League of Nations mandate.[34] However, the British repealed the regulations before terminating their mandate, a fact that was not recognised by Israel on the grounds that Britain did not follow the formal revocation procedure.[35] Despite several statements by the British and the Jordanian government that they considered the regulations as repealed, Israel is upholding these provisions and applies them to the occupied territories.[36]

Article 119 (1) is part of the penal provisions of the regulations and it states as follows:

> 'A Military Commander may by order direct the forfeiture … of any house, structure, or land from which he has reason to suspect that any firearm has been illegally discharged, … or of any house, structure or land … the inhabitants or some of the inhabitants of which he is satisfied have committed, or attempted to commit, … any offence against these Regulations … ; and when any house, structure or land is forfeited as aforesaid, the Military Commander may destroy the house or the structure or anything on growing on the land.'[37]

---

[34] Darcy, S. (2003) *supra* note 30, pp.11ff; O'Brien, W.V. (1991). *Law and Morality in Israel's War with the PLO*. London, Routledge, pp.242ff; League of Nations, C. 529. M. 314. 1922. VI, Mandate for Palestine (12 August 1922).

[35] See eg the detailed argumentation on the validity of the regulations of advocate Rosenthal in an objection to an assigned residence order to the Home Front Command: unofficial English translation online available at: http://www.hamoked.org/files/2014/1159021_eng.pdf (accessed on 15/04/18).

[36] Welchman, L. (1993). *A Thousand and One Homes: Israel's Demolition and Sealing Of Houses in the Occupied Palestinian Territories*. Ramallah, Al-Haq, pp.14ff, online available at: http://www.alhaq.org/publications/publications-index/item/a-thousand-and-one-homes?category_id=10 (accessed on 15/04/18); Roadstrum Moffett, M. (1989). *Perpetual Emergency: A Legal Analysis of Israel's Use of the British Defence (Emergency) Regulations, 1945, in the Occupied Territories*. Ramallah, Al-Haq, pp.6ff, online available at: http://www.alhaq.org/publications/publications-index/item/perpetual-emergency-a-legal-analysis-of-israel-s-use-of-the-british-defense-emergency-regulations-1945-in-the-occupied-territories
(accessed on 15/04/18); Darcy, S. (2003) *supra* note 30, pp.11ff.

[37] Defence (Emergency) Regulations, 27 September 1945, Palestine Gazette (No. 1442), Supp. No. 2, pp.1055-1109, p.1089.

Taking from the wording of Article 119, the Military Commander can order the destruction of 'the house or the structure' in case of a suspected launch of any firearm from this building or if any person living in such a building was involved in the commission of an offence against the Defence (Emergency) Regulations or other Military Court offences. In case of punitive house demolitions in response to offences such as suicide attacks, the fact that the perpetrator has lived in a house would suffice to justify its demolition. The families of perpetrators or alleged perpetrators are specifically targeted, but as family ties are no precondition, any other person or structure could be at risk as well.[38] An indicative example represents the sealing of homes whose owners have rented them to other unrelated persons who in turn have committed the offences triggering the sealing.[39]

The law of armed conflict contains several rules dealing with the destruction of property. Article 53 Fourth Geneva Convention limits property destructions to those 'absolutely necessary' for military operations.[40] A similar caveat is made by Article 23 Hague Regulations, allowing only for property destruction or seizure if 'imperatively demanded by the necessities of war'.[41] However, as Darcy argues, the punitive nature of these house demolitions and the prior notice to the inhabitants of a certain house before demolishing it, invalidate the point of military necessity which is foremost concerned with the imminent need to act. Similarly, this imminence is lacking in case of punishment following an attack already carried out. In addition, any destruction under the reservation of Article 53 of the Fourth Geneva Convention has to be proportionate in terms of the damage done and the military advantages to be gained – criteria whose

[38] Darcy, S. (2003) *supra* note 30, p.13.
[39] Kretzmer, D. (2002) *supra* note 17, p.159; HCJ 7040/15, 7076/15, 7077/15, 7079/15, 7081/15, 7082/15, 7084/15, 7085/15, 7087/15, 7092/15, 7180/*15 Haj Hamed et al v The Military Commander of the West Bank Area* (Judgment) 12 November 2015, unofficial English translation online available at: http://www.hamoked.org/files/2015/1159915_eng.pdf (accessed on 15/04/18); HCJ 8150/15, 8154/15, 8156/15 *Abu Jamal et al v GOC Home Front Command* (Judgment) 22 December 2015, Opinion Justice Mazuz, para.11, unofficial English translation online available at: http://www.hamoked.org/files/2015/1160003_eng.pdf (accessed on 15/04/18).
[40] Article 53 Fourth Geneva Convention reads: 'Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.'.
[41] Regulations concerning the Laws and Customs of War on Land, annexed to Convention (IV) respecting the Laws and Customs of War on Land *supra* note 8, Article 23.

fulfilment appear questionable regarding punitive house demolitions in response to already committed acts.[42]

Furthermore, the Military Commander can decide at his or her own discretion whether and how to employ Article 119 without any formal court proceedings, meaning the rule represents an extrajudicial sanction. However, the law of armed conflict calls for guarantees of fair trial for a population living under occupation, including the right to be heard, to be represented or to present witnesses.[43] Aggravating the situation for affected persons, the Israeli Supreme Court has ruled against the right to judicial review in relation to house demolitions.[44]

After examining the emergency regulation Israel is referring to in order to justify punitive house demolitions, this stance will be compared with Israel's obligations under the law of armed conflict. As outlined in the previous chapter, the prohibition of collective punishment is enshrined in international treaty law and customary law on armed conflicts. The most important provisions are contained in the Fourth Geneva Convention and the two Additional Protocols to the Geneva Conventions. Israel is a state party to the Fourth Geneva Convention,[45] but it is neither party to the First nor to the Second Additional Protocol.[46]

Therefore, the rule most pertinent to Israel's occupation of the Palestinian territories is Article 33 Fourth Geneva Convention, with its first paragraph stating that: 'No protected person may be punished for an offence he or she has not personally committed. Collective penalties … are prohibited.'[47] As a reminder, this prohibition should be understood in a broad sense, covering not only judicial sanctions, but also extrajudicial

---

[42] Uhler, O.M. & Coursier, H. (eds.) (1958) *supra* note 9, p.302; Darcy, S. (2003) *supra* note 30, pp.13f.
[43] For more details, see Convention (IV) relative to the Protection of Civilian Persons in Time of War *supra* note 10, Articles 71 to 73.
[44] Darcy, S. (2003) *supra* note 30, pp.43ff; HCJ 6696/02 *Amar et al v IDF Commander in the West Bank* (Judgment) 6 August 2002, Opinion Justice Barak, para.2ff.
[45] Signature on 12 August 1949; Ratification on 06 July 1951, entry into force on 06 January 1952; for more details, see United Nations Treaty Collection, detail on the Fourth Geneva Convention, online available at: https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280158b1a (accessed on 15/04/18).
[46] See the United Nations Treaty Series for ratification details on Additional Protocol I: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f3586 (accessed on 15/04/18); Additional Protocol II: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f3cb8(accessed on 15/04/18).
[47] Convention (IV) relative to the Protection of Civilian Persons in Time of War *supra* note 10, Article 33.

acts such as the order given by a Military Commander under Article 119 rendering punitive house demolitions illegal under the prohibition of collective punishment. In addition, the prohibition is well-established in customary international law, further backing Israel's obligations in this regard.[48]

The essence of collective punishment constitutes the imposition of sanctions or penalties on a group as such for acts committed or allegedly committed by some of its members and for which they do not bear individual responsibility. Therefore, there has to be a sufficient link or nexus between the (allegedly) committed offence and the punishment to establish the punitive nature of the act itself. Furthermore, the effect of collective punishment on innocent persons has to be substantial and not only a side effect of a sanction imposed on the perpetrator individually such as imprisonment.[49]

In the case of punitive house demolitions in the OPT, Palestinian families are rendered homeless for a crime allegedly committed by one of their relatives. They are punished as a group in violation of the principle of individual responsibility for crimes committed or allegedly committed by others. Gathering from Israeli punitive house demolition policy solely targeting Palestinians as well as its argumentation brought forward in relevant court cases discussed in detail below, this policy overlaps with the broader discriminatory treatment of Palestinians by the Israeli authorities. The punitive house demolitions carried out by Israel in the OPT represent acts of collective punishment. They are prohibited under the law of armed conflict applicable in the OPT and Israel has an obligation to abstain from such violations and to rather ensure the protection of the population living under its occupation. However, as Israel is not complying with its international obligations so far, the role of the prohibition of collective punishment in the broader struggle for justice of the Palestinians consists in denying legality to Israeli punitive house demolition policy and offering means to document Israeli violations of the law of armed conflict.

In conclusion, punitive house demolitions are violating Israel's obligations under the law of armed conflict. The emergency regulation the state is relying on does not justify these violations either – its inability to do so has been shown from several perspectives above. Given this finding of Israeli acts in contravention of the law of armed conflict, an

[48] Darcy, S. (2003) *supra* note 30, pp.19f; for the rules on collective punishment in customary international humanitarian law see: Henckaerts, J.M. & Doswald-Beck, L. (eds.) (2005). *Customary International Humanitarian Law*. Volume 1. Cambridge, Cambridge University Press, pp.372ff.
[49] Darcy, S. (2003) *supra* note 30, pp.23f.

examination of the state's line of argument appears the more interesting and necessary. A review of decisions of the Israeli Supreme Court might be helpful in this regard and will be undertaken subsequently, as the Court has been backing the government line on the issue.

3.2.3.3 Israel's punitive house demolition policy and the Israeli Supreme Court

3.2.3.3.1 Cases on punitive house demolitions

This section addresses some of the Israeli Supreme Court's key judgments on punitive house demolitions illustrating the relationship between Israel's policy on collective punishment and the law of armed conflict. By exploring the arguments brought forward by the Israeli authorities and supported by the Court, Israel's need to justify its policy and its awareness thereof will be highlighted, indicating policy choices contrary to its obligations under the law of armed.

In the past, Israel has often justified its punitive house demolition policy with its alleged deterrent character. This argument has found its way into the judgments of the Israeli Supreme Court, sitting as the High Court of Justice. The Court has not only demonstrated support for the government position but has argued in a more elaborate way than the government itself. For this reason, the policy of punitive house demolitions and its relation to the law of armed conflict appear to be properly explored by a look at government responses to petitions in combination with the reasoning found in the Court's decisions.[50]

During the course of judgments on Article 119, punitive house demolitions have undergone various classifications regarding their character. At the beginning of the occupation, the Court heard claims that house demolitions under the Article 119 would constitute reprisals prohibited by the last sentence of Article 33 Fourth Geneva Convention.[51] The Court countered this claim by arguing that house demolitions were not measures of ensuring future compliance, but of punishment.[52] Later however, the Court had to deal with the issue of collective punishment, a debate it has partly stirred up itself by describing house demolitions as punitive to avoid a finding of unlawful reprisals. However, since the Court and the government still consider Article 119 in force

[50] Qupty, M. (1992) *supra* note 14, pp.88, 101ff.
[51] Article 33 Fourth Geneva Convention fourth sentence states: 'Reprisals against protected persons and their property are prohibited'; Kretzmer, D. (2002) *supra* note 17, p.151.
[52] See eg Shamgar calling it 'personal punitive measures': Shamgar, M. (1971) *supra* note 10, p.443.

and applicable to the OPT, the discussion of collective punishment put forward by petitioners again and again was rather evaded by focussing on proportionality and military discretion.

Generally, the Court has upheld a very broad understanding of Article 119 and its constitutive elements. For instance, it considered sons of a family to be inhabitants of their parents' house even though they did not live there during term time or they lived permanently in student accommodation.[53] Furthermore, it rejected the claim that the phrase 'some of the inhabitants' would refer to at least more than one person living in the house being involved in the commission of an offence. In addition, since the Article's text does not require any kind of participation in the offence by the other inhabitants of the house, the Court approved house demolitions in cases where the rest of the family did not even had knowledge of the offence committed by one of their relatives.[54]

In the *Turkmahn* case, the Court introduced a test limiting the scope of Article 119. It decided on the demolition of a house comprising of three rooms in response to the perpetrator shooting a couple. However, as the house was inhabited not only by the perpetrator's siblings and mother, but also by one of his brothers and his family, the Court found that the entire demolition would be disproportionate. Given the technical impossibility to destroy only parts of the house, the Court ordered the sealing of two rooms, leaving the third room for the married brother and his family. This test however, bears another range of problematic questions as to why the Court considered the suffering of the nuclear family of the perpetrator less severe than of his wider family and why it employed a proportionality test in this case and not in other similar cases before as well. The Court addressed none of these questions in its judgment. However, the Court kept the proportionality test and from this case onwards decided on demolitions only in cases were just the nuclear family of the perpetrator was affected.[55]

Regarding the effectiveness of punitive house demolitions as deterrence, the Court has avoided to offer a clear answer and instead decided that it would not question the

---

[53] For a discussion of the 'residency tie' see: HCJ 1125/16 *Mer'i et al v Military Commander of IDF Forces in the West Bank* (Judgment) 31 March 2016, Opinion Justice Naor, para.12ff, unofficial English translation online available at: http://www.hamoked.org/files/2016/1125_16_eng.pdf (accessed on 15/04/18).

[54] Kretzmer, D. (2002) *supra* note 17, pp.153ff.

[55] Kretzmer, D. (2002) *supra* note 17, pp.159ff; HCJ 5510/92 *Turkman v Defense Minister* (case as referred to in Kretzmer, D.); see eg HCJ 4597/14 *'Awawdeh et al v West Bank Military Commander* (Judgment) 1 July 2014, Opinion Justice Naor, para.27, unofficial English translation online available at: http://www.hamoked.org/images/1158437_eng.pdf (accessed on 15/04/18).

Military Commander's assessment on the issue. Initially, the Court seemingly accepted a very low level of effectiveness to be sufficient to justify house demolitions and sealings. In the *Nazaal* case it held that 'it is sufficient that we are dealing with an unknown variable, against which there stands the chance (even if it be a small chance) that using the measure may possibly save human lives, in order to prevent us from intervening in the assessment and decision of the respondent.'[56]

In 2005 however, punitive house demolitions were discontinued due to the finding of a committee of high-ranking officials that such measures were rather detrimental to the overall situation and an ineffective deterrent. Furthermore, the committee was concerned about the compatibility of punitive house demolitions with international law.[57] Nevertheless, the policy of punitive house demolitions was re-established in 2008 – after an increase in terrorist attacks, the government argued in Court that 'there is a need to strengthen the deterrence measures, including demolitions of terrorists' houses and intensifying the sanctions against the terrorists' families'. [58] The Court's sole response was that '[o]ur position is that there is no room to intervene in the respondent's change of policy' and that 'an authority can change a policy and surely it may change it with change in circumstances', therefore abstaining from any intervention.[59]

---

[56] HCJ 6026/94 *Nazaal v Commander of IDF Forces in the Judea and Samaria Area* (recited in Kretzmer, D. (2002) *supra* note 17, p.162).

[57] HCJ 7733/04 *Mahmud 'Ali Nasser et al v Commander of IDF Forces in the West Bank* (Judgment) 20 June 2005, Opinion Justice Barak, para.4, unofficial English translation online available at: http://www.hamoked.org/files/2011/110740_eng.pdf (accessed on 15/04/18); Harpaz, G. (2015) *supra* note 29, pp.41f; Guiora, A.N. (2006). Transnational Comparative Analysis of Balancing Competing Interests in Counter-Terrorism, *Temple International & Comparative Law Journal*, 20 (2), pp.363-393, pp.375f; Ben-Naftali, O., Harpaz, G., Shany, Y. & Kremnitzer, M. (2014). Expert Opinion: The Lawfulness of Israel's House Demolition Policy under International Law and Israeli Law, unofficial English translation online available at: http://www.hamoked.org/files/2014/1159001_eng.pdf (accessed on 15/04/18) pp.17ff.

[58] HCJ 9353/08 *Abu Dheim et al v GOC Home Front Command* (Judgment) 5 January 2009, unofficial English translation online available at: http://www.hamoked.org/items/110991_eng.pdf (accessed on 15/04/18) para.10; see also: HCJ 9353/08 *Abu Dheim et al v GOC Home Front Command* (Petition for Order Nisi) 6 November 2008, para.8ff, unofficial English translation online available at: http://www.hamoked.org/items/110468_eng.pdf (accessed on 15/04/18); HCJ 8091/14 *HaMoked - Center for the Defence of the Individual et al v Minister of Defense et al* (Judgment) 31 December 2014, Opinion Justice Rubinstein, para.20, unofficial English translation online available at: http://www.hamoked.org/files/2014/1159007_eng.pdf (accessed on 15/04/18); HCJ 4597/14*'Awawdeh et al* (Judgment) *supra* note 55, Opinion Justice Naor, para.23.

[59] HCJ 9353/08 Abu Dheim et al v GOC Home Front Command (Judgment) *supra* note 58, para.11.

In the *'Awawdeh* case, the Court by and large continued the line of reasoning before the policy of punitive house demolitions was put on hold in 2005. Despite the petitioners' arguments as to why these house demolitions are prohibited under international law and that the point of deterrence would not change the illegality of the measure, the respondent decided to adhere to that principle and formulated the reason for the demolition order as 'for the purpose of deterring others from the execution of additional terror attacks.' [60] In addition, the respondent cited former Court decisions acknowledging that 'the exercise of said sanction indeed has a severe punitive implication', but that this punitive nature would be a side effect only and not the overall aim of the measure.[61]

Not challenging the authorities' response to the petition, the Court held that it would not interfere with the Military Commander's decision on the effectiveness of such measures. Even though the Court applied a proportionality test, it found that the partial demolition of a house met the criteria. Despite the petitioners' claim that the other part of the building would collapse as well unless the structure of the building were to be strengthened prior to partial demolition, the respondent proceeded with the demolition.[62]

In conclusion, the Israeli Supreme Court is upholding the government policy on punitive house demolitions, effectively supporting the imposition of collective punishment. Not only did the Court support the authority's line, it backed it with additional argumentation, new interpretations of Article 119 and new criteria, while failing to grasp the claims and line of reasoning brought forward by petitioners. This worrying history of Court cases on punitive house demolitions has led up to a case challenging Israel's core defence of such measures – Article 119 itself. With the cases presented above in mind, the case confronting Article 119 is discussed in the following.

---

[60] HCJ 4597/14 *'Awawdeh et al v West Bank Military* Commander (Response) 30 June 2014, para.27, unofficial English translation online available at: http://www.hamoked.org/images/1158435_eng.pdf (accessed on 15/04/18).
[61] HCJ 6026/94 *Nazaal v Commander of IDF Forces in Judea and Samaria Area* (recited in HCJ 4597/14 *'Awawdeh et al* (Response) *supra* note 60, para.34).
[62] HCJ 4597/14 *'Awawdeh et al* (Judgment) *supra* note 55, Opinion Justice Naor, para.15ff; Re: HCJ 4597/14 *'Awawdeh v the Military Commander* (Updating Notice) 1 July 2014, unofficial English translation online available at: http://www.hamoked.org/files/2014/1158439_eng.pdf (accessed on 15/04/18).

3.2.3.3.2 Challenging Article 119 Defence (Emergency) Regulations – the *HaMoked* case

In 2014, the human rights organisation HaMoked and seven other local human rights organisations filed a petition to the Court in order to review the general use of Article 119 and its compatibility with the law of armed conflict and human rights law. This case and its implications are analysed subsequently. Although the focus will be on the Court's findings regarding the law of armed conflict due to the explicit prohibition of collective punishment, a brief account of the shortcomings of the law of armed conflict in offering redress to victims as well as the potential role of human rights bodies in this regard conclude the section.

Drawing on the research question, its second part addresses not only the protection but the empowerment of groups and the *HaMoked* case represents an example of such empowerment through legal means – through the law of armed conflict. The prohibition of collective punishment enables the Palestinians to initiate court proceedings challenging its imposition and to actively participate in the change of their own living conditions. The law of armed conflict is the yardstick against which Israeli state practice is measured and it provides the Palestinians with tools to advance their struggle for justice. Although the prohibition of collective punishment on its own is unlikely to end Israel's punitive house demolition policy, it plays a role in working towards that aim by documenting and challenging Israeli practice. The judgment given by Justice Rubinstein, Deputy President of the Court and chair of the panel of three judges, made clear that the Court would not again decide on issues already addressed by it in the past – although this was a core argument of the petitioners. They argued that the discussion of collective punishment in two judgments around thirty years ago concluded that Article 119 as part of local law was superior to international law, and therefore the question whether it was in breach of the latter was not evaluated, rendering a review of the compatibility of punitive house demolitions with international law timely.[63] In addition, they made a point concerning international criminal law and house demolitions potentially constituting war crimes in the light of the State of Palestine's accession to the Rome Statute of the International Criminal Court.[64]

[63] The two judgments were: HCJ 434/79 *Sahweil v Commander of the Judea and Samaria Area and HCJ 897/86 Ramzi Hana Jaber v GOC Central Command et al* (as referred to in HCJ 8091/14 *HaMoked et al* (Judgment) *supra* note 58, Opinion Justice Rubinstein, para.3ff).
[64] HCJ 8091/14 *HaMoked - Center for the Defence of the Individual et al v Minister of Defense et al* (Petition for Order Nisi) 27 November 2014, unofficial English translation online available at: http://www.hamoked.org/files/2014/1159000_eng.pdf (accessed on 15/04/18); on this note, see the debate about universal jurisdiction and the arrest warrant issued by a British court

Nevertheless, the Court upheld its position that the assessment of effective deterrence remains with the military and is not up to its evaluation. Furthermore, it referred to recent cases such as *'Awawdeh* and *Qawasmeh*, stating that although house demolitions have not been used for several years, the current situation would demand a return to this measure and that it made its stance clear in these decisions already.[65]

On the issue of collective punishment, the Court made a rather unconvincing point by distinguishing between proportionate and disproportionate house demolitions, thereby blurring the absolute character of the prohibition of collective punishment.[66] It stated that 'proportionality also relates, in our opinion, to the question of whether the measure is exercised collectively – such as, God forbid, the demolition of the houses of an entire neighborhood, an inconceivable action in the context of Regulation 119 – as opposed to the demolition of the house of a proven terrorist, and the injury, which should not be taken lightly, is caused to the property of the house's inhabitants and neither to the property of others nor to human life.'[67]

However, the Court seemingly ignored the other persons living in the house with the perpetrator. Collective punishment does not start with the involvement of unrelated neighbours or landlords; it starts with the involvement of other members of a group such as family members of the perpetrator (civilians protected by the prohibition of collective punishment under the Fourth Geneva Convention). Although the Court has shown substantial efforts to make a case for punitive house demolitions, their illegality under the law of armed conflict remains unchanged – irrespective of any proportionality thresholds put forward by the Court.

---

against Major General Almog regarding the commission of war crimes, including the demolition of houses in the Gaza Strip in 2002: Machover, D. & Maynard, K. (2006). Prosecuting Alleged Israeli War Criminals in England and Wales, *Denning Law Journal*, pp.95-114. Similar attempts were undertaken against the Israeli politician Tzipi Livni in 2009 and 2011 (arrest warrants) and 2016 (questioning by the police): Williams, S. (2012). Arresting Developments? Restricting the Enforcement of the UK's Universal Jurisdiction Provisions, *Modern Law Review*, 75 (3), pp. 368-386; BBC News (4 July 2016). Israeli politician Tzipi Livni 'summonsed by UK police', online available at: http://www.bbc.co.uk/news/world-middle-east-36697324 (accessed on 15/04/18).

[65] HCJ 4597/14 'Awawdeh et al (Judgment) *supra* note 55; HCJ 5290/14, 5295/14, 5300/14 *Qawasmeh et al v Military Commander of the West Bank Area* (Judgment) 11 August 2014, unofficial English translation online available at: http://www.hamoked.org/files/2014/1158616_eng.pdf (accessed on 15/04/18); HCJ 8091/14 *HaMoked et al* (Judgment) *supra* note 58, Opinion Justice Rubinstein, para.16.

[66] HCJ 8091/14 *HaMoked et al* (Judgment) *supra* note 58, Opinion Justice Rubinstein, para.24.

[67] HCJ 8091/14 *HaMoked et al* (Judgment) *supra* note 58, Opinion Justice Rubinstein, para.25.

In his concurring opinion to the judgment Justice Sohlberg added another layer to the deterrent character of punitive house demolitions, citing studies on deterrence and family ties: 'The centrality of the family in the eyes of those involved in terror, is clearly indicated by these studies, and supports the deterring value embedded in the demolition of a terrorist's house.'[68] He even called deterrence via targeting family members or the family home the 'soft spot' of terrorists.[69]

Sohlberg elaborated on collective punishment as 'a moral issue, an issue of values, difficult and seething'.[70] Engaging in an excess of religious argumentation, he finally concluded that 'the sinner is not alone',[71] basing his point on family responsibility for not preventing attacks to equating having a suicide bomber in the family with leprosy: 'According to the Torah, when leprosy contaminates the walls of the house and cannot be eradicated, the entire house should be destroyed, even if consequently, all inhabitants of the house are injured, including the neighbor, whose wall is also destroyed.'[72]

In response to this panel judgment, the petitioners decided to file a request for further hearing with the Court. The main argument again was that the issue of collective punishment has never been satisfyingly discussed, not even in the judgment given in the case at hand where it formed the core claim of the petition.[73]

The authority's response to the request was rather brief and restated the argument that the issue has already been decided and that there would be hardly a chance to overturn these rulings – a stance that was confirmed by the Court which denied the request in a short four pages decision in November 2015.[74]

---

[68] HCJ 8091/14 *HaMoked et al* (Judgment) *supra* note 58, Opinion Justice Sohlberg, para.10; he also refers to a study which supports 'targeting what terrorists value': Wilner, A.S. (2011). Deterring the Undeterrable: Coercion, Denial, and Delegitimization in Counterterrorism, *Journal of Strategic Studies*, 34 (1), pp.3-37, p.31.
[69] HCJ 8091/14 *HaMoked et al* (Judgment) *supra* note 58, Opinion Justice Sohlberg, para.7ff, 12; see also the study on the effectiveness of punitive house demolitions in bringing down the number of suicide attacks which delivered inconclusive results but was still cited by Sohlberg in favour of the policy: Benmelech, E., Berrebi, C. & Klor, E.F. (2015). Counter-Suicide-Terrorism: Evidence from
House Demolitions, *Journal of Politics*, 77 (1), pp.27-43.
[70] HCJ 8091/14 *HaMoked et al* (Judgment) *supra* note 58, Opinion Justice Sohlberg, para.16.
[71] HCJ 8091/14 *HaMoked et al* (Judgment) *supra* note 58, Opinion Justice Sohlberg, para.25.
[72] HCJ 8091/14 *HaMoked et al* (Judgment) *supra* note 58, Opinion Justice Sohlberg, para.26.
[73] HCJFH 360/15 *HaMoked - Center for the Defence of the Individual et al v Minister of Defense* (Request for Further Hearing) 15 January 2015, para.2ff, unofficial English translation online available at: http://www.hamoked.org/files/2015/1159120_eng.pdf (accessed on 15/04/18).
[74] HCJFH 360/15 *HaMoked - Center for the Defence of the Individual et al v Minister of Defense* (Response) 12 February 2015, para.3ff, 15ff, unofficial English translation online available at:

On the same day, the judgment on the *Haj Hamed et al* case dealing with six house demolitions was delivered, declaring five of them proportionate and cancelling one in favour of the eviction of the suspect's family from a rented apartment.[75] Interestingly, in this as well as the *HaMoked* case, the Court mentioned not the compatibility of house demolitions with international law, but the need of international law to keep up with reality. In the *Haj Hamed et al* case, it was argued that 'the expectation that the state continues to adhere to the dichotomous distinctions created by international law may tie its hands in the war against terror, and put at risk the security of its citizens'.[76]

Sadly enough, the accusation that international law should be more realistic is nothing new in this context. The codification history of the Geneva Conventions as well as their Additional Protocols have exposed similar lines of argument, for instance those brought forward by the British when they warned the conference delegates that they are going to be disappointed if they demanded too many concessions in terms of state power.[77] It seems, as if the attitude demonstrated at conferences around seventy and fifty years ago respectively, has not changed much in Israel. Israeli authorities still tend to favour the ability to keep all options available and as in the case of punitive house demolitions in the OPT, to use them if they consider it necessary or beneficial. However, states have overwhelmingly agreed on the prohibition of collective punishment and so has Israel at least with regards to the Fourth Geneva Convention. And what is more, the prohibition offers a tool to the Palestinians to actively remind Israel of that obligation.

The review of court cases on punitive house demolitions has shown a continuing approval of the state's policy permitting collective punishment by the Israeli Supreme Court. While the government appears to be sure of the '[a]bsence of a real chance to overturn the ruling concerning Regulation 119',[78] the Court tries to justify what the

---

http://www.hamoked.org/files/2015/1159121_eng.pdf (accessed on 15/04/18); para.3ff, 15ff; HCJFH 360/15 *HaMoked et al v Minister of Defense et al* (Judgment) 12 November 2015, para.4f, unofficial English translation online available at: http://www.hamoked.org/files/2015/1159125_eng.pdf (accessed on 15/04/18).

[75] *Haj Hamed et al supra* note 39, Opinion Justice Naor, para.36ff; punitive house demolitions are still carried out, see eg: B'Tselem (2017). Innocents punished: Israeli military demolishes three homes and seals another, Ramallah District, online available at: http://www.btselem.org/photoblog/innocents-punished-israeli-military-demolishes-three-homes-and-seals-another-ramallah-dist (accessed on 15/04/18).

[76] *Haj Hamed et al supra* note 39, Opinion Justice Sohlberg, para.3; see also HCJ 8091/14 *HaMoked et al* (Judgment) *supra* note 58, Opinion Justice Rubinstein, para.22.

[77] See eg: Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977), Volume IX, p.73.

[78] HCJFH 360/15 *HaMoked et al* (Response) *supra* note 74, para.15ff.

authorities seem to perceive as their right – the right to demolish homes of perpetrators or alleged perpetrators of crimes in the OPT. In doing so, the Court has referred to an ever more unusual range of sources – even biblical stories and leprosy have entered the legal argument. This shows how hard it has become for the Court to uphold the government's position. Objections to the generally supportive line of case law are scarce and so far, they have only constituted the minority opinion, unable to overturn the Court's final decision.[79]

Israel's punitive house demolition policy seems to enjoy public support as well. It was even argued that the Supreme Court's permissive decisions on house demolitions are due to government and public pressure and the fear of damaging the Court's reputation if a judgment is interfering too much with military decisions and security needs.[80] For instance, after the beginning of the second intifada, Dershowitz and Lewin have proposed the destruction of entire villages and even death sentences for a suicide bomber's family.[81] Dershowitz went on after his proposal to broaden Israeli punitive house demolition policy to destruction of entire villages that a 'nonlethal approach like this is among the most moral and calibrated responses to terrorism' and that the 'problem with destruction of houses is how the world literally sees it'.[82]

Fletcher has argued that this acceptance of collective punishment via punitive house demolitions represents an indicator of 'deeply-held sentiments of collective guilt'.[83] He derives his analysis from biblical Hebrew terminology for terms such as guilt and punishment and explains the use of those concepts in the Bible, in particular the book of Genesis and their collective character.[84] The notion of collective guilt appeared

---

[79] Dissenting Opinions have been given by Justice Cheshin, Vogelman and Mazuz (their statements regarding the lawfulness of Regulation 119 are usefully summarised in HCJ 8150/15, 8154/15, 8156/15 *Abu Jamal et al v GOC Home Front Command* (Judgment) 22 December 2015, Opinion Justice Mazuz, para.3ff, unofficial English translation online available at: http://www.hamoked.org/files/2015/1160003_eng.pdf (accessed on 15/04/18).
[80] Harpaz, G. (2015) *supra* note 29, pp.37ff; Sultany, N. (2007). The Legacy of Justice Aharon Barak: A Critical Review, *Harvard International Law Journal Online*, 48, pp.83-92, pp.86f; Dotan, Y. (1999). Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice during the Intifada, *Law & Society Review*, 33 (2), pp.319-363, pp.326ff; Simon, D. (1994). The Demolition of Homes in the Israeli Occupied Territories, *Yale Journal of International Law*, 19 (1), pp.1-79, pp.27ff.
[81] Fletcher, G.P. (2004) *supra* note 2; Lewin, N. (2002). Deterring Suicide Killers, *Sh'ma: A Journal of Jewish Responsibility*, pp.11-12.
[82] Dershowitz, A.M. (2002). *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*. New Haven, Yale University Press, p.179.
[83] Fletcher, G.P. (2004) *supra* note 2, p.166.
[84] Fletcher, G.P. (2004) *supra* note 2, pp.168ff; on the socio-psychological factors underlying a desire for collective punishment see also: Mannheim, H. (1998). *Group Problems in Crime and Punishment*. 2nd edition. London, Routledge, pp.53ff; Masalha, N. (2007). *The Bible and Zionism:*

particularly in the comments made by Justice Sohlberg. In stating that 'the sinner is not alone', he attributed responsibility for the act committed by a relative to the entire family, arguing that they "should have known", that they "should have done something to prevent the act" and so forth. However, it appears to be hardly possible that of all families around the world, Palestinian families are especially aware of all the plans or actions of their relatives. Since punitive house demolitions are only carried out in the OPT against Palestinians, this attribution of responsibility is not only aimed at families of alleged terrorists, it is aimed at the Palestinians in general in the context of Israel's broader discriminatory treatment. Sohlberg attributed responsibility to persons far beyond any legal conceptions thereof, but rather engaging in a moral argument. Yet a Court should not hear discriminatory notes on leprosy as if an entire family of a suicide bomber would be ill or a plague to the detriment of existing legal obligations of a state to refrain from collective punishment.

The public support as well as the apparent denial of the government that punitive house demolitions would violate any of its commitments, indicate an acceptance of collective punishment applied as policy measure against Palestinians in Israel. The idea of collective guilt and notions such as the war on terror and a sense of revenge for gruesome attacks all contribute to a situation where collective punishment of a whole group is not conceived to be wrong or even illegal. Together with the long list of court cases, the whole situation has entered a certain routine and the government as well as the courts and the public might have become used to it. It has become so entrenched that a challenge of its legal basis such as in the *HaMoked* case appears to have aroused feelings of astonishment amongst the government and the judges of the Supreme Court.

Nevertheless, what made this challenge of collective punishment at the highest judicial level in Israel possible in the first place was the prohibition of collective punishment enshrined in the law of armed conflict. Although the Israeli authorities have so far shown no sign of surrendering the powers under Article 119, their acts will be measured against Israel's international legal obligations.

International law can provide a platform for actors other than states and for the less powerful or marginalised in particular.[85] As argued in the methodology chapter, groups

Invented Traditions, Archaeology and Post-Colonialism in Palestine-Israel. London, Zed Books, pp.148ff.

[85] Hegtvedt, K.A. (2005). Doing Justice to the Group: Examining the Roles of the Group in Justice Research, *Annual Review of Sociology*, 31, pp.25-45; Knop, K. (2002). *Diversity and Self-Determination in International Law*. Cambridge, Cambridge University Press, pp.109ff;

such as minorities and peoples are active participants in initiating social change and so shape their own struggle for justice. To do so within the framework of international law, to establish violations of the law of armed conflict by Israel represents a factor strengthening the broader case made by the Palestinians and enables them to be heard internationally and represent themselves in international fora. In this way, the Palestinians have used the prohibition of collective punishment to actively engage in change. This transition from mere protection towards empowerment represents an important step in acknowledging the role of groups in relation to collective punishment – and the Palestinians have proved their ability to use the law of armed conflict to raise awareness for their cause.[86]

In addition, the prohibition of collective punishment under the law of armed conflict blocks Israel from making its case under this legal framework. In that sense, the law of armed conflict denies legality to punitive house demolitions – an important indicator of the international stance on collective punishment. Furthermore, by providing regulations on collective punishment, the law of armed conflict delivers important support for the petitioners. It renders what has happened to them from "unjust" or "immoral" to illegal, it provides the basis for a court case, it confirms that punitive house demolitions are against Israel's own legal obligations – they are not just wrong, they are against the law. Seen as a tool in their struggle for justice, the prohibition of collective punishment under the law of armed conflict enables the Palestinians as a group to highlight contraventions against legal obligations supposed to protect them.

Admittedly, the prohibition of collective punishment under the law of armed conflict alone is not enough to empower affected Palestinians, but it forms an important part in the process working towards empowerment in their broader struggle for justice against the illegal occupation of their territory. By monitoring state (non-)compliance with international obligations and recording Israeli violations thereof, the court cases brought based on the substantive prohibition of collective punishment contribute to this broader struggle. This contribution can best be realised by a combined effort together with domestic and international mechanisms and applicable human rights oversight by bodies such as the Human Rights Committee or the United Nations Human Rights

Koskenniemi, M. (2014). What is International Law for?, in Evans, M.D. (ed.) *International Law*. 4th edition. Oxford, Oxford University Press, pp.29-52, pp.44f.

[86] Malloy, T.H. (2014). National Minorities between Protection and Empowerment: Towards a Theory of Empowerment, *Journal on Ethnopolitics and Minority Issues in Europe*, 13 (2), pp.11-29, pp.15ff; Sadan, E. (2004). *Empowerment and Community Planning: Theory and Practice of People-Focused Social Solutions*. Tel Aviv, Hakibbutz Hameuchad Publishers, pp.73ff.

Council as the law of armed conflict itself does not provide for redress for victims. Although there is a discussion on individuals as rightholders under the law of armed conflict, this is an emerging field.[87] After arguing in favour of individual rights deriving from the law of armed conflict and the right of individuals to reparation, Gaeta points to several ways of enforcing such a right. These include claims brought by the state of nationality on behalf of the individual as in the Eritrea-Ethiopia Claims Commission or domestic courts and tribunals able to deal with violations of the law of armed conflict.[88]

The International Criminal Court which adjudicates serious breaches of the law of armed conflict, but does not mention collective punishment explicitly, is not accessible to victims of armed conflict and cannot provide individual reparation.[89] On the other hand, human rights bodies might be able to provide remedies, but not on the account of violations of the law of armed conflict, but human rights law. An example thereof is the case law of the European Court of Human Rights with regards to the non-international armed conflict in Chechnya as will be seen in the second case study. Although the Court does not apply the law of armed conflict, but the rights enshrined in the ECHR and those rights only, it managed to provide redress for human rights violations committed during armed conflict. In doing so, the Court has documented the violations of the law of armed conflict committed by Russia and provided redress for the victims by giving a full account of what had happened as well as ordering the state to pay damages in the form of pecuniary and non-pecuniary damages in several cases.[90]

Given that the Israeli government has a long record of non-compliance with international obligations in relation to the OPT including the prohibition of collective punishment, any actions such as bringing cases on punitive house demolitions might seem futile. Yet it is this ongoing and thorough documentation or archiving of the events going on in the OPT, that calls out the illegality of Israeli state practice and contributes to the Palestinians broader struggle for justice. Since 2009, these efforts are supported

[87] Gaeta, P. (2011). Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?, in Ben-Naftali, O. (ed.). *International Humanitarian Law and International Human Rights Law*. Oxford, Oxford University Press, pp.305-327, 318ff; Ronzitti, N. (2007). Access to Justice and Compensation for Violations of the Law of War, in Francioni, F. (ed.). *Access to Justice as a Human Right*. Oxford, Oxford University Press, pp.95-134; Provost, R. (2002). *International Human Rights and Humanitarian Law*. Cambridge, Cambridge University Press, pp.45ff.
[88] Gaeta, P. (2011) *supra* note 87, pp.322ff; for domestic proceedings see eg: *Mustafic v the Netherlands*, The Hague Court of Appeal, Case No. 200.020.173/01, Judgment (5 July 2011).
[89] Oberleitner, G. (2015). *Human Rights in Armed Conflict.* Cambridge, Cambridge University Press, pp.317f.
[90] See the chapter on the case study on Chechnya below.

on international level by reports of the United Nations High Commissioner on Human Rights explicitly aimed at 'ensuring accountability and justice for all violations of international law in the Occupied Palestinian Territory, including East Jerusalem'.[91]

Summing up, the *HaMoked* case might not have been successful in changing the stance of the Court and the Israeli government on the issue of punitive house demolitions for now. However, it has been successful in raising awareness for the situation in the OPT and this attention on the issue was brought about by the Palestinians themselves – they have used the prohibition of collective punishment under the law of armed conflict to actively engage in their struggle for justice. Furthermore, the prohibition has put Israel in a position where it has to argue and justify its actions against its international obligations – a task that is not going to become easier with the Palestinians exposing its violations and actively campaigning against it.

3.2.4 Conclusion

This case study has shown the implications of the prohibition of collective punishment under the law of armed conflict on punitive house demolitions in the Occupied Palestinian Territories. Given that Israel is upholding its policy, the prohibition covers the important role of blocking Israel from justifying its actions under the law of armed conflict on one hand, and on the other hand providing a tool for affected groups to make their case in court. These two functions are ultimately intended to promote justice for the Palestinians and to contribute to their empowerment.

Punitive house demolitions in times of occupation predominantly regulated by the framework of the law of armed conflict represent the first stage in explaining the development of state policies and the law on collective punishment. Although at first sight it might look as if international law would be powerless against the policies promoted by Israel, the prohibition of collective punishment has certainly contributed to the considerable lengths the state has gone to in order to justify its actions. This need for justification indicates an awareness of the illegality of the measures taken, but also, as seen in the judgments of the Supreme Court and the government's responses, a deliberate decision against compliance. However, such a decision is not upheld easily if confronted with compelling evidence against it.

[91] See eg: A/HRC/37/41 Ensuring accountability and justice for all violations of international law in the Occupied Palestinian Territory, including East Jerusalem, Report of the United Nations High Commissioner for Human Rights (19 March 2018).

The imposition of collective punishment in practice, informed by a policy of punitive house demolitions by Israel, sheds light on the development of a certain acceptance of the said measure and a certain hostility towards the protection of groups such as peoples and minorities – a continuing development already witnessed during the codification process of relevant instruments on the law of armed conflict discussed in the previous chapter. Such a phenomenon should lead to a stronger focus on the issue and a greater awareness of the dangers such as getting used to illegal practices over time. Unfortunately, as will be seen in the following chapters, international law has not done more to protect groups such as the Palestinians or the Chechens from collective punishment in changing contexts, but rather less as it is not explicitly prohibited under human rights law.

The punitive house demolitions carried out in the OPT by Israel and its respective policy represent a sound starting point for understanding the breadth of this development and of its consequences. In this light, the consideration of collective punishment in other contexts, particularly the context of human rights law, appears not only timely but crucial to enable the active participation of these groups in their struggle for justice. Building on these findings, the following part will deal with collective punishment in human rights law and a case study on collective punishment in Chechnya.

4 Collective punishment, state policies and human rights law

4.1 Collective punishment and international human rights law

4.1.1 Introduction

After outlining the legal regulation of collective punishment in the law of armed conflict and the case study on the Occupied Palestinian Territories, collective punishment will be discussed in the context of human rights law in the following.

There is no explicit prohibition of collective punishment in international human rights law. However, there are several rights and principles related to the act of collective punishment as well as to its broader background. These rights and principles will be outlined below. In addition to rights and principles relevant to collective punishment, there are situations that are worth exploring, particularly states of emergency for which human rights instruments such as the International Covenant on Civil and Political Rights and the European Convention on Human Rights provide. States of emergency could be seen as a transition or link between the law of armed conflict and human rights law in the context of collective punishment. These situations are linked to exceptional circumstances, such as armed conflict, internal unrest or natural catastrophes. For this reason, the assessment of collective punishment during states of emergency highlights the fluid transition between these two legal frameworks – between the law of armed conflict and human rights law.

After looking at collective punishment and states of emergency, the chapter is going to analyse express and implied references to collective punishment that might be found in the existing framework of human rights instruments, especially the ICCPR and the ECHR due to the present thesis' focus on Chechnya, but other regional instruments such as the African Charter on Human and Peoples' Rights as well. Gathering an understanding of the current legal framework in relation to collective punishment represents the basis for later considerations of potential ways to include a prohibition of collective punishment under human rights law. At this point, the assessment of collective punishment under human rights law will be limited to its substantive aspects, while several procedural aspects are subject of the last chapter of the thesis. In addition to examining references

to collective punishment in human rights instruments, the use of the term in the European Court of Human Rights' case law will be reviewed.

In terms of the research question, this chapter builds the foundation for understanding the relationship between state policies on and the legal regulation of collective punishment in situations governed by human rights law. Whereas the main discussion of state policies on collective punishment will be left to the case study on Chechnya, the applicable legal framework will be set out at this point to provide the substance necessary for assessing how the relevant law is applied in practice by specific actors. It will be shown that the gap in human rights law meant that Russian authorities could adopt legislation permitting collective punishment without contradicting any explicit international rule prohibiting it. In contrast to the Israeli government which has to justify its collective punishment policy due to the ongoing efforts of the Palestinians calling out this violation of the law of armed conflict, the Russian government did not face the same challenge.

Furthermore, as already seen in the case study on the Occupied Palestinian Territories, group empowerment is about tools and mechanisms to actively engage in change and addressing collective punishment can contribute towards that goal. To start such a debate in human rights law, aspects of existing human rights engaged in the context of collective punishment have to be examined first. This does not mean that potential ways of including a prohibition of collective punishment in human rights law are going to be assessed already at this point – this discussion is left to the last part of the thesis. However, the framework, which will also act as a point of reference for these later chapters, is presented here. The regulation of collective punishment during states of emergency, specific human rights violated in the course of collective punishment itself as well as underlying principles such as individual responsibility and group rights will be outlined below.

The first section is devoted to collective punishment during states of emergency, supported by a short look at case law of the ECtHR on the state of emergency regulations in Turkey targeting Kurdish villages. Following that, the rights and principles of human rights law relating to collective punishment, in particular human rights violations involved in the imposition of collective punishment such as the right to life, the prohibition of torture, the protection of property and the prohibition of discrimination as well as underlying principles, are addressed. Whereas the principle of individual responsibility is well-established in the case law of the ECtHR, the concept of group

rights will be borrowed from the ACHPR. Although these group rights do not relate to the act of collective punishment specifically, they offer a first glimpse at a theoretical framework that will be useful in assessing potential ways of including a prohibition of collective punishment under human rights law later on. The concept of minority rights is mentioned only briefly at this point, as the examination of group or collective rights from a theoretical perspective will follow in the last part of the thesis. At the end, references to the term "collective punishment" in the case law of the European Court of Human Rights are reviewed, indicating a certain familiarity of the Court with that concept already.

Ultimately, the chapter concludes that human rights law at present is unable to encompass the particular wrong done by collective punishment, the imposition of sanctions on a group as such for an act allegedly committed by one or some of its members, leaving affected groups not only without protection, but without tools to bring about change and seek redress for collective punishment. However, the fact that collective punishment as a concept has at least been present in the ECtHR's case law as well as the potential of group rights to offer ways to address collective punishment under human rights law, open the way for further analysis at a later stage.

4.1.2 Reference to collective punishment relating to states of emergency

The law on states of emergency provides a useful introduction to the understanding of collective punishment under human rights law. States of emergency represent to some extent a middle ground between the state of armed conflict and the state of peace, as they are not confined to armed conflict, but also encompass other crisis situations such as internal unrest, terrorist attacks or environmental disasters.[1] For this reason, they lead the discussion logically from one legal system into another, from the law of armed conflict to human rights law. The declaration of a state of emergency in such cases allows the state to limit the enjoyment of some human rights as laid out in the treaties the state has signed up to, except for non-derogable rights and peremptory norms.[2]

The following section focusses on the state of emergency regulations under the ICCPR due to the explicit reference to collective punishment in the Human Rights Committee's

[1] Nowak, M. (2005). *U.N. Covenant on Civil and Political Rights: CCPR Commentary*. 2nd edition. Kehl, N.P. Engel Verlag, pp.89ff.
[2] E/CN.4/Sub.2/1997/19 Tenth annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37 (23 June 1997) para.34ff.

(HRC) General Comment 29 interpreting Article 4 ICCPR regulating derogations in times of emergency. In addition to that framework, case law of the ECtHR on the issue will be mentioned whenever relevant as the case study following this chapter is centred on the ECHR. After discussing states of emergency and their relevance to collective punishment as well as to the transition from the law of armed conflict to human rights law, references to judgments of the European Court of Human Rights on Turkey's declaration of a state of emergency are provided to emphasise the relation between states of emergency and collective punishment in practice.

4.1.2.1 Article 4 of the International Covenant on Civil and Political Rights (ICCPR)

States of emergency represent situations of crisis, of exceptional circumstances allowing states to limit the enjoyment of certain human rights according to the procedure of the relevant human rights instrument. However, this possibility of derogation from human rights guarantees opens the way to abuse, explaining the need to address acts of collective punishment occurring during such situations. The way in which states of emergency are regulated by human rights instruments is described by reference to Article 4 ICCPR. Article 15 ECHR, which similarly includes the regulation of states of emergency under the Convention, will not be examined separately in all detail. This is due to its strong resemblance to Article 4 ICCPR as well as the scarcity of debate on states of emergency in the negotiation process of the ECHR. These debates overwhelmingly refer back to the discussions surrounding the issue in the United Nations Commission on Human Rights which was dealing with the same issue at that time.[3] Furthermore, the preference given to Article 4 ICCPR stems from the HRC's more detailed examination of peremptory norms which are non-derogable although they are not included in the list in Article 4 (2) ICCPR.[4] For these reasons, reference to Article 15 ECHR or case law of the European Court of Human Rights is made only if it diverges from or adds significantly to the elaborations made concerning Article 4 ICCPR.

The main rationale behind states of emergency is that if a situation reaches such a level of severity that it 'threatens the life of the nation', non-discriminatory measures 'strictly required by the exigencies of the situation' can be taken, given that the state has declared the state of emergency in accordance with the relevant procedure provided by the

[3] DH(56)4 European Commission of Human Rights, Preparatory Work on Article 15 of the European Convention of Human Rights (22 May 1956), pp.3f, pp.12ff.
[4] Schabas, W.A. (2015). *The European Convention on Human Rights: A Commentary*. Oxford, Oxford University Press, pp.588ff.

treaty.[5] The principle of proportionality represents an important limitation as to which measures can be taken in the event of a state of emergency since it asks for a 'reasonable relation'[6] of the measures and the goals about to be achieved by them.[7] Having laid out these main criteria, they will be looked at in further detail in the following.

States of emergency are controversial.[8] Sheeran points out that the derogation system has been used by governments not to avert a crisis threatening the life of the nation but rather to suppress peaceful protests in order to remain in power.[9] The terrorism and security debate has highlighted this potential of abuse of the state of emergency regime.[10] Regarding the question of the existence of a state of emergency, the Human Rights Committee has maintained a stricter stance than the ECtHR, notably because the Committee's approach to derogations does not mention the concept of 'margin of appreciation' which has broadened the instances in which the Court has found a state of emergency.[11] Despite initial criticism,[12] in the case *A and others v the United Kingdom*, the European Court of Human Rights found that the national government might be best placed to decide on whether there is a state of emergency and stepped aside conceding a broad margin of appreciation to the state.[13]

The emergency situation does not have to encompass the entire country. It can be geographically limited, as seen in the example of *Lawless v Ireland*[14] before the European

---

[5] CCPR/C/21/Rev.1/Add.11 General Comment No.29: States of Emergency (Article 4) (31 August 2001); 999 UNTS 171 International Covenant on Civil and Political Rights (16 December 1966) Article 4.
[6] Nowak, M. (2005) *supra* note 1, p.95 para.25.
[7] Nowak, M. (2005) *supra* note 1, pp.97f.
[8] Nowak, M. (2005) *supra* note 1, pp.84f.
[9] Sheeran, S.P. (2013). Reconceptualizing States of Emergency under International Human Rights Law, *Michigan Journal of International Law*, 34 (1), pp.491-557, pp.492f, 546f.
[10] Sheeran, S.P. (2013) *supra* note 9, pp.541ff; Humphreys, S. (2006). Legalizing Lawlessness: On Giorgio Agamben's State of Exception, *European Journal of International Law*, 17 (3), pp.677-687, pp.683ff; (2006) (book review); Agamben, G. (2005). *State of Exception* (translated by Attell, K.). Chicago, University of Chicago Press.
[11] Schabas, W.A. (2015) *supra* note 4, p.600; Gross, O. & Ni Aoláin, F. (2001). From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights, *Human Rights Quarterly*, 23 (3), pp.625-649, pp.630ff; Joseph, S. (2002). Human Rights Committee: General Comment 29, *Human Rights Law Review*, 2 (1), pp.81-98, p.86.
[12] CommDH(2002)7 Opinion 1/2002 of the Commissioner for Human Rights, Mr Alvaro Gil-Robles, on certain aspects of the United Kingdom 2001 derogation from Article 5 par. 1 of the European Convention on Human Rights (28 August 2002).
[13] *A and others v the United Kingdom* (Merits and Just Satisfaction) no. 3455/05, Court (Grand Chamber) (19 February 2009) para.180; Joseph, S. (2002) *supra* note 11, pp.86ff; Marks, S. (1995). Civil Liberties at the Margin: The UK Derogation and the European Court of Human Rights, *Oxford Journal of Legal Studies*, 15 (1), pp.69-95, pp.74ff, 93f.
[14] *Lawless v Ireland (No.3)* (Merits) no. 332/57, Chamber (1 July 1961).

Court of Human Rights, when Ireland declared a state of emergency because of the existence, as the Court put it, of a 'secret army engaged in unconstitutional activities and using violence to attain its purposes' operating from its territory and carrying out attacks in Northern Ireland.[15] Vice versa, the Court confirmed the existence of a state of emergency on the territory of the United Kingdom regarding the same situation.[16] Another example for territorially limited derogations could be found in Turkey's declarations of a state of emergency regarding the south-east of the country.[17] This example will be addressed separately in the next section. Although these cases have been dealt with under the ECHR and not the ICCPR, the latter framework maintains that interpretation.[18]

There are several conditions limiting the situations in which a state of emergency can be declared. The most significant limitation to a declaration of a state of emergency under Article 4 ICCPR might be found in the passage 'strictly required by the exigencies of the situation' calling for an assessment of the measures taken relatively to the threat in question – meaning an assessment of their proportionality. This assessment should consider factors such as the 'duration, geographical coverage and material scope of the state of emergency'.[19] According to the Human Rights Committee, 'this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party'.[20] In addition to the factors already mentioned, the HRC has issued General Comments on Article 4 ICCPR which are

[15] *Lawless v Ireland (No.3) supra* note 14, para.28; Schabas, W.A. (2015) *supra* note 4, pp.594ff.
[16] *Ireland v the United Kingdom* (Merits and Just Satisfaction) no.5310/71, Plenary (18 January 1978).
[17] Derogation contained in a letter from the Permanent Representation of Turkey, dated 6 August 1990, registered at the Secretariat General on 7 August 1990, online available at: http://www.coe.int/en/web/conventions/search-on-reservations-and-declarations/-/conventions/declarations/results?_coeconventions_WAR_coeconventionsportlet_formDate=1453195415220&_coeconventions_WAR_coeconventionsportlet_searchBy=state&_coeconventions_WAR_coeconventionsportlet_codePays=TUR&_coeconventions_WAR_coeconventionsportlet_numSTE=&_coeconventions_WAR_coeconventionsportlet_codesMatieres=&_coeconventions_WAR_coeconventionsportlet_enVigueur=false&_coeconventions_WAR_coeconventionsportlet_dateDebut=05%2F05%2F1949&_coeconventions_WAR_coeconventionsportlet_dateStatus=19%2F01%2F2016&_coeconventions_WAR_coeconventionsportlet_numArticle=&_coeconventions_WAR_coeconventionsportlet_codeNature= (accessed on 15/04/18); *Aksoy v Turkey* (Merits and Just Satisfaction) no. 21987/93, Chamber (18 December 1996) para.70; *Bilen v Turkey* (Merits and Just Satisfaction) no.34482/97, Fourth Section (21 February 2006) para.46; Schabas, W.A. (2015) *supra* note 4, pp.596ff.
[18] Joseph, S., Schultz, J. & Castan, M. (2004). *The International Covenant on Civil and Political Rights: Cases, Material, and Commentary*. 2nd edition. Oxford, Oxford University Press, p.825; International Law Association (1985). Paris Minimum Standards of Human Rights Norms in a State of Emergency, *American Journal of International Law*, 79, pp.1072-1081, Section (A)4.
[19] General Comment 29 *supra* note 5, para.4; Nowak, M. (2005) *supra* note 1, pp.97f.
[20] General Comment 29 *supra* note 5, para.4.

understood as 'instruments that develop creatively the understanding of the rights in the ICCPR'.[21] General Comment 5 as well as General Comment 29 emphasise that the measures have to be of an 'exceptional and temporary nature'.[22] The Siracusa principles describe proportionality in terms of measures taken in reaction to an 'actual, clear, present, or imminent danger and may not be imposed merely because of an apprehension of potential danger'.[23]

Regarding proportionality considerations, the positions of the HRC and the ECtHR differ again. In contrast to the rather strict stance taken by the Committee, the Court has conceded a relatively broad margin of appreciation to the member states in its case law as already seen regarding the assessment of the existence of a state of emergency. For instance in the case of *Lawless v Ireland*, the Court concluded that provisions allowing for detention without trial were in accordance with Article 15 ECHR as they were accompanied by sufficient safeguards.[24] Furthermore, in the case *Ireland v the United Kingdom*, the Court found regulations which did not define any limitation as to the duration of detention in line with being 'strictly required by the exigencies of the situation' as their effect was apparently mitigated in practice as well.[25] On the other hand, the Court declared regulations providing for the denial of re-hearing and detention without judicial supervision for fourteen days not 'strictly required by the exigencies of the situation'.[26]

In addition to the proportionality threshold, Article 4 ICCPR as well as Article 15 ECHR make clear that a state declaring a state of emergency can neither derogate from other international obligations under that provision such as the Geneva Conventions or other

---

[21] Medina, C. (2013). The Role of International Tribunals: Law-Making or Creative Interpretation?, in Shelton, D. (ed.). *The Oxford Handbook of International Human Rights Law*. Oxford, Oxford University Press, pp.649-669, p.661.
[22] General Comment 29 *supra* note 5, para.1; see also: HRI/GEN/1/Rev.9 (Vol. I) General Comment No.5: Derogations (Article 4) (31 July 1981) (replaced by General Comment 29).
[23] E/CN.4/1985/4 (Annex) The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (28 September 1984), principle 54; O'Donnell, D. (1985). Commentary by the Rapporteur on Derogation Symposium: Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights: Commentary, *Human Rights Quarterly*, 7 (1), pp.23-34; Joseph, S., Schultz, J. & Castan, M. (2004) *supra* note 18, pp.825ff.
[24] *Lawless v Ireland (No.3) supra* note 14, para.31ff.
[25] *Ireland v the United Kingdom supra note 16*, para.243; Schabas, W.A. (2015) *supra* note 4, pp.598ff; see also *Brannigan and McBride v the United Kingdom* (Merits and Just Satisfaction) nos. 14553/89 14554/89, Plenary (26 May 1993) para.66: Seven days of detention without trial was considered 'strictly required by the exigencies of the situation.
[26] *Denmark, Norway, Sweden, and the Netherlands v Greece (1)* nos.3321/67, 3322/67, 3323/67, 3344/67, European Commission of Human Rights (5 November 1969) para.234; *Aksoy v Turkey supra* note 17, para.78.

international human rights treaties nor take measures which are 'inconsistent with its other obligations under international law' as put by Article 15 ECHR.[27]

Furthermore, Article 4 ICCPR states that measures taken during a state of emergency should be non-discriminatory, meaning that aspects of the right to non-discrimination are not derogable. However, it has been argued that indirect discrimination of a certain group for instance caused by the geographical scope of a declaration of a state of emergency would be permissible.[28] Although Article 15 ECHR does not explicitly refer to non-discrimination, this principle is implied under the proportionality assessment. Reaffirming this stance, the European Court of Human Rights has declared the indefinite detention of suspected terrorists who were not nationals of the United Kingdom in derogation of Article 5 ECHR as 'disproportionate in that they discriminated unjustifiably between nationals and non-nationals'.[29]

Completing the range of criteria limiting the derogation measures permissible during a state of emergency is the list of non-derogable rights including amongst others the right to life and to recognition as a person before the law and the freedom from torture and slavery. In General Comment 29 on Article 4 ICCPR the HRC stated that this enumeration of non-derogable rights in Article 4 (2) of the Covenant is not exhaustive, taking into account other peremptory norms.[30] Following this assumption, it concluded that 'States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance … by imposing collective punishments'.[31] Although this formulation does not allow for a classification of the prohibition of collective punishment as peremptory norm as it encompasses norms of the law of armed conflict as well as peremptory norms,[32] the General Comment makes clear that a state of emergency could not be invoked to justify

[27] Joseph, S., Schultz, J. & Castan, M. (2004) *supra* note 18, pp.827f; Nowak, M. (2005) *supra* note 1, p.99; General Comment 28, para.9, 10; Hartman, J.F. (1985). Working Paper for the Committee of Experts on the Article 4 Derogation Provision Symposium: Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights: Commentary, *Human Rights Quarterly*, 7 (1), pp.89-131, p.119; Schabas, W.A. (2015) *supra* note 4, pp.600f.
[28] Joseph, S., Schultz, J. & Castan, M. (2004) *supra* note 18, pp.828f; Nowak, M. (2005) *supra* note 1, pp.99f.
[29] *A and others v the United Kingdom supra* note 13, para.190; Schabas, W.A. (2015) *supra* note 4, p.600.
[30] Joseph, S. (2002) *supra* note 11, pp.91ff.
[31] General Comment 29 *supra* note 5, para.11.
[32] This relates to the question whether the prohibition of collective punishment could be considered jus cogens; on that see the short remarks in the chapter on collective punishment and the law of armed conflict.

the imposition of collective punishment.[33] The summary records on the drafting of General Comment 29 reveal debates as to the understanding of collective punishment in the context of human rights law. For instance, a reformulation of the paragraph including the reference to collective punishment was suggested: 'States parties may not invoke article 4 of the Covenant as justification for taking hostages by derogating from article 9 of the Covenant or for imposing collective punishments by derogating from article 14'.[34] This proposal linked collective punishment directly to the right to equality before the courts and the fair trial guarantees laid out in the ICCPR. However, the proposal was not pursued further. The final version of General Comment 29 refers to collective punishment in the context of the law of armed conflict, but groups it together with other guarantees included in Article 14 ICCPR, namely 'fundamental principles of fair trial, including the presumption of innocence'.[35]

In the same General Comment, the HRC referred to 'the international protection of the rights of persons belonging to minorities' and emphasised that elements of their protection 'must be respected in all circumstances'.[36] Here the Committee mentioned the prohibition of genocide, the non-discrimination clause in Article 4 ICCPR itself and the prohibition of deportation or forcible transfer of population constituting a crime against humanity. Clearly, the Committee was aware of the dangers a state of emergency could represent for marginalised groups within states declaring such an emergency and the potential for abuse of these powers.[37] More broadly, the Committee stated the 'substantive gap' in securing human rights created by states of emergency as the impetus for drafting General Comment 29. Similarly, in the document outlining the Committee's intention of drafting General Comment 29 on Article 4 ICCPR, it highlighted the dangers of a 'grey zone' between the applicability of the law of armed conflict and human rights law in times of crisis that do not fulfil the criteria necessary to apply the law of armed conflict. With that in mind, the explicit mention of collective punishment indicates the

[33] General Comment 29 *supra* note 5, para.11.
[34] CCPR/C/SR.1874 Summary Record of the 1874th Meeting, 70th session (24 October 2000) Mr Klein, para.30; E/CN.4/2000/145 Letter dated from the head of the delegation of Sweden, 56th session (4 April 2000) Annex: CCPR/C/66/R.8 Draft General Comment on Article 4: Non-derogable rights under the CCPR, pp.26ff.
[35] General Comment 29 *supra* note 5, para.11.
[36] General Comment 29 *supra* note 5, para.13(c).
[37] Joseph, S., Schultz, J. & Castan, M. (2004) *supra* note 18, pp.830f.

importance the Committee attributed to it as well as the indirect acknowledgement that collective punishment can occur outside the ambit of the law of armed conflict.[38]

The consideration of these further non-derogable rights has been described in the scholarly literature as 'controversial' due to its significant departure from the explicit wording of Article 4 ICCPR.[39] On the other hand, General Comment 29 was prepared following advice and recommendations of experts and non-governmental organisations such as the International Commission of Jurists. This and the Human Rights Committee's authority to assess derogations as to their compatibility with other international obligations of a state might well justify the broad stance the Committee has taken with regards to non-derogable rights.[40] Regarding the ECHR, Schabas argues that the position of the HRC on the issue 'is certainly germane to the interpretation of Article 15 of the European Convention, given the broad similarities between the relevant provisions'.[41]

This consideration of collective punishment in the context of states of emergency throws light on the changing field of application of collective punishment from situations governed by the law of armed conflict to situations governed by human rights law. In particular, the indirect acknowledgement of the possibility that collective punishment can occur in situations not covered by the law of armed conflict, represents significant support for the thesis argument for a potential prohibition of collective punishment under human rights law. The following example of a policy of collective punishment against the Kurds in Turkey completes this brief analysis of states of emergency, highlighting the importance of that concept in practice.

4.1.2.2 A brief account of the state of emergency in Turkey and collective punishment

In order to demonstrate the link between states of emergency and collective punishment, the situation in south-east Turkey from 1990 to 2002, the time when Turkey officially declared a state of emergency and derogated from rights set out in the ECHR, will be considered briefly. [42] The imposition of collective punishment during a state of emergency strengthens the case made for the consideration of the concept of collective punishment under human rights law.

---

[38] E/CN.4/2000/145 Letter dated from the head of the delegation of Sweden, Annex *supra* note 34, pp.24ff.
[39] Joseph, S., Schultz, J. & Castan, M. (2004) *supra* note 18, p.831; Joseph, S. (2002) *supra* note 11, p.91.
[40] Nowak, M. (2005) *supra* note 1, p.96; Joseph, S. (2002) *supra* note 11, p.91.
[41] Schabas, W.A. (2015) *supra* note 4, p.593.
[42] Derogation contained in a letter from the Permanent Representation of Turkey *supra* note 17.

Tensions between the Turkish government and the Kurds in this region intensified with the foundation of the Kurdistan's Workers Party (PKK) in 1978.[43] When Turkey declared a state of emergency in the regions populated by Kurds, it adopted specific decrees granting significant powers to the regional authorities and responsibility clauses effectively enabling them to act with impunity. Decree no. 430 of 1990 for instance provided that '[n]o criminal, financial or legal responsibility may be claimed against the State of Emergency Regional Governor or a Provincial Governor within a state of emergency region in respect of their decisions or acts connected with the exercise of the powers entrusted to them by this decree, and no application shall be made to any judicial authority to this end.'[44]

One specific power granted to these governors was the 'temporary or permanent evacuation, change of place, regrouping of villages, grazing fields and residential areas for reasons of public security.'[45] This provision was used as a pretext to implement a policy of village destruction. While the Turkish government denied those allegations, security forces were searching villages for PKK members and destroying homes and even entire villages if the residents did not agree to join the pro-government 'village guards'.[46]

According to Human Rights Watch, more than 3000 villages were destroyed in the first half of the 1990s.[47] Officially, Turkey blamed the PKK for those incidents and justified its own actions with the exceptional circumstances.[48] Yet the strong case law of the

[43] Abbas, T. & Yigit, I.H (2016). Perspectives on Ethno-National Conflict Among Kurdish Families With Members in the PKK, *Terrorism and Political Violence*, 28 (2), pp.297-315, pp.299f; McDowall, D. (2004). *A Modern History of the Kurds*. 3rd edition. London, I.B. Tauris, pp.421ff; Goldman, O.Q. (1994). The need for an independent international mechanism for the protection of group rights: A case study of the Kurds, *Tulsa Journal of Comparative & International Law*, 2, pp.45-89, pp.71ff.

[44] *Akdivar and Others v Turkey* (Merits and Just Satisfaction) no.21893/93, Court (Grand Chamber) (16 September 1996) para.42.

[45] Derogation contained in a letter from the Permanent Representation of Turkey *supra* note 17.

[46] Jongerden, J. (2010). Village evacuation and reconstruction in Kurdistan (1993 – 2002), *Études Rurales*, 186, pp.77-100, pp.79ff; Bruinessen van, M. (1990). The Kurds in Turkey: Further Restrictions of Basic Rights, *International Commission of Jurists Review*, 45, pp.46-52, pp.50f; Human Rights Foundation of Turkey (1994). Turkey Human Rights Report 1993, pp.56ff, online available at: http://en.tihv.org.tr/wp-content/uploads/2015/08/Ra1993HumanRightReport.pdf (accessed on 15/04/18).

[47] Human Rights Watch (2005). "Still critical": Prospects in 2005 for Internally Displaced Kurds in Turkey, 17 2(D), pp.5f, online available at: https://www.hrw.org/reports/2005/turkey0305/turkey0305.pdf (accessed on 15/04/18).

[48] Çali, B. (2010). The Logics of *Supra*national Human Rights Litigation, Official Acknowledgment, and Human Rights Reform: The Southeast Turkey Cases before the European Court of Human Rights, 1996-2006, *Law & Social Inquiry*, 35 (2) pp.311-337, pp.318ff.

European Court of Human Rights on house destruction during the state of emergency indicates systematic state involvement.[49]

In the 1998 case *Selçuk and Asker v Turkey*, the applicants' village, situated in the region for which a state of emergency was declared, was burned down.[50] The applicants insisted that their village was deliberately burned down by local security forces and that they even knew the commanding officer as he had been visiting the village several times. However, the government rejected that allegation and instead claimed that the PKK itself was responsible for the destruction of the village and burned the homes as punishment for the villagers' good relations with the security forces.[51] Nevertheless, after a series of investigations and hearing of witnesses carried out by the European Commission on Human Rights on behalf of the Court, the Court found no reason to doubt the applicants' account of the events confirming state involvement in the destruction of the village.[52] The applicants claimed violations of several rights, amongst others of Articles 2, 3, 6, 8, 14 ECHR and of Article 1 of Protocol No. 1 to the Convention.[53] The different substantial rights involved are not going to be discussed in detail here, but these rights will be taken as a guideline for the consideration of collective punishment in human rights law in the next section.

In addition, the Court's relevant case law points to the punitive character of the village destructions which was pursued by a policy expressed in the state of emergency regulations more broadly.[54] During the assessment of a violation of Article 3 ECHR in the case *Yöyler v Turkey* the Court made clear that 'even assuming that the motive behind

---

[49] *Selçuk and Asker v Turkey* (Merits and Just Satisfaction) no.23184/94, Chamber (24 April 1998); *Orhan v Turkey* (Merits and Just Satisfaction) no.25656/94, Court (First Section) (18 June 2002); *Yöyler v Turkey* (Merits and Just Satisfaction) no.26973/95, Court (Fourth Section) (24 July 2003); for more case law references see footnotes 149ff below; Reidy, A., Hampson, F. & Boyle, K. (1997). Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey, *Netherlands Quarterly of Human Rights*, 15 (2) pp.161-173, pp.165ff.

[50] *Selçuk and Asker v Turkey supra* note 49, para.10.

[51] *Selçuk and Asker v Turkey supra* note 49, para.11ff.

[52] *Selçuk and Asker v Turkey supra* note 49, para.61.

[53] Articles 2 (right to life), 3 (prohibition of torture), 6 (right to a fair trial), 8 (right to respect for private and family life), 14 (prohibition of discrimination) and of the Convention and of Article 1 of Protocol No. 1 (protection of property).

[54] *Yöyler v Turkey supra note 49*, para.71ff; Jacoby, T. (2005). Semi-Authoritarian Incorporation and Autocratic Militarism in Turkey, *Development and Change*, 36 (4), pp.641-665, pp.648f; Robins, P. (1993). The Overlord State: Turkish Policy and the Kurdish Issue, *International Affairs*, 69 (4), pp.657-76, pp.664f; Muller, M. (1996). Nationalism and the rule of law in Turkey: The elimination of Kurdish representation during the 1990s, in Olson, R.W. (ed.). *The Kurdish Nationalist Movement in the 1990s: Its Impact on Turkey and the Middle East*. Kentucky, University Press of Kentucky, pp.173-199, pp.180f.

this impugned act was to punish the applicant and his relatives for their alleged involvement in the PKK, that would not provide a justification for such ill-treatment.'[55]

Furthermore, the practice to force the persons living in a house to watch it being set alight while preventing anyone from extinguishing the fire clearly carries a punitive character. Not only is the house destroyed for alleged contact to the PKK, the people living in it are made to witness its destruction to reinforce this manifestation of state power.[56] The impunity accompanying these acts could be seen as another indicator enforcing the punitive nature of the destruction of houses and villages. As the Court said in *Akdivar and Others v Turkey*, 'the prospects of success of civil proceedings based on allegations against the security forces must be considered to be negligible in the absence of any official inquiry into their allegations, even assuming that they would have been able to secure the services of lawyers willing to press their claims before the courts.'[57]

Given that collective punishment cannot be justified by a state of emergency or any decree allowing for the evacuation of villages without the possibility to hold local authorities to account for resulting damages, the policy of village destruction contravenes several specific provisions of human rights law. The cases brought before the ECtHR referred to above create a valuable starting point for the ensuing discussion of aspects of human rights law relating to the act of collective punishment. States of emergency represent the transition between the law of armed conflict and human rights law as the situation in question is often one of internal unrest falling short of the threshold of armed conflict. The example of emergency rules imposing collective punishment on a specific group emphasises this transition in practice. In that sense, this short section about states of emergency and the Kurds prepares the ground for the case study on the Chechens in the next chapter, where human rights law is fully applicable and not limited by a declared situation of crisis.

4.1.3 Related rights and principles in international and regional human rights instruments

This section will look at the concept of collective punishment under human rights law in peacetime, meaning in situations governed by human rights law in the absence of a declared state of emergency. Therefore, it describes impositions of collective punishment in times where the state in question has not claimed that any exceptional

[55] *Yöyler v Turkey supra note 49*, para.74.
[56] *Selçuk and Asker v Turkey supra* note 49, para.77.
[57] *Akdivar and Others v Turkey, supra* note 44, para.73.

circumstances would prevail and consequently, all human rights instruments signed by the state are fully applicable.

Except for the brief reference to collective punishment in General Comment 29 examined above, human rights instruments such as the ICCPR or the ECHR remain silent on the issue, meaning that neither of them contains an explicit prohibition of collective punishment. This lack of a prohibition represents a gap in human rights law. Certainly, one could break the concept of collective punishment down into more general principles, such as the principle of individual responsibility. Or, as seen in the cases on village destruction in south-east Turkey as well as in the Chechen context examined in the case study following this chapter, find violations of the right to life and the prohibition of torture regarding the ill-treatment of villagers or family members, the protection of property due to house burnings, the right to fair trial or other specific rights.

Used as guideline, some of the rights addressed in the case *Selçuk and Asker v Turkey* outlined above are examined for potential links to the underlying reason for their violation, the collective punishment of villagers due to their affiliation with a certain group. In doing so, Articles 2, 3, 14 and Article 1 Protocol No. 1 to the Convention will be considered in more detail due to their prevalence in the related case law.

The question whether these human rights are able to encompass the act of collective punishment is limited to the specific rights addressed, leaving the general debate about individual and collective rights and their structure and compatibility to the last two chapters of the thesis. Nevertheless, some aspects of this general debate are considered below as they are part of the existing human rights framework relating to collective punishment. These are the principle of individual responsibility, which encompasses some of the characteristics of collective punishment and the group rights mentioned in the ACHPR, which similarly address some aspects of the concept of collective punishment.

Since the empowerment of groups is also a question of the tools and mechanisms available to them, the discussion of several specific human rights and some broader principles intends to build the foundation for an analysis of potential ways of including a prohibition of collective punishment in human rights law. The existing framework will be assessed according to its ability to encompass such a prohibition. The choice of specific rights for discussion stems from the nature of the act of collective punishment. As seen in the case studies, collective punishment can take several forms, ranging from

the killing and ill-treatment of members of a certain group to house and village destruction. These acts violate several specific human rights and these rights will be examined for potential collective aspects.

Again, as the following case study analyses various forms of collective punishment imposed on the Chechens by Russian and Russian-loyal authorities, the evaluation of those human rights laid out above will first and foremost centre on the ECHR, while mentioning relevant rights and principles encompassed in other international and regional instruments as appropriate.

4.1.3.1 The right to life

Article 2 ECHR guarantees the right to life.[58] Not only its location in the Convention as first right to be mentioned, but also the strong resemblance to such guarantees in other human rights instruments points to its paramount import.[59] To put it in the Court's words, the overlap of treaties regarding the right to life 'indicates that the right to life is an inalienable attribute of human beings and forms the supreme value in the hierarchy of human rights.'[60]

As the Article states, '[n]o one shall be deprived of his life intentionally'. However, this statement does not apply in case of the execution of death penalties, self-defence, lawful arrest or prevention of escape and lawful action undertaken in order to suppress riots or an insurrection.[61]

Considering the right to life in the current context of collective punishment, the right itself is by guarantee of Article 1 ECHR secured to 'everyone'. Its content is based on the life of individuals as are its elements. Article 2 ECHR is not only engaged in case of death, but also in cases where the applicant's life or the life of an applicant's relative is 'at serious risk'.[62] Thinking of the burning of houses, applicants' right to life might be engaged when they were still in the building when it was set alight by security forces as part of a wider policy of collective punishment as seen in the case *Selçuk and Asker v Turkey* referred to above.[63] The same could be said about collective punishment

[58] Article 2 ECHR.
[59] Schabas, W.A. (2015) *supra* note 4, pp.117ff.
[60] *Streletz, Kessler and Krenz v Germany* (Merits) nos. 34044/96 35532/97 44801/98, Court (Grand Chamber) (22 March 2001) para.94; Schabas, W.A. (2015) *supra* note 4, pp.118f.
[61] Schabas, W.A. (2015) *supra* note 4, pp.122f.
[62] *Krivova v Ukraine* (Merits and Just Satisfaction) no. 25732/05, Court (Fifth Section) (9 November 2010) para.45; *Ilhan v Turkey* (Merits and Just Satisfaction) no.22277/93, Court (Grand Chamber) (27 June 2000) para.75; Schabas, W.A. (2015) *supra* note 4, pp124ff.
[63] *Selçuk and Asker v Turkey supra* note 49, para.13.

practices imposed on the Chechens such as the atrocities committed during searches and the burning of houses of relatives of alleged insurgents.[64]

Article 2 ECHR does not address the issue of violations of the right to life during armed conflict. However, Article 15 ECHR on the derogation from certain rights in case of a state of emergency makes clear that states might derogate from Article 2 ECHR to cover 'lawful acts of war'.[65] Nevertheless, other obligations relating to Article 2 ECHR such as the procedural obligation to conduct an effective investigation apply during times of armed conflict as well.[66] Furthermore, in anticipation of the following case study, it might be worthwhile adding at this point that Russia has never derogated from the ECHR under Article 15 and therefore, the Court has evaluated situations brought before it from Chechnya 'against a normal legal background'[67] – meaning as it would evaluate any other case being brought in peacetime.[68]

Regrettably, the Court has conceded broad discretion to the Russian authorities regarding measures to suppress an insurgency, for instance in *Khamzayev and Others v Russia* the Court said:

> 'The Court is aware of the difficult situation in the Chechen Republic at the material time, which called for exceptional measures on the part of the State to suppress the illegal armed insurgency. … Bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the obligation to protect the right to life must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities'.[69]

---

[64] For relevant cases see the following case study on Chechnya in the next chapter.
[65] Article 15 (2) ECHR.
[66] *Al-Skeini and Others v the United Kingdom* (Merits and Just Satisfaction) no. 55721/07, Court (Grand Chamber) (7 July 2011) para.164; *Güleç v Turkey* (Merits and Just Satisfaction) no. 21593/93, Court (Chamber) (27 July 1998) para.81; *Isayeva v Russia* (Merits and Just Satisfaction) no. 57950/00, Court (First Section) (24 February 2005) para.180, 210.
[67] *Isayeva v Russia supra note 66*, para.191; *Khamzayev and Others v Russia* (Merits and Just Satisfaction) no. 1503/02, Court (First Section) (3 May 2011) para.185.
[68] Schabas, W.A. (2015) *supra* note 4, pp.154ff.
[69] *Khamzayev and Others v Russia supra* note 67, para.178 (notes omitted); *Akhmadov and Others v Russia* (Merits and Just Satisfaction) no.21586/02, Court (First Section) (14 November 2008) para.97; *Isayeva v Russia supra note 66*, para.180; *Makaratzis v Greece* (Merits and Just Satisfaction) no.50385/99, Court (Grand Chamber) (20 December 2004) para.69; *Mahmut Kaya v Turkey* (Merits and Just Satisfaction) nos.22535/93, 22535/93, Court (First Section) (28 March 2000) para.86.

However, the evaluation of the situation in Chechnya is going to be left to the following case study – the reference at this point is only intended to link the two parts and highlight the relevance of specific human rights in the collective punishment context.

Interesting insights are also offered by a look at the prohibition of discrimination according to Article 14 ECHR in relation to Article 2 ECHR, meaning violations of the right to life motivated by discrimination aimed at a certain group. This again points at the potential overlap between collective punishment and discrimination in practice as the broader group, to which a family whose house was burnt down belongs (such as the Chechens) can also be subject to a broader discrimination campaign in addition to collective punishment targeting Chechen families of alleged insurgents. However, this does not mean that the act of collective punishment requires a discriminatory element, it is simply often the case in practice. Although non-discrimination considerations are pertinent to a number of cases, including the Chechen and Kurdish cases, the Court has struggled to find violations of Article 14 ECHR. This might also stem from its high threshold regarding the burden of proof – to establish proof beyond reasonable doubt of discriminatory motivation of an act engaging the right to life is, as Schabas rightly notes, 'extraordinarily difficult'.[70]

Judge Bonello, in a dissenting opinion on a case about the death of a young man of Roma origin in police custody, was particularly frank about his frustrations:

> 'I consider it particularly disturbing that the Court, in over fifty years of pertinacious judicial scrutiny, has not, to date, found one single instance of violation of the right to life (Article 2) or the right not to be subjected to torture or to other degrading or inhuman treatment or punishment (Article 3) induced by the race, colour or place of origin of the victim. Leafing through the annals of the Court, an uninformed observer would be justified to conclude that, for over fifty years democratic Europe has been exempted from any suspicion of racism, intolerance or xenophobia.'[71]

Summing up, the right to life as a fundamentally individual right does not offer a way of accounting for the specific wrong done by collective punishment, the imposition of

[70] Schabas, W.A. (2015) *supra* note 4, pp.159f.
[71] *Anguelova v Bulgaria* (Merits and Just Satisfaction) no. 38361/97, Court (First Section) (13 June 2002) Dissenting opinion Judge Bonello, para.2 (notes omitted).

sanctions on a group for acts allegedly committed by one or some members of the group for which the other members do not bear individual responsibility.

4.1.3.2 The prohibition of torture

Another fundamental guarantee that has been violated by the imposition of collective punishment is the prohibition of torture or inhuman or degrading treatment or punishment. Breaches of Article 3 ECHR have been found in cases relating to the Kurds and the Chechens.

In the case *Selçuk and Asker v Turkey*[72] the houses of the applicants were burnt down due to security forces' allegations that they had been previously used by members of the PKK.[73] The Court found that these acts violated not only the applicants' right to private and family life and to an effective remedy, but also the prohibition of torture or inhuman or degrading treatment or punishment as the destruction of their homes and the way in which it was conducted reached the necessary level of severity to constitute inhuman treatment.[74] In the following years, the Court has reaffirmed this stance several times.[75]

However, torture, inhuman or degrading treatment or punishment refer to such treatment of individuals, not groups.[76] Although the ECtHR has found violations of Article 3 ECHR regarding relatives of victims of human rights violations, their suffering has been seen as a separate and distinct violation of the relatives' rights as individuals.[77] An example for that line of reasoning is the case *Musayev and Others v Russia*. In this case, one of the applicants witnessed the 'extrajudicial execution of several of his relatives and neighbours' and he 'was subjected to threats from the perpetrators and forced at gunpoint to lie on the ground, fearing for his own life'.[78] Gathering from these facts, as

---

[72] *Selçuk and Asker v Turkey supra* note 49.
[73] *Selçuk and Asker v Turkey supra* note 49, para.8ff.
[74] *Selçuk and Asker v Turkey supra* note 49, para.72ff.
[75] See eg: *Ahmet Özkan and Others v Turkey* (Merits and Just Satisfaction) no.21689/93, Court (Second Section) (6 April 2004); *Ipek v Turkey* (Merits and Just Satisfaction) no.25760/94, Court (Second Section) (17 February 2004).
[76] Schabas, W.A. (2015) *supra* note 4, pp.169ff.
[77] See eg: *Janowiec and Others v Russia* (Merits and Just Satisfaction) nos.55508/07 29520/09, Court (Grand Chamber) (21 October 2013) para.177, 181; *Salakhov and Islyamova v Ukraine* (Merits and Just Satisfaction) no.28005/08, Court (Fifth Section) (14 March 2013) para.204; *Esmukhambetov and Others v Russia* (Merits and Just Satisfaction) no.23445/03, Court (First Section) (29 March 2011) para.190; *Khadzhialiyev and Others v Russia* (Merits and Just Satisfaction) no. 3013/04, Court (First Section) (6 November 2008) para.121; *Varnava and Others v Turkey* (Merits and Just Satisfaction) nos.16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Court (Grand Chamber) (18 September 2009) para.200; *Luluyev and Others v Russia* (Merits and Just Satisfaction) no. 69480/01, Court (First Section) (9 November 2006) para.114ff.
[78] *Musayev and Others v Russia* (Merits and Just Satisfaction) nos.57941/00, 58699/00 and 60403/00, Court (First Section) (26 July 2007) para.169.

well as the insufficient investigation following the incident, the Court found that the applicant had suffered from inhuman and degrading treatment in violation of Article 3 ECHR.[79]

In the 2014 case *Antayev and Others v Russia*, the Court found substantive violations of Article 3 ECHR amounting to inhuman and degrading treatment as well as torture. The applicants, two families of Chechen origin, were subjected to that treatment whilst security forces were searching their homes for weapons. The verbal abuse going alongside the physical attacks during the searches was ethnically motivated. Consequently, the Court confirmed a violation of Article 14 ECHR the prohibition of discrimination taken together with Article 3 ECHR in relation to the majority of applicants.[80]

The Court has found that discrimination in itself can amount to inhuman treatment in violation of Article 3 ECHR, depending on its severity.[81] Furthermore, acts motivated by discriminatory attitudes towards a specific group carried out by private persons were held to be in violation of the state's procedural obligations in cases where there 'was a systematic practice' of the authorities tolerating violence against a specific group.[82] The Court emphasised that view in the case *Antayev and Others v Russia* referred to above in the following way: 'Racial violence is a particular affront to human dignity and, in view of its dangerous consequences, requires special vigilance and a vigorous reaction from the authorities.'[83]

Article 3 ECHR has often been invoked in cases concerning acts of collective punishment and the review of references to collective punishment in the ECtHR's case law following in the next section supports this finding. Although the ill-treatment of the individual applicants is a result of the imposition of collective punishment, Article 3 ECHR

[79] *Musayev and Others v Russia supra* note 78; Schabas, W.A. (2015) *supra* note 4, pp.170f.
[80] *Antayev and Others v Russia* (Merits and Just Satisfaction) no.37966/07, Court (First Section) (3 July 2014).
[81] *Moldovan and Others v Romania (No.2)* (Merits and Just Satisfaction) no.41138/98 64320/01, Court (Second Section) (12 July 2005) para.111; *East African Asians v the United Kingdom* nos.4403/70-4419/70, 4422/70, 4423/70, 4434/70, 4443/70, 4476/70-4478/70, 4486/70, 4501/70, 4526/70-4530/70, Commission Report (14 December 1973) DR 78, p.5, p.62, para.208.
[82] *Begheluri and Others v Georgia* (Merits and Just Satisfaction) no. 28490/02, Court (Fourth Section) (7 October 2014) para.144.
[83] *Antayev and Others v Russia supra* note 80, para.120; Schabas, W.A. (2015) *supra* note 4, pp.196ff.

addresses only the outcome, but not the underlying reason for the human rights violation.

4.1.3.3 The protection of property

The right to property is interesting in the context of collective punishment as the examples of collective punishment include property destruction such as the burning of homes or entire villages. In addition, the discussion of property rights will include not only the ECHR but the ACHPR and its collective aspects which are useful for the understanding of the current legal framework available relevant to collective punishment.

The right to property in Article 1 Protocol No. 1 ECHR refers to the 'peaceful enjoyment of his possessions' of 'every natural or legal person',[84] situating the provision in a profoundly individual context.[85] On the other hand, the ACHPR does not limit the right to property to individuals as it solely states that '[t]he right to property shall be guaranteed' without naming any specific beneficiaries.[86] According to the African Commission on Human and Peoples' Rights, this formulation should be understood as encompassing the right to property of individuals, groups and peoples.[87] The African Commission on Human and Peoples' Rights has affirmed that interpretation for instance in the case concerning the Endorois community, which was forcibly evicted from their ancestral lands without adequate consultation or compensation. The Commission held in 2009 that 'the Endorois as a distinct people have suffered a violation of Article 14 of the Charter'.[88]

---

[84] Article 1 Protocol 1; Schabas, W.A. (2015) *supra* note 4, p.969.
[85] Schabas, W.A. (2015) *supra* note 4, pp.960ff.
[86] African (Banjul) Charter on Human and Peoples' Rights (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986) Article 14.
[87] Schabas, W.A. (2015) *supra* note 4, p.959; African Commission on Human and Peoples' Rights, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (24 October 2011) para.53; African (Banjul) Charter on Human and Peoples' Rights *supra* note 86, Article 14; Olaniyan, K. (2008). Civil and Political Rights in the African Charter: Articles 8 – 14, in Evans, M. & Murray, R. (eds.). *The African Charter on Human and Peoples' Rights: The System in Practice 1986 – 2006.* 2nd edition. Cambridge, Cambridge University Press, pp.213-243, pp.238ff.
[88] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (Endorois case) Communication 276/2003, 27th Activity Report (2009) (Annex 5) para.238; Ssenyonjo, M. (2015). The Development of Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights by the African Commission on Human and Peoples' Rights, *International Human Rights Law Review*, 4, pp.147-193, pp.160ff; similar decisions regarding indigenous peoples' rights to land have been handed down by the Inter-American Court of Human Rights, see eg I/A Court H.R., Case of Kichwa Indigenous People of Sarayaku v Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, para 217; I/A Court H.R., Case of the Mayagna (Sumo) Awas

Although the ACHPR provides for the protection of collective property, the content of the right itself does not address the particular wrong done by collective punishment, meaning the punishment of a group as such for acts committed by some of its members. However, this vital acknowledgement of collective human rights will be examined further below in the context of explicit group rights mentioned in the ACHPR.

4.1.3.4 The prohibition of discrimination

This short introduction to the prohibition of discrimination represents the starting point for further reference to it throughout the remainder of the thesis, in particular when it comes to questions of the translation of the act of collective punishment into human rights law at a later stage. Furthermore, non-discrimination provisions in other Council of Europe human rights instruments, namely the European Framework Convention on the Protection of National Minorities and the European Social Charter are not discussed at this point. This decision is due to their similarity to Article 14 ECHR as well as the focus on the procedural aspects of these instruments. For this reason, they are discussed in more detail in the last chapter, whereas the substantive elements of non-discrimination are examined in the following.

As already noted above, although the definition of collective punishment only requires the existence of an identifiable group in a relatively neutral sense, the groups affected by collective punishment in practice are likely to have a broader shared identity and therefore might be subject to discrimination based on those characteristics as well. This overlap between the imposition of collective punishment on groups such as the Chechen family of an alleged insurgent and its implications for the broader group to which they belong, the Chechens, makes it difficult to draw a clear-cut line between all the different measures and policies they are exposed to and targeted by. This is particularly true in the present context, as the prohibition of discrimination is examined for its potential to encompass the particular wrong done by collective punishment. For this reason, it is useful to keep in mind the overlap of groups and the measures they are exposed to in order not to conflate the understanding of groups in relation to collective punishment with the groups protected under Article 14 ECHR.

Article 14 ECHR prohibits discrimination based on grounds 'such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a

---

Tingni Community v Nicaragua. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para.149

national minority, property, birth or other status.'[89] As the formulation 'such as' indicates, the enumeration of grounds in the article is not exhaustive.[90] However, Article 14 ECHR is limited to the 'enjoyment of the rights and freedoms set forth in this Convention', meaning it is subsidiary in nature and has no independent standing as a right in itself. For the prohibition of discrimination to be applicable, another Convention right must be at least engaged. Consequently, Article 14 ECHR does not require the breach of another Convention right to be triggered, but only a factual situation falling 'within the ambit' of another right.[91]

A broader prohibition of discrimination came into force with Article 1 Protocol 12 to the ECHR. In contrast to Article 14 ECHR, Article 1 Protocol 12 prohibits discrimination not regarding Convention rights but regarding 'any right set forth by law'.[92] As the rest of the provision should be interpreted identical to Article 14 ECHR, its difference lies in the scope of application.[93]

According to the ECtHR, discrimination means 'treating differently, without an objective and reasonable justification, persons in similar situations'.[94] In the case *Abdulaziz, Cabales and Balkandali v the United Kingdom*, the Court defined discrimination as 'cases where a person or group is treated, without proper justification, less favourably than another'.[95] Taking into account the focus of the present thesis on collective punishment of groups who are additionally targeted in practice due to their shared identity such as minorities, the grounds of race, ethnic origin and association with a national minority are going to be explored in some detail in the following.

---

[89] Article 14 ECHR.
[90] Schabas, W.A. (2015) *supra* note 4, pp.555, 572f; *Carson and Others v the United Kingdom* (Merits) no.42184/05, Court (Grand Chamber) (16 March 2010) para.61, 70.
[91] Schabas, W.A. (2015) *supra* note 4, pp.562f; *Sejdić and Finci v Bosnia and Herzegovina* (Merits and Just Satisfaction) nos. 27996/06, 34836/06, Court (Grand Chamber) (22 December 2009) para.39; *Abdulaziz, Cabales and Balkandali v the United Kingdom* (Merits and Just Satisfaction) nos.9214/80, 9473/81, 9474/81, Court (Plenary) (28 May 1985) para.71; *Petrovic v Austria* (Merits and Just Satisfaction) no.20458/92, Court (Chamber) (27 March 1998) para.22; *Sahin v Germany* (Merits and Just Satisfaction) no.30943/96, Court (Grand Chamber) (8 July 2003) para.85.
[92] Article 1 Protocol 12 ECHR.
[93] Schabas, W.A. (2015) *supra* note 4, pp.1180ff; *Sejdić and Finci v Bosnia and Herzegovina supra* note 91, para.55; *Zornić v Bosnia and Herzegovina* (Merits and Just Satisfaction) no.3681/06, Court (Fourth Section) (15 July 2014) para.26f.
[94] *Sejdić and Finci v Bosnia and Herzegovina supra* note 91, para.42; Schabas, W.A. (2015) *supra* note 4, pp.564ff.
[95] *Abdulaziz, Cabales and Balkandali v the United Kingdom supra* note 91, para.82.

Discrimination on the grounds of race as explicitly named in Article 14 ECHR is overlapping in practice with the concept of ethnic origin. In *Timishev v Russia* in 2005, the applicant's right to liberty of movement was restricted due to his Chechen origin. The Court emphasised that '[d]iscrimination on account of one's actual or perceived ethnicity is a form of racial discrimination' and found a violation of the Article 14 ECHR in combination with freedom of movement governed by Article 2 of Protocol 4 to the Convention.[96] The Court has considered racial discrimination as 'particularly invidious' in its case law and therefore, it requires states to 'use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment'.[97]

The ground of discrimination based on association with a national minority has largely been considered in cases relating to Roma.[98] However, the ground of discrimination does not make up for the lack of minority rights as they are provided for instance by Article 27 ICCPR which will be discussed further in due course.[99] Furthermore, several attempts to include minority rights in the Convention or its Protocols failed and the European Framework Convention for the Protection of National Minorities has been criticised for its implementation difficulties.[100] Specific instruments and mechanisms on minority protection and empowerment and how these could enhance the present thesis' aim of

[96] *Timishev v Russia* (Merits and Just Satisfaction) nos.55762/00, 55974/00, Court (Second Section) (13 December 2005) para.53ff; Schabas, W.A. (2015) *supra* note 4, pp.577ff.
[97] *D.H. and others v the Czech Republic* (Merits and Just Satisfaction) no.57325/00, Court (Grand Chamber) (13 November 2007) para.176; *Horváth and Kiss v Hungary* (Merits and Just Satisfaction) no.11146/11, Court (Second Section) (29 January 2013) para.101.
[98] See eg: *D.H. and others v the Czech Republic supra* note 97; *Chapman v the United Kingdom* (Merits) no.27238/95, Court (Grand Chamber) (18 January 2001) para.93ff.
[99] *G. and E. v Norway* (Decision) nos.9278/81, 9415/81, Commission (Plenary) (3 October 1983) p.35.
[100] Schabas, W.A. (2015) *supra* note 4, pp.581f; CM/AS(2014)Rec2040-final "The situation and rights of national minorities in Europe" – Parliamentary Assembly Recommendation 2040 (2014) (Reply adopted by the Committee of Ministers on 17 September 2014 at the 1207th meeting of the Ministers' Deputies) (19 September 2014); CM/AS(2004)Rec1623-final Rights of national minorities – Parliamentary Assembly Recommendation 1623 (2003) (Reply adopted by the Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers' Deputies) (21 December 2004); Resolution 1713 (2010) Minority Protection in Europe: best practices and deficiencies in implementation of common standards, adopted by the Standing Committee, acting on behalf of the Assembly, on 12 March 2010 (Doc. 12109, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Cilevičs); Resolution 1866 (2012) An Additional Protocol to the European Convention on Human Rights on National Minorities, adopted by the Standing Committee, acting on behalf of the Assembly, on 9 March 2012 (see Doc. 12879, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Frunda).

translating a prohibition of collective punishment from the law of armed conflict into human rights law, are considered in more detail in the final part of the thesis.

Again, the prohibition of discrimination is aimed at individuals who are targeted because they are members of or affiliated with a certain group. However, collective punishment is addressing the reverse situation – groups are targeted because one or some of their members are accused of having committed certain acts. For this reason, the prohibition of discrimination in its present form cannot encompass this particular wrong done by collective punishment. The question of whether it might be possible to achieve a different result via an extensive interpretation or development of the prohibition of discrimination, will be discussed in due course.

4.1.3.5 The principle of individual responsibility

Grotius said that 'no Man, if entirely innocent, can be punished for another's Crime … because all Obligation to Punishment is grounded upon Guilt'.[101] He added that 'Guilt must of Necessity be personal, because it results from our Will'[102] highlighting the principle of individual responsibility for crime and rejecting any collective punishment giving the example of children being punished for their parents' crimes.[103] This principle of criminal law that responsibility is personal, can be found in the case law of the European Court of Human Rights as well.[104]

The presumption of innocence laid out in Article 6 (2) ECHR opposes any form of collective guilt. Schabas describes collective guilt as being 'punished not for their acts or omissions but for their association with others'.[105] The ECtHR has dealt with the personal character of liability in *A.P., M.P. and T.P. v Switzerland* regarding the imposition of sanctions on heirs for the alleged commission of crimes by the deceased person and it held that 'criminal liability does not survive the person who has committed the criminal act.'[106] The Court confirmed that '[i]nheritance of the guilt of the dead is not compatible

---

[101] Tuck, R. (ed.)(2005). *The Rights of War and Peace, Book II by Hugo Grotius (1583-1645).* Indianapolis, Liberty Fund, Chapter XXI, p.1084.
[102] Tuck, R. (ed.)(2005) *supra* note 101, p.1084.
[103] Tuck, R. (ed.)(2005) *supra* note 101, pp.1084ff.
[104] Weigend, T. (2014). Subjective Elements of Criminal Liability, in Dubber, M.D. & Hörnle, T. (eds.). *The Oxford Handbook of Criminal Law*. Oxford, Oxford University Press, pp.490-511, pp.490ff; see also African (Banjul) Charter on Human and Peoples' Rights *supra* note 86, Article 7 (2), stating that 'punishment is personal' and Organization of American States (OAS), American Convention on Human Rights, 'Pact of San Jose', Costa Rica, (22 November 1969) Article 5 (3).
[105] Schabas, W.A. (2015) *supra* note 4, p.280.
[106] *A.P., M.P. and T.P. v Switzerland* (Merits and Just Satisfaction) no.19958/92, Court (Chamber) (29 August 1997) para.48; see also: *E.L., R.L. and J.O.-L. v Switzerland* (Merits and Just Satisfaction) no.20919/92, Court (Chamber) (29 August 1997) para.53.

with the standards of criminal justice in a society governed by the rule of law' and constitutes a violation of the presumption of innocence under Article 6 (2) ECHR.[107] This view was reaffirmed in 2012 in the case *Lagardère v France* where the applicant faced civil proceedings for his fathers' misappropriation of corporate assets although his father was found guilty only post mortem.[108]

Besides these inheritance related cases, the Court was dealing with the personal character of responsibility in cases about lustration mechanisms in Eastern European countries which adopted such measures after the dissolution of the Soviet Union. In its case law, the Court has criticised several of these measures as being overly broad and lacking 'individualisation'.[109]

In addition, the Council of Europe has issued a resolution on lustration laws reaffirming that measures should not be imposed collectively and that the 'aim of lustration is not to punish people presumed guilty'.[110]

The case *Sõro v Estonia* dealt with an act adopted by the Estonian parliament providing for the disclosure of persons who worked for the Committee for State Security during Soviet occupation of the country. The applicant was employed by Soviet security services as a driver and received notice from the Estonian security services in 2004 that his name would be registered under this Disclosure Act. Following the publication of his name, the applicant was forced to quit his job due to ongoing harassment. The Court found that the Disclosure Act did not allow for the consideration of the level of engagement with Soviet security services, given that he was only working as a driver and was not involved in any substantive intelligence related activities. Furthermore, the Court held that the publication of his name and its consequences were serious enough to represent a violation of his right to respect for his private life, Article 8 ECHR.[111]

---

[107] *A.P., M.P. and T.P. v Switzerland supra* note 106, para.48.
[108] *Lagardère v France* (Merits and Just Satisfaction) no.18851/07, Court (Fifth Section) (12 April 2012).
[109] *Sõro v Estonia* (Merits and Just Satisfaction) no.22588/08, Court (First Section) (3 September 2015) para.60; *Ādamsons v Latvia* (Merits and Just Satisfaction) no.3669/03, Court (Third Section) (24 June 2008) para.125; for other cases on this issue see eg: *Sidabras and Džiautas v Lithuania* (Merits and Just Satisfaction) nos.55480/00 and 59330/00, Court (Second Section) (27 July 2004); *Matyjek v Poland* (Merits and Just Satisfaction) no.38184/03, Court (Fourth Section) (24 April 2007); *Haralambie v Romania* (Merits and Just Satisfaction) no.21737/03, Court (Third Section) (27 October 2009).
[110] Resolution 1096 (1996) On Measures To Dismantle The Heritage Of Former Communist Totalitarian Systems, adopted by the Assembly on 27 June 1996 (23rd Sitting) (Doc. 7568, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Severin) para.12.
[111] *Sõro v Estonia supra* note 109.

In a concurring opinion, Judge Pinto de Albuquerque pointed to another aspect of the case which bears valuable insights regarding the principle of individual responsibility.[112] In assessing the Disclosure Act, he particularly stressed that 'the law is applied individually, which implies the prohibition of collective guilt, and fairly, which requires at least the acknowledgment of basic procedural guarantees such as the right of defence, the presumption of innocence and the right of appeal to a court.'[113]

Although individual responsibility, the prohibition of collective guilt and the presumption of innocence might sound promising in terms of absorbing the concept of collective punishment, they cannot provide redress for groups due to their individual nature. In addition, they do not address the specific wrong done by collective punishment, the punishment of a group for an act committed by one of its members.

4.1.3.6 Group rights in the African Charter on Human and Peoples' Rights (ACHPR)

Although a more detailed analysis of the group rights debate will be undertaken in the last part of the thesis, existing collective dimensions of human rights such as those found in the ACHPR are mentioned at this point already as this chapter is trying to provide an overview of existing substantive aspects of human rights law relevant to collective punishment.[114] However, the procedural aspects of the ACHPR of potential benefit to a prohibition of collective punishment under human rights law will be analysed in the last chapter.

Articles 19 to 24 ACHPR address the rights of peoples directly. They include guarantees of equality,[115] the right to existence and self-determination,[116] the right to freely dispose of wealth and natural resources, [117] the right to social, economic and cultural development,[118] the right to national and international peace and security[119] and the right to a general satisfactory environment favourable to their development. [120] As shown above in the *Endorois* case in 2009, the African Commission on Human and Peoples' Rights confirmed the commitment to collective rights in its case law, refuting

[112] *Sõro v Estonia supra* note 109, concurring opinion Judge Pinto de Albuquerque, para.7ff.
[113] *Sõro v Estonia supra* note 109, concurring opinion Judge Pinto de Albuquerque, para.13.
[114] Baldwin, C. & Morel, C. (2008). Group Rights, in Evans, M. & Murray, R. (eds.). *The African Charter on Human and Peoples' Rights: The System in Practice 1986 – 2006.* 2nd edition. Cambridge, Cambridge University Press, pp.244-288, p.244.
[115] African (Banjul) Charter on Human and Peoples' Rights *supra* note 86, Article 19.
[116] African (Banjul) Charter on Human and Peoples' Rights *supra* note 86, Article 20.
[117] African (Banjul) Charter on Human and Peoples' Rights *supra* note 86, Article 21.
[118] African (Banjul) Charter on Human and Peoples' Rights *supra* note 86, Article 22.
[119] African (Banjul) Charter on Human and Peoples' Rights *supra* note 86, Article 23.
[120] African (Banjul) Charter on Human and Peoples' Rights *supra* note 86, Article 24.

claims that the rights set out in Articles 19 to 24 ACHPR would be 'merely aspirational'.[121] In this case, the Commission found not only a violation of the right to property of the Endorois community, but a violation of their right to freely dispose of their natural resources due to a lack of compensation (Article 21 ACHPR)[122] as well as a violation of Article 22 ACHPR, the right to development.[123] So far, the Commission has employed a broad understanding of the term 'people' used in the Charter and included distinct groups within a state such as indigenous peoples or ethnic groups in that category as well.[124] The example of the *Endorois* case has been followed by the African Court on Human and Peoples' Rights in 2017 when it found a violation of the right to freely dispose of wealth and natural resources and the right to social, economic and cultural development of the Ogiek community.[125]

Article 19 ACHPR states the equality of all peoples and that '[n]othing shall justify the domination of a people by another', therefore prohibiting discrimination against peoples. The concepts of inequality and domination used in the article refer to internal situations, an example of which would be the Apartheid regime in South Africa. The element necessary for Article 19 ACHPR to be triggered is the systematic nature of discrimination, meaning of a measure that would 'affect adversely an identifiable group'. [126] The imposition of collective punishment in form of ill-treatment and destruction of homes represents a measure having an 'adverse effect' on an 'identifiable group' such as civilians, villagers or families of insurgents (and the Palestinians, the Kurds or the Chechens in a broader sense). Furthermore, the state policies targeting those groups, some of which are even part of the domestic law of the state in question, could be well considered to be of a systematic nature. The question however, whether or not a collective right to non-discrimination could remedy the lack of a prohibition of collective punishment under human rights law, will be considered in the last part of the thesis.

---

[121] Baldwin, C. & Morel, C. (2008) *supra* note 114, pp.245ff.
[122] *Endorois case supra* note 88, para.268.
[123] *Endorois case supra* note 88, para.298.
[124] Baldwin, C. & Morel, C. (2008) *supra* note 114, pp.247ff; *Legal Resources Foundation v Zambia*, Communication 211/98, 14th Activity Report (2001), AHG/229(XXXVII), para.73; Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights *supra* note 87, para.1; Ashamu, E. (2011). Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya: A Landmark Decision from the African Commission, *Journal of African Law*, 55 (2), pp.300-313, pp.302ff.
[125] *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogiek),* Application No. 006/2012, Judgment (26 May 2017).
[126] *Legal Resources Foundation v Zambia supra* note 124, para.73; Baldwin, C. & Morel, C. (2008) *supra* note 114, pp.250ff.

According to Baldwin and Morel, Article 23 ACHPR, the right to peace and security is '[a]t its most basic level, … the right to be free from violence'.[127] The violence referred to includes not only violence systematically targeting peoples directly, but also any other act creating violence leading to the same effect. The Commission considered Article 23 ACHPR in the *Mauritanian* case in 2000.[128] This case concerned serious human rights violations including summary executions, ill-treatment and detention of Black Mauritanians by the government that came to power after a coup d'état and specifically targeted that ethnic group. One of the communications constituting the case referred to the security forces 'surrounding the villages, confiscating land and livestock belonging to the Black Mauritanians and forcing the inhabitants to flee towards Senegal, leaving their property for the Haratines to take or to be destroyed.'[129] Regarding Article 23 ACHPR, the Commission established that the authorities themselves were attacking Mauritanian villages and that these 'unprovoked attacks on villages constitute a denial of the right to live in peace and security'.[130] The duties arising for a state from Article 23 ACHPR do not only include to refrain from actions threatening peace and security, but to take active steps to ensure peace and security. This positive obligation includes the protection from acts of violence by third parties and inaction on behalf of the state in case a marginalised group is targeted systematically and suffering from acts of violence constitutes a violation of Article 23 ACHPR.[131]

The destruction of homes or villages may sound familiar being a practice used in the context of collective punishment as shown in the case study on the Occupied Palestinian Territories, the short reference to village destruction in the Kurdish regions of Turkey as well as in Chechnya as described in the next chapter. For this reason, the *Mauritanian* case is a valuable source showing how other regional human rights bodies have dealt with policies and practices which amount to collective punishment. However, even the

---

[127] Baldwin, C. & Morel, C. (2008) *supra* note 114, p.280.
[128] *Malawi Africa Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants Droit, Association mauritanienne des droits de l'Homme v Mauritania* (Mauritanian case), Communications 54/91, 61/91, 98/93, 164/97-196/97, 210/98 (11 May 2000), AHG/222 (XXXVI Add.) 13th Activity Report (1999-2000).
[129] *Mauritanian case supra* note 128, para.17; Bekker, G. (2013). The protection of asylum seekers and refugees within the African regional human rights system, *African Human Rights Law Journal*, 13, pp.1-29, pp.18f.
[130] *Mauritanian case supra* note 128, para.140.
[131] Baldwin, C. & Morel, C. (2008) *supra* note 114, pp.280ff; Ugochukwu, B., Badaru, O. & Okafor, O. (2012). Group Rights under the African Charter on Human and Peoples' Rights: Concept, Praxis and Prospects, in Ssenyonjo, M. (ed.). *African Regional Human Rights System*. Leiden, Martinus Nijhoff, pp.101-117, pp.115f.

right to peace does not account for the whole of collective punishment as it does not address the punishment of an identifiable group for the actual or alleged commission of an act by one or some of its members.

Nevertheless, Article 23 ACHPR has another aspect supporting group empowerment. The subject claiming a violation of the right to peace and security against a state is not the state in which the people in question is living, but the people itself.[132] This changes the status of peoples from being merely objects of human rights instruments to being actively engaged. In sum, Article 23 ACHPR holds 'immense potential', but case law on it is scarce and therefore it is still in need of further interpretation in order to 'clearly setting out the minimum duties that are placed on States to protect, and not to harm, peoples'.[133]

In conclusion it can be said, that the group rights mentioned in the ACHPR in general hold potential for the discussion of translating the act of collective punishment into human rights law. In their present shape, they are not able to cover a prohibition of collective punishment, but ways of developing their underlying rationale towards that objective are going to be considered later on in more detail.

4.1.3.7 Minority rights

Finally, another aspect of collective rights can be found in Article 27 ICCPR protecting the rights of minorities. These rights have been defined by the Human Rights Committee as primarily individual rights, protecting individual members of minorities and not the minority as a group or collectivity.[134] However, the tensions that might arise between individual rights of members and collective rights of the group have been discussed in several cases where the HRC has tried to reconcile conflicting rights by limiting individual rights of group members in favour of other members' rights or rights of the minority as a whole.[135]

Yet an assessment of the Council of Europe minority rights instrument, the European Framework Convention for the Protection of National Minorities will be included in the final part of the thesis and not at this stage. This decision is due to the primary function of such an assessment being the comparison of collective rights frameworks in order to

---

[132] Baldwin, C. & Morel, C. (2008) *supra* note 114, pp.281f.
[133] Baldwin, C. & Morel, C. (2008) *supra* note 114, p.283.
[134] CCPR/C/21/Rev.1/Add.5 General Comment No.23: Rights of Minorities (Article 27) (26 April 1994); Joseph, S., Schultz, J. & Castan, M. (2004) *supra* note 18, pp.761ff.
[135] CCPR/C/13/D/24/1977 *Lovelace v Canada* (024/1977) (30 July 1981) para.14ff; CCPR/C/70/D/547/1993 *Mahuika et al v New Zealand* (547/93) (27 Oct 2000) para.9.6.

find potential ways of including a prohibition of collective punishment in human rights law, rather than to outline existing substantive human rights guarantees, be they individual or collective in nature, relating to the act of collective punishment itself. Traditional minority rights relating to language and culture are not at the centre of collective punishment, as it is the physical violence imposed on a specific group. Arguably, the intent behind a policy of collective punishment does entail those wider aspects, but the immediate effect of collective punishment is a violent response to an act allegedly committed by one or some members of a specific group.

To sum up, the existing human rights framework is unable to encompass the act of collective punishment, therefore leaving a gap in protection. How this gap might be closed will be subject of the last part of the thesis. However, it is important to address the rights engaged in the imposition of collective punishment in order to understand the interaction between rights and principles and to provide a foundation for ways to close this gap. This analysis will be provided in the last two chapters of the thesis, addressing the theoretical framework of group rights as human rights and collective aspects of CoE human rights instruments, in particular of the European Social Charter, facilitating a prohibition of collective punishment from a procedural perspective.

4.1.4 Reference to the term 'collective punishment' in the case law of the European Court of Human Rights

Although the ECHR does not include an explicit prohibition of collective punishment and the Court has never found any such violation, it has referred to the term 'collective punishment' in several cases. As of April 2018, reference to the term 'collective punishment' can be found in 46 cases. The fact, that this terminology is not unknown to the Court provides significant support to the argument made in this thesis for closer attention to collective punishment under the framework of the ECHR.

Broadly speaking, the cases mentioning the term collective punishment deal with the treatment of prisoners, non-refoulement, references to international law standards including collective punishment and the treatment of Kurds in Turkey, mainly discussed under Article 3 ECHR.

The case *Blokhin v Russia* in 2016 concerned the treatment of juvenile offenders in temporary detention centres[136] and is part of a broader set of cases concerning detention

[136] *Blokhin v Russia* (Merits and Just Satisfaction) no. 47152/06, Court (Grand Chamber) (23 March 2016).

conditions where applicants have described practices as 'collective punishment'.[137] The applicant described the supervisor's policy to force all inmates to stand in line without moving after one of them has disobeyed the detention centre's regime as 'collective punishment'.[138] Furthermore, the Court referred to international materials relevant for the case such as the Recommendation on the European Rules for juvenile offenders subject to sanctions or measures.[139] This recommendation includes a reference to collective punishment as well: 'Collective punishment, corporal punishment, punishment by placing in a dark cell, and all other forms of inhuman and degrading punishment shall be prohibited.'[140] However, the Court did not refer to the term in its judgment.

In 2012 in *Nada v Switzerland*, a case concerning the list of al-Qaeda affiliates introduced by the United Nations Security Council's Sanction Committee, the Court referred to a decision of the Swiss Federal Court stating that the prohibition of collective punishment amounted to *jus cogens*, contrasting it with other rights and principles such as economic freedom, which did not amount to *jus cogens*.[141] However, the Court did not give an independent assessment or response to this statement. In *J. and Others v Austria* the Court referred to the Convention concerning Forced or Compulsory Labour which prohibits forced labour as a form of collective punishment.[142]

In the 2013 case *Maskhadova and Others v Russia* the applicants claimed that the government's refusal to return the body of the former Chechen president and separatist

---

[137] See eg: *Mamedova v Russia* (Merits and Just Satisfaction) no. 7064/05, Court (First Section) (1 June 2006) para.43 (reference to collective punishment of inmates); *Athary v Turkey* (Merits and Just Satisfaction) no. 50372/09, Court (Second Section) (11 December 2012) para.21 (referring to collective punishment as stated in para.32 of the UNHCR Detention Guidelines of 2012 (UN High Commissioner for Refugees (2012). Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, online available at: http://www.refworld.org/docid/503489533b8.html (accessed on 15/04/18); *Kamenica and Others v Serbia* (Decision) no. 4159/15, Court (Third Section) (4 October 2016) para.23, 30 (regarding collective punishment as a war crime – case related to Yugoslavian conflict); *X. and Y. v the United Kingdom* (Decision) no. 5302/71, Commission (Plenary) (11 October 1973) (ill-treatment in detention in Northern Ireland).

[138] *Blokhin v Russia supra* note 136, para.32; *McFeeley et al. v the United Kingdom* (Decision) no. 8317/78, Commission (Plenary) (15 May 1980) para.2, 11, 32, 70f.

[139] Recommendation CM/Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008.

[140] Recommendation CM/Rec(2008)11 *supra* note 139, para.95.2; *Blokhin v Russia supra* note 136, para.79.

[141] *Nada v Switzerland* (Merits and Just Satisfaction) no. 10593/08, Court (Grand Chamber) (12 September 2012) para.47.

[142] *J. and Others v Austria* (Merits and Just Satisfaction) no. 58216/12, Court (Fourth Section) (17 January 2017) para.9; C029 Convention concerning Forced or Compulsory Labour, Geneva, 14th ILC session (28 June 1930) Article 20.

leader Aslan Maskhadov did not represent a measure to combat terrorism but in fact collective punishment of the families.[143] Although the Court did not refer to the term collective punishment explicitly, it held that the Russian authorities' decision not to return Aslan Maskhadov's body failed to consider the individual circumstances of the applicants. Stressing the punitive character of the decision, the Court found a violation of the applicants' right to private and family life: 'In the absence of such an individualised approach, the adopted measure mainly appears to have a punitive effect on the applicants by switching the burden of unfavourable consequences in respect of activities of the deceased person from that person onto his or her close family members.'[144]

In the 2013 non-refoulement case *I. K. v Austria* it was argued that the Chechen applicant was likely to suffer from collective punishment in Russia because his father who had already been shot had worked for Aslan Maskhadov. The Court referred in its judgment to the term 'collective punishment' three times whilst citing relevant country information.[145] In *F.H. v Sweden*, another non-refoulement case, the Court referred to country information on Iraq mentioning 'collective punishment' of members of the Ba'ath party.[146] In another non-refoulement case, the Palestinian applicant mentioned collective punishment as well.[147]

In *Yordanova and Others v Bulgaria* in 2012, the applicants of Roma origin claimed that the eviction order, which was not based on individual conduct, would amount to collective punishment based on their ethnic origin.[148]

In *Cichopek and Others v Poland*, a case on lustration measures, the term 'collective punishment' was mentioned nine times, including references to a judgment of the Polish Constitutional Court, with one dissenting opinion (to that Polish judgment) confirming the imposition of collective punishment.[149] In an expropriation case relating to property

[143] *Maskhadova and Others v Russia* (Merits and Just Satisfaction) no. 18071/05, Court (First Section) (6 June 2013) para.197.
[144] *Maskhadova and Others v Russia supra* note 143, para.236.
[145] *I.K. v Austria* (Merits and Just Satisfaction) no. 2964/12, Court (First Section) (28 March 2013) para.51, 53.
[146] *F.H. v Sweden* (Merits) no. 32621/06, Court (Third Section) (20 January 2009) para.58.
[147] *M.H. v Sweden* (Decision) no. 10641/08, Court (Third Section) (21 October 2008) para.29.
[148] *Yordanova and Others v Bulgaria* (Merits and Just Satisfaction) no. 25446/06, Court (Fourth Section) (24 April 2012) para.87.
[149] *Cichopek and Others v Poland* (Decision) nos. 15189/10, 10011/11, 10072/11... Court (Fourth Section) (14 May 2013)

of German citizens on Polish territory the applicants claimed the seizure of property amounted to collective punishment.[150]

In addition, the applicants referred to the term collective punishment in a number of cases concerning the treatment of Kurds in Turkey as already referred to above.[151] In some of those cases, the applicants linked collective punishment directly to Article 3 ECHR, stating that it amounted to inhuman and degrading treatment[152] or to torture[153] or phrased their complaints more generally in ways such as '[t]he applicants maintain under Article 3 of the Convention that they were subjected to inhuman and degrading treatment as well as collective punishment'. [154] In some of these cases, collective punishment was not only referred to in relation to Article 3 ECHR, but also Article 14 ECHR, the prohibition of discrimination.[155]

---

[150] *Preussische Treuhand Gmbh and Co. Kg a. A. v Poland* (Decision) no. 47550/06, Court (Fourth Section) (7 October 2008) para.42.
[151] *Bulut v Turkey* (Decision) no. 43599/98, Court (Third Section) (1 June 2006); *Işçi v Turkey* (Decision) no. 31849/96, Court (First Section) (20 March 2001).
[152] *Dündar v Turkey* (Decision) no. 23182/94, Commission (Plenary) (28 November 1994); *Asker v Turkey* (Decision) no. 23185/94, Commission (Plenary) (28 November 1994); *Z.D. v Turkey* (Decision) no. 25801/94, Commission (Plenary) (23 May 1996); *Ovat v Turkey* (Decision) no. 23180/94, Commission (Plenary) (3 April 1995); *Altun v Turkey* (Decision) no. 24561/94, Commission (Plenary) (11 September 1995); *Ahmet (Son of Mehmet), Ahmet (Son of Sabri) and Isiyok v Turkey* (Decision) no. 22309/93, Commission (Plenary) (3 April 1995); *Akdivar and Others v Turkey supra* note 44; *Selçuk and Asker v Turkey supra* note 49.
[153] *Hazar, Tektas, Bekiroglu, Pekol, Bozkus, Tektas, Atman, Isik, Aksucu, Doster, Demirhan and Sahin v Turkey* (Decision) nos. 62566/00, 62567/00, 62568/00..., Court (First Section) (10 January 2002).
[154] *Kinay v Turkey* (Decision) no. 31890/96, Court (First Section) (30 May 2000); *Altinok v Turkey* (Decision) no. 31846/96, Court (First Section) (30 May 2000); *Aygördü and Others v Turkey* (Decision) no. 33323/96, Court (First Section) (19 September 2000); *Aggül and Others v Turkey* (Decision) no. 33324/96, Court (First Section) (19 September 2000); *Ince and Others v Turkey* (Decision) no. 33325/96, Court (First Section) (19 September 2000); *Güven v Turkey* (Decision) no. 31847/96, Court (First Section) (30 May 2000); *Aslan v Turkey* (Decision) no. 22497/93, Commission (Plenary) (20 February 1995); *Yilmaz v Turkey* (Decision) no. 23179/94, Commission (Plenary) (15 May 1995); *Demir v Turkey* (Decision) no. 22280/93, Commission (Plenary) (9 January 1995); *Yasar v Turkey* (Decision) no. 22281/93, Commission (Plenary) (3 April 1995); *Ayder, Lalealp, Doman, Biçer and Ekmekçi v Turkey* (Decision) no. 23656/94, Commission (Plenary) (15 May 1995); *Bilgin v Turkey* (Decision) no. 23819/94, Commission (Plenary) (15 May 1995).
[155] *Dündar v Turkey supra* note 152; *Asker v Turkey supra* note 152; *Z.D. v Turkey supra* note 152; *Ovat v Turkey supra* note 152; *Altun v Turkey supra* note 152; *Ahmet (Son of Mehmet), Ahmet (Son of Sabri) and Isiyok v Turkey supra* note 152; *Laçin v Turkey* (Decision) no. 23654/94, Commission (Plenary) (15 May 1995); *Çelik v Turkey* (Decision) no. 23655/94, Commission (Plenary) (15 May 1995); *Akdivar and Others v Turkey supra* note 44.

In *Ayder and Others v Turkey*, the applicants requested the Court to find that they have been subjected to collective punishment and argued that it would constitute inhuman and degrading treatment. However, the Court did not follow this request.[156]

In 2004 in the case of *Ahmet Özkan and Others v Turkey* the applicants' claim regarding collective punishment was referred to by the Court itself: 'The applicants claimed that the military operation of 20 February 1993 had been conducted to terrorise and humiliate the population of Ormaniçi by rounding them up as a collective punishment, which, according to the applicants, was an inhuman form of punishment.'[157]

Furthermore, there are four cases where the Court cited provisions of the law of armed conflict relating to collective punishment, or in which the applicants referred to them.[158] Another interesting case in this regard is the 1958 interstate case *Greece v the United Kingdom* dealing with collective punishment imposed by British authorities in Cyprus.[159] Judge Eustathiades posed the question in his dissenting opinion on whether the destruction of buildings and plantations is 'nonetheless a collective punishment prohibited by the Convention, both under Article 3 and under the reservation concerning respect for "other obligations under international law" in Article 15.' However, he refrained from answering this question by offering some inconclusive thoughts on the individual and collective aspect of this complex issue:

> 'Having said this, I do not think that it would be relevant in the present instance to find that, because no general practice constituting an abuse exists, therefore there have been no individual cases of abuse. The question at issue is whether, in cases of the destruction of buildings and plantations near the scene of attacks – the cases complained of by the Greek Government – the British authorities have not gone beyond the requirements of security, thus showing that they have been using such measures for purposes of collective persecution. In this connection, in view of the circumstances mentioned by both sides, I hesitate to say that security reasons had no connection with the action taken by the British

[156] *Ayder and Others v Turkey* (Merits and Just Satisfaction) no. 23656/94, Court (First Section) (8 January 2004) para.112.
[157] *Ahmet Özkan and Others v Turkey supra* note 75, para.332, 339.
[158] *X. v Norway* (Decision) no. 2369/64, Commission (Plenary) (3 April 1967); *Fejzić and Others v Serbia* (Communicated Case) no. 4078/15 (15 April 2015); *Trivkanović v Croatia* (Merits and Just Satisfaction) no. 12986/13, Court (First Section) (6 July 2017); *Zdjelar and Others v Croatia* (Merits and Just Satisfaction) no. 80960/12, Court (First Section) (6 July 2017).
[159] *Greece v the United Kingdom* (Volume II) Report (31) no. 176/56, Commission (Plenary) (26 September 1958).

> authorities. On the other hand, in view of the same circumstances, it does not seem to me to be established that the destruction in question was exclusively in the interests of security.'[160]

This review of cases brought before the ECtHR clearly shows that the concept of collective punishment as such is not unknown to the Court. Although the Court has not followed the requests made by applicants to address the concept of collective punishment, it has cited relevant country information provided by non-governmental organisations and evidence of collective punishment provided by applicants. However, the Court has not rejected the use of this notion in the ECHR context either.

4.1.5 Conclusion

The short account of states of emergency at the beginning of this chapter has highlighted the fluid transition between the law of armed conflict and human rights law and the importance of considering the concept of collective punishment in situations governed by human rights law. After introducing the concept of collective punishment through states of emergency to human rights law, this chapter has analysed existing human rights law provisions and principles that relate to the concept of collective punishment. Some of them have that connection due to the way in which collective punishment is imposed such as the right to life, the prohibition of torture, the protection of property or the prohibition of discrimination. These rights are engaged in the instances of village destruction briefly referred to regarding the Kurds and the following case study on collective punishment in Chechnya.

Gathering from the review of the rights and principles related to collective punishment, it can be said that human rights law in its present state is unable to encompass this act. The specific wrong done by collective punishment, the imposition of sanctions on a group for acts allegedly committed by one or some of its members, cannot be addressed by the specific human rights violations that go alongside it. These specific human rights are able to confront the result of an act of collective punishment, for instance the destruction of a house by finding a violation of the right to property. However, they are not equipped to tackle the underlying reason for that specific violation, the collective punishment of a group for an act committed by some of its members.

Nevertheless, the concept of collective punishment is not unknown to the European Court of Human Rights. Although the Court has not decided on the issues so far, it has

[160] *Greece v the United Kingdom supra* note 159, para.377.

not rejected the use of the notion either. This familiarity strengthens the thesis' argument for a consideration of collective punishment in the context of the ECHR.

The finding that human rights law in its present state is unable to deal with collective punishment represents a vital precondition for the ensuing attempt to find potential ways to close this gap in the final part of the thesis. And the case study in the next chapter as well as the examples mentioned above reaffirm the significance of a prohibition of collective punishment under human rights law in practice.

This chapter has tried to outline the current human rights framework and to point to the existing gap in protection regarding collective punishment. Specific rights and principles such as the prohibition of discrimination or ACHPR group rights discussed here prepare the ground for the analysis of potential ways to close the gap in human rights law at a later stage.

After this theoretical account of human rights law, the case study following in the next chapter, will strengthen the argument for a prohibition of collective punishment under human rights law from a practical perspective.

4.2 Case study on Chechnya

4.2.1 Introduction

After examining collective punishment in the context of human rights law in the preceding chapter, its imposition in practice is discussed in the following. As the framework currently applicable to the situation in Chechnya is in question, concerns about the protection of Chechens affected by collective punishment have arisen. Chechnya has experienced two non-international armed conflicts in its recent past, with one of them potentially still going on. This long period of transition is prone to producing grey areas where it might be unclear which legal framework, the law of armed conflict or human rights law, applies. Apart from the choice of the Chechens to use the system of the European Convention on Human Rights as means of empowerment to engage in their struggle for justice, this question of applicability and potential grey areas strengthens the case for the assessment of collective punishment under human rights law.

Policies imposing collective punishment are being pursued on the federal and local level and realised partially in law and in practice. *Zachistkas* or sweeping operations during the second non-international armed conflict in Chechnya were carried out to punish the inhabitants of entire villages for allegedly hiding insurgents. The current head of Chechnya itself, Ramzan Kadyrov, has been eager on continuing this so-called fight against terrorism by imposing collective punishment in the form of house burning.[1] As house burning or house destruction is a form of collective punishment already well-established through the case study on the Occupied Palestinian Territories, it will be emphasised here as well. Furthermore, legislation adopted by the Russian State Duma targeting relatives of alleged terrorists might be particularly aimed at groups such as the Chechens. Altogether, the treatment of Chechens who have been critical of the government of either the Chechen Republic (CR) or the Russian Federation (RF) of which it is one of 83 regions, of which 21 are ethnic republics, raises questions about the consideration of collective punishment in times governed by human rights law.[2]

[1] Human Rights Watch (2016). "Like Walking a Minefield": Vicious Crackdown on Critics in Russia's Chechen Republic, online available at: https://www.hrw.org/sites/default/files/report_pdf/chechnya0816_1.pdf (accessed on 15/04/18) pp.29ff.

[2] ЧИСЛО РАЙОНОВ, ГОРОДСКИХ И СЕЛЬСКИХ НАСЕЛЕННЫХ ПУНКТОВ ПО СУБЪЕКТАМ РОССИЙСКОЙ ФЕДЕРАЦИИ (numbers deriving from the 2010 population census), online available at: http://www.gks.ru/free_doc/new_site/perepis2010/croc/Documents/Vol1/pub-01-03.pdf (accessed on 15/04/18).

Given that collective punishment as such is not prohibited under human rights law, RF and CR authorities could pursue their policies imposing collective punishment effectively and relatively undisturbed. However, the cases brought by Chechens before the European Court of Human Rights are continuing to challenge the authorities. They have done so over enforced disappearances, and they might do so over collective punishment if there would be a prohibition under the ECHR. As this chapter is devoted to the case study on Chechnya only, potential ways of realising such a prohibition under human rights law will be deferred and discussed in the last part of the thesis. However, the successful cases Chechens have brought before the ECtHR serve as an indicator of the potential of the Court's mechanisms as a means of empowerment for marginalised groups such as minorities. Against this background, the case study illustrates how collective punishment was and is used in Chechnya as well as the potential of human rights law to assist affected groups in challenging such policies in practice.

The chapter will start with a short account of the two non-international armed conflicts in Chechnya, the ensuing so-called counter-terrorist operation witnessing the 'Chechenisation' of the conflict and the situation today, leaving it open to debate as to whether there is still an armed conflict going on or not.[3] After setting out this problematic context, forms of collective punishment practised during and since the periods of armed conflict, namely *zachistkas* and house burning, are discussed. In addition to these forms of collective punishment emerging from the practice of security forces in Chechnya, the Russian law providing for the confiscation of property of family members of alleged terrorists adopted in 2013 will be analysed. The chapter will conclude with a short review of two cases involving collective punishment in Chechnya brought before the European Court of Human Rights. The general review of cases referring to collective punishment in the previous chapter has shown that the Court is already aware of this terminology. Chechen cases not only reaffirm the account of the current situation in Chechnya, but also strengthen the case made in terms of the potential of the Court's mechanisms in the context of group empowerment.

[3] Human Rights Watch (2009). "What Your Children Do Will Touch Upon You" – Punitive House-Burning in Chechnya, online available at: http://www.hrw.org/sites/default/files/reports/chechnya0709webwcover_1.pdf (accessed on 15/04/18) p.11.

4.2.2 Setting the scene – non-international armed conflicts and Chechnya's current status

The situation in Chechnya cannot be assessed without looking at its recent past. The current uncertain status is the result of two non-international armed conflicts in Chechnya over the last decades namely 1994 to 1997 and 1999 to 2009. Although large-scale fighting has ceased, the government of the CR under Ramzan Kadyrov is continuing to lead counter-terrorist operations targeting not only alleged insurgents, but people critical of his rule more generally. The problem which arises during long periods of transition, where there still might be a lingering armed conflict, is bound up with the question of which legal framework is applicable.

This question ultimately leads to the analysis of seemingly basic principles of the law of armed conflict – the beginning and end of armed conflicts. In this context, the emphasis will be placed on non-international armed conflicts and a short analysis of prevailing theories will be provided. Acknowledging the scarcity of academic literature in this area, the aim of this section is not to engage with all the unresolved complexities of the issue, but rather to highlight the underlying problems relevant to the thesis – long periods of transition combined with potential gaps in protection and a lack of empowerment of marginalised groups.

4.2.2.1 Two non-international armed conflicts in Chechnya

The following section looks at the events in Chechnya from the beginning of the 1990s up to today and at the broader context of these events. Russia has fought two non-international armed conflicts against Chechnya in rapid succession. Although the Russian government declared the second armed conflict to be over in 2009, tensions between Federal and CR forces and Chechen insurgent forces remain. Furthermore, the focus has shifted from being a conflict with Russia to being a conflict of Chechens against Chechens from which Federal authorities are largely absent. This short account of Chechnya's recent history provides an understanding of how collective punishment has adapted to changing circumstances, strengthening the case for its consideration under human rights law.

In the year between 1990 and 1991, starting before the collapse of the Soviet Union, all ethnic republics, including the Chechen-Ingush Republic on 27 November 1990, declared state sovereignty. This 'parade of sovereignties' demanded full-fledged membership of the Soviet Union, meaning the same status as the Russian Soviet Federative Socialist Republic (RSFSR). In reaction to this threat to Russia effectively becoming a confederation, the Federative Treaty providing for a division of powers was

drafted in 1992 and signed by most subjects of the RSFSR. However, two ethnic republics, Chechnya and Tatarstan did not sign the treaty.[4]

The Chechens have a long history of resistance against Russian invasions and became part of the then Russian empire only in 1864 after Shamil, an imam who managed to unite the North Caucasian peoples in their fight against Russia, was captured.[5] The treatment of the Chechens under Soviet rule did not change for the better, culminating in the deportation of the entire Chechen and Ingush people under Stalin in 1944. Accused as a people of supporting Nazi Germany in the Second World War, they were all deported to Central Asia and Siberia and only returned in the late 1950s after Stalin's death and Khrushchev's coming to power.[6]

Chechnya continues to be the most ethnically homogenous of Russia's ethnic republics, and is increasingly so as other ethnicities leave, a factor contributing to the rise of its independence movement. According to the Russian-wide population census from 2010, around 95% of Chechnya's population is comprised of its 'titular' people, of ethnic Chechens. In contrast, there are only around 53% ethnic Tatars in the Republic of Tatarstan.[7]

In June 1991, the then Chechen-Ingush Republic seceded from the Russian Federation.[8] This accompanied by a range of other political factors accompanying the break-up of the Soviet Union, led to the first non-international armed conflict between Chechnya and Russia in 1994.[9] Although the Russian authorities labelled the operation 'restoration of the constitutional order',[10] the Russian Constitutional Court declared that Additional

---

[4] Bowring, B. (2010). The Russian Constitutional System: Complexity and Asymmetry, in Weller, M. & Nobbs, K. (eds.) *Asymmetric Autonomy and the Settlement of Ethnic Conflicts.* Philadelphia, University of Pennsylvania Press, pp.48-74, pp.54ff.
[5] Bowring, B. (2010) *supra* note 4, p.57; Cornell, S.E. (2001). *Small Nations and Great Powers: A Study Of Ethnopolitical Conflict In The Caucasus*. London, Routledge Curzon, pp.12f.
[6] Cornell, S.E. (2001) *supra* note 5, pp.14ff, 186ff.
[7] официальной публикации итогов Всероссийской переписи населения 2010 года, население по национальности и владению русским языком по субъектам Российской Федерации http://www.gks.ru/free_doc/new_site/perepis2010/croc/Documents/Vol4/pub-04-04.pdf
(accessed on 15/04/18) pp.54f, 60f; for the full census report see:
http://www.gks.ru/free_doc/new_site/perepis2010/croc/perepis_itogi1612.htm
(accessed on 15/04/18).
[8] Bowring, B. (2010) *supra* note 4, p.57.
[9] Souleimanov, E. (2007). *An Endless War: The Russian-Chechen Conflict in Perspective*. Frankfurt am Main, Peter Lang, pp.93ff.
[10] Cherkasov, A. & Grushkin, D. (2005). The Chechen Wars and the Struggle for Human Rights, in Sakwa, R. (ed.). *Chechnya: From Past to Future*. London, Anthem Press, pp.131-156, p.138.

Protocol II to the Geneva Conventions,[11] regulating the law of armed conflict in a conflict not of an international character was applicable to the situation and it therefore constituted a non-international armed conflict.[12] After a period of intense fighting resulting in the almost entire destruction of the Chechen capital Grozny and the defeat of the Russian army by Chechen forces, a cease-fire agreement was signed in 1996 and a formal peace treaty in 1997, coinciding with the election of the separatist leader Aslan Maskhadov as president recognised by Russia.[13] The Khasavyurt Peace Accords postponed the final settlement of the status of Chechnya to the end of 2001. Despite that caveat, the vague wording of the agreement which amongst others, referred to relations between Russia and Chechnya as governed by international law, led to conflicting interpretations. The Chechen side interpreted the reference to international law as official recognition of Chechnya's independence, whereas the Russian side considered Chechnya as a republic within the Federation. These differences as well as the delay in reaching a political agreement, contributed to the destabilisation of the situation.[14]

As a result of the conflict, large parts of Chechnya's infrastructure as well as available housing had been destroyed and almost half of the population had fled to neighbouring republics such as Ingushetia. In the period between this and the following armed conflict, Chechnya was de facto independent. However, Maskhadov's compromise policies did not manage to reconcile internal rivalries and his attempt to unite the country, centralise power and rebuild an effective state apparatus failed.[15]

In addition, the situation remained tense due to the formation of militant groups adhering to Wahhabism, a stream of Islam different to Sufi Islam as traditionally practised in Chechnya and brought to the region by Islamic organisations backed by foreign financial support.[16] Although Maskhadov condemned their actions, the influence of adherents to Wahhabism grew, pushing for the establishment of a caliphate of

[11] 1125 UNTS 609, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva (8 June 1977).
[12] Gaeta, P. (1996). The Armed Conflict in Chechnya before the Russian Constitutional Court, *European Journal of International Law*, 7 (4), pp.563-570, p.568.
[13] Grant, T.D. (2010). Chechnya, *Max Planck Encyclopedia of Public International Law*, para.16ff.
[14] Souleimanov, E. (2007) *supra* note 9, pp.119ff.
[15] Souleimanov, E. (2007) *supra* note 9, pp.127ff.
[16] Rezvani, B. (2014). Reflections on the Chechen Conflict: Geopolitics, Timing and Transformations, *Middle Eastern Studies*, 5 (6), pp.870-890, pp.873ff.

Chechnya and Dagestan and later a Confederation of the Mountain Peoples of the Caucasus.[17]

In 1999, a group of Jihadist fighters led by Shamil Basayev, a high-profile military commander who stood against Alsan Maskhadov in the presidential elections, and Amir Khattab, a foreign field commander, attacked villages in neighbouring Dagestan in pursuit of those plans. This incident in combination with the apartment block bombings in Moscow and other Russian cities at that time could be seen as the impetus Russia used to justify its subsequent campaign of air strikes against Chechnya, starting the second armed conflict.[18] Russia framed the conflict as a war against international terrorism without taking into account the little support extremist factions gained amongst the Chechen population and their president, let alone the lacking proof of Chechen responsibility for the apartment block bombings.[19]

Despite its character as a non-international armed conflict, Russia has avoided that term and has spoken instead of an 'antiterrorist operation'.[20] The major bombing offensives took place from late 1999 to early 2000 and afterwards, the conflict was transformed by a process of 'Chechenisation', meaning the local government under Akhmat Kadyrov and following his assassination on 9 May 2004, his son, Ramzan, put in place by the Russian authorities continued fighting the insurgents. Russia officially declared the end of the 'antiterrorist operation' in April 2009.[21]

Although the end of the second non-international armed conflict in Chechnya will be discussed in the next section, it is worth noting already that at least during the most intense periods of fighting, the conflict reached the threshold of Additional Protocol II to the Geneva Conventions. Gathering from this assessment, the Russian authorities were bound by the prohibition of collective punishment as enshrined in Article 4 Additional Protocol II protecting victims of non-international armed conflicts as well as Common

---

[17] Gilligan, E. (2010). *Terror in Chechnya: Russia and the Tragedy of Civilians in War*. Princeton, Princeton University Press, pp.28ff; Souleimanov, E. (2007) *supra* note 9, pp.127ff.
[18] Zurcher, C. (2007). *The Post-Soviet Wars: Rebellion, Ethnic Conflict, and Nationhood in the Caucasus.* New York, New York University Press, pp.85ff.
[19] Russell, J. (2007). *Chechnya – Russia's 'War on Terror'*. Abingdon, Routledge, pp.74ff.
[20] Gilligan, E. (2010) *supra* note 17, pp.33, 124f; Gray, C. (2012). The Meaning of Armed Conflict: Non-International Armed Conflict, in O'Connell, M.E. (ed.). *What Is War? An Investigation in the Wake of 9/11*.Leiden, Martinus Nijhoff, pp.69-95, pp.89f; Abresch, W. (2005). A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya, *European Journal of International Law*, 16 (4), pp.741-767, p.754.
[21] Human Rights Watch (2009) *supra* note 3, pp.11ff, 25; Dannreuther, R. (2014). Shifting Dynamics of the Insurgency and Counterinsurgency in the North Caucasus, *Ethnopolitics*, 13 (4), pp.377-395, p.385.

Article 3 to the Geneva Conventions and the prohibition of collective punishment based on customary international law. However, as already established above with regards to the case study on the Occupied Palestinian Territories, victims of violations of the Additional Protocol cannot seek redress under the law of armed conflict. This factor again highlights the potential of the ECtHR to fill this gap and provide Chechens affected by collective punishment with redress.

After 2009, sporadic fighting as well as acts of collective punishment imposed on relatives of alleged insurgents continued. This agenda is now firmly in the hands of Ramzan Kadyrov whose regime is supported by the Russian authorities and has been given substantial discretion in its "fight against terrorism".[22] The way in which the local government has taken over the rebuilding and modernisation of Chechnya has been sold as a success story by the Russian authorities to its own population as well as abroad.[23]

Starting from this brief account of the two non-international armed conflicts in Chechnya, the question arises as to its current status. The transition from a non-international armed conflict to a situation of actual peace is mostly not determined by a clear-cut point in time, but rather by a long and difficult process, involving reconciliation and regaining of mutual trust beyond the mere rebuilding of cities and infrastructure. The question whether the second non-international armed conflict in Chechnya is still ongoing and the more general question of whether and how it is possible to determine the end of such a conflict are addressed in the following. Ultimately, this grey area between the applicability of the law of armed conflict and human rights law highlights the importance of a consideration of collective punishment under human rights law as the use of these practices continues.

4.2.2.2 The end of non-international armed conflicts

After setting out the context, the theoretical background of the situation in Chechnya will be assessed. Although the end of the counter-terrorist operation was announced in 2009, violent clashes between Kadyrov's regime and insurgents as well as attacks by Islamist groups have not ceased.[24] This situation, which continues to this day, necessitates an

[22] Snetkov, A. (2015). *Russia's Security Policy under Putin: A critical perspective.* Abingdon, Routledge, pp.114ff, 173ff.
[23] Snetkov, A. (2015) *supra* note 22, pp.176ff.
[24] Human Rights Watch (2014). Burning Down the House in Chechnya, online available at: http://www.hrw.org/news/2014/12/10/dispatches-burning-down-house-chechnya-0 (accessed on 15/04/18); Memorial Human Rights Centre (2016). Counter-terrorism in the North Caucasus: a human rights perspective. 2014 – first half of 2016, online available at: https://memohrc.org/sites/all/themes/memo/templates/pdf.php?pdf=/sites/default/files/doklad_severnyy_kavkaz_-_angl.pdf (accessed on 15/04/18) pp.28f.

examination of the question as to when a non-international armed conflict ends. This question is vital in the present context as it illustrates the problems that can occur during periods of transition in terms of protecting affected groups. In other words, long transition periods between times of a non-international armed conflict and the return to peace not just characterised by the absence of violence, but a certain degree of stability, can lead to long gaps in protection, to grey areas where the applicability of the relevant legal framework might be unclear.

Non-international armed conflicts were defined by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the 1995 *Tadić* case as 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.[25] This 'protracted armed violence … within a State'[26] reaching a certain level of intensity and 'organization of the parties to the conflict',[27] distinguishes non-international armed conflicts from 'internal disturbances and tensions'.[28] According to Article 1 (1) Additional Protocol II to the 1949 Geneva Conventions, the Protocol applies to armed conflicts between a state and 'dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.'[29]

The beginning and end of non-international armed conflicts are difficult to pin down, not least because major treaties do not offer a definition of non-international armed conflicts.[30] For this reason, the *Tadić* judgment of the ICTY is an important point of reference which is widely held to be reflective of customary international law.[31]

---

[25] *Prosecutor v Dusko Tadić a/k/a "Dule"* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) para.70.
[26] *Prosecutor v Dusko Tadić a/k/a "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) supra* note 25, para.70.
[27] *Prosecutor v Dusko Tadić a/k/a "Dule"* (Opinion and Judgment) IT-94-1-T (7 May 1997) para.562; Additional Protocol II *supra* note 11, Article 1.
[28] Additional Protocol II *supra* note 11, Article 1 (2).
[29] Additional Protocol II *supra* note 11, Article 1; Sandoz, Y., Swinarski, C. & Zimmermann, B. (eds.)(1987). *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Geneva, Martinus Nijhoff, pp.1347ff; Milanović, M. & Hadzi-Vidanovic, V. (2013). A taxonomy of armed conflict, in White, N. & Henderson, C. (eds.). *Research Handbook on International Conflict and Security Law*. Cheltenham, Edward Elgar, pp.256–314, pp.280ff; Sivakumaran, S. (2011). Re-envisaging the International Law of Internal Armed Conflict, *European Journal of International Law*, 22 (1), pp.219-264, pp.225ff.
[30] Milanović, M. & Hadzi-Vidanovic, V. (2013) *supra* note 29, pp.282ff.
[31] Milanović, M. & Hadzi-Vidanovic, V. (2013) *supra* note 29, p.283; *Prosecutor v Akayesu* (Trial Chamber Judgment) ICTR-96-4 (2 September 1998) para.619; *Prosecutor v Rutaganda* (Trial Chamber Jugdement) ICTR-96-3 (6 December 1999) para.92; *Prosecutor v Lubanga* (Decision on the Confirmation of Charges) ICC-01/04-01/06 (29 January 2007) para.233.

According to *Tadić,* '[i]nternational humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.'[32] In the *Haradinaj* case, the Tribunal reaffirmed this criterion as crucial. However, it is still unclear what exactly is meant by a 'peaceful settlement' and when one could declare a non-international armed conflict as terminated without risking the danger of doing so prematurely. In case of non-international armed conflicts, the International Committee of the Red Cross has found the test of a 'risk of resumption' to be practical to define the termination of said conflict.[33] This test should focus 'not solely on the cessation of hostilities, which may be short-lived, but on an evaluation that related military operations of a hostile nature have also ended'.[34]

The test established in *Tadić* has been summarised and reaffirmed in the *Boškoski* judgment of 2008 by the Trial Chamber and later the Appeals Chamber of the ICTY.[35] The Tribunal laid out the two constitutive criteria for a non-international armed conflict – organisation and intensity. The criterion of organisation relates to armed groups only, as it is assumed that a government involved in a non-international armed conflict is sufficiently organised. The *Boškoski* judgment offers five criteria for determining sufficient organisation of armed groups namely the existence of a command structure, of military and logistical capacity, of an internal disciplinary system including the ability to implement the law of armed conflict and the ability of the group to speak with one voice.[36]

The intensity necessary for a situation to constitute a non-international armed conflict can be approached through a range of factors such as the number and type of troops involved and their weapons and equipment, the seriousness of attacks regarding casualties, damage and territorial scope, the effects on the civilian population or the involvement of external actors such as the United Nations Security Council. Particular

[32] *Prosecutor v Dusko Tadić a/k/a "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) supra* note 25, para.70.
[33] 32IC/15/11 Report: International humanitarian law and the challenges of contemporary armed conflicts Document prepared by the International Committee of the Red Cross, Geneva for the 32nd International Conference of the Red Cross and the Red Crescent, Geneva, Switzerland 8-10 December 2015 (October 2015) pp.10f; *Prosecutor v Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj* (Judgment) T-04-84bis-T (29 November 2012) para.396.
[34] International Committee of the Red Cross (2015) *supra* note 33, p.11.
[35] *Prosecutor v Ljube Boškoski and Johan Tarčulovski* (Judgment) ICTY-04-82-T (10 July 2008), para.175ff; the judgment was confirmed by the Appeals Chamber: *Prosecutor v Ljube Boškoski and Johan Tarčulovski* (Judgment) ICTY-04-82-A (19 May 2010) para.19ff.
[36] *Prosecutor v Ljube Boškoski and Johan Tarčulovski, Trial Chamber, supra* note 35, para.194ff.

emphasis was put on the way in which state organs use armed force against armed groups as indicative of a non-international armed conflict.[37]

In addition, the Tribunal referred to case law of the European Court of Human Rights several times. Interestingly, the Tribunal pointed to Chechen cases where the Court has refrained from categorising the situation in Chechnya during the second non-international armed conflict.[38] However, the fact that the Tribunal drew from human rights case law is illustrative of the intersections between the law of armed conflict and human rights law when it comes to non-international armed conflicts. Furthermore, the Tribunal discussed the decision of the Russian Constitutional Court on the categorisation of the First Chechen War as non-international armed conflict briefly. The use of the army against the insurgents was indicative of a non-international armed conflict in that context.[39]

In theory, a non-international armed conflict would end when these criteria of sufficient organisation of the parties and intensity of the fighting are no longer present. However, in practice there might be a range of various factors pointing to an end of the conflict, but the presence of one of them on its own might be not enough to assess the whole situation accurately. Examples might be a prolonged period where no attacks are carried out, the return of refugees to their homes, disarmament programmes or the conclusion of a peace treaty. However, caution has to be applied as the situation on the ground might still be one of armed conflict despite the conclusion of a peace treaty or a decrease in attacks.[40]

Bartels held that a non-international armed conflict ends when the organisation of the parties and the intensity of the fighting fall under a certain threshold and the constitutive criteria for an armed conflict are no longer present. However, he acknowledged the dangers of declaring a non-international armed conflict over in terms of protection afforded to the parties and cited the *Gotovina et al* judgment in this regard.[41] In this case, the ICTY considered the question of determining the end of an armed conflict, aptly

[37] Bartels, R. (2014). From Jus In Bello to Jus Post Bellum: When do Non-International Armed Conflicts End?, in Stahn, C., Easterday, J.S & Iverson, J. (eds.). *Jus Post Bellum: Mapping the Normative Foundations*. Oxford, Oxford University Press, pp.297-314, p.307; *Prosecutor v Ljube Boškoski and Johan Tarčulovski, Trial Chamber, supra* note 35, para.177f.
[38] *Prosecutor v Ljube Boškoski and Johan Tarčulovski, Trial Chamber, supra* note 35, para.178f.
[39] *Prosecutor v Ljube Boškoski and Johan Tarčulovski, Trial Chamber, supra* note 35, para.180.
[40] Bartels, R. (2014) *supra* note 37, pp.309ff.
[41] *Prosecutor v Ante Gotovina, Ivan Čermak, Mladen Markač* (Judgment) IT-06-90-T (15 April 2011) para.1694.

summarising the problems arising therefrom: '[T]he participants in an armed conflict may find themselves in a revolving door between applicability and non-applicability, leading to a considerable degree of legal uncertainty and confusion.'[42] This dilemma is well illustrated by examples such as the continuation of fighting between splinter groups, fragmented opposition forces or terrorist activities that might follow once the most intense periods of fighting are over.[43]

Bartels concluded that current non-international armed conflicts 'show that it is neither possible, nor desirable, to identify a specific point in time when international humanitarian law ceases to apply'.[44] However, whereas he argued for the application of some form of 'jus post bellum' or 'law after war' to address the potential gaps arising, the present thesis argues for the consideration of one specific concept of the law of armed conflict under human rights law. Furthermore, the idea pursued in this thesis aims at a prohibition of collective punishment under human rights law as that would include situations not only after an armed conflict, as addressed by 'jus post bellum', but also instances of collective punishment at any other time, independent from the occurrence of an armed conflict.

The International Committee of the Red Cross issued a conference paper on current challenges for the law of armed conflict in 2015, conceding that research on the issue of how armed conflicts end is scarce.[45] It singled out two opinions on how to assess the end of a non-international armed conflict. The first referred to the level of intensity of the ongoing fighting, meaning that the conflict would end as soon as the necessary threshold level for 'protracted armed violence' is no longer met.[46] The second opinion focussed on the organisation of the parties and required that at least one of the parties to the conflict no longer meets the threshold of organisation, meaning it is no longer able to carry out 'sustained and concerted military operations'.[47] However, this view also accepts that a non-international armed conflict would end in case the fighting has ceased and there is no real risk of the conflict flaring up again despite the parties still meeting the necessary

[42] *Prosecutor v Ante Gotovina, Ivan Čermak, Mladen Markač supra* note 41, para.1694.
[43] Bartels, R. (2014) *supra* note 37, p.310.
[44] Bartels, R. (2014) *supra* note 37, p.314.
[45] International Committee of the Red Cross (2015) *supra* note 33, p.8.
[46] *Prosecutor v Dusko Tadić a/k/a "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) supra* note 25, para.70.
[47] Additional Protocol II *supra* note 11, Article 1.

level of organisation, therefore accepting the intensity threshold as laid out by the first opinion.[48]

Taking into account the possibility of resumption in non-international armed conflicts which can be characterised by alternating periods of hostilities and relative calm, there is a risk in declaring the end of such conflicts prematurely. Therefore, the ICTY has decided that any such assessments should wait until any risk of resumption can be ruled out.[49] This evaluation of the cessation of hostilities without possible reoccurrence has to be based on the facts on the ground.[50]

Although the situation in Chechnya constituted 'protracted armed violence … within a State'[51] during the first period of the second armed conflict, it is unclear whether the level of violence still meets the threshold criteria of 'intensity of the conflict and the organization of the parties to the conflict'.[52] Since 2010 there has been a decline in government officials' and insurgents' deaths from 127 to 52 per year.[53] However, the data for the first quarter of 2017 suggests a rise with 28 casualties[54] already compared to 27 deaths in 2016[55] and 14 deaths in 2015 altogether.[56] There are several approaches regarding such thresholds. Data models trying to define the beginning and end of armed conflicts operate with battle deaths thresholds ranging from 1000 to 25 per year.[57]

---

[48] International Committee of the Red Cross (2015) *supra* note 33, p.10.
[49] International Committee of the Red Cross (2015) *supra* note 33, p.10; *Prosecutor v Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj supra* note 33, para. 396.
[50] International Committee of the Red Cross (2015) *supra* note 33, p.11.
[51] *Prosecutor v Dusko Tadić a/k/a "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) supra* note 25, para.70.
[52] *Prosecutor v Dusko Tadić a/k/a "Dule"* (Opinion and Judgment) *supra* note 27, para.562; O'Loughlin, J. & Witmer, F.D.W. (2012). The diffusion of violence in the North Caucasus of Russia, 1999–2010, *Environment and Planning A*, 44, pp.2379-2396, pp.2383ff; Souleimanov, E.A. & Aliyev, H. (2014). Asymmetry of Values, Indigenous Forces, and Incumbent Success in Counterinsurgency: Evidence from Chechnya, *Journal of Strategic Studies*, pp.1-26, p.12; Milanović, M. & Hadzi-Vidanovic, V. (2013) *supra* note 29, pp.280ff; Sivakumaran, S. (2011) *supra* note 29, pp.225ff.
[53] Caucasian Knot (2015). Infographics. Total number of victims in Northern Caucasus in 2010-2014 under the data of the Caucasian Knot, online available at: http://eng.kavkaz-uzel.ru/articles/30858/ (accessed on 15/04/18).
[54] Caucasian Knot (2017). Infographics. Statistics of victims in Northern Caucasus in Quarter 1 of 2017 under the data of the Caucasian Knot, online available at: http://www.eng.kavkaz-uzel.eu/articles/39081/ (accessed on 15/04/18).
[55] Caucasian Knot (2017). Infographics. Statistics of victims in Northern Caucasus for 2016 under the data of the Caucasian Knot, online available at: http://www.eng.kavkaz-uzel.eu/articles/38325/ (accessed on 15/04/18).
[56] Caucasian Knot (2016). Infographics. Statistics of victims in Northern Caucasus for 2015 under the data of the Caucasian Knot, online available at: http://www.eng.kavkaz-uzel.eu/articles/34527/ (accessed on 15/04/18).
[57] Kreutz, J. (2010). How and when armed conflicts end: Introducing the UCDP Conflict Termination dataset, *Journal of Peace Research*, 47 (2), pp.243-250; Walter, B. (2004). Does

Depending on which of these models is applied, the situation in Chechnya could be considered to have constituted a non-international armed conflict until the first half of the 2000s, or it could be classed as ongoing.[58]

The uncertainty surrounding the end of non-international armed conflicts strengthens the case for the assessment of collective punishment under human rights law. Although one could make a case for there still being a non-international armed conflict in Chechnya arguing that collective punishment is prohibited under the law of armed conflict, this position does not reflect the approach taken by Chechens themselves. They brought their cases relating to the armed conflict before the European Court of Human Rights. Another argument might be found in the position taken by the Russian government. Right from the start of the second non-international armed conflict, the authorities have avoided a categorisation as armed conflict, calling it an "antiterrorist operation" instead. Although this does not change Russia's obligations under the law of armed conflict, such a stance may exploit the uncertainty surrounding the end of non-international armed conflicts in general and the current situation in Chechnya in particular. This uncertainty is created by collective punishment not being considered by human rights law. This short section on the status of Chechnya and its theoretical underpinnings has outlined additional reasons for such a consideration.

4.2.3 Forms of collective punishment used in practice

The following sections discuss forms of collective punishment that were or still are used in Chechnya by state security forces against alleged insurgents or alleged terrorists and their families. During the second non-international armed conflict, acts of collective punishment targeted entire villages. Today, these operations are smaller in scale, but retain all the characteristics of collective punishment, namely the punishment of a group for acts allegedly committed by one or some of its members.

4.2.3.1 Zachistka

Zachistkas are sweeping operations conducted in villages predominantly during the early years of the second non-international armed conflict in Chechnya in response to insurgent attacks close to a village. Not only do they stand out for the brutality with

conflict beget conflict? Explaining recurring civil war, *Journal of Peace Research*, 41(3), pp.371-388; Quinn, J.M., Mason, D. & Gurses, M. (2007). Sustaining the peace: Determinants of civil war recurrence, *International Interactions,* 33(2), pp.167-193; Sambanis, N. (2004). What Is Civil War? Conceptual and Empirical Complexities of an Operational Definition, *Journal of Conflict Resolution,* 48 (6), pp.814-858.

[58] Caucasian Knot (2017). North Caucasus – statistics of victims, online available at: http://www.eng.kavkaz-uzel.eu/rubric/601 (accessed on 15/04/18).

which they were conducted, but also for the indiscriminate use of force against civilians. Killing villagers or destroying their property for alleged ties to insurgents constitutes collective punishment. The ensuing section outlines the general nature of these operations as well as an account of cases regarding *zachistkas* brought before the European Court of Human Rights again pointing to the Court's awareness of the situation in Chechnya and the use of collective punishment.

The major bombing offensives during the second non-international armed conflict in Chechnya have taken place from late 1999 to early 2000 and simultaneously, *zachistkas* emerged. The word itself derives from зачистить (zachistit'), meaning 'to clear' or 'to clean out'. *Zachistkas* are sweeping or mopping-up operations during which entire villages were sealed for a period ranging from several days up to three weeks 'to check people's residence permits and identify participants of illegal armed formations'.[59] These operations were conducted as a punishment for prior insurgent attacks at Russian troops or checkpoints or diversionary insurgent attacks in the vicinity of the village in question. The strong variation in the duration of *zachistkas* further emphasises their punitive character – the uncertainty of villagers as to when the operation might be over contributes to their fear and anguish, not to mention the uncertainty as to which measures the soldiers might resort to.

At the start of such an operation, a village would be encircled by heavy artillery, tanks and trucks, sometimes even helicopters. This task would usually be carried out by conscript soldiers. Subsequently, special forces or contracted soldiers would enter the village in search for weapons or insurgents. Houses were searched by military forces that did not provide any information about their identity or rank, accompanied by summary executions, torture, looting, destruction of property, detention and disappearances. The concealed nature of those operations substantially obstructed efforts to identify the persons or military unit responsible. The soldiers entering a village usually refused to identify themselves or name their rank or other affiliation and used masks or soot to cover their faces. The military vehicles surrounding the villages as well as entering it would have no registration plates or unrecognisable, often deliberately

[59] Memorial Human Rights Centre (2007). Counter Terror: Russian Practice, Reports of human rights organizations hearings of International Commission of Jurists 29-30 January 2007, online available at: http://old.memo.ru/s/267.html (accessed on 15/04/18).
p.17; Souleimanov, E. (2007) *supra* note 9, pp.173ff; Wilhelmsen, J. (2017). *Russia's Securitization of Chechnya: How War Became Acceptable.* Abingdon, Routledge, pp.180ff.

muddy plates. Some incidents of *zachistkas* are reported from the first Chechen war as well, where Russian forces sealed villages in order to 'cleanse out Chechen fighters'.[60]

One of the most horrific *zachistkas* took place in and around the Novye Aldy suburb of Grozny in 2000. The village was sealed for several days, carried out by contracted soldiers and special forces. People were burnt inside their homes, summarily executed and their property looted and destroyed. The operation resulted in about 56 deaths with some sources even referring to as many as 82, all of them civilians.[61]

The sweeping operation was preceded by heavy shelling of the area, followed by conscript soldiers entering Novye Aldy telling the residents that they should have their documents ready for inspection by contract soldiers the next day. When more than a hundred of those 'kontraktniki' arrived on 5 February, they started to search for hidden insurgents and weapons despite no evidence or reports supporting such allegations. During the *zachistka*, the soldiers engaged in summary executions of civilians, rape and the looting and destruction of homes.[62]

An illustration of the scope of atrocities suffered could be provided by two decisions of the European Court of Human Rights relating to applicants who lost five[63] and seven[64] of their relatives respectively during the operation:

The dead bodies of five members of the Estamirov family were found by a relative lying in their home's courtyard and doorway, one of them partly burned, including a pregnant woman and a child with all of them carrying gunshot wounds. Their valuables had been taken – jewellery removed from the bodies and their property looted and burned.[65]

In the *Musayev and Others* case decided in 2007, the applicants found the dead bodies of their relatives piled up on the streets, shot in their homes and some of them burned in their own cellar. The victims bore gunshot wounds and cartridges of automatic rifles and

---

[60] Gilligan, E. (2010) *supra* note 17, pp.50ff, 53.
[61] Memorial Human Rights Centre (4 February 2010). Clean-up operation in New Aldy. To the 10th Anniversary of the Tragedy. Press-conference, online available at: http://www.memo.ru/eng/news/2010/02/03/0302101.htm (accessed on 15/04/18); Gilligan, E. (2010) *supra* note 17, pp.54ff; Souleimanov, E. (2007) *supra* note 9, p.176
[62] Human Rights Watch (2000). February 5: A Day of Slaughter in Novye Aldi, 12 (9), online available at: https://www.hrw.org/reports/2000/russia_chechnya3/ (accessed on 15/04/18).
[63] *Estamirov and Others v Russia* (Merits and Just Satisfaction) no.60272/00, Court (First Section) (12 October 2006).
[64] *Musayev and Others v Russia* (Merits and Just Satisfaction) no.57941/00, 58699/00 and 60403/00, Court (First Section) (26 July 2007).
[65] *Estamirov and Others v Russia supra* note 63, para.14.

machine guns were scattered around the area. Furthermore, their property was looted and much of it destroyed.[66]

These and the cases cited in the following emerged from the events of the second non-international armed conflict in Chechnya. As such, they are direct successors of the first Chechen cases brought before the European Court of Human Rights on this issue which were decided in 2005.[67] These successful cases started a whole range of cases brought by Chechens establishing Russian responsibility for numerous human rights violations and awarding damages. Apart from that, these cases fulfilled another role. As Bowring rightly points out, '[t]he Chechen applicants in many ways spoke for the whole of their people. Their objective in the proceedings was not to obtain monetary compensation. What they wanted was the vindication, at the highest level, of the truth of their account of what had happened to them and to the mass of Chechens.'[68]

Other cases involving *zachistkas* include *Magomed Musayev and Others v Russia* decided in 2008.[69] The sweeping operation had taken place in the neighbouring villages of Raduzhnoye, Pobedinskoye and Dolinskiy simultaneously and three of the applicants' relatives were amongst the 21 men that had been detained. Following a similar pattern, '[t]he operation was carried out by 60 to 70 armed men wearing masks and camouflage uniforms, in a convoy of military trucks and armoured personnel carriers (APCs) with obscured number plates'.[70] The case *Baysayeva v Russia* about the disappearance of the applicant's husband concerns a *zachistka* taking place in the village of Podgornoye. It refers to the detention of over 50 people including the applicant's husband as he had apparently witnessed the killing of two men by soldiers.[71]

---

[66] *Musayev and Others v Russia supra* note 64, para.11ff.
[67] See eg: *Khashiyev and Akayeva v Russia* (Merits and Just Satisfaction) nos. 57942/00, 57945/00, Court (First Section) (24 February 2005); *Isayeva v Russia* (Merits and Just Satisfaction) no.57950/00, Court (First Section) (24 February 2005); Bowring, B. (2009). Fragmentation, Lex Specialis and the Tensions in the Jurisprudence of the European Court of Human Rights, *Journal of Conflict & Security Law*, 14 (3), pp.485-498; Bowring, B. (2012). What reparation does a torture survivor obtain from international litigation? Critical reflections on practice at the Strasbourg Court, *International Journal of Human Rights*, 16 (5), pp.755-772.
[68] Bowring, B. (2009) *supra* note 67, p.496.
[69] *Magomed Musayev and Others v Russia* (Merits and Just Satisfaction) no.8979/02, Court (First Section) (23 October 2008).
[70] *Magomed Musayev and Others v Russia supra* note 69, para.7.
[71] *Baysayeva v Russia* (Merits and Just Satisfaction) no.74237/01, Court (First Section) (5 April 2007).

Another disappearance case is *Musayeva v Russia* where the applicant's son was detained during a *zachistka* taking place in the southern part of Grozny.[72] Similarly, the case *Akhmadova and Sadulayeva v Russia* concerned the detention and disappearance of the applicant's husband following a *zachistka* in the town of Argun. In this case, 11 of the men detained during the *zachistka* disappeared and bodies of four of them were discovered shortly after their disappearance close to a Russian military base whereas the bodies of some of the remaining missing persons including the applicant's husband were found later on the outskirts of the town.[73] The case *Isigova and Others v Russia* was dealing with two men who disappeared after being detained with around 40 others during a *zachistka* in the village of Sernovodsk.[74] The case of *Turluyeva and Khamidova v Russia* concerned disappearance after a *zachistka* in the village of Alleroy.[75] The case of *Zulpa Akhmatova and Others v Russia* reported *zachistkas* in the villages of Novye Atagi and Starye Atagi.[76] The case of *Askharova v Russia* dealt with detention after the *zachistka* in the village of Serzhen-Yurt.[77]

This list of cases before the European Court of Human Rights relating to *zachistkas* is not exhaustive. Their large number indicates the Court's awareness of this collective punishment practice in the Chechen context. This in turn could support the argument that the collective implications of such situations have to be reconsidered by human rights law – a point that will be analysed further in the last part of the thesis. In any case, the Court does know that collective punishment has been used in Chechnya during the second non-international armed conflict. This finding strengthens the argument for a prohibition thereof under human rights law as the Court deals with such situations, but not with the act itself.

According to estimates, 5 000 to 10 000 deaths were caused by *zachistkas* between 2000 and 2004. However, the data collected concerns only a third of the territory subjected to

[72] *Musayeva v Russia* (Merits and Just Satisfaction) no.12703/02, Court (First Section) (3 July 2008).
[73] *Akhmadova and Sadulayeva v Russia* (Merits and Just Satisfaction) no.40464/02, Court (First Section) (10 May 2007).
[74] *Isigova and Others v Russia* (Merits and Just Satisfaction) no.6844/02, Court (First Section) (26 June 2008).
[75] *Turluyeva and Khamidova v Russia* (Merits and Just Satisfaction) no.12417/05, Court (First Section) (14 May 2009).
[76] *Zulpa Akhmatova and Others v Russia* (Merits and Just Satisfaction) nos.13569/02, 13573/02, Court (First Section) (9 October 2008).
[77] *Askharova v Russia* (Merits and Just Satisfaction) no.13566/02, Court (First Section) (4 December 2008).

such operations, indicating a higher absolute toll.[78] After 2004 *zachistkas* still took place, but their number decreased.[79]

Subsequently to *zachistkas* disappearances and abductions became more common and the armed conflict was transformed by a policy of 'Chechenisation'.[80] The power of Akhmat Kadyrov, who fought in the first non-international armed conflict against Russia but changed sides afterwards, was strengthened and he became the president of Chechnya in 2003.[81] His influence was protected by the 'Kadyrovtsy', an infamous armed group led by his son Ramzan. Akhmad Kadyrov sought to incorporate Chechen insurgents into the police and administrative apparatus, offering incentives such as amnesties on one hand, but employing torture to force people to join his private security force on the other. Additionally, these groups were responsible for the disappearances and hostage-taking of relatives of alleged insurgents. This development had a significant impact on the situation, as the united fight against Russia turned into a fight between Chechens. In 2004, Akhmat Kadyrov was killed in a bomb attack, ceding his power to his son Ramzan who became president three years later.[82] Under his leadership, the use of collective punishment changed from *zachistkas* to other forms such as house burning.

This section has shown how collective punishment was imposed on the Chechens in the early years of the second non-international armed conflict. Moreover, the cases brought before the European Court of Human Rights indicate an awareness of the Court of such practices in Chechnya. The way in which collective punishment has persisted even after periods of large scale fighting illustrates its flexibility and perhaps explains how it could be seamlessly transferred into a different context, governed by human rights law. The forms collective punishment has taken after that transition are discussed in the following.

4.2.3.2 House burning and other current forms of collective punishment

After setting out collective punishment during the early period of the second non-international armed conflict, this section will focus on the forms in which collective punishment has been imposed recently. With Ramzan Kadyrov coming to power in 2007, the policy of collective responsibility of families for the acts of their relatives has reached

[78] Gilligan, E. (2010) *supra* note 17, pp.75f.
[79] Memorial Human Rights Centre (2008). Special Operations "*Zachistka*", online available at: http://www.memo.ru/2008/09/04/0409081eng/part5.htm (accessed on 15/04/18).
[80] Gilligan, E. (2010) *supra* note 17, p.83.
[81] Human Rights Watch (2009) *supra* note 3, p.12.
[82] Snetkov, A. (2015) *supra* note 22, pp.114ff; Souleimanov, E. (2007) *supra* note 9, pp.189ff.

new popularity. In reaction to his calls on families to take the blame for alleged actions of their relatives, houses have been burned down, people have been publicly humiliated and whole families have been expelled. These actions will be outlined below in the context of collective punishment. As house burning or house destruction represents a recurring theme from the case study on the Occupied Palestinian Territories, it will be focused on in this setting as well.

One of the practices used against insurgents is punitive house burning, has been carried out since the early 2000s. This tactic was increasingly employed after Ramzan Kadyrov became president of Chechnya in 2007, broadening the influence and importance of CR security agencies and law enforcement. Government officials would typically approach the family of an alleged insurgent in order to gather information about his or her whereabouts and try to persuade the family to compel their insurgent relative to return home – otherwise they would face consequences. Shortly after such interrogations or after insurgent attacks close to their villages, houses of families of alleged insurgents are burned. The highest number of house burnings to date – 25 – was reported in 2008. Conducted at night, people were forced out of their homes and prevented from extinguishing the fire. Additionally, they were warned not to complain about the incident and in the cases where people filed claims, no investigation took place.[83] Although the Chechen government denied any responsibility for the burnings, Kadyrov made statements implying the punishment of relatives of insurgents on several occasions.[84] Similar findings are made by the Society for Threatened Peoples, which stressed the

[83] Human Rights Watch (2009) *supra* note 3, pp.19ff; Dannreuther, R. (2014) *supra* note 21, p.385; European Council on Refugees and Exiles (2011). *Guidelines on the Treatment of Chechen Internally Displaced Persons (IDPs), Asylum Seekers and Refugees in Europe*, online available at: http://www.ecre.org/topics/areas-of-work/returns/174.html (accessed on 15/04/18) pp.44ff; Human Rights Watch (2014). Human Rights Watch Concerns and Recommendations on Russia: Submitted to the UN Human Rights Committee on the occasion of its Pre-Sessional Review of Russia, online available at: http://www.hrw.org/sites/default/files/related_material/2014_Russia_HRCsubmission.pdf (accessed on 15/04/18) p.8; A/HRC/25/NGO/156 Written statement submitted by the Society for Threatened Peoples, a non-governmental organization in special consultative status (4 March 2014).

[84] Human Rights Watch (2009) *supra* note 3, pp.22ff; International Crisis Group (2012). The North Caucasus: The Challenges of Integration (II), Islam, the Insurgency and Counter-Insurgency, Europe Report N°221, online available at: http://www.crisisgroup.org/~/media/Files/europe/caucasus/221-the-north-caucasus-the-challenges-of-integration-ii-islam-the-insurgency-and-counter-insurgency.pdf (accessed on 15/04/18) p.28.

persecution of alleged 'Wahhabis', involving the denunciation of men with beards or women wearing a 'non-traditional' Hijab as terrorists.[85]

During the last few years, attacks on governmental premises or government officials have spread across the North Caucasus region once again.[86] After an insurgent attack in Grozny in December 2014 and statements made by Kadyrov regarding responsibility of family members for their relatives, at least six incidents of house-burning of relatives of insurgents were reported.[87] Some local human rights organisations even speak of the destruction of the homes of 15 families linked to Kadyrov's remarks.[88] In May 2016, the family homes of two insurgents were burned down after they attacked a checkpoint. Furthermore, families of persons suspected to be involved in a shootout with security forces in December 2016, were facing expulsion.[89]

These actions are accompanied by an increasingly drastic rhetoric. Kadyrov and the Chechen parliament have repeatedly called for stronger Russian legislation permitting the punishment of family members of alleged insurgents – the proposals range from confiscation of property to expanded responsibility for assistance resulting in imprisonment from 15 to 25 years.[90] The efforts to enact laws providing for the collective responsibility of family members will be discussed in more detail below.

Apart from legal attempts to impose collective responsibility on families of alleged insurgents or terrorists or of people critical of his regime more generally, Kadyrov has

---

[85] Written statement submitted by the Society for Threatened Peoples, a non-governmental organization in special consultative status *supra* note 83, p.2.
[86] Dannreuther, R. (2014) *supra* note 21, pp.385ff.
[87] Human Rights Watch (2014). Burning Down the House in Chechnya, online available at: http://www.hrw.org/news/2014/12/10/dispatches-burning-down-house-chechnya-0 (accessed on 15/04/18).
[88] Memorial Human Rights Centre (2016). Counter-terrorism in the North Caucasus: a human rights perspective. 2014 – first half of 2016, online available at: https://memohrc.org/sites/all/themes/memo/templates/pdf.php?pdf=/sites/default/files/doklad_severnyy_kavkaz_-_angl.pdf (accessed on 15/04/18) p.28.
[89] Memorial Human Rights Centre (2016) *supra* note 88, pp.28f; OC Media (2017). 'Citizens council' expels families of slain militants in Chechnya, online available at: http://oc-media.org/citizens-council-expels-families-of-slain-militants-in-chechnya/ (accessed on 15/04/18); Caucasian Knot (2016). Villagers demand to expel family members of suspected militant from Chechnya, online available at: http://www.eng.kavkaz-uzel.eu/articles/37909/ (accessed on 15/04/18).
[90] Caucasian Knot (2015). Chechen Parliament submits to Russian State Duma bill on punishment of terrorists' family members, online available at: http://eng.kavkaz-uzel.ru/articles/30509/ (accessed on 15/04/18); Radio Liberty (13 January 2015). Russian Duma To Consider Criminal Accountability For Militant Families, online available at: http://www.rferl.org/content/russia-duma-criminal-accountability-militant-families/26792038.html (accessed on 15/04/18).

pursued this agenda in practice. In 2016, the non-governmental organisation Human Rights Watch issued a report documenting the current situation in Chechnya. It includes the case of Ramazan Dzhalaldinov who published a video complaint to Putin about Ramzan Kadyrov's regime and corruption on social media.[91] When the video got the attention of the authorities in Grozny, Dzhalaldinov fled to the neighbouring republic of Dagestan. He was portrayed as being mentally 'unstable' and even Ramzan Kadyrov himself thought it necessary to visit his village and interview other villagers who supported this claim. Dzhalaldinov's family was repeatedly pressured by the police to provide information about his whereabouts. This culminated in a raid of the family home after which Dzhalaldinov's wife and three daughters were taken to the regional police department and his wife and oldest daughter were severely beaten in order to find out where he was hiding. His wife was subjected to mock executions several times. After that, they were brought to the border with Dagestan and told never to return to Chechnya. In the meantime, their home was burned down by unidentified men. A few days later, Chechen officials found Dzhalaldinov and afterwards he appeared on Chechen television publicly apologising for his behaviour and rejecting any allegations of ill-treatment by the authorities. Ramzan Kadyrov accepted his apology via the social media platform Instagram.[92]

This case is illustrative of the current climate in Chechnya. In particular the practice of public humiliation has become more popular and local residents speak of fearing this public loss of face more than any physical violence. As one Grozny resident put it: 'They will disown you, publically [sic] humiliate you, make you a prostitute or a drug addict. You won't be able to live with dignity in this republic anymore. This is worse than death.'[93] This damage to the reputation does not only affect the person making the apology, but his or her family as well. Public humiliation resulting in the collective expulsion of an entire family could be seen as fulfilling the criteria of collective punishment. Furthermore, these practices are not any longer only applied against

[91] Nikitenko, T. (2016). 'Это государственный терроризм'. Игорь Каляпин о том, почему в Чечне сжигают дома, Open Russia, online available at: https://openrussia.org/post/view/14983/ (accessed on 15/04/18);
Radio Free Europe/Radio Liberty (2016). House Of Chechnya Whistle-Blower Reportedly Burned, online available at: https://www.rferl.org/a/russia-chechnya-whistle-blower-house-burned/27732868.html (accessed on 15/04/18).
[92] Human Rights Watch (2016) *supra* note 1, pp.29ff; Memorial Human Rights Centre (2016) *supra* note 88, pp.34f.
[93] International Crisis Group (2015). Chechnya: The Inner Abroad, online available at: https://d2071andvip0wj.cloudfront.net/236-chechnya-the-inner-abroad.pdf (accessed on 15/04/18) p.35.ff.

alleged terrorists or insurgents, but any person criticising the regime, even if their so-called crime consists only in a critical post on social media.[94]

Apart from that, the harassment of human rights organisations and their members is widespread, including the killing of human rights defenders as well as the burning of offices, which led to most of them leaving the republic over safety concerns.[95] Furthermore, people who turn to those human rights defenders for help are targeted as well. Murad Amriev was kidnapped and tortured by Chechen police in 2013 demanding from him to denounce his brother who was living abroad and compel him to return to Chechnya to face charges for alleged crimes. After that incident, Amriev contacted local human rights organisations for help. In June 2017, he was detained in the Bryansk region of Russia on allegations of using fraudulent documents. Now transferred to Chechnya, he made a public statement saying that he was released, and his rights are being observed. However, as Tatiana Lokshina from Human Rights Watch Russia observed, 'he and his family are in fact hostages'.[96]

When applied to the situation in Chechnya, house burning and public humiliation result in the punishment of innocent people for alleged acts of others. They belong to the same group as they are considered the relatives of suspected insurgents or terrorists or their supporters by the authorities. And the authorities, in particular Ramzan Kadyrov himself, have shown their intent to punish this group collectively rather openly and in public. Leading a policy centred on the collective responsibility of family members and pursuing it in practice, effectively resulting in collective punishment, would not have been as

[94] Human Rights Watch (2016) *supra* note 1, pp.18ff.
[95] Human Rights Watch (2016) *supra* note 1, pp.35ff; International Crisis Group (2015) *supra* note 93, pp.35ff; *Estemirova v Russia* (Communicated Case) no.42705/11 (16 November 2015); Memorial Human Rights Centre (2016) *supra* note 88, pp.17ff.
[96] Committee for the Prevention of Torture (2017). заявителю Комитета по предотвращения пыток урожает опрасность, online available at: http://www.pytkam.net/press-centr.novosti/4574 (accessed on 15/04/18); Meduza News (2017). Сбежавшего на Украину чемпиона мира по ММА задержали и хотят доставить в Чечню. Там его раньше пытали, online available at: https://meduza.io/feature/2017/06/05/sbezhavshego-na-ukrainu-chempiona-mira-po-mma-zaderzhali-i-hotyat-dostavit-v-chechnyu-tam-ego-ranshe-pytali (accessed on 15/04/18); Caucasian Knot (2017). MMA World Champion, who complained about torture in Chechnya, detained near Bryansk, online available at: http://www.eng.kavkaz-uzel.eu/articles/39628/ (accessed on 15/04/18); Caucasian Knot (2017). Murad Amriev says his rights are observed in Chechnya, online available at: http://www.eng.kavkaz-uzel.eu/articles/39702/ (accessed on 15/04/18); Caucasian Knot (2017). Rights defenders explain Amriev's statements as compromise with Chechen law enforcers, online available at: http://www.eng.kavkaz-uzel.eu/articles/39705/ (accessed on 15/04/18).

simple if there were rules explicitly prohibiting it. This again highlights the timeliness of a discussion of translating a prohibition of collective punishment into human rights law.

4.2.4 Law on the confiscation of property (family responsibility)

Legislation adopted by the Russian State Duma in 2013 illustrates how the non-existence of a prohibition of collective punishment under human rights law is enabling the adoption of laws introducing it. Due to this gap, there are no explicit rights or obligations in international human rights law a domestic law in favour of collective punishment would breach. In this sense, the silence of human rights law had an effect on state practice regarding collective punishment – it made it easier to introduce measures amounting to collective punishment at domestic level as there was no international standard Russia had to refute or object to first.

An amendment to counter-terror legislation obliging family members of alleged terrorists to pay for damages arising from terrorist attacks is now applicable across Russia. As the amendment includes not only relatives, but also persons 'close' to the perpetrator, the scope of the provision is as broad as it is vague. Given that these persons bear no individual responsibility for the committed acts, they are held to account solely because of their ties with the perpetrator. The content of this amendment as well as its implications in terms of collective punishment are considered in the following.

Besides additional prohibitions relating to the participation in terrorist training and the organisation of terrorist groups, the Russian legislation N 302-FZ 'On Amendments to Certain Legislative Acts of the Russian Federation' encompassed a modification of the Federal Law N 35-F3 'On Countering Terrorism' from 2006 concerning terrorist acts.[97]

The amendment to Article 18 Part 1 of the Federal Law N 35-F3 reads as follows:

> 'Reparation of harm, including moral harm, suffered as a result of a terrorist act is to be carried out … at the expense of the person who committed the act of

[97] Federal Law of the Russian Federation on November 2, 2013 N 302-FZ "On Amendments to Certain Legislative Acts of the Russian Federation" Федеральный закон Российской Федерации от 2 ноября 2013 г. N 302-ФЗ "О внесении изменений в отдельные законодательные акты Российской Федерации" online available at: http://www.rg.ru/2013/11/06/izmenenia-dok.html (accessed on 15/04/18); Roudik, P. (2013). Russia: Law Requires Terrorists to Compensate Their Victims, Global Legal Monitor, online available at: http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403734_text (accessed on 15/04/18); Vatchagaev, M. (2013). New Russian Legislation Codifies Collective Punishment, *Eurasia Daily Monitor*, 10 (195), online available at: http://www.jamestown.org/single/?tx_ttnews%5Btt_news%5D=41553&no_cache=1#.VS5N7fmG_hB (accessed on 15/04/18).

terrorism, as well as at the expense of his/her close relatives, relatives and friends if there is sufficient reason to believe that money, valuables and other property was received by them as a result of the terrorist activities and (or) are the proceeds of such property [received as a result of terrorist activity].'

Regarding the procedural aspects, the amendment provides that federal executive agents

> 'are entitled to request information about the legal origin of money, valuables, and other property and income from their close relatives, relatives and other persons close to the perpetrator of a terrorist act, where there is sufficient reason to believe that the property was received as a result of terrorist activities and (or) is the income from such property, and shall verify the reliability of such information. Specified persons are obliged to submit information requested. … In the absence of reliable information on the legality of the origin of money, property or other assets and income from them relevant materials are to be sent to the office of the prosecutor of the Russian Federation. The Prosecutor General of the Russian Federation or his subordinate prosecutors upon the receipt of these materials in accordance with the legislation of the Russian Federation on civil proceedings, appeal to the court with an application to make income of the Russian Federation the money, valuables, and other property and income from them, in respect to which the said person has not presented data confirming the legality of their acquisition.'[98]

According to this amendment, relatives and friends of as well as 'close persons' to the perpetrator shall be held to account to compensate for damages occurring through terrorist acts, even for moral damages. Their property shall be open to seizure if they cannot provide evidence that its possession does not derive from 'terrorist activity'.[99] Given the traditions of inheritance and properties received as a gift in the North Caucasus, the means to proof the legal title to possession can be difficult to obtain.[100]

---

[98] Federal Law of the Russian Federation on November 2, 2013 N 302-FZ *supra* note 97, Article 7, verbatim translation by Elena Gorianova (Russian to English) and Leona Vukalic (Russian to German); Plater-Zyberk, H. (2014). *Russia's Contribution as a Partner in the War on Terrorism.* Carlisle Barracks, US Army War College, Strategic Studies Institute, pp.8f.

[99] Federal Law of the Russian Federation on November 2, 2013 N 302-FZ *supra* note 97, Article 7.

[100] Aliyev, H. (2013). New Anti-Terrorism Law to Target Families of North Caucasus Insurgents, online available at: http://www.cacianalyst.org/publications/analytical-articles/item/12876-

The law containing this amendment was approved with 439 votes in favour, none against and one abstention.[101] Apparently, it was adopted with suicide bombers in mind – persons who cannot be held to account after committing their acts. Collective punishment is the imposition of sanctions on a group as such for an act allegedly committed by one or some of its members. Applying this definition to the seizure of property of a group of persons who were not involved in the commission of a crime in any way and who are held to account because of their relationship with the perpetrator, the amendment to the law on countering terrorism resonates with the key elements of collective punishment. In addition, several statements of members of the Russian State Duma outlined below explain the underlying reasons of the amendment in a way indicative of a collective punishment policy.

As the amendment represents legislation applicable across Russia, it is considered under human rights law in times of peace. The specific effects of this amendment in the Chechen context are aggravated by the question on whether there is still an ongoing non-international armed conflict or not. However, as this Russian-wide amendment does not refer in any sense to these peculiarities, it is supposed to be applied in times of peace. Furthermore, the current situation in Chechnya would not change the nature of the amendment, meaning its applicability during times governed by human rights law. This might seem like something obvious, but the significance lies in the substance of this amendment as it introduces collective punishment, a concept regulated by the laws of armed conflict outside of that context. As already laid out in the previous chapter, human rights law has not yet adapted to that change in circumstances.

Generally speaking, the provisions on family responsibility undermine the principle of personal liability and the presumption of innocence. Arguments against that finding made by members of the Russian State Duma relied on the civil nature of the claim, and therefore the presumption of innocence would not be violated.[102] However, as shown by

---

new-anti-terrorism-law-to-target-families-of-north-caucasus-insurgents.html (accessed on 15/04/18).

[101] Russian State Duma, Chronicle of the meeting on 25 October 2013, online available in Russian at: http://transcript.duma.gov.ru/node/3948/ (accessed on 15/04/18).

[102] Arutunyan, A. (2013). Paying for Terror in Russia, online available at: http://themoscownews.com/russia/20131114/192050210/Paying-for-terror-in-Russia.html (accessed on 15/04/18); Obrazkova, M. (2013). Proposed Russian law targets terrorists' families, online available at: http://rbth.co.uk/politics/2013/10/21/proposed_russian_law_targets_terrorists_families_30985.html (accessed on 15/04/18); Radio Free Europe/Radio Liberty (2013). Caucasus Report: Russia To Hold Relatives Of 'Terrorists' Financially Responsible For Material Damage, online available at:

the case *Lagardère v France* mentioned in the preceding chapter, such situations can be in violation of the right in question.[103] According to the European Court of Human Rights a 'clear enough link between the criminal case and the related compensation proceedings to justify extending the scope of the application of Article 6 § 2 to the latter'[104] is necessary and such a link could be established in the cases set out in the legislation as well. For this reason, the amendment violates the presumption of innocence under the ECHR. However, the presumption of innocence does not address the full extent of collective punishment, as already set out in the preceding chapter.

Several members of the Russian State Duma, predominantly from the governing party 'United Russia', have emphasised the responsibility of family members due to their alleged support of relatives committing or allegedly committing terrorist acts. Their argumentation strongly resonates with the reasoning of the Israeli Supreme Court examined in the case study on the Occupied Palestinian Territories. These judgments included statements such as 'the sinner is not alone' indicating a strong tendency towards the attribution of collective guilt resulting in collective punishment.[105] In a similar vein, Duma members spoke of the strong influence of the family over its members. Furthermore, during the parliamentary readings of the amendment, the seizure of property of family members and other close persons was presented as an incentive to young people not to engage in crime, another issue already prevalent in Israeli collective punishment policy, the alleged deterrent aspect of such provisions. Moreover, the point was made that punishment should be 'inevitable', a statement likely referring to the case of suicide bombers.[106] In addition, the concept of seizing property was contrasted with the existence of the death penalty in Western countries, portraying this solution as more lenient, another strategy witnessed in Israeli argumentation of its collective punishment policy before.[107]

---

http://www.rferl.org/content/russia-terrorism-law-terrorists-financial-liability/25157756.html (accessed on 15/04/18).

[103] *Lagardère v France* (Merits and Just Satisfaction) no.18851/07, Court (Fifth Section) (12 April 2012) para.59ff.

[104] *Lagardère v France supra* note 103, para.64.

[105] HCJ 8091/14 HaMoked: Center for the Defence of the Individual et al v Minister of Defense et al (Petition for Order Nisi) 27 November 2014, unofficial English translation online available at: http://www.hamoked.org/files/2014/1159000_eng.pdf (accessed on 15/04/18) Opinion Justice Sohlberg, para.25; for further information see the chapter on the Occupied Palestinian Territories.

[106] Russian State Duma, Transcript of the meeting on 15 October 2013, online available in Russian at: http://transcript.duma.gov.ru/node/3933/ (accessed on 15/04/18).

[107] Zakonia (online portal on Russian law) (2014). Семейная ответственность за теракт. Противодействие терроризму или расплата «за компанию»?, online available at:

There are still attempts to tighten anti-terror legislation, such as the bill suggested by Roman Khudyakov, a member of the Russian State Duma. He proposed legislation introducing the criminal liability of relatives of suspected insurgents and explained this step with reference to Israel's policy of house demolitions: 'These measures make to think not just about yourself, because with such actions he dooms his family for life in starvation with reputation tainted forever'.[108] Similar proposals were made recently by the head of Chechnya, Ramzan Kadyrov.[109]

In April 2017, Kadyrov spoke about collective responsibility of family members in an interview with Russian media. He reaffirmed his stance that the family of someone who has joined a terrorist group are accomplices in the crime and equally responsible for their relative's actions. In addition, he has again called for the expulsion of these families, which has already been witnessed in practice in recent years.[110]

Another example for the creeping introduction of collective responsibility into the Chechen legal system is the 'spiritual and moral passportisation' campaign that was launched in February 2016. According to the procedure, every Chechen citizen between the age of 14 and 35 would receive a document stating not only their passport number, address and place of work or study, but also their religious denomination, teip and wird membership. After an overwhelmingly negative reaction to this project and broad media attention, Kadyrov announced its termination. However, the idea of the campaign was pursued further in the form of a questionnaire disseminated to young people by teachers and local police. This questionnaire asks for details of older family members and imposes responsibility for all future actions of the 'candidate for passportisation' on these

http://www.zakonia.ru/theme/semejnaja-otvetstvennost-za-terakt-protivodejstvie-terrorizmu-ili-rasplata-za-kompaniju-15-01-2014 (accessed on 15/04/18).

[108] Interfax (2014). Bill on criminal liability for terrorists' relatives unlikely to be considered in State Duma – official, online available at: http://russialist.org/interfax-bill-on-criminal-liability-for-terrorists-relatives-unlikely-to-be-considered-in-state-duma-official/ (accessed on 15/04/18); TASS Russian News Agency (2014). Bill on criminal liability of terrorists' relatives submitted to Russia's Duma, online available at: http://tass.ru/en/russia/714054 (accessed on 15/04/18).

[109] Caucasian Knot (2015). Chechen Parliament submits to Russian State Duma bill on punishment of terrorists' family members, online available at: http://eng.kavkaz-uzel.ru/articles/30509/ (accessed on 15/04/18); Balmforth, T. (2015). Russian Duma To Consider Criminal Accountability For Militant Families, online available at: http://www.rferl.org/content/russia-duma-criminal-accountability-militant-families/26792038.html (accessed on 15/04/18).

[110] OC Media (2017). Collective responsibility in Chechnya; an ineffective method of influence, online available at: http://oc-media.org/collective-responsibility-in-chechnya-an-ineffective-method-of-influence/ (accessed on 15/04/18).

relatives.[111] In that sense, family members are held to account as guarantors for their relatives.[112]

Although the law adopted by the Russian State Duma applies to the whole country, family members of alleged insurgents or of alleged terrorists, mainly in the North Caucasus and in Chechnya – given Ramzan Kadyrov's engagement in so-called counter-terrorism activities – are particularly targeted for acts they are not personally responsible for. As outlined above, collective punishment should be interpreted in its broadest sense, including any kind of penalties imposed on groups for acts allegedly committed by some of its members. Since this definition applies to practices used in Chechnya such as *zachistka* or house burning, it certainly applies to a legal regulation as well.

Russian legislation has effectively introduced collective punishment, but the law of armed conflict does not apply in peacetime and human rights law does not address collective punishment explicitly. So far, the European Court of Human Rights has decided upon violations of specific rights by collective punishment, but not on collective punishment itself. Due to the lack of legal consideration of collective punishment under human rights law, it is seen as a "practice" leading to human rights violations, not as a human rights violation itself. In a recent report the Human Rights Committee asked Russia to '[i]mmediately end the practice of collective punishment of relatives and suspected supporters of alleged terrorists, and provide effective remedies to victims for violation of their rights, including for damage or destruction of property and forced expulsion.'[113] This statement was made in the context of Russia's 'counter-terrorism operations in the Chechen Republic', but it likewise referred to the violation of specific human rights and the "practice" of collective punishment as their trigger. [114]

---

[111] Caucasian Knot (2016). Жители Чечни пожаловались на "духовную паспортизацию" под видом анкетирования, online available at: http://www.kavkaz-uzel.eu/articles/278238/ (accessed on 15/04/18).
[112] Memorial Human Rights Centre (2016) *supra* note 88, p.24; Tumanov, G. (2016). В Чечне ввели «духовно-нравственный паспорт», Kommersant News, online available at: http://www.kommersant.ru/doc/2919256 (accessed on 15/04/18); Caucasian Knot (2016) *supra* note 111.
[113] CCPR/C/RUS/CO/7 Concluding observations on the seventh periodic report of the Russian Federation (31 March 2015) advance unedited version adopted at the 3157th meeting (CCPR/C/SR.3157) para.7; CCPR/C/RUS/CO/6 Concluding observations of the Human Rights Committee: Russian Federation (24 November 2009) para.14.
[114] Concluding observations on the seventh periodic report of the Russian Federation *supra* note 113, para.7.

The assessment of this legal provision introducing family responsibility and in effect, collective punishment, gives rise to serious concerns. However, the fact that a vacuum in protection has enabled this provision appears the more concerning. Human rights law has to address the challenges it faces and this brief account of an amendment of Russian counter-terror law has shown the importance of that discourse in practice.

4.2.5 References to collective punishment in Chechnya in the case law of the European Court of Human Rights

The need to consider collective punishment under human rights law stems not only from the changing circumstances, but also from the choices made by the actors in practice. Whereas Palestinians have used the prohibition of collective punishment in the law of armed conflict as tool to make their case, Chechens have brought cases relating to the armed conflict and the current, uncertain situation before the European Court of Human Rights. The analysis of potential ways to translate the concept of collective punishment into human rights law and formulate a prohibition draws from that essential difference, determined as it was by the fact that the Chechens, unlike the Palestinians, had the Strasbourg system available to them.

Before starting with the review of cases, a few remarks on the monitoring function of the ECtHR with regards to the law of armed conflict and its ability to provide redress for victims of armed conflict are in order. The ECtHR has taken the stance to apply the ECHR only and not the law of armed conflict to situations amounting to a non-international armed conflict such as in Chechnya. This approach has led to a number of successful cases brought by Chechen applicants and although they were not assessed against the law of armed conflict, the Court was able to supervise situations of internal violence and offer redress to the victims.[115]

In terms of available remedies, the Court can rely on 'just satisfaction' which commonly consists of a payment of pecuniary and non-pecuniary damages and court costs, individual measures such as the reopening of domestic judicial proceedings or the imposition of positive obligations on the respondent state and general measures to prevent recurrence in the course of pilot judgements addressing a 'structural or systemic problem'.[116]

---

[115] Abresch, W. (2005) *supra* note 23; for the leading Chechen cases see *supra* note 67.
[116] ECtHR, Rules of Court, Registry of the Court, Strasbourg (14 November 2016) Rule 61 (1); Open Society Justice Initiative (2010). *From Judgment to Justice: Implementing International and Regional Human Rights Decisions*. New York, Open Society Foundations, pp.39ff; McKay, F. (2013). What Outcomes for Victims?, in Shelton, D. (ed.). *The Oxford Handbook of International*

In the judgements relating to the Chechen conflict, the Court provided an authoritative account of the events and the numerous violations of Chechens' rights committed by the Russian state and this in itself fits with a corrective approach to empowerment (as described in the following chapter), which deals with mending long histories of discrimination and oppression. However, in comparison with another regional human rights body, the Inter-American Court of Human Rights, the ECtHR could improve its remedial framework by outlining the specific ways in which a state has to comply with a judgement instead of leaving the means of compliance up to the state itself.[117] Yet a thorough examination of the remedial framework of the ECtHR and the Inter-American Court goes beyond the scope of this thesis.

The review of cases referring to collective punishment in the preceding chapter revealed that there is not much reference to the term 'collective punishment' in the case law on Chechnya in this context. The cases on *zachistkas* reviewed above do not refer to collective punishment explicitly. However, the two cases outlined below show the Court's awareness of the continuing imposition of collective punishment on Chechens after the most intense periods of fighting of the second non-international armed conflict and after the decrease of *zachistkas.* The following analysis will show that the Court has indicated a desire or an intention to consider them as instances of collective punishment. In addition, this section will conclude with a short digression to Austrian asylum cases, which include a large number of Chechen cases concerning collective punishment, reaffirming the widespread use of collective punishment in Chechnya.

In the case *Turluyeva v Russia*, the Court dealt with disappearance and house burning occurring in 2009.[118] The applicant was the mother of a young man who had contacts with insurgents via phone and internet and who disappeared after a special operation aimed at discovering hidden insurgents. The events on the day of his disappearance started with armed men arriving at their home, who alleged that members of the insurgents had been hiding on their estate and showed the body of a young man to the applicant. This man and another man accused of being insurgents had been killed by the

Human Rights Law. Oxford, Oxford University Press, pp.921-954; on individual measures see eg: *Assanidze v Georgia* (Merits and Just Satisfaction) no. 71503/01, Court (Grand Chamber) (8 April 2004) (ordering the release of the applicant).

[117] Bowring, B. (2012) *supra* note 67, p.760f, pp.767ff; Hawkins, D. & Jacoby, W. (2010). Partial Compliance: A Comparison of the European and Inter-American American Courts for Human Rights, *Journal of International Law and International Relations*, 6 (1), pp.35-85.

[118] *Turluyeva v Russia* (Merits and Just Satisfaction) no.63638/09, Court (First Section) (20 June 2013).

security forces while allegedly hiding on the estate belonging to the applicant and her brothers in law. The applicant and another relative were brought to the district department of the interior for questioning and when they returned their homes had been burned down. The applicant's son disappeared after a relative saw him the same day at the district department bearing visible signs of beatings.[119]

Regarding the house burning, the Russian government accepted the applicant's account of the events to the extent set out in a memorandum stating that '[a]s a result of this conflict, the houses at 117 Sovetskaya Street had burned down'.[120] Fire fighters at the scene told the applicant their house had been burned down deliberately contradicting the government's version of the houses 'burning down' as they apparently 'had been burned down'.[121] In a later statement, servicemen of the district department of the ministry of the interior who had participated in the special operation confirmed that the houses 'had been burned down'.[122] Another argument for the deliberate nature of the destruction of their homes can be found in the timeline of the events. The special operation, which resulted in the killing of two alleged insurgents took place before the applicant was questioned, and her home and the homes of her relatives were still undamaged. After the applicant returned from being questioned, her house was burned down, meaning it occurred long after the special operation 'aimed at locating and exterminating members of illegal armed groups' took place.[123]

Although the European Court of Human Rights did not explicitly refer to collective punishment in the context of this case, the nature of the events indicates the imposition of collective punishment on the applicant in the form of house burning. Her home as well as the homes of her relatives were burned down due to alleged ties to insurgents, making them bear responsibility for acts committed by others. In the authorities' view, the applicant as well as her relatives were supporters of or at least sympathising with the insurgents.

In the second case, *I.K. v Austria* in 2013, the Court established a violation of the prohibition of torture or inhuman or degrading treatment or punishment relating to a Chechen asylum seeker. In this case, it was likely that the applicant would suffer from collective punishment if he would be deported to Russia. His father was killed because

[119] *Turluyeva v Russia supra* note 118, para.8ff.
[120] *Turluyeva v Russia supra* note 118, para.19.
[121] *Turluyeva v Russia supra* note 118, para.11.
[122] *Turluyeva v Russia supra* note 118, para.41.
[123] *Turluyeva v Russia supra* note 118, para.18.

he had worked for separatist leader Aslan Maskhadov. Furthermore, he himself was beaten by security forces, arrested several times and only released in exchange for ransom.[124]

The Court referred to a number of reports providing country-specific information describing the current situation in Chechnya. These reports include two mentions of collective punishment: 'The burning of homes of suspected rebels, a mechanism of collective punishment in use since 2008, was reportedly continuing.'[125] And: 'Chechen law-enforcement and security agencies under Ramzan Kadyrov's *de facto* control were continuing to resort to collective punishment of relatives and suspected supporters of alleged insurgents.'[126]

While concluding its assessment of the situation in Chechnya, the Court stated: 'The reports also still referred to the practice of reprisals and collective punishment of relatives and suspected supporters of alleged insurgents'.[127] Apart from the Court's effective recognition of the use of collective punishment in Chechnya, these remarks also indicate that the Court had been aware of collective punishment in Chechnya before ('still'). This might be a reference to the *zachistka* cases it dealt with earlier, thereby acknowledging that these sweeping operations constituted collective punishment as well.

However, as already seen in the case review in the preceding chapter, the Court has not decided on the issue of collective punishment itself. It has rather recognised that collective punishment is used by CR authorities, but since collective punishment itself is not prohibited by the ECHR, it can only find contraventions regarding the outcomes it causes. The information on collective punishment is merely used as a reference to show the real risk of ill-treatment the applicant would face in case of deportation and the Court did not elaborate any further on collective punishment.

However, the Court took some time to discuss the decision of the Austrian Asylum Court (*Asylgerichtshof*), which in turn refers to country reports on Chechnya speaking of

[124] *I.K. v Austria* (Merits and Just Satisfaction) no.2964/12, Court (First Section) (28 March 2013); for another case relating to punitive measures imposed on the relatives of Aslan Maskhadov see: *Maskhadova and Others v Russia* (Merits and Just Satisfaction) no. 18071/05, Court (First Section) (6 June 2013) (discussed in section 4.1.4 above).
[125] *I.K. v Austria supra* note 124, para.51.
[126] *I.K. v Austria supra* note 124, para.54.
[127] *I.K. v Austria supra* note 124, para.81.

collective punishment and one of its forms, house burning.[128] Citing the asylum case of the applicant's mother, the Austrian courts found that she would be at serious risk of ill-treatment because of her 'membership of a particular social group' meaning supporters of the insurgent movement.[129] To face the risk of ill-treatment due to the affiliation with or belonging to a certain group is already indicative of collective punishment.

Apart from the decisions relating to this case brought before the European Court of Human Rights, it is interesting to have a look at further decisions of the Austrian courts, in particular regarding asylum cases. Austria has a relatively large Chechen diaspora, numbering about 30,000, and as a result, a large number of asylum cases deals with Chechen applicants.[130] A search on the database of the Austrian court dealing with asylum cases, the Federal Administrative Court (*Bundesverwaltungsgericht*), yields a staggering 1258 results when searching for 'Chechnya' and 'collective punishment' for the period between January 2014 and April 2018.[131] One recent example includes the granting of asylum in 2017 to a former insurgent who fled Chechnya in 2013. In its decision, the Austrian court referred to detailed country specific information on the use of collective punishment in Chechnya. It mentioned house burnings as well as the law on the confiscation of property of relatives of alleged terrorists as discussed above.[132]

This section has highlighted the European Court of Human Rights' awareness of collective punishment being used in Chechnya. However, the Court has not decided on collective punishment so far, it has only referred to a vast number of country specific reports containing information on collective punishment in Chechnya. Yet it has not rejected the use of this notion either. In addition, the large number of Chechen asylum cases brought before Austrian courts indicate that collective punishment is a broader

[128] *I.K. v Austria supra* note 124, para.17.
[129] *I.K. v Austria supra* note 124, para.13.
[130] Medien-Servicestelle (2015). Rund 30.000 TschetschenInnen in Österreich, online available in German at: http://medienservicestelle.at/migration_bewegt/2015/02/26/rund-30-000-tschetscheninnen-in-oesterreich/ (accessed on 15/04/18).
[131] Austrian Legal Information Database (Rechtsinformationssystem), online available in German at: https://www.ris.bka.gv.at/Ergebnis.wxe?Abfrage=Bvwg&Entscheidungsart=Undefined&SucheNachRechtssatz=True&SucheNachText=True&GZ=&VonDatum=01.01.2014&BisDatum=15.04.2018&Norm=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=tschetschenien+kollektivbestrafung&Position=1 (accessed on 15/04/18).
[132] BVwG 09.05.2017, W226 2105945-2, online available in German at: https://www.ris.bka.gv.at/Dokumente/Bvwg/BVWGT_20170509_W226_2105945_2_00/BVWGT_20170509_W226_2105945_2_00.pdf (accessed on 15/04/18).

issue that should be addressed outside of the context of armed conflict under human rights law.

4.2.6 Conclusion

This chapter has shown the effects of a gap in protection from collective punishment under human rights law in practice. After briefly elaborating on the two non-international armed conflicts that have been fought in Chechnya during the last decades, the complexities of defining the beginning and end of such conflicts were highlighted from a theoretical perspective.

The short foundational section has prepared the ground for the ensuing assessment of forms of collective punishment witnessed in Chechnya. Starting with collective punishment applied in practice, *zachistkas* or sweeping operations were most common during the early stages of the second non-international armed conflict. These operations were characterised by summary executions, disappearances, looting and the destruction of property. Entire villages were punished for alleged ties to insurgents as perceived by the security forces – this constitutes collective punishment.

Fortunately, *zachistkas* are no longer used in Chechnya. However, the concept of collective punishment has adapted to the changing circumstances. After attacks on governmental premises or in reaction to comments critical of the authorities, family homes of the alleged perpetrators are burned down. Ramzan Kadyrov's open support for family responsibility for the alleged crimes committed by their relatives indicates a general policy of not only collective responsibility, but in effect collective punishment. His comments denouncing certain families are followed by action, resulting in their homes being burned down or in public humiliation and collective expulsion from Chechnya, affecting the entire family just as much as the destruction of their home. As innocent people are punished for acts allegedly committed by one of their members, collective punishment is still in use in Chechnya.[133] In preparation of these acts, the authorities even collect information about the broader family relationships of young people.

In addition to these forms of collective punishment exercised in practice, a law has been adopted by the Russian State Duma. Collective responsibility is imposed on a broader circle by the confiscation of property of families or even persons close to someone who

[133] See eg: PACE, Resolution 2157 (2017) Human rights in the North Caucasus: what follow-up to Resolution 1738 (2010)? (25 April 2017).

committed a terrorist attack in order to cover for damages resulting from the act. This amendment to counter-terror legislation is applicable across Russia, but the particular circumstances in Chechnya are likely to result in a stronger impact on its population. Furthermore, statements made by Duma members during the readings of the bill indicate that the amendment was modelled on collective punishment policies applied by Israel against the Palestinians.

In response, the Chechens have turned to the European Court of Human Rights. They have brought a large number of cases relating amongst others to *zachistkas*, enforced disappearances and torture. However, cases where collective punishment is explicitly mentioned are scarce. So far, the Court has not decided on the issue of collective punishment itself. But the Court has acknowledged the situation in Chechnya and has not rejected the use of the concept in this context.

The uncertain situation in Chechnya does not offer sufficient protection from collective punishment, as the question of whether the second non-international armed conflict is still ongoing is open to debate. This gap in protection is situated in human rights law. Another aspect why human rights law should consider the concept of collective punishment within its framework is the active choice of Chechens to take their cases to the European Court of Human Rights. Just as they have done in other respects, the Chechens could use the Court's mechanisms as means of empowerment to actively participate in the broader struggle for justice if there would be a prohibition of collective punishment. Consequently, the final part of the thesis will outline potential ways of approaching collective punishment within human rights law in an attempt to provide affected groups with the tools they need to engage in that change.

5 Human rights and collective punishment – can human rights law take on the challenge?

5.1 Conceptual differences and group rights in human rights law

5.1.1 Introduction

The preceding parts have laid out the meaning and scope of collective punishment under the law of armed conflict and its interplay with human rights law. Both parts are supported by case studies highlighting the practical importance of the prohibition of collective punishment and the problems arising in case of a gap in protection. This gap is the subject of the last part of the thesis. The characteristics defining the law of armed conflict and human rights law will be discussed in search for reasons causing the gap in human rights law, followed by an account of the current understanding of group rights in human rights law and group empowerment. This theoretical analysis of the foundation of group rights forms the base for the following chapter which will explore potential practical solutions, focusing on the European Convention on Human Rights.

The research question asked about the relationship between state policies on collective punishment and its regulations under the law of armed conflict and human rights law, and what effects this relationship has on the protection and empowerment of groups. The last part of this question will be addressed here. Owing to the theoretical approach adopted, it is not enough to examine what the law is; one also has to question how it is applied in practice and what impact the law, or the lack of it, has on the living conditions of those affected. In short, this part will focus on how to deal with these effects in order to work towards the empowerment of affected groups and ways to hold authorities to account for acts of collective punishment in situations governed by human rights law.

The chapter starts with a short review of the different underlying tenets of the law of armed conflict and human rights law. In addition, the question of the applicability of the law of armed conflict and human rights law will be addressed briefly in order to delineate their scope. Afterwards, the position of group rights in human rights law is examined. As the present thesis is contemplating a prohibition of collective punishment under human rights law, the subjects of which are groups, the question of whether group rights can be accommodated by human rights law is an important precondition for the evaluation of potential solutions. This analysis will start with a brief general account of

the development of group rights, followed by the comparison of two theoretical stances. One position claims that group rights are group-differentiated rights held by the individual members of a group, whereas the other proposes that groups themselves can be rightholders. After establishing that groups are capable of holding rights, the question of whether these rights can be human rights is addressed, followed by an account of group empowerment, explaining the underlying rational of this review of theoretical approaches to group rights.

The conclusion is that groups can be the holders of rights, that some of those rights can be group or collective human rights and that the human rights framework needs to accommodate these findings in order to protect and empower groups affected by collective punishment.

5.1.2 The interplay between the law of armed conflict and human rights law

Starting with a comparison of the underlying approaches of the law of armed conflict and human rights law, this section traces some of the deeper reasons for why collective punishment has not been considered under human rights law so far. In addition, this question will be separated from the frequently recurring debate on the application of either or both frameworks, which might be referred to as the *lex specialis* debate.

The juxtaposition of conceptual aspects of the law of armed conflict and human rights law is helpful in order to understand where the regulation of collective punishment comes from and why the translation of the act itself into human rights law might encounter difficulties. To tackle those potential obstacles, one has to be mindful of the origin and context of collective punishment. Similarly, the conceptual differences between the law of armed conflict and human rights law should not be confused with their applicability. Several approaches, above all the *lex specialis* argument, have been put forward to deal with situations involving potential norm conflicts. However, the present thesis does not aim at resolving these issues, nor at applying the law of armed conflict outside its domain. It rather aims at a separate and independent consideration of the act of collective punishment under human rights law. Not the applicability of the prohibition of collective punishment under the law of armed conflict in situations governed by human rights law.

The section will start with an overview of the conceptual approaches taken by the law of armed conflict and human rights law, providing some insights into their different starting points and actors. Subsequently, a short delineation of the applicability of the

law of armed conflict and human rights law will reject the *lex specialis* argument and clarify the broader aim of the thesis.

5.1.2.1 Different perspectives

The law of armed conflict and human rights law do not only address different situations. They are situated in different contexts, concern different actors and start from different vantage points. The group-based concept pursued in the law of armed conflict has to be acknowledged when thinking about collective punishment and the translation of the act into human rights law. For this reason, a review of the conceptual foundations of both legal frameworks is useful in order to identify the differences and take them into account in the course of devising potential solutions.

The law of armed conflict and human rights law differ in terms of context and relationships they address. Whereas the law of armed conflict applies in times of armed conflict, regulating the relationship between states, organised armed groups and groups of protected persons, human rights law is concerned with the affairs between states and individuals under their jurisdiction.[1] Another distinction can be made regarding their structure. The law of armed conflict obliges the parties to act in a certain way compared with human rights law which traditionally confers certain positive rights onto individuals.[2]

In order to be protected under the law of armed conflict, individuals have to be part of a group – such as combatants, prisoners of war or civilians. For instance, the Geneva Conventions include several requirements for conferring combatant status to militias, resistance groups and national liberation movements.[3] Although these requirements list individual duties such as to carry your arms openly, they have a "group dimension" insofar as the group itself has to abide by the law of armed conflict. For this reason, the members of the group have to fulfil certain requirements in order to ensure the group's

---

[1] Provost, R. (2002). *International Human Rights and Humanitarian Law*. Cambridge, Cambridge University Press, pp.6ff; Bowring, B. (2009). Fragmentation, Lex Specialis and the Tensions in the Jurisprudence of the European Court of Human Rights, *Journal of Conflict & Security Law*, 14 (3), pp.485-498, pp.489ff.

[2] Doswald-Beck L. & Vité, S. (1993). International Humanitarian Law and Human Rights Law, *International Review of the Red Cross*, 33 (Special Issue 293), pp.94-119, pp.101ff.

[3] 970 UNTS 31, Convention (I) for the amelioration of the condition of the wounded and sick in armed forces in the field, Geneva (12 August 1949) Article 13 (2); 971 UNTS 85, Convention (II) for the amelioration of the condition of the wounded, sick and shipwrecked members of the armed forces at sea, Geneva (12 August 1949) Article 13 (2); 75 UNTS 135, Convention (III) relative to the Treatment of Prisoners of War, Geneva (12 August 1949) Article 4(A)(2); 1125 UNTS 3, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva (8 June 1977) Articles 43, 44.

compliance.[4] Provost highlights the importance of group membership with an example based on irregular combatants: 'In all cases, the existence of, and appurtenance to, an identifiable group is an absolute condition for application of humanitarian law in favour of irregular combatants. Isolated *francs-tireurs* are not given any protection as privileged belligerents and are liable to be tried as war criminals.'[5]

The Fourth Geneva Convention on the protection of civilians in times of armed conflict is applicable to 'protected persons'. Article 4 defines this group as persons who 'find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.'[6] Given the exclusion of several groups such as the party's own nationals from that definition, the Convention widens the application of some of its parts to the 'whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion'.[7]

The International Tribunal for the Former Yugoslavia has ruled on the issue of group membership and the definition of 'protected persons' in the case *Mucić and others*.[8] The question revolved around the detention of Bosnian Serbs by the Bosnian government, meaning the detention of its own nationals.[9] The Tribunal found that the condition of nationality was too strict, as 'the victims of the acts alleged in the Indictment were arrested and detained mainly on the basis of their Serb identity'. [10] The Tribunal reaffirmed this reasoning in its Appeals Judgment, emphasising the 'development of conflicts based on ethnic or religious grounds' and its effect on the interpretation of the nationality criterion.[11] Provost welcomed this shift as it focuses on the 'substantive links between an individual and a party to the conflict rather than fixing on the rather formal, and at times highly artificial, concept of nationality.'[12] Apart from a few exceptions such

[4] Provost, R. (2002) *supra* note 1, pp.35f.
[5] Provost, R. (2002) *supra* note 1, p.36.
[6] 75 UNTS 287, Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva (12 August 1949) Article 4 GCIV.
[7] Convention (IV) relative to the Protection of Civilian Persons in Time of War *supra* note 6, Article 13.
[8] *Prosecutor v Delalić, Mucić, Delić and Landzo* (Judgment) IT-96-21-T (16 November 1998).
[9] *Prosecutor v Delalić, Mucić, Delić and Landzo* (Judgment) *supra* note 8, para.264.
[10] *Prosecutor v Delalić, Mucić, Delić and Landzo* (Judgment) *supra* note 8, para.265.
[11] *Prosecutor v Delalić, Mucić, Delić and Landzo* (Appeal Judgment) IT-96-21-A (20 February 2001) para. 73; see also: *Prosecutor v Duško Tadić* (Appeal Judgment) IT-96-21-A (15 July 1999) para.166; *Prosecutor v Zlatko Aleksovski* (Appeal Judgment) IT-95-14/1-A (24 March 2000) para.152.
[12] Provost, R. (2002) *supra* note 1, pp.39f.

as minority rights, human rights law does not require membership of a group.[13] However, the broader aspects of group rights in human rights law are discussed below in more detail.

The requirement to be a member of a group in order to gain a certain status highlights the differences between the law of armed conflict and human rights law. Under the law of armed conflict, one has to be part of the protected persons or the civilians to become subject to guarantees and protections whereas human rights law focuses on the individual alone. However, the act of collective punishment cannot be sufficiently considered under human rights law if the analysis is limited to individuals as subjects of rights. Aware of the problems arising from situations where both areas of law, the law of armed conflict and human rights law are seemingly inadequate, several voices have argued for a variety of modes of applicability to remedy such situations. Although the thesis does not support this conflation of conceptual issues with applicability and therefore aims at solutions based on human rights law only, the impetus that might have contributed to the emergence of the *lex specialis* and similar arguments is understandable from this point of view. A short overview of this debate is provided below.

5.1.2.2 The lex specialis debate

Non-international armed conflicts and long periods of transition between armed conflicts and times of peace are factors that have contributed to blurring the line of application between the law of armed conflict and human rights law. As a result, a variety of approaches to dealing with potential norm conflicts and the scope of the relevant frameworks has emerged. This section will outline some of the positions on this issue starting with case law of the International Court of Justice (ICJ) and its reception in academia followed by the stance of the European Court of Human Rights on the applicability of the law of armed conflict in cases under its jurisdiction.

Milanović has written a very useful chapter addressing the current state of this debate. He begins by assessing the case law of the ICJ on the relationship between the law of armed conflict and human rights law. In the *Nuclear Weapons* Advisory Opinion, the Court held that the right to life deriving from human rights law would also apply in times of armed conflict, but it would have to be interpreted using standards of the law of armed conflict: 'The test of what is an arbitrary deprivation of life, however, then falls to be

[13] Provost, R. (2002) *supra* note 1, p.42; CCPR/C/21/Rev.1/Add.5 General Comment No.23: Rights of Minorities (Article 27) (26 April 1994).

determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.'[14]

After ruling on one specific provision – the right to life – in the *Nuclear Weapons* Advisory Opinion, the Court assessed the general implications of this *lex specialis* approach in the *Advisory Opinion on the Legality of the Construction of a Wall in the Occupied Palestinian Territory*.[15] Here, the Court declared that both human rights law and the law of armed conflict would apply in times of armed conflict, with the law of armed conflict being *lex specialis* to human rights law.[16] It established three different modes of applicability: '[S]ome rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.' [17] Milanović criticised this verdict as 'vague' and 'unhelpful' as it lays out different general applicability options without saying which provisions would fall into which category, therefore not providing sufficient guidance for future cases.[18] In the following case *Armed Activities on the Territory of the Congo*, the Court dropped the *lex specialis* reference, but maintained those general categories.[19]

After discussing a range of cases highlighting the problems created by norm conflicts between the law of armed conflict and human rights law, Milanović concludes that there 'is *simply no evidence* that *lex specialis* is in fact a rule of conflict resolution' and that states should use the relevant derogation mechanisms to avoid such situations instead.[20] Although *lex specialis* might have its use in a harmonious interpretation to some extent, he calls for the concept to be 'discarded as a general matter, and it should especially not

---

[14] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p.226*, para.25; Milanović, M. (2011). Norm Conflicts, International Humanitarian Law, and Human Rights, in Ben-Naftali, O. (ed.). *International Humanitarian Law and International Human Rights Law*. Oxford, Oxford University Press, pp.95-152, p.99.
[15] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, ICJ Reports 2004,* p.136.
[16] Doswald-Beck, L. (1997). International and humanitarian law and the Advisory Opinion of the ICJ on the legality of the threat or use of nuclear weapons, *International Review of the Red Cross*, 316, pp.35-55, pp.50f.
[17] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 15, para. 106.
[18] Milanović, M. (2011) *supra* note 14, p.100.
[19] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, ICJ Reports 2005,* p.168, para.216; Happold, M. (2013). International Humanitarian Law and Human Rights Law, in White, N. & Henderson, C. (eds.). *Research Handbook on International Conflict and Security Law*. Cheltenham, Edward Elgar, pp.444-466, pp.459ff.
[20] Milanović, M. (2011) *supra* note 14, p.115.

be used to describe the relationship between IHL [international humanitarian law] and IHRL [international human rights law] as a whole.'[21]

Clapham has summarised the relevant academic debate in his chapter in the recent commentary on the 1949 Geneva Conventions. He discusses treaties explicitly regulating their own relationship with the Geneva Conventions and others which contain only references to their relationship in case law. He concludes that the question as to the general relationship between the law of armed conflict and human rights law is still 'unsettled' and that there is no '"one-size-fits-all" answer'.[22]

In tracing the origins of the law of armed conflict and of human rights law, Bowring points to additional differences between the two frameworks and questions whether human rights bodies such as the ECtHR should apply the law of armed conflict. The law of armed conflict, being a framework centred on the conduct in war, meaning not only the protection of civilians, but lawful ways of killing, is based on a fundamentally different premise than human rights law which has the protection of individuals against the state at its core.[23] The ECtHR has decided not to apply the law of armed conflict to water down the protection granted under the ECHR, when it stated in the *Isayeva* case that '[n]o martial law and no state of emergency has been declared in Chechnya, and no derogation has been made under Article 15 of the Convention. The operation in question therefore has to be judged against a normal legal background.'[24]

Returning to Clapham and his categories of human rights treaties regulating their relationship with the Geneva Conventions, the ECHR is located amongst the group

---

[21] Milanović, M. (2011) *supra* note 14, pp.124, 115.
[22] Clapham, A. (2015). The Complex Relationship Between the Geneva Conventions and International Human Rights Law, in Clapham, A., Gaeta, P. & Sassòli, M. (eds.). *The 1949 Geneva Conventions: A Commentary*. Oxford, Oxford University Press, pp.701-735, 734f.
[23] Bowring, B. (2009) *supra* note 1, pp.489ff; contra Hampson, F. (2013). The relationship between international humanitarian law and international human rights law, in Sheeran, S. & Rodley, N. (eds.). *Routledge Handbook of International Human Rights Law*. Abingdon, Routledge, pp.185-213; E/CN.4/Sub.2/2005/14 Working paper by Ms. Hampson and Mr. Salama on the relationship between human rights law and international humanitarian law (21 June 2005); Quénivet, N. (2008). The Right to Life in International Humanitarian Law and Human Rights Law, in Arnold, R. & Quénivet, N. (eds.). International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law. Leiden, Martinus Nijhoff, pp.331-353; Abresch, W. (2005). A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya, *European Journal of International Law*, 16 (4), pp.741-767; Gioia, A. (2011). The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict, in Ben-Naftali, O. (ed.). *International Humanitarian Law and International Human Rights Law*. Oxford, Oxford University Press, pp.201-249.
[24] *Isayeva v Russia* (Merits and Just Satisfaction) no.57950/00, Court (First Section) (24 February 2005) para.191 (in-quote references omitted).

'referring to their applicability in situations of armed conflict'.[25] Article 15 ECHR regulating the derogation procedure in times of emergency, makes clear that the Convention continues to apply during armed conflict. Yet the Court has referred to terminology stemming from the law of armed conflict as seen in the *Isayeva* case where it mentioned the terms 'illegal armed insurgency', 'armed fighters', 'evacuation of civilians' and 'indiscriminate weapons'.[26] In 2011 in *Al-Skeini v United Kingdom* and *Al-Jedda v United Kingdom* concerning the British occupation of parts of Iraq during and in the aftermath of the international armed conflict, the Court explicitly referred to provisions of the Geneva Conventions.[27] However, it still applied the relevant ECHR provisions and not any less strict rules applicable to occupying powers under the law of armed conflict.[28]

Another case resulting from the armed conflict with Iraq is *Hassan v United Kingdom* on the legality of detention during the conflict.[29] The Court approached the question on the applicability of the law of armed conflict as follows: '… deprivation of liberty pursuant to powers under international humanitarian law must be "lawful" to preclude a violation of Article 5 § 1. This means that the detention must comply with the rules of international humanitarian law and, most importantly, that it should be in keeping with the fundamental purpose of Article 5 § 1, which is to protect the individual from arbitrariness …'.[30] In doing so, the Court has resorted to 'treaty interpretation in the light of subsequent practice and other international obligations' and decided against the government's argument that 'since Tarek Hassan was captured and initially detained as a suspected combatant, Article 5 was displaced by international humanitarian law as *lex specialis*'.[31]

This stance of the ECtHR is shared by the underlying tenets of this thesis. Although the prohibition of collective punishment is a concept stemming from the law of armed conflict, the question at hand is not one of the applicability of the law of armed conflict outside of its scope. It is rather a question of human rights law finding its own way of

[25] Clapham, A. (2015) *supra* note 22, pp.711f.
[26] *Isayeva v Russia supra* note 24, para.180, 189.
[27] *Al-Skeini and Others v the United Kingdom* (Merits and Just Satisfaction) no. 55721/07, Court (Grand Chamber) (7 July 2011) para.89ff; *Al-Jedda v United Kingdom* (Merits and Just Satisfaction) no. 27021/08, Court (Grand Chamber) (7 July 2011) para.42ff.
[28] *Al-Skeini v United Kingdom supra* note 27, para.168ff; *Al-Jedda v United Kingdom supra* note 27, para.97ff; Clapham, A. (2015) *supra* note 22, pp.713f.
[29] *Hassan v United Kingdom* (Merits) no. 29750/09, Court (Grand Chamber) (16 September 2014).
[30] *Hassan v United Kingdom supra* note 29, para.105.
[31] Clapham, A. (2015) *supra* note 22, p.715; *Hassan v United Kingdom supra* note 29, para.88.

dealing with the act of collective punishment itself. For this reason, the term "translating" is used – it is not Article 33 (1) of the Fourth Geneva Convention that should be applied by the ECtHR, rather the ECHR itself should provide the Court with means to address collective punishment and support affected groups in their struggle for justice.[32]

The human rights commonly violated by collective punishment include no collective element which could be assessed by judicial bodies such as the ECtHR.[33] However, this section has shown that the Court should still not resort to – and so far has not resorted to – the application of the law of armed conflict to the detriment of the protection and guarantees enshrined in the ECHR. Despite the *lex specialis* debate contributing to the confusion surrounding these issues, the Court has adopted a sensible approach based on its own derogation procedure and general treaty interpretation.

The comparison between the law of armed conflict and human rights law at the beginning of this section highlighted their different approaches and reflected on the difficulties complicating the attempt to "translate" collective punishment from the law of armed conflict into human rights law, which will be discussed in the next chapter. However, before embarking on that endeavour, the general question of whether human rights law is able to consider situations with group implications at all has to be examined. The following section will address this question.

5.1.3 Group rights and human rights law

This section analyses the position of human rights law regarding group rights. As mentioned above during the discussion of conceptual differences between the law of armed conflict and human rights law, the requirement of group membership, for instance regarding minority rights, is the exception in human rights law. However, the question of group rights in human rights law is a different one. Although one of the theories discussed in more detail supports the idea of individual rights based on group membership, the focus here is on rights held by groups collectively and independent of their members. The terms group rights and collective rights are used interchangeably in this context.

Collective punishment is the punishment of a group as such for an act committed or allegedly committed by one or some of its members for which they do not bear individual

[32] 75 UNTS 287, Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva (12 August 1949) Article 33.
[33] For a review of those rights see the preceding chapter on collective punishment and human rights law.

responsibility. A prohibition of collective punishment under human rights law would have to be able to encompass the collective dimension of this definition. This in turn would mean to allow groups to hold rights under human rights law such as the ECHR. As already laid out in the preceding chapters, individual rights protected under human rights law are unable to address the particular wrong done by collective punishment and the underlying intention going with it.[34] Groups are targeted because of alleged acts of some of their members – the act of collective punishment is not aimed at a particular individual member of a group, it is aimed at the group as a whole. For this reason, a prohibition of collective punishment needs to address the group as a collectivity. In order to empower affected groups, they require rights they can assert themselves as subjects, as independent rightholders.

The question of group rights in human rights law is addressed in the following. Although focused on the relationship of group rights and human rights law, the general tenets of the group rights debate will open the section and provide an overview of the concept's development. This is useful as most of the general debate is applicable to the particular debate about group rights and human rights as well. Subsequently, two group rights theories are contrasted – Will Kymlicka's 'group-differentiated rights', which has dominated the field for some time, and Dwight Newman's 'collective rights'.[35] This comparison highlights basic theoretical characteristics, in particular the problems of liberal theory with rights conceptions not based on individuals. After coming to the conclusion that groups are capable of holding rights, the concept of collective human rights will be discussed. An important aspect in this regard is the clarification that group or collective rights and collective human rights are not necessarily the same thing. Much theoretical confusion can be avoided by holding that group rights can be human rights, but group rights and human rights are two different concepts with both having their own theoretical foundation. Following that, the importance of considering collective punishment as a group right under human rights law will be supported by a short account of the meaning of empowerment and how it can contribute to the active participation of groups in social change.

---

[34] On this point in general see eg: McKay, F. (2013). What Outcomes for Victims?, in Shelton, D. (ed.). *The Oxford Handbook of International Human Rights Law*. Oxford, Oxford University Press, pp.921-954, p.951.

[35] Kymlicka, W. (1996). *Multicultural Citizenship: A Liberal Theory of Minority Rights.* Oxford, Clarendon Press; Newman, D. (2011). *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups*. Oxford, Hart.

5.1.3.1 The development of group rights

This short account of the general group rights debate already indicates that it is a contested field. The different approaches to the question relate to the different underlying ideologies or philosophical stances of the authors as much, or sometimes even more as they relate to practical considerations. Unless otherwise stated, this thesis adopts the understanding that group or collective rights describe rights held by groups instead of rights held by individuals. First however, the following sections need to provide some theoretical grounding for that understanding. This section will contribute to that aim by tracing the development of group rights.

In her introduction to a collection of articles on group rights, Stapleton provides a historical account of group rights, starting with English pluralism in the early twentieth century and Frederic Maitland. He was inspired by the German thinker Otto von Gierke who rejected the prevailing theory of groups as mere aggregations of individuals without independent existence by reference to German native societies being built on local communities (*Gemeinden*) and fellowships (*Genossenschaften*).[36] In his lecture on moral and legal personality, Maitland touched on 'group-personality': 'If the law allows men to form permanently organised groups, those groups will be for common opinion right-and-duty-bearing units' and '[f]or the morality of common sense the group is person'.[37]

In the interwar period, the focus shifted from groups with which the pluralists were concerned such as corporations, trusts and trade unions to groups based on nationality, ethnicity or race. Exemplary of that shift was the question of minority rights arising after the First World War. The League of Nations' minority protection scheme recognised the political status of several European minorities.[38] However, the way in which Nazi Germany used minority protection as a cloak for aggression undermined those efforts and the concept of group rights in general. Sceptics include Barker, who described totalitarianism as 'the idea of the transcendent and unitarian group'.[39] Albeit to a lesser extent, this scepticism continued after the Second World War, with opponents of group

[36] Stapleton, J. (1995). Introduction, in Stapleton, J. (ed.). *Group Rights: Perspectives since 1900*. Bristol, Thoemmes Press, pp.xiff.
[37] Maitland, F.W. (1903). Moral Personality and Legal Personality, in Fisher, H.A.L. (1911)(ed.). *The Collected Papers of Frederic William Maitland.* Cambridge, Cambridge University Press, pp.304-320, p.314.
[38] Stapleton, J. (1995) *supra* note 36, pp.xxiiff.
[39] Barker, E. (1942). *Reflections on Government*. New York, Oxford University Press (reprinted 1958), p.152.

rights perceiving them merely as impeding 'free individual choice'.[40] For instance Oakeshott depicts 'anti-individualists' or the 'mass man' as follows: 'He wants 'salvation'; and in the end will be satisfied only with release from the burden of having to make choices for himself.'[41]

Accounts dismissive of group rights or focused solely on individual rights have been and are being subjected to more and more questioning.[42] For instance, Rawls' *A Theory of Justice,* published in 1970, was thoroughly criticised by Van Dyke.[43] Rawls' findings are based on social contract theory and have the individual as starting point. Van Dyke's criticism is best explained in two of his remarks: 'It is arbitrary to assume that justice is only for individuals, or only for individuals and states.' And: 'Groups in fact have status and rights at an intermediate level between the individual and the state, and it is imperative for a theory of justice to take this fact into account.'[44]

This is not the only instance of Van Dyke trying to explain the problems of liberal thought with collective entities as it is centred around the individual.[45] After citing Dworkin and the idea that individuals' interests give rise to individual rights if there is no 'collective goal' denying that, he moved on questioning whether the individual's interest must necessarily result in a right held by an individual and whether sometimes it might not be more useful to have a collective entity holding such a right.[46] As he concluded: 'Individuals are not self-sufficient. … The development of their personalities and talents, their philosophies of life, and perhaps their very existence would depend on the community of which they are a part.'[47]

Similarly, Macdonald argued that the fixation of liberal thought on the individual as rightholder was missing the 'centrality of groups as the bearers of rights' which he explained as follows: 'I do not choose my language - it chooses me; I do not choose my

---

[40] Stapleton, J. (1995) *supra* note 36, pp.xxviiff; Oakeshott, M. (1961). The Masses in Representative Democracy, in Hunold, A. (ed.). *Freedom and Serfdom: An Anthology of Western Thought*. Dordrecht, D. Reidel, pp.151-170.
[41] Oakeshott, M. (1961) *supra* note 40, p.168.
[42] Stapleton, J. (1995) *supra* note 36, p.xxixf; O'Nions, H. (2007). *Minority Rights Protection in International Law: The Roma of Europe*. Farnham, Ashgate, pp.26ff.
[43] Rawls, J. (1971). *A Theory of Justice*. Cambridge, Harvard University Press.
[44] Van Dyke, V. (1975). Justice as Fairness: For Groups?, *American Political Science Review*, 69, pp.607-614, p.614.
[45] Van Dyke, V. (1974). Human Rights and the Rights of Groups, *American Journal of Political Science*, 18 (4), pp.725-741; Van Dyke, V. (1982). Collective Entities and Moral Rights: Problems in Liberal-Democratic Thought, *Journal of Politics*, 44 (1), pp.21-40.
[46] Dworkin, R. (1978). Taking Rights Seriously. Cambridge, Harvard University Press, p.xi; Van Dyke, V. (1982) *supra* note 45, pp.23ff.
[47] Van Dyke, V. (1982) *supra* note 45, p.39.

history, nor my cultural heritage nor my race. It is not that I am an individual with a particular identity who freely chooses to which groups I belong. My identity as an individual is, at least in part, a function of the groups of which I am a member.'[48]

Segesvary's stance on group rights provides a useful addition to the quotes above as he approached the issue from the point of socio-cultural analysis. He held that the 'individual human being and his group or community are *ontologically* interdependent.'[49] By that he meant '[t]here can be no individual without a group or community; there can be no community without individuals who are not only the actors in social and cultural life but the bearers of the community's belief- and value-systems, of its traditionally transmitted symbolic order.'[50] In his opinion, groups are sui generis entities just as individuals. Therefore, he criticised the 'sacralizing' of the abstract individual and the elimination of groups which has led to a situation where individuals are faced with an 'all-powerful' state.[51]

This socio-cultural analysis corresponds well with the methodological approach adopted in this thesis, the position that law has to be examined in relation to its impact in practice and its ability to provide tools for change. Segesvary offers an analysis of group rights dividing them into 'quasi-group rights' and 'sui generis group rights' with the former describing groups based on predetermined natural conditions such as sex or age and the latter 'derived from the constitution of a specific social and cultural human environment by groups of men' such as ethnic groups. His reasoning for attributing rights to such 'sui generis groups' resonates with the underlying tenets of this thesis' research question: 'The origin of group rights resides in the fact that members of the group are discriminated against precisely because of their group membership and not for their specific characteristics, qualities or defects, as individuals.'[52]

Gathering from this short review of the development of group rights theory, the stance that groups are constitutive of individual human beings and therefore rights-bearing entities just as individuals represents a promising starting point. The arguments that group rights would undermine individual choice or create the conditions for totalitarian

---

[48] Macdonald, I. (1989). Group Rights, *Philosophical Papers*, 18 (2), pp.117-136, p.122.
[49] Segesvary, V. (1995). Group rights: The definition of group rights in the contemporary legal debate based on socio-cultural analysis*, International Journal on Group Rights*, 3, pp.89-107, p.93; see also: Bowring, B. (2008). *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics*. Abingdon, Routledge-Cavendish, pp.151ff.
[50] Segesvary, V. (1995) *supra* note 49, p.93.
[51] Segesvary, V. (1995) *supra* note 49, pp.94ff.
[52] Segesvary, V. (1995) *supra* note 49, p.102.

regimes are superficial and not convincing. Based on this principal assumption, a more detailed analysis of two contrasting theories of group rights is provided in the following to ground the theoretical approach.

5.1.3.2 Group-differentiated rights and group rights

After outlining the origins of group rights including some comments and positions, the focus will now turn to recent scholarship on the matter. For the sake of space and clarity, this section compares only two stances representative of recent developments. One is Kymlicka's theory of 'group-differentiated rights' held by individual members of the group and the other is Newman's theory of collective moral rights held by groups, partly supported by Jovanović' core claims.[53] The contrast between those theories' conceptual foundations will emphasise the thesis' claim that it is not enough to simply grant rights to individual members of a group and not to the group itself. Thinking of collective punishment, an individual right would fail to acknowledge the inherent collective dimension of the act itself and would be unable to address the particular wrong done. However, in order to reach the point of devising potential solutions, potential obstacles such as theories rejecting group rights, have to be confronted first.

Will Kymlicka's liberal theory of minority rights as group-differentiated rights starts from the premise of rights granted because of specific qualities or features of a group in contrast to another group. Group members have individual rights due to their group membership.[54] Consequently, Kymlicka's account of minority rights is rooted in liberal individualist analysis.[55]

In his 1996 monograph *Multicultural Citizenship: A Liberal Theory of Minority Rights* Kymlicka devoted a chapter to individual and collective rights. In his opinion, it is not the distinction between individual and collective rights that is important, but the distinction between different claims of a group which he calls 'internal protections' and 'external restrictions'.[56] In his words: 'The first involves the claim of a group against its own members; the second involves the claim of a group against the larger society.'[57]

---

[53] Kymlicka, W. (1996) *supra* note 35; Newman, D. (2011) *supra* note 35; Jovanović, M. (2012). *Collective Rights: A Legal Theory*. Cambridge, Cambridge University Press.
[54] Kymlicka, W. (1996) *supra* note 35, pp.27ff, 110ff.
[55] Bowring, B. (1999). Multicultural Citizenship: A More Viable Framework for Minority Rights?, in Fottrell, D. & Bowring, B. (eds.). *Minority and Group Rights in the New Millennium*. The Hague, Kluwer Law International, pp.1-24, pp.9ff.
[56] Kymlicka, W. (1996) *supra* note 35, p.36.
[57] Kymlicka, W. (1996) *supra* note 35, p.36.

When discussing 'internal protections', issues such as internal dissent and the limitation of rights of group members are mentioned. However, being limitations on individual autonomy, these restrictions would raise 'the danger of individual oppression'. Although Kymlicka concedes that every state requires its citizens to contribute in some sense to the public good, be it by paying taxes or military duties, his 'internal restrictions' definition would only apply to limitations of 'basic civil and political liberties'. An example thereof would be cultural or religious traditions calling for particular gender roles or church duties.[58]

The nature of 'external protections' is defined by their concern with equality. Although special rights for instance in terms of land or language might create an 'unfair' situation between two groups, meaning putting one group in a better position to the detriment of another, Kymlicka sees the potential of 'external protections' in their ability to reduce the vulnerability of a minority against the larger society. Therefore, he supports 'external protections', but not 'internal restrictions'.[59]

In Kymlicka's view, the term 'collective rights' is misleading as it does not distinguish between 'internal restrictions' and 'external protections' and because it 'suggests a false dichotomy with individual rights'.[60] Owing to his theory, the idea that collective rights are opposed to individual rights would be unhelpful as the concept of group-differentiated rights grants rights to individual members of groups. However, Kymlicka is not overly concerned with the broader implications of the group rights debate, as indicated by one remark made during his assessment of the 'ambiguity' of collective rights, using the example of French Canadians' language rights: 'This debate is sterile because the question of whether the right is (or is not) collective is morally unimportant. The real issue in evaluating language rights is why they are group-specific – that is, why francophones should be able to demand court proceedings or education in their mother-tongue at public expense when Greek- or Swahili-speakers cannot.'[61]

Dwight Newman, the second author presented here, would disagree with the statement that the question of whether a right is collective or not is morally unimportant. In his 2011 monograph *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups*, he lays out the principles for collective moral rights. According to

[58] Kymlicka, W. (1996) *supra* note 35, p.37.
[59] Kymlicka, W. (1996) *supra* note 35, pp.37f.
[60] Kymlicka, W. (1996) *supra* note 35, p.46.
[61] Kymlicka, W. (1996) *supra* note 35, pp.46f.

Newman, a moral right is 'an entitlement or justified claim whose justification does not depend on whether any legal or political system recognizes the right.'[62] Collectivities are a 'collection of persons such that one would still identify it as the same collectivity were some or all of the included persons to change' and groups are collectivities with 'particularly strong member identification'.[63]

Following Raz' interest-based theory of rights, he argues that groups can be rightholders: '[O]nce we realise that a collectivity, a corporation or other, can act as a deep personification, mediating for persons of ultimate value [individual members], we see that a collectivity's capacity for rights makes sense.'[64] Elaborating on that, he holds that '[c]ollective rights will exist when a collective interest is sufficient to ground a duty.'[65] In order to support his claim, Newman refers amongst others to a case brought before the ECtHR. In the case *Metropolitan Church of Bessarabia and Others v Moldova* the Court ruled that the non-recognition of the applicant Church by the Moldovan state violated the applicants' freedom of religion.[66] By stating that the recognition of a Church was vital to the protection of freedom of religion, the judgment affirms that 'the individual right to freedom of religion presupposes the fulfilment of certain collective interests of religious collectivities.'[67] Referring to the "collective dimension" of the right to manifest one's religion, the Court held:

> 'Seen in that perspective, the right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords.'[68]

---

[62] Newman, D. (2011) *supra* note 35, pp.58ff; Raz, J. (1986). *The Morality of Freedom*. Oxford, Clarendon Press, p.11.
[63] Newman, D. (2011) *supra* note 35, p.4.
[64] Newman, D. (2011) *supra* note 35, p.56.
[65] Newman, D. (2011) *supra* note 35, p.80.
[66] *Metropolitan Church of Bessarabia and Others v Moldova* (Merits and Just Satisfaction) no.45701/99, Court (First Section) (13 December 2001) para.130.
[67] Newman, D. (2011) *supra* note 35, pp.78f; see also: *Hasan and Chaush v Bulgaria* (Merits and Just Satisfaction) no. 30985/96, Court (Grand Chamber) (26 October 2000) para.62.
[68] *Metropolitan Church of Bessarabia and Others v Moldova supra* note 66, para.118; see also eg: *Religionsgemeinschaft der Zeugen Jehovas and Others v Austria* (Merits and Just Satisfaction) no.40825/98, Court (First Section) (31 July 2008); *Fusu Arcadie and Others v the Republic Of Moldova* (Merits and Just Satisfaction) no.22218/06, Court (Third Section) (17 July 2012).

According to Newman's theory, collectivities have to fulfil two 'community conditions' in order to become rightholders: The service principle and the mutuality principle. The service principle requires that collectivities serve their members' interests, meaning that they can only hold rights if that is in the interest of its members.[69] This 'interest' is preserved as long as 'sufficient regard' has been paid to individual members' interests and they have not been ignored by the collectivity.[70] Furthermore, serving in its members' interest should be understood in a broad sense, which differs from Kymlicka's focus on individual autonomy.[71]

While the service principle describes the internal relationship between members and the group, the mutuality principle describes the external relationship between collectivities and their relationship to non-members. Newman holds that 'a collectivity's claims to rights must be respectful of equivalently weighty interests of non-members'.[72] Limitations to rights as well as means of coordination are offered to reconcile conflicts between collectivities' rights and those of non-members.[73]

After outlining Kymlicka's and Newman's account of group-differentiated rights and collective rights respectively, Newman's response to Kymlicka as well as a broader critical analysis of his theory are examined in the following.

First of all, Newman notes that Kymlicka's theory of group-differentiated rights avoids the broader group rights debate and instead focuses on individual rights in a minority rights context based on equality considerations. This approach does not contribute to a theory of group rights, as such a theory would have to be able to take majority as well as minority rights into account. Furthermore, Newman finds that Kymlicka's emphasis on individual autonomy based on a context of choice enabled by groups, restrains the 'object of equality behind the rights he advocates'.[74] As seen above, Newman's service principle is not limited to interests of individual autonomy, but includes broader interests promoting the wellbeing of the members of a group.[75]

---

[69] Newman, D. (2011) *supra* note 35, pp.58ff; Raz, J. (1986) *supra* note 62, pp.207ff.
[70] Newman, D. (2011) *supra* note 35, pp.126ff.
[71] Newman, D. (2011) *supra* note 35, pp.119ff.
[72] Newman, D. (2011) *supra* note 35, p.131.
[73] Newman, D. (2011) *supra* note 35, pp.137ff; Wa Mutua, M. (1999). Limitations on Religious Rights: Problematizing Religious Freedom in the African Context, *Buffalo Human Rights Law Review*, 5, pp.75-105.
[74] Newman, D. (2011) *supra* note 35, p.14.
[75] Newman, D. (2011) *supra* note 35, pp.13ff; Kymlicka, W. (1989). *Liberalism, Community, and Culture.* Oxford, Clarendon Press, pp.166ff.

Against Kymlicka's note that collective rights are 'heterogeneous' and 'have little in common',[76] Newman holds that to 'the extent that such rights are heterogeneous, they are no more so than individual rights, and much writing has sought to analyse the justifications of individual rights'.[77] Although Kymlicka is concerned with the clarity of collective rights, his categories of 'internal restrictions' and 'external protections' are vaguely defined themselves. According to him, 'internal restrictions' are objectionable if they infringe the rights of individual members of the group, or their 'basic civil and political liberties'.[78] However, elaborating further on that claim, he provides examples of taxation, which indicates that taxation would already infringe basic civil liberties and therefore almost any 'internal restriction' would be impermissible. Furthermore, 'external protections' can impose restrictions on or transform individual rights as well and have characteristics of 'internal restrictions'. For this reason, Newman criticises Kymlicka's basic categories as 'blurred' and not able to deal 'meaningfully' with the question of identifying external and internal aspects of cases.[79]

Another point of critique is found in Kymlicka's understanding of self-government. He describes self-government rights as devolving 'powers to smaller political units, so that a national minority cannot be outvoted or outbid by the majority on decisions that are of particular importance to their culture'. [80] However, Newman holds that self-government can be seen as part of the process of internal self-determination – a right 'giving rise to extended discussions on collective rights differing from traditional liberal rights.'[81] In particular, he highlights that any form of self-government is likely to include forms of internal restrictions for members of the group in question and a general objection to such restrictions would 'rob self-government of a substantial part of its meaning'.[82]

Similar to Newman, Miodrag Jovanović' theory of collective rights as presented in his 2012 monograph *Collective Rights: A Legal Theory* is grounded in Raz' interest-based theory of rights.[83] However, he develops a different approach as he claims that groups can have rights which are independent of their contribution to their members' wellbeing.

---

[76] Kymlicka, W. (1996) *supra* note 35, pp.35f.
[77] Newman, D. (2011) *supra* note 35, p.15.
[78] Kymlicka, W. (1996) *supra* note 35, p.37.
[79] Newman, D. (2011) *supra* note 35, p.17, 19, 16ff.
[80] Kymlicka, W. (1996) *supra* note 35, pp.38f.
[81] Newman, D. (2011) *supra* note 35, pp.23f; Crawford, J. (1985). The Rights of Peoples: Peoples or Governments, *Bulletin of the Australian Society of Legal Philosophy*, 9 (2), pp. 136-147.
[82] Newman, D. (2011) *supra* note 35, p.24.
[83] Jovanović, M. (2012) *supra* note 53.

Furthermore, he divides groups into pre-legally existing and legally constituted groups, with indigenous groups being an example for the former and trade unions for the latter.[84] Only 'pre-legally existing' groups can claim collective rights. Jovanović builds his theory on 'value collectivism'. Borrowing from Hartney, he describes value collectivism as 'the view that a collective entity can have value independently of its contribution to the well-being of individual human beings'.[85]

Newman has questioned Jovanović' theory regarding these two tenets – the selection of groups capable of holding rights and value collectivism providing for collective rights independent from their contribution to the wellbeing of group members. Understandably, a narrow approach of individual wellbeing such as Kymlicka's which accepts only group-differentiated rights that advance individual autonomy, would not be able to encompass the variety of rights groups can hold in order to advance and promote members' interests in general. However, situated within Newman's understanding, it is questionable which collective rights Jovanović has in mind as being independent of members' wellbeing, as most collective rights are likely to contribute to or promote exactly that in a broader sense. As Newman summarises: 'Something that makes the community's life go better that would not have made a particular individual's life go better but for the individual's participation in the community is actually primarily a collective interest and only secondarily an individual interest. And, here, one arrives already at the possibility of collective interests that are in some manner irreducible to individual interests.'[86]

Furthermore, legally constituted groups can hardly be reduced to mere legal constructs, as they too should be capable of holding rights to act in the interests of their members. In this regard, Newman refers to trade unions as example. He argues that groups of workers in particular industries might well have a 'clear set of shared understandings, a shared identity' and could therefore be considered to have pre-legal existence. Developing this thought, he points out: 'If the group then attained status as a trade union … the fact the group had legal recognition and legal definition would not be good reason to then say that it could not hold collective rights.'[87]

---

[84] Jovanović, M. (2012) *supra* note 53, pp.125ff.
[85] Jovanović, M. (2012) *supra* note 53, p.46, 44ff; Hartney, M. (1991). Some Confusions Concerning Collective Rights, *Canadian Journal of Law and Jurisprudence*, 4 (2), pp.293-314, p.297.
[86] Newman, D. (2013). Value Collectivism, Collective Rights, and Self-Threatening Theory, *Oxford Journal of Legal Studies*, 33 (1), pp. 197–210, p.202.
[87] Newman, D. (2013) *supra* note 86, p.208.

Although Newman's and Jovanović' account of group rights differ in their realisation, both agree that Kymlicka's concept of group-differentiated rights is insufficient to provide a sound theoretical grounding for group rights. Both agree that groups can be rightholders and have irreducible collective rights.

In addition to Newman and Jovanović, Corsin Bisaz has written the monograph *The Concept of Group Rights in International Law: Groups as Contested Right-Holders, Subjects and Legal Persons* in 2012.[88] According to Jovanović, Bisaz' account of group rights in international law is focused on legal rights and refrains explicitly from the more substantial debate of the theoretical grounding thereof.[89] Although he too comes to the conclusion that groups can be rightholders, he does so by stating that any claims to the contrary would be 'unconvincing'.[90] Despite the practical value of his research in terms of a thorough and useful review of existing group rights in international law combined with an outlook on potential emerging concepts and how states could deal with group rights in future, he does not provide a theoretical framework for his claim.[91]

The review of Kymlicka's and Newman's theory has shown that current scholarship is shifting from individual rights based on group membership to collective rights held by groups which are irreducible to their individual members. Despite conceptual differences between Newman and Jovanović, the general thrust of their and Bisaz' work points in the direction of groups as independent rightholders away from liberal accounts based on individual autonomy only. This finding represents an important step towards the consideration of a prohibition of collective punishment under human rights law based on a group right. The final missing component opening the way to embark on potential practical solutions to the problem at hand is the analysis of human rights law's capacity to encompass group rights which will be dealt with subsequently.

5.1.3.3 Group rights as human rights

Although the question of human rights held by groups or collective human rights is at the centre of this chapter, its evaluation will be rather brief. This is due to the overlap of the general theoretical debate on group rights with the claims made regarding collective

[88] Bisaz, C. (2012). *The Concept of Group Rights in International Law: Groups as Contested Right-Holders, Subjects and Legal Persons*. Leiden, Martinus Nijhoff.
[89] Jovanović, M. (2013). Review of C. Bisaz, The Concept of Group Rights in International Law – Groups as Contested Right-Holders, Subjects and Legal Persons, *International Journal on Minority and Group Rights*, 20, pp.577-583.
[90] Bisaz, C. (2012) *supra* note 88, p.19.
[91] Jovanović, M. (2013) *supra* note 89, pp.2ff.

human rights. However, in that overlap lies significant danger too. Although the question at hand is whether human rights can be held by a group, that does not mean that group rights are simply a subdivision of human rights. Some group rights are human rights, but that does not mean that all group rights are human rights – just as not all individual rights are human rights.

The question whether group rights are human rights is controversial. Arguments range from opposition based on the premise that human rights are necessarily linked to individual human beings to support stating that some aspects fundamental to human life can only be protected by recognising their collective dimension.[92] Felice has written a comprehensive monograph entitled *Taking Suffering Seriously: The Importance of Collective Human Rights* in 1996.[93] First, he points out that the exercise of some individual rights is depending on the previous realisation of an associated group right. Support for this stance might be found in the ECtHR case referred above, where the Court held that the recognition of a church was vital to the protection of freedom of religion of individuals.[94]

Felice's main claim, however, is based on the following assumption: 'In contrast to the liberal premise of the isolated human being, the ideas of collective human rights begin with a view of humans as they really are, that is, as social beings.'[95] These social beings 'congregate, associate and exist within groups.'[96] Felice widens the scope of groups holding human rights to include not only groups defined by ethnicity or race, but also groups based on class, gender and sexuality.[97] His understanding of the term 'human' is informed by his definition of the social being: 'Human here means fundamental

[92] Jones, P., Group Rights, The Stanford Encyclopedia of Philosophy (Summer 2016 Edition), Edward N. Zalta (ed.), online available at: https://plato.stanford.edu/archives/sum2016/entries/rights-group/ (accessed on 15/04/18); Contra group rights as human rights see eg: Donnelly, J. (2013). *Universal Rights in Theory and Practice*. 3rd edition. Ithaca, Cornell University Press, pp.45ff; Jovanović, M. (2012) *supra* note 53, pp.166ff; Griffin, J. (2008). *On Human Rights*. Oxford, Oxford University Press, pp.256-276; Pro group rights as human rights: Thompson, J. (2015). Can Groups Have Human Rights?, *Ethical Perspectives*, 22 (2), pp.291-313; Holder, C. (2006). Self-Determination as a Universal Human Right, *Human Rights Review*, 7 (4), pp.5-18; Felice, W.F. (1996). *Taking Suffering Seriously: The Importance of Collective Human Rights*. New York, State University of New York Press; Freeman, M. (1995). Are there Collective Human Rights?, *Political Studies,* 43 (1), pp.25-40; Crawford, J. (1985) *supra* note 81, pp. 136-147.
[93] Felice, W.F. (1996) *supra* note 92.
[94] *Metropolitan Church of Bessarabia and Others v Moldova supra* note 66, para.118.
[95] Felice, W.F. (1996) *supra* note 92, p.19.
[96] Felice, W.F. (1996) *supra* note 92, p.19.
[97] Felice, W.F. (1996) *supra* note 92, pp.17ff.

relationships, processes, and interactions with others in society.'[98] Building on Marxist theory, he states the promise of collective human rights: '[A] democratic socialist theory of collective human rights could confront structures of domination and exploitation through its advocacy of certain group rights. This theory could expose how the structures of class society violate these rights and thereby create pressure for fundamental change.'[99]

Felice's stance could be supported by Gould's recent essay on *A Social Ontology of Human Rights*. Although not explicitly referring to the concept of group rights in human rights law, Gould further develops her account of agency stemming from earlier works, which is based on 'individuals-in-relations'.[100] These relations are understood as 'constitutive of individuals in the sense that they become who they are in and through these relations', but the individuals concerned retain the ability of choosing and changing these relations individually or collectively with others.[101] Speaking of the features of her social ontology, she holds that agency 'is essentially open to others and expresses our need for and dependence on each other. Such interdependence and mutual neediness involve elements of both inter-constitution through processes of recognition and the necessity for collective rather than only individual action for the realization of many aims and goals.'[102]

On a side note and for clarification purposes, Bisaz argues that much of the controversy surrounding group rights stems from the (in his opinion wrong) conception that group rights are necessarily human rights or a sub-group of human rights. He holds that 'providing group rights does not mean at the same time to provide human rights or vice versa, there is no basis for such a conceptual connection.'[103] Although some group rights are considered fundamental rights, 'it is important not to discuss this topic from a categorical perspective, but from the perspective of a concrete example of a group right like the group's right to existence in the sense of the Genocide Convention.'[104]

---

[98] Felice, W.F. (1996) *supra* note 92, p.19.
[99] Felice, W.F. (1996) *supra* note 92, pp.136f.
[100] Gould, C.C. (2015). A Social Ontology of Human Rights, in Cruft, R., Liao, S.M. & Renzo, M. (eds.). *Philosophical Foundations of Human Rights*. Oxford, Oxford University Press, pp.177-195, p.181; Gould, C.C. (1988). *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy, and Society*. Cambridge, Cambridge University Press; Gould, C.C. (1978). *Marx's Social Ontology*. Cambridge, MIT Press.
[101] Gould, C.C. (2015) *supra* note 100, pp.184, 191ff.
[102] Gould, C.C. (2015) *supra* note 100, p.186.
[103] Bisaz, C. (2012) *supra* note 88, p.156.
[104] Bisaz, C. (2012) *supra* note 88, pp.156, 153ff.

This case-by-case assessment of group rights as human rights in practice seems appealing as more international and regional human rights instruments are featuring collective rights, starting with the most prominent group right, the right to self-determination of peoples, which is enshrined in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights dating back to 1966.[105] More recent instruments, such as the African Charter on Human and Peoples' Rights include whole sections explicitly dealing with group rights.[106] This development has been characterised by some as the emergence of a "third generation" of human rights, with the first generation containing civil and political rights and the second economic and social rights. Rights constituting this "third generation" include rights of indigenous peoples, rights to development, peace, culture or a clean environment.[107]

Apart from the endorsement of collective rights in human rights instruments in practice, Felice's theoretical argument for collective human rights corresponds well with the theoretical approach grounding this thesis. His theory of collective human rights encompassing groups based on ethnicity, race, class, gender and sexuality represents a strong starting point for potential ways to approach collective punishment in human rights law. Although Felice lists some groups explicitly, these are seen as illustrative of his theory and not as excluding groups based on other criteria as long as the group as such is identifiable. A prohibition of collective punishment under human rights law could contribute to the empowerment of affected groups to actively engage in and raise awareness for their broader struggle for justice and social change. After establishing the possibility of collective human rights, the question of group empowerment and its implications for the present thesis are outlined in the following last section of this chapter.

---

[105] 999 UNTS 171 International Covenant on Civil and Political Rights (16 December 1966) Article 1; 993 UNTS 3 International Covenant on Economic, Social and Cultural Rights (16 December 1966) Article 1.

[106] African (Banjul) Charter on Human and Peoples' Rights (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986) Articles 19 to 24.

[107] Jones, P. (2016) *supra* note 92; A/RES/61/295 United Nations Declaration on the Rights of Indigenous Peoples (13 September 2007); Xanthaki, A. (2011). The UN Declaration on the Rights of Indigenous Peoples and Collective Rights: What's the Future for Indigenous Women?, in Stephen, A. & Xanthaki, A. (eds.). *Reflections on the UN Declaration on the Rights of Indigenous Peoples*. Oxford, Hart, pp.413-431.

5.1.3.4 From protection to empowerment

A theoretical aspect that does not directly relate to the question of group rights but to the general aim of the present thesis is that of group empowerment. As argued throughout the preceding chapters, groups affected by collective punishment such as the families of alleged terrorists or insurgents need tools to hold the perpetrators to account. At the same time, the groups mentioned in the case study also belong to bigger groups or communities, namely the Palestinians and the Chechens and the collective punishment policies imposed on Palestinian and Chechen families overlap with the discriminatory treatment of those groups by the authorities in general even though the prohibition of collective punishment itself does not require a discriminatory element regarding group composition. The question of empowerment explains the importance of a consideration of collective punishment under human rights law as groups need rights they can assert themselves to call on duty bearers to respect their rights and bear responsibility in case of violations.

Tove Malloy has written about a theory of empowerment for national minorities in 2014. Setting the scene, she confirms that 'the protection paradigm holds a hegemonic position in policy-making' and that 'a dependency relationship is created which on the surface renders members of minorities inactive in the determination of their own existence. One might argue that the notion of protection portrays minorities as victims, or recipients of a type of entitlement, the entitlement of protection. It brackets minorities as objects rather than subjects of their own lives.'[108] Whereas Malloy sees protection as a 'one-way process involving proactive providers and passive recipients', empowerment is about 'the capacity of the beneficiaries as actors who make choices and take action on the basis of choices'. To get from protection to empowerment, Malloy envisages a transition building on this capacity of beneficiaries.[109]

To create her theory of minority empowerment, Malloy relies on Sadan's theory of empowerment based on power.[110] Sadan divides empowerment into 'individual empowerment', 'community empowerment' and 'empowerment as a professional practice'.[111] Community empowerment is understood as 'the increased control of people

[108] Malloy, T.H. (2014). National Minorities between Protection and Empowerment: Towards a Theory of Empowerment, *Journal on Ethnopolitics and Minority Issues in Europe*, 13 (2), pp.11-29, pp.11f, 13.
[109] Malloy, T.H. (2014) *supra* note 108, pp.15ff.
[110] Sadan, E. (2004*). Empowerment and Community Planning: Theory and Practice of People-Focused Social Solutions.* Tel Aviv, Hakibbutz Hameuchad Publishers.
[111] Sadan, E. (2004) *supra* note 110, pp.73ff.

as a collective over outcomes important to their lives'.[112] Speaking about ethnic minorities, Sadan develops a 'corrective' and a 'preserving' approach. As the corrective approach 'sees empowerment as a method of treatment which will ease problems created as a result of prolonged deprivation and discrimination, and will help a group overcome obstacles on the path to social equality' it is more relevant to the present thesis than the preserving approach which deals with the protection of special qualities and resources of the group which could be of benefit to the larger society if it is willing to undertake adjustments to enable the group's empowerment.[113] In the process of community empowerment, a 'collective with a common critical characteristic, that suffers from social stigmas and discrimination, acquires ability to control its relevant environment better and to influence its future.'[114]

According to Malloy, 'empowerment as part of social change within a social structure is seen as human action made possible within the boundaries of the social structure in which it takes place (structuration).'[115] After reviewing Sadan's account of collective empowerment, Malloy offers a combination of empowerment and rights theory. In this combination, she finds the 'two-way process that identifies the relationship between the rights-holder and the duty-bearer' in contrast to the one-way relationship examined at the beginning. For Malloy, minority groups only need to act in case of positive rights, which they can claim. However, in my opinion, rights based on non-interference also have this inherent call for action. As Malloy rightly says: '[W]hen minorities mobilize on the basis of protection schemes by claiming their rights and calling on duty-bearers to take responsibility, they move towards the goal of empowerment.'[116] What groups such as minorities are empowered to do by a prohibition of collective punishment under human rights law is exactly that, 'calling on duty-bearers to take responsibility'.

The aspect of group empowerment strengthens the call of this chapter for human rights held by groups in the form of a prohibition of collective punishment under human rights law. Such a provision would enable affected groups to act and not just to be acted upon. In addition, they could also contribute to the broader struggle for justice of the bigger group they belong to. Although a prohibition implies only retrospective action in terms of claim proceedings, it also offers preventive potential as duty bearers are asked to

[112] Sadan, E. (2004) *supra* note 110, p.85.
[113] Sadan, E. (2004) *supra* note 110, pp.95f.
[114] Sadan, E. (2004) *supra* note 110, p.145.
[115] Malloy, T.H. (2014) *supra* note 108, p.20.
[116] Malloy, T.H. (2014) *supra* note 108, p.21.

comply with an obligation and the relevant institutions overseeing these obligations could monitor their conduct. These aspects are considered in more detail in the next chapter, which is devoted to potential solutions in practice.

5.1.4 Conclusion

Collective punishment is defined as the punishment of a group as such for an act committed or allegedly committed by one or some of its members for which they do not bear individual responsibility. Due to this inherent collective dimension, collective punishment has to be approached from a group rights perspective. A prohibition of collective punishment centred on an individual as rightholder is unable to encompass the particular wrong done by collective punishment. Consequently, this discussion needs to be based on the affected group, the family of an alleged insurgent, as rightholder. However, in order to get to the practical considerations surrounding that prohibition, the possibility of rights held by groups in human rights law needs to be established first.

This chapter has addressed the nature and conceptual differences between the law of armed conflict and human rights law, including some aspects of the applicability of both frameworks in case of norm conflicts. Subsequently, it focused on the concept of group rights by first providing a general account of their development, followed by a comparison of two competing theories and the situation of group rights within human rights law and group empowerment. In conclusion, one can hold that groups are constitutive of individual human beings who are essentially social beings. For this reason, groups are right-bearing entities who derive those rights from collective interests that are irreducible to their individual members. Although group rights are not a sub-group of human rights from a conceptual point of view, group rights can be human rights. Human rights understood as rights regulating fundamental social processes and interactions with others in society can accommodate the notion of group rights.

Expanding on this short summary, the chapter has provided the theoretical foundation for the following attempt to devise ways to deal with collective punishment under human rights law. The possibility of rights based on groups as rightholders under human rights law is an essential precondition for the assessment of the practical viability of a prohibition of collective punishment under this framework in the next chapter.

5.2 Closing the gap – a practical question

5.2.1 Introduction

This last chapter analyses the potential of a prohibition of collective punishment under the European Convention on Human Rights or an additional protocol to it. Owing to the underlying methodological approach, this emphasis on the application and effect of law in practice represents a sound conclusion of the thesis. However, the potential solution offered in this chapter provides merely an outlook and its realisation depends on further developments in the area.

The analysis so far has established the possibility of group rights as human rights in the preceding chapter, as well as the necessity of a consideration of collective punishment under the human rights framework in the chapters on human rights and collective punishment and the case study on Chechnya. This section of the analysis, which is intended to lay the basis for suggestions on how to address collective punishment under human rights law, starts with an assessment of other Council of Europe human rights instruments bearing collective aspects. These are the Framework Convention for the Protection of National Minorities and the European Social Charter.

Even though the minority rights enshrined in the FCNM focus on rights of persons belonging to national minorities instead of the rights of national minorities as groups, the examination of that area of human rights offers insights in the realisation of collective rights in practice. Another important indicator is the ESC whose collective complaint mechanism is only available to collectivities such as non-governmental organisations or trade unions. Looking at how the European Committee on Social Rights (ECSR) is dealing with collective complaints by these organisations relating to groups such as the Roma generates useful evidence for the viability to adjudicate on collective rights in the human rights context.

In addition, one should not forget one crucial aspect these two instruments (just as any international treaty) bring to the discussion of group rights in the CoE context – state consent. Member states of the CoE have agreed on these two human rights treaties and regarding the ESC, also on group rights and a collective complaints mechanism open only to collectivities to ensure their protection. This approval lends support to a consideration of a prohibition of collective punishment as a group right under the ECHR, another CoE human rights instrument.

In order to highlight similarities and differences between rights and cases relating to the ESC and the ECHR, a short case review will be undertaken. The selected cases focus on discrimination of groups and the majority thereof concerns the Roma community. To see how the ECSR and the European Court of Human Rights deal with similar situations and applicants of the same group offers valuable insights into their working methods and potential ways of realising a prohibition of collective punishment under the ECHR.

Finally, the usefulness of a broad interpretation of the ECHR in the light of the FCNM, the ESC and the African Charter on Human and Peoples' Rights will be addressed. Although the ECtHR's references to the FCNM and the ESC support the general acceptance of a broader, perhaps groups-encompassing reading of the ECHR, a prohibition of collective punishment cannot be interpreted into its existing framework. For this reason, the potential of a new rule is analysed and weighed up against previous unsuccessful efforts to include minority rights or social rights into the ECHR. Given the well-established state consent regarding the prohibition of collective punishment under the law of armed conflict, the fundamental nature of a right to freedom from collective punishment and its sufficiently precise wording, the chapter concludes that the adoption of a new rule prohibiting collective punishment under the ECHR is viable.

5.2.2 European Framework Convention on the Protection of National Minorities (FCNM)

Reversing the chronological order of their creation, the assessment of group related human rights instruments of the CoE starts with the Framework Convention. This decision is due to the cross-referencing case reviews of the ECSR and the ECtHR which lead logically to the last section of the chapter and are therefore better placed after this section.

The FCNM was adopted by the Council of Europe in 1995 and entered into force in 1998.[1] As the term "framework" indicates, it sets out programme-type provisions, calling on member states to promote and implement these principles. Although the Framework Convention is a legally binding instrument, the formulation of its provisions allows for a measure of discretion.[2] It has no complaints mechanism, but states are required to provide periodical reports which are reviewed by the Advisory Committee (AC) under

[1] CETS 157 Framework Convention for the Protection of National Minorities (adopted on 1 February 1995, entry into force on 1 February 1998).
[2] Philips, A. (2004). The Framework Convention for the Protection of National Minorities, in Council of Europe Publishing (ed.). *Mechanisms for the Implementation of Minority Rights*. Strasbourg, Council of Europe Publishing, pp.109-129, pp.109f.

the FCNM. Although the FCNM addresses 'persons belonging to a national minority' and not national minorities as collectivities, its Article 3 (2) states that '[p]ersons belonging to national minorities may exercise the rights and enjoy the freedoms flowing from the principles enshrined in the present framework Convention individually as well as in community with others.'[3] In the following, the monitoring procedure of the AC and the non-discrimination framework of the FCNM will be outlined. Both serve as indicators of the way in which CoE member states perceive human rights related to groups and how those relevant FCNM principles could support a prohibition of collective punishment.

5.2.2.1 Monitoring procedure

The monitoring mechanism of the FCNM is set out in its Articles 24 to 26 with the main competent body being the Committee of Ministers (CoM).[4] The CoM monitors the implementation of the FCNM and is supported in its tasks by the Advisory Committee. Originally, the European Commission on Democracy through Law supported a judicial mechanism. During the negotiations on the final draft, however, the support for some form of committee or expert panel oversight was growing and realised in the form laid out in Articles 24 to 26 FCNM. This means that individual petitions cannot be filed under the FCNM framework.[5] The AC is an independent expert committee. Its impartiality is crucial to ensure an unbiased monitoring process as the CoM which acts as the CoE's decision-making body, is a political body.[6] The AC reviews periodic state reports and adopts opinions on measures to be taken to implement the FCNM which are forwarded to the CoM.[7] The AC can request further information from the state under review and after notifying the CoM, it can seek information from non-governmental sources as well.[8] In addition to these tasks, the AC is conducting country visits.[9]

---

[3] Article 3 (2) FCNM; ACFC/56DOC(2016)001 The Framework Convention: a key tool to managing diversity through minority Rights, Thematic Commentary No. 4 The Scope of Application of the Framework Convention for the Protection of National Minorities (27 May 2016) para.2; Thornberry, P. & Estébanez, M. (2004). *Minority Rights in Europe*. Strasbourg, Council of Europe Publishing, pp.98f.

[4] Topidi, K. (2005). Articles 24-26, in Weller, M. (ed.). *The Rights of Minorities in Europe: A Commentary on the European Framework Convention for the Protection of National Minorities*. Oxford, Oxford University Press, pp.573-587.

[5] Topidi, K. (2005) *supra* note 4, pp.575ff.

[6] Topidi, K. (2005) *supra* note 4, pp.577ff; Article 26 FCNM.

[7] Resolution (97)10 Rules adopted by the Committee of Ministers on the Monitoring Arrangements under Articles 24 to 26 of the Framework Convention for the Protection of National Minorities (17 September 1997) Rule 23; on the outline for state reports see: ACFC/INF (98)2 Rules of Procedure of the Advisory Committee on the Framework Convention for the Protection of National Minorities (29 October 1998).

[8] Resolution (97)10 *supra* note 7, Rules 29, 31.

[9] Resolution (97)10 *supra* note 7, Rule 32; Thornberry, P. & Estébanez, M. (2004) *supra* note 3, pp.112ff.

Neither the findings of the AC nor the CoM are legally binding.[10] In addition, the effectiveness of the monitoring process is suffering due to delays in the submission of state reports and initial uncooperative behaviour of states regarding comments to AC opinions and the follow-up process which is fortunately changing.[11]

In his concluding remarks to the commentary, Weller pointed to the weak wording of the FCNM as well as the limited capacities of the CoM and the AC.[12] He observed that the Framework Convention was a result of the rejection of a protocol relating to minority rights to the ECHR in 1993 just a few years before the adoption of the FCNM.[13] Nevertheless, he reaffirmed that minority rights are human rights.[14] Overall, Weller painted an optimistic outlook which, more than ten years after his remarks can only be confirmed by the number of states acceding to the Framework Convention.[15] As of April 2018, 39 member states of the Council of Europe have signed and ratified the treaty, leaving Belgium, Greece, Iceland and Luxembourg as signatory states which have not yet ratified and Andorra, France, Monaco and Turkey which have neither signed nor ratified the FCNM.[16] Furthermore, Kosovo is subject to a specific monitoring arrangement regarding the principles set out in the FCNM in accordance with an agreement signed between the CoE and the United Nations Interim Administration Mission in Kosovo (UNMIK).[17] These accession numbers as well as the increasing compliance of states with

[10] Topidi, K. (2005) *supra* note 4, p.581.
[11] Topidi, K. (2005) *supra* note 4, pp.582f; see eg: Advisory Committee on the Framework Convention for the Protection of National Minorities, 10th Activity Report covering the period 1 June 2014 - 31 May 2016, pp.13f.
[12] Weller, M. (2005). Conclusion: The Contribution of the European Framework Convention for the Protection of National Minorities to the Development of Minority Rights, in Weller, M. (ed.). *The Rights of Minorities in Europe: A Commentary on the European Framework Convention for the Protection of National Minorities*. Oxford, Oxford University Press, pp.609-638.
[13] Weller, M. (2005) *supra* note 12, p.610; for further details on the debate on an additional protocol see the last section of the chapter.
[14] Weller, M. (2005) *supra* note 12, p.613; Heintze, H.-J. (2005). Article 1, in Weller, M. (ed.). *The Rights of Minorities in Europe: A Commentary on the European Framework Convention for the Protection of National Minorities*. Oxford, Oxford University Press, pp.77-96; Article 1 FCNM; Hannikainen, L. (2007). Legal nature of minority rights as part of human rights, limitations, derogations, reservations, and interpretative statements, in Weller, M. (ed.). *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies*. Oxford, Oxford University Press, pp.27-48, pp.27ff.
[15] Weller, M. (2005) *supra* note 12, pp.628f.
[16] Council of Europe, State Parties to the FCNM, online available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/157/signatures?p_auth=ZuYF6lVq (accessed on 15/04/18).
[17] Council of Europe, Agreement between the United Nations Interim Administration Mission in Kosovo (UNMIK) and the Council of Europe on technical arrangements related to the Framework Convention for the Protection of National Minorities, 890th meeting (30 June 2004) online available at:

their reporting obligations are 'actively contributing to lifting the expectations of performance in relation to the Framework Convention.'[18] In other words, states are increasingly more willing to accept minority rights obligations such as those set out in the FCNM. This gradual shift could serve as important indicator when it comes to the interpretation of other human rights instruments such as the ECHR in the group rights context.

5.2.2.2 Non-discrimination

Article 4 FCNM enshrines the rights of equality before the law, equal protection by the law and a prohibition of discrimination based on belonging to a national minority.[19] In addition, the Article calls for the adoption of adequate measures to promote full and effective equality between persons belonging to a national minority and to the majority and clarifies that such measures would not be considered discriminatory. The adequacy of such measures is determined by their proportionality.[20] Although the FCNM follows the traditional individualistic human rights framework, Alfredsson argued that 'there are good reasons for extending minority rights to group rights' – a point he only briefly explained by reference to solidarity and conflict prevention aspects.[21]

Interestingly, at the end of his short commentary on Article 4 FCNM, Alfredsson reiterated his opinion that group rights might be beneficial in terms of minority protection and expressed support for the adoption of an additional protocol to the ECHR on minority rights to allow the ECtHR 'to deal not only with the rules of equal rights and non-discrimination, but also with specific, special measures for the effective realization of minority rights.'[22] Several attempts of adopting such an additional protocol for national minorities will be discussed later in this chapter.

In addition to the rights set out in Article 4 FCNM, Article 6 FCNM urges states to undertake effective measures to 'promote mutual respect and understanding and co-

---

https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805dc82d (accessed on 15/04/18).

[18] Weller, M. (2005) *supra* note 12, p.635.

[19] Article 4 FCNM; Alfredsson, G. (2005). Article 4, in Weller, M. (ed.). *The Rights of Minorities in Europe: A Commentary on the European Framework Convention for the Protection of National Minorities*. Oxford, Oxford University Press, pp.141-152; ACFC/44DOC(2012)001rev Thematic Commentary No. 3: The Language Rights of Persons Belonging to National Minorities under the Framework Convention
(adopted on 24 May 2012) para.26ff; Thornberry, P. & Estébanez, M. (2004) *supra* note 3, pp.100ff.

[20] Alfredsson, G. (2005) *supra* note 19, pp.148f.

[21] Alfredsson, G. (2005) *supra* note 19, pp.150f.

[22] Alfredsson, G. (2005) *supra* note 19, p.152.

operation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity' and to 'protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.'[23]

Given the regulation of non-discrimination by the ECHR as well as the FCNM, the question as to their relationship arises. The FCNM refers directly to the ECHR in its Articles 19 and 23. Article 19 FCNM contains a general clause on compliance with other relevant instruments when implementing FCNM principles.[24] Article 23 FCNM states that any principles of the Framework Convention which have a counterpart in the ECHR should be 'understood so as to conform to the latter provisions'.[25] This rule provides useful guidance as the AC can refer to the ECtHR's case law in areas such as freedom of expression, assembly or religion. However, this is not a one-way process. The ECtHR has in turn referred to AC opinions in cases such as *D.H. and Others v the Czech Republic*, *Oršuš and Others v Croatia* or *Antayev and Others v Russia*.[26] Furthermore, other CoE bodies such as the ESC discussed in the following, have made use of the state reports delivered under the FCNM system as well.[27]

The increasing number of states ratifying the FCNM as well as their willingness to contribute to the AC's monitoring procedure are promising developments in the context of minority rights. Together with the ECtHR practice of referring to AC opinions, this gradual shift could help facilitate a broader interpretation of the ECHR and group rights such as a prohibition of collective punishment.

5.2.3 European Social Charter (ESC)

In search for useful guidance for the adoption of a prohibition of collective punishment under the ECHR, the ESC's collective complaints system and Article E Revised ESC on

[23] Article 6 FCNM; Thematic Commentary No. 4 The Scope of Application of the Framework Convention for the Protection of National Minorities *supra* note 3, para.51ff.
[24] Article 19 FCNM; Spiliopoulou Åkermark, S. (2008). The Added Value of the Framework Convention for the Protection of National Minorities (I), in Verstichel, A, Alen, A., De Witte, B. & Lemmens, P. (eds.). *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?.* Antwerp, Intersentia, pp.69-90, pp.79ff.
[25] Article 23 FCNM.
[26] Spiliopoulou Åkermark, S. (2008) *supra* note 24, pp.82ff; *D.H. and Others v the Czech Republic* (Merits and Just Satisfaction) no.57325/00, Court (Grand Chamber) (13 November 2007) para.66; *Oršuš and Others v Croatia* (Merits and Just Satisfaction) no.15766/03, Court (Grand Chamber) (16 March 2010) para.68ff; *Antayev and Others v Russia* (Merits and Just Satisfaction) no.37966/07, Court (First Section) (3 July 2014) para.83.
[27] See eg: *European Roma Rights Centre (ERRC) v Bulgaria* (Merits) no.46/2007 (3 December 2008) para.46; *Centre on Housing Rights and Evictions (COHRE) v Italy* (Merits) no.58/2009 (25 June 2010) para.69.

non-discrimination are examined below in more detail. In addition, several non-discrimination cases of the ECSR are reviewed to highlight the viability of adjudicating group rights in practice.

The ESC was adopted in 1961 and entered into force in 1965.[28] Following the structure of the emerging International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, it was envisaged as the social, economic and cultural rights counterpart to the civil and political rights encompassing ECHR.[29] However, the ESC has suffered from a lack of state as well as public interest in the first years after its adoption. The available monitoring and supervision mechanisms and its programme-type provisions have been criticised.[30] In response, the ESC underwent substantial revision in 1995 and 1996, one of the most important developments being the establishment of a collective complaints system only open to complaints by collectivities and not by individuals.[31] As of April 2018, the additional protocol introducing the collective complaints system was signed and ratified by 15 CoE member states.[32] The Revised Charter was signed and ratified by 34 CoE member states by April 2018, 11 states including Germany, Spain and the United Kingdom have signed but not ratified and Liechtenstein and Switzerland have neither signed nor ratified the treaty.[33] The following section will focus on the relevant provisions of this Revised Charter.

The Revised ESC is built upon several groups of protected rights, covering the areas of housing, health, education, employment, legal and social protection, movement of

[28] CETS 035 European Social Charter (adopted on 18 October 1961, entry into force on 26 February 1965).
[29] Benelhocine, C. (2012). *The European Social Charter*. Strasbourg, Council of Europe Publishing, pp.12f.
[30] See eg: De Schutter, O. & Sant'Ana, M. (2012). The European Social Charter, in De Beco, G. (ed.). *Human Rights Monitoring Mechanisms of the Council of Europe*. London, Routledge, pp.71-99, p.72; Gori, G. (2005). Domestic Enforcement of the ESC: The Way Forward, in De Búrca, G., De Witte, B. & Ogertschnig, L. (eds.). *Social Rights in Europe*. Oxford, Oxford University Press, pp.69-88, pp.70f.
[31] CETS 158 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (adopted on 9 November 1995, entry into force on 1 July 1998); CETS 163 European Social Charter (revised) (adopted on 3 May 1996, entry into force 1 July 1999).
[32] Council of Europe, State Parties to the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, online available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/158/signatures?p_auth=F3KSQtYr (accessed on 15/04/18).
[33] Council of Europe, State Parties to the Revised ESC, online available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163/signatures?p_auth=6WKmbcgT (accessed on 15/04/18).

persons and non-discrimination.[34] In contrast to other human rights instruments such as the ECHR where states ratify the treaty as a whole and make reservations in that process, the ESC requires acceding states only to agree on six out of nine 'core provisions' and they can decide by which other provisions they want to be bound subject to certain minimum thresholds.[35] The core provisions include Article 1 (right to work), 5 (right to organise), 6 (right to bargain collectively), 7 (right of children and young persons to protection), 12 (right to social security), 13 (right to social and medical assistance), 16 (right of the family to social, legal and economic protection), 19 (right of migrant workers and their families to protection and assistance) and 20 (right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex) Revised ESC.[36]

Compliance with these rights is monitored by the European Committee on Social Rights. In addition to issuing conclusions on received state reports, this body decides on collective complaints brought by trade unions and non-governmental organisations. Ideally, the Committee's activities result in changes in the law of the affected member state, bringing its legal framework in line with the Charter. Although the ECSR's decisions are only declaratory of the law and not directly enforceable in domestic courts, some states have even undertaken necessary legislative changes as soon as a collective complaint arose and before the ECSR had handed down a decision.[37]

5.2.3.1 Collective complaints procedure

In contrast to other human rights instruments, the ESC does not provide for individual petition. Instead, the collective complaints system allows organisations to raise concerns about domestic legislation affecting Charter rights of whole groups of people such as workers or union members. The organisations entitled to submit complaints to the ECSR are national and international workers' and employers' organisations, international non-governmental organisations with participatory status and included in a list of the

[34] Benelhocine, C. (2012) *supra* note 29, pp.19ff.
[35] European Social Charter (revised) *supra* note 31, Part III Article A 1 (c).
[36] European Social Charter (revised) *supra* note 31, Part III Article A 1 (b).
[37] See eg: *European Council of Police Trade Unions v Portugal* (Merits) no.11/2001 (21 May 2002); Benelhocine, C. (2012) *supra* note 29, pp.26f; Council of Europe (2016). Collective Complaints Procedure, online available at: https://edoc.coe.int/en/european-social-charter/7252-european-social-charter-collective-complaints-procedure.html (accessed on 15/04/18) pp.4f; De Schutter, O. & Sant'Ana, M. (2012) *supra* note 30, p.92.

CoE and national non-governmental organisations of states which have agreed to their standing.[38]

Of particular interest in the present context is the ECSR's case law on discrimination of Roma, a group frequently involved in ECtHR cases as well. Among the international non-governmental organisations which have brought applications relating to access to education, health or housing of Roma are the Centre on Housing Rights and Evictions (COHRE), the European Roma Rights Centre (ERRC) and the International Centre for the Legal Protection of Human Rights (INTERIGHTS).[39] This procedural aspect – to have a non-governmental organisation representing a specific group – might be something the ECtHR could take up as non-governmental organisations enjoy standing under the ECHR as well. The question of group applications to the ECtHR will be discussed in more detail below.

Positive aspects of the collective complaints mechanism are its relative simplicity and short duration. However, this might also be due to the low number of cases brought so far.[40] Given that the ESC is not directly applicable in the domestic setting and the ECSR is the only body deciding on its rights, complaining organisations do not have to exhaust domestic remedies before they bring an application. Furthermore, complaints can also be filed before a law potentially violating ESC rights enters into force, adding a preventative aspect. Apart from incorporating the ECSR's decision into national legislation to remedy laws in violation of ESC rights, the Committee's decisions can also be referred to by domestic courts. According to the ECSR they should 'decide the matter in the light of the principles the Committee has laid down on this subject or, as the case may be, for the legislator to enable the courts to draw the consequences as regards the conformity with the Charter and the legality of the provisions at issue'.[41]

In its decisions, the ECSR can include immediate measures either on its own initiative or following the request of a party to the case. Immediate measures are 'necessary with a

[38] Benelhocine, C. (2012) *supra* note 29, p.54; Churchill, R.R. & Khaliq, U. (2004). The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?, *European Journal of International Law*, 15 (3), pp.417-456, pp.424ff.
[39] Benelhocine, C. (2012) *supra* note 29, pp.66ff.
[40] As of April 2018, there have been 214 decisions on the merits: see ESC database, online available at: http://hudoc.esc.coe.int/eng#{"ESCDcType":["DEC"]} (accessed on 15/04/18).
[41] *Confederation of Swedish Enterprise v Sweden* (Merits) no.12/2002 (15 May 2003) para. 42; Brillat, R. (2005). The Supervisory Machinery of ESC: Recent Developments and their Impact, in De Búrca, G., De Witte, B. & Ogertschnig, L. (eds.). *Social Rights in Europe*. Oxford, Oxford University Press, pp.31-43, pp.40ff.

view to avoiding the risk of serious damage and to ensuring effective respect for the rights recognised in the Charter.'[42]

After the ECSR has decided on the merits of a collective complaint, the decision is forwarded to the Committee of Ministers. The complaint remains confidential until the CoM has adopted a resolution or recommendation but will be published after four months if the CoM does not act upon it.[43] By adopting a resolution on the decision, the CoM is 'taking note' of the ECSR's decision and by adopting a recommendation it requires states to 'do everything in their power' to conform with it.[44]

The collective complaints mechanism enabling non-governmental organisations to represent groups such as the Roma offers a promising route towards the realisation of a prohibition of collective punishment under the ECHR. As will be shown below, non-governmental organisations can submit cases to the ECtHR and therefore, the existing legal framework is already able to encompass such claims. Furthermore, the ECSR's case law examined subsequently proves that claims brought by non-governmental organisations on behalf of groups can be adjudicated in practice.

5.2.3.2 Non-discrimination

In contrast to the 1961 Charter which only referred to non-discrimination in its preamble, Part V of the Revised ESC contains Article E, a general non-discrimination clause.[45] It states: 'The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.'[46]

Apart from clarifying that differential treatment based on objective and reasonable grounds should not be considered discriminatory in the Appendix attached to the Revised ESC, the Charter mentions non-discrimination explicitly in some of its provisions.[47] Article E has been based on Article 14 ECHR and is also dependent on the

---

[42] Council of Europe (2016) *supra* note 37, p.14.
[43] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints *supra* note 29, Articles 8, 9; Benelhocine, C. (2012) *supra* note 29, pp.50ff.
[44] See eg: Resolution CM/ResChS(2017)9: Collective Complaint No. 111/2014: *Greek General Confederation of Labour (GSEE) v Greece* (5 July 2017); Benelhocine, C. (2012) *supra* note 29, p.51.
[45] Besson, S. (2012). Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: "It Takes Two to Tango in the Council of Europe", *American Journal of Comparative Law*, 60 (1), pp.147-180, p.155.
[46] European Social Charter (revised) *supra* note 31, Part V Article E.
[47] European Social Charter (revised) *supra* note 31, Appendix Article E.

violation of a substantive right of the Charter.[48] Besson has written on the relationship between the ECSR and the ECtHR regarding the discrimination of Roma. She holds that '[t]o a large extent, these developments have been mutually responsive and convergent. This has been the case, for instance, with regard to the emerging notions of collective indirect discrimination and remedial positive duties'.[49]

As already mentioned in the chapter on the regulation or rather non-regulation of collective punishment under human rights law, rules on non-discrimination do not entail the specific wrong done by collective punishment. Discrimination targets a single person because that person belongs to a specific group. Collective punishment however, targets a whole group because of alleged acts of a member of that group. Even though both situations involve specified groups, in one instance the individual member is targeted and in the other the group as such. For this reason, the analysis of non-discrimination cases of the ECSR seems particularly promising for the present thesis – the Revised ESC allowing for collective complaints brought by organisations which represent groups such as the Roma. This is different to the non-discrimination cases brought before the ECtHR and therefore it merits closer attention. However, even a group right to non-discrimination does not cover all elements of collective punishment as it lacks the punishment for an act allegedly committed by one or some of the group's members preceding the imposition of collective punishment. Although a group right to non-discrimination offers support to a prohibition of collective punishment on a general level, it cannot replace such a prohibition.

A search on Article E Revised ESC on the ECSR database reveals that it was invoked in around a third of its cases so far. This stands in stark contrast to the reluctant use the ECtHR has been making of its non-discrimination provisions laid out in Article 14 ECHR and Article 1 Protocol 12 to the ECHR.[50] In the following, some ECSR cases addressing Article E Revised ESC are examined. This case review stands in dialogue with the review of discrimination cases of the ECtHR in the ensuing section.

Several collective complaints with regard to housing, health care and social and workers rights' protection of Roma in conjunction with Article E Revised ESC were brought

[48] CETS 163 Explanatory Report to the European Social Charter (Revised) (3 May 1996) para.135ff, see eg: *Autism-Europe v France* (Merits) no.13/2002 (4 November 2003).
[49] Besson, S. (2012) *supra* note 45, p.149.
[50] Besson, S. (2012) *supra* note 45, pp.158f.

against France, Bulgaria, Italy and Portugal.[51] In these as well as other cases concerning Roma, the ECSR has confirmed that the concept of racial discrimination is to be interpreted in the light of ECtHR case law, mentioning leading ECtHR cases such as *Timishev v Russia* outlined below.[52] This interpretational reference as well as the context of the ECSR cases show that both, the ECSR and the ECtHR are dealing with similar situations affecting similar groups. However, in contrast to the ECtHR, the ECSR has proven that it is possible to address discrimination based on group characteristics not only in the individual, but the collective context.

The ECSR has highlighted discrimination against Roma by referring to the concept of vulnerability which is also making headway in the ECtHR's non-discrimination case law.[53] In the 2012 case *Médecins du Monde - International v France* the Committee stated: 'It recalls that it recognised that special consideration should be given to the needs and different lifestyle of the Roma, which are a specific type of disadvantaged group and a vulnerable minority'.[54] In the same case, the Committee held that '[i]t considers the alleged discrimination in the enjoyment of the rights guaranteed under the Charter as inseparable from the other violations alleged, given the claim that the alleged discrimination specifically concerned persons because of their ethnic origin.'[55] This is a welcome approach standing in contrast to ECtHR cases where the Court found it 'not necessary' to address the discriminatory implications of cases.[56]

In the 2011 case *Centre on Housing Rights and Evictions (COHRE) v France* the ECSR found an 'aggravated violation' because of the 'the active role of the public authorities in framing and implementing this discriminatory approach to security' targeting

---

[51] See eg: *European Roma Rights Centre (ERRC) v France* (Merits) no.51/2008 (19 October 2009); *Centre on Housing Rights and Evictions (COHRE) v France* (Merits) no.63/2010 (28 June 2011); *European Roma and Travellers Forum (ERTF) v France* (Merits) no.64/2011 (24 January 2012); *European Roma Rights Centre (ERRC) v Bulgaria* (Merits) no.31/2005 (18 October 2006); *European Roma Rights Centre (ERRC) v Bulgaria* (Merits) no.46/2007 (3 December 2008); *European Roma Rights Centre (ERRC) v Portugal* (Merits) no.61/2010 (30 June 2011).
[52] See eg: *Médecins du Monde - International v France* (Merits) no.67/2011 (11 September 2012) para.39; *Centre on Housing Rights and Evictions (COHRE) v Italy*, no.58/2009 *supra* note 27, para.37f; *Timishev v Russia* (Merits and Just Satisfaction) nos.55762/00, 55974/00, Court (Second Section) (13 December 2005) para.56ff.
[53] Peroni, L. & Timmer, A. (2013). Vulnerable groups: The promise of an emerging concept in the European Human Rights Convention law, *International Journal of Constitutional Law*, 11 (4), pp.1056-1085.
[54] *Médecins du Monde - International v France*, no.67/2011 *supra* note 52, para.40; see also: *European Roma Rights Centre (ERRC) v Portugal*, no.61/2010 *supra* note 51, para.20; *International Federation of Human Rights (FIDH) v Belgium* (Merits) no.62/2010 (21 March 2010) para.165, 204.
[55] *Médecins du Monde - International v France*, no.67/2011 *supra* note 52, para.41.
[56] See ECtHR case review below.

vulnerable groups.[57] Referring to ECtHR case law, the Committee held that '[t]he European Court of Human Rights considered inacceptable any waiver of the right not to be subjected to racial discrimination as such a waiver "would be counter to an important public interest"'.[58] This straightforward integration of ECtHR interpretations into ECSR decisions indicates the viability of cross-referencing, which could offer a perspective on how the ECtHR could take the broader collective aspect of cases into account.

In *European Roma Rights Centre (ERRC) v Italy* in 2005, the ECSR has confirmed the positive obligations arising from the Charter as 'equal treatment implies that Italy should take measures appropriate to Roma's particular circumstances to safeguard their right to housing and prevent them, as a vulnerable group, from becoming homeless.'[59] In the same case, the Committee took a strong stance regarding state responses to discrimination of vulnerable groups: 'Finally, the Committee notes that when credible evidence is adduced alleging discrimination it becomes incumbent on the State party concerned to answer to the allegations by pointing to, for example, legislative or other measures introduced, statistics and examples of relevant case-law. More precise allegations call for more detailed response.'[60]

In the 2012 case *European Roma and Travellers Forum (ERTF) v France* the Committee reaffirmed its practice-oriented understanding, as it 'must also be ensured that discrimination is eliminated not only in law but also in fact.'[61] Talking about the contents of Article E, the ECSR noted that the 'function of Article E is to help secure the equal effective enjoyment of all the rights enshrined in the Charter regardless of any particular characteristic of an individual or group of persons.' [62] This in turn highlights the collective character of ESC rights and, looking at the ECSR's practice, the viability of adjudicating such group rights and ensuring their effective protection.

---

[57] *Centre on Housing Rights and Evictions (COHRE) v France*, no.63/2010 *supra* note 51, para.53.
[58] *Centre on Housing Rights and Evictions (COHRE) v France,* no.63/2010 *supra* note 51, para.77 (quote citing *D.H. and Others v the Czech Republic* (Grand Chamber) *supra* note 26, para. 204, as well as *Oršuš and Others v Croatia supra* note 25, para. 178).
[59] *European Roma Rights Centre (ERRC) v Italy* (Merits) no.27/2004 (7 December 2005) para.21.
[60] *European Roma Rights Centre (ERRC) v Italy*, no.27/2004 *supra* note 59, para.24 (in-text references omitted); see also: *European Roma Rights Centre v Greece* (Merits) no.15/2003 (8 December 2004) para.50.
[61] *European Roma and Travellers Forum (ERTF) v France*, no.64/2011 *supra* note 51, para.42; see also: *European Roma Rights Centre (ERRC) v Italy*, no.27/2004 *supra* note 59, para.46; *International Commission of Jurists v Portugal* (Merits) no.1/1998 (9 September 1999) para.32.
[62] *European Roma and Travellers Forum (ERTF) v France*, no.64/2011 *supra* note 51, para.41, see also eg: *International Federation of Human Rights (FIDH) v Belgium*, no.62/2010 *supra* note 54, para.48.

In *Centre on Housing Rights and Evictions (COHRE) v Italy*, a case on the segregation of Roma families and their right to housing decided in 2010, the Committee held that the housing policies targeting Roma and Sinti constituted an aggravated violation of ESC rights. Such violations are defined as 'measures violating human rights specifically targeting and affecting vulnerable groups' where 'public authorities not only are passive and do not take appropriate action against the perpetrators of these violations, but they also contribute to such violence.'[63]

The effects of aggravated violations are described as follows: '[They] do not only affect individuals as victims or the relationship between these individuals and the respondent state: they challenge the community interest and the fundamental common standards shared by Council of Europe Member States (human rights, democracy and the rule of law). Consequently, the situation requires urgent attention from all Council of Europe Member States.'[64] This emphasis on the collective aspect of ESC rights as well as on collective responsibility highlights the strong stance the ECSR is taking on the protection of those rights. At the same time, it shifts the focus from a liberal individualist approach to a collective approach. This in turn is supported by the argument made in the preceding chapter on group rights as human rights, that the 'individual human being and his group or community are *ontologically* interdependent.'[65]

The ECSR's statement that aggravated violations 'specifically targeting and affecting vulnerable groups' 'challenge the community interest and the fundamental common standards shared by Council of Europe Member States' and that such violations require 'urgent attention from all Council of Europe Member States' indicates a strong belief of the ECSR in the consent around ESC rights. Being a CoE instrument just as the ECHR, this common stance on the collective responsibility to ensure the protection of groups from particularly serious violations should not be seen in isolation and only relating to the ESC. In order to give meaning and gravity to this pledge, this consent could be interpreted in the broader context of the obligations of CoE member states including the ECHR.

Regarding the relationship between the ECHR and the ESC, the ECtHR has referred to case law of the ECSR in several instances. In *Sanchez Navajas v Spain* the Court held that

---

[63] *Centre on Housing Rights and Evictions (COHRE) v Italy, no.58/2009 supra* note 27, para.76f.
[64] *Centre on Housing Rights and Evictions (COHRE) v Italy, no.58/2009 supra* note 27, para.78.
[65] Segesvary, V. (1995). Group rights: The definition of group rights in the contemporary legal debate based on socio-cultural analysis*, International Journal on Group Rights*, 3, pp.89-107, p.93.

'it may infer from Article 11 of the Convention, read in the light of Article 28 of the European Social Charter (Revised), that workers' representatives should as a rule, and within certain limits, enjoy appropriate facilities to enable them to perform their trade-union functions rapidly and effectively', taking on board an ESC provision and its interpretation by the ECSR.[66]

Furthermore, the Court has referred extensively to ECSR case law on the right to bargain collectively and applied the ECSR's interpretation of ESC provisions in the 2008 case *Demir and Baykara v Turkey*. After talking about the 'common values' of the ESC and the ECHR, the Court acknowledged that the right to bargain collectively was now part of Article 11 ECHR (freedom of assembly and association), even though that contradicted its own preceding case law.[67] As a result, the Court held that Turkey was bound by ESC provisions via its interpretation of the ECHR even though it had not signed up to the relevant ESC provisions.[68] Acknowledging that, the Court made a remark of significant value in the present context:

> 'In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.'[69]

This 'continuous evolution' and the interpretation of the ECHR as a 'living instrument' will be addressed below in the section on interpreting the ECHR.

Concluding his assessment of the relationship between the ECSR and the ECtHR, Akandji-Kombé located its most important aspects 'in the dynamic intersection between the bodies charged with the protection of human rights, particularly in Europe, that hold that social rights, on the one hand, and civil and political rights on the other are

---

[66] *Sanchez Navajas v Spain* (Decision) no.57442/00, Court (Fourth Section) (21 June 2001) para. 2.
[67] *Demir and Baykara v Turkey* (Merits and Just Satisfaction) no.34503/97, Court (Grand Chamber) (12 November 2008) para.85.
[68] De Schutter, O. & Sant'Ana, M. (2012) *supra* note 30, p.95.
[69] *Demir and Baykara v Turkey supra* note 67, para.86 (in-text references omitted); see also: *Marckx v Belgium* (Merits and Just Satisfaction) no.6833/74, Court (Plenary) (13 June 1979) para.41; *Airey v Ireland* (Merits) no.6289/73, Court (Chamber) (9 October 1979) para.26.

interdependent, and working towards the same goal: the protection of each human being.'[70] This section has underscored the potential of ESC principles and ECSR case law for a prohibition of collective punishment under the ECHR and will be supported by a look at the ECHR's own already existing principles and cases preparing the ground for such a prohibition in the following section.

5.2.4 European Convention on Human Rights (ECHR)

After examining the FCNM and the ESC, the ECHR itself will be analysed for potential support for a prohibition of collective punishment. The possibility of applications brought by non-governmental organisations offers such support on the procedural level while the ECtHR's case law on non-discrimination provides insights into the present substantive framework strengthening the call for a prohibition of collective punishment. The case review will focus on minority related cases which address situations similar to the ECSR cases reviewed above and on cases highlighting the Chechen context.

5.2.4.1 Group applications

Article 34 ECHR regulates individual applications. It states that '[t]he Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation …'. [71] The ability of non-governmental organisations and groups of individuals to file applications is of particular interest. As examined above, the ESC only accepts collective complaints brought by non-governmental organisations or trade unions. This procedure and the ECSR case law might be used for guidance when approaching the rather scarce case law of the ECtHR on applications by applicants other than individuals.

According to Schabas, the term 'non-governmental organisation' has to be interpreted in a 'broad and flexible' way and 'is not subject to any formalities of registration', encompassing corporate bodies as well.[72] Furthermore, the question of representation is not dependent on rigorous formalities as 'some form of authorization' suffices for an individual to speak on behalf of a corporate body.[73]

---

[70] Akandji-Kombé, J.F. (2005). The Material Impact of the Jurisprudence of the European Committee of Social Rights, in De Búrca, G., De Witte, B. & Ogertschnig, L. (eds.). *Social Rights in Europe*. Oxford, Oxford University Press, pp.89-108, p.108.
[71] Article 34 ECHR.
[72] Schabas, W.A. (2015). *The European Convention on Human Rights: A Commentary*. Oxford, Oxford University Press, p.736; *Hyde Park and Others v Moldova (No. 4)* (Merits and Just Satisfaction) no. 18491/07, Court (Fourth Section) (7 April 2009) para.33; *Agrotexim and Others v Greece* (Merits) no. 14807/89, Court (Chamber) (24 October 1995) para.66ff.
[73] Schabas, W.A. (2015) *supra* note 72, p.736; see also *Nosov v Russia* (Decision) no. 30877/02, Court (First Section) (20 October 2005).

However, in order to be eligible to submit an application, the group of individuals or non-governmental organisation has to be a victim of a violation of ECHR rights. According to the ECtHR in 2013, 'Article 34 concerns not just the direct victim or victims of the alleged violation, but also any indirect victims to whom the violation would cause harm or who would have a valid and personal interest in seeing it brought to an end.'[74] Although the victim criterion is not to be interpreted in a narrow sense, certain rights under the ECHR cannot be claimed by non-governmental organisations as victims.[75] The example of the right to marry is illustrative of rights which are by their nature limited to individual applicants. Apart from that, the Court has found that corporations as subsumed under the term non-governmental organisation by Article 34 ECHR can be victims of violations of their right to property or freedom of expression or association.[76] However, in two cases decided in 2001, advocacy groups were denied victim status in the case where the persons they represented had individual victim status and no separate issues affecting solely the organisation itself arose.[77]

Furthermore, cases brought by minority groups themselves are rare.[78] The case *48 Kalderas Gypsies v Germany and the Netherlands* was brought by three Roma families regarding the authorities' refusal to provide them with identity documents and the arising consequences for their living conditions. However, the case was dismissed on the grounds of non-exhaustion of domestic remedies as well as insufficient evidence provided to the Commission.[79] Another case, *Rassemblement Jurassien and Unite Jurassienne v Switzerland*, dealt with a French-speaking minority's freedom of assembly in a newly created predominantly German-speaking Swiss Canton. The application was held inadmissible and the Commission emphasised that it did not see any discriminatory treatment in the case.[80]

---

[74] *Vallianatos and Others v Greece* (Merits and Just Satisfaction) nos. 29381/09, 32684/09, Court (Grand Chamber) (7 November 2013) para.47 (in-text references omitted).
[75] Schabas, W.A. (2015) *supra* note 72, p.741; Article 12 ECHR.
[76] See eg: *Hyde Park and Others v Moldova (Nos. 5 and 6)* (Merits and Just Satisfaction) nos. 6991/08, 15084/08, Court (Fourth Section) (14 September 2010) para.32; Schabas, W.A. (2015) *supra* note 72, p.741.
[77] *Čonka et Ligue des Droits de L'homme c Belgique* (Decision) no. 51564/99, Court (Third Section) (13 March 2001); *Grande Oriente d'Italia di Palazzo Giustiniani v Italy* (Merits and Just Satisfaction) no. 35972/97, Court (Fourth Section) (2 August 2001) para.15, 24ff.
[78] Bowring, B. (2013). Protecting Minority Rights through an Individual Rights Mechanism: The Strasbourg Court and some Significant Developments to June 2012, *European Yearbook of Minority Issues*, 10, pp.437-460, pp.441f.
[79] *48 Kalderas Gipsies v Federal Republic of Germany and the Netherlands* (Decision) nos. 7823/77, 7824/77, Commission (Plenary) (6 July 1977).
[80] *Rassemblement Jurassien and Unite Jurassienne v Switzerland* (Decision) no. 8191/78, Commission (Plenary) (10 October 1979) para.13.

A more recent case, decided in 2012, is *Aksu v Turkey* relating to publications which exhibited bias against Roma. The applicant, although not directly affected, was found eligible to submit an application due to his affiliation with the Roma community. The Court held that 'in the present case the applicant, who is of Roma origin, complained about remarks and expressions which allegedly debased the Roma community. It is true that the applicant was not personally targeted; he could, however, have felt offended by the remarks concerning the ethnic group to which he belonged.'[81]

In the 2013 judgment *Vallianatos and Others v Greece*, Judge Pinto de Albuquerque elaborated on these remarks in his partly concurring, partly dissenting opinion. He held that 'when a law or regulation confers a Convention right solely on one group of people based on an identifiable characteristic of that group, by implication depriving another group of people in the same or similar situation of the enjoyment of the said right without any objective justification, the Convention compliance of that law or regulation may be reviewed *in abstracto* by the Court on the basis of a complaint lodged by any member of the deprived group of people.'[82]

Such statements are nothing new in the Court's case law. For instance in the 2006 case *Arvanitaki-Roboti and Others v Greece* dealing with 91 applicants of the same profession (doctors), Judges Tulkens and Spielmann discussed the collective aspects of applications in their joint concurring opinion.[83] They held that 'it is each applicant, taken individually, who has sustained the non-pecuniary damage, irrespective of whether his or her application was lodged with the Court singly or jointly with others' and that collective complaints intended to encompass 'class action' are 'not (yet) the case'.[84] Indicating support for group rights, they noted that 'we believe that it would certainly be desirable in future for the Court to be able to recognise, in certain cases, a right to take action as a group …'.[85] This remark shows that there is a need for a broader reading of Article 34

[81] *Aksu v Turkey* (Merits and Just Satisfaction) nos. 4149/04, 41029/04, Court (Grand Chamber) (15 March 2012) para.53.
[82] *Vallianatos and Others v Greece supra* note 74, partly concurring, partly dissenting opinion of Judge Pinto de Albuquerque; see also: *Marckx v Belgium supra* note 69, para.27; *Sejdić and Finci v Bosnia and Herzegovina* (Merits and Just Satisfaction) nos. 27996/06, 34836/06, Court (Grand Chamber) (22 December 2009) para.28f.
[83] *Arvanitaki-Roboti and Others v Greece* (Merits and Just Satisfaction) no.27278/03, Court (First Section) (18 May 2006).
[84] *Arvanitaki-Roboti and Others v Greece supra* note 83, joint concurring opinion of Judges Tulkens and Spielmann (*Translation*) para.3f.
[85] *Arvanitaki-Roboti and Others v Greece supra* note 83, joint concurring opinion of Judges Tulkens and Spielmann (*Translation*) para.5.

ECHR regarding the admissibility of applications which could be attained by reference to the ESC as laid out above.

5.2.4.2 Non-discrimination in the minority rights context

The general tenets of Article 14 ECHR have already been discussed in the chapter relating to collective punishment and human rights law. Therefore, the following section focuses on the review of several cases relating to minorities and how the Court has dealt with the broader collective implications in contrast to the ECSR. At the same time, the Chechen cases in this review highlight the overlap between the groups affected by collective punishment directly (Chechen families of alleged insurgents) and the general discriminatory treatment of the broader group they belong to (the Chechens).

Article 14 ECHR had a slow start to say the least.[86] Formulations such as that 'no separate issue arises under Article 14 of the Convention' or that the 'Court considers that these complaints arise out of the same facts as those considered under Articles … and does not find it necessary to examine them separately' might sound all too familiar to people studying the Court's case law on non-discrimination.[87]

Recently however, the Court has become more active regarding Article 14 ECHR. This development started with the 2005 judgment in *Timishev v Russia*. The applicant of Chechen ethnicity was refused entry into Kabardino-Balkaria where he lived with his family due to the border officials' order not to let any Chechens pass. In addition, his children were refused access to school because he could not provide the school with any identity documents. To receive compensation for the property the applicant lost in Chechnya, he had to surrender his migrant card which confirmed his status as resident in Kabardino-Balkaria and as forced migrant from Chechnya.[88]

The Court found a violation of the applicant's right to liberty of movement (Article 2 Protocol 4 to the ECHR) in conjunction with Article 14 ECHR. It elaborated on the circumstances of the order given to border officials not to admit any Chechens: '[A] person's ethnic origin is not listed anywhere in Russian identity documents, the order barred the passage not only of any person who actually was of Chechen ethnicity, but

[86] Bowring, B. (2013) *supra* note 78, pp.442ff.
[87] See eg: *Hirst v the United Kingdom* (No. 2) (Merits and Just Satisfaction) no.74025/01, Court (Grand Chamber) (6 October 2005) para.87; *Kiliç v Turkey* (Merits and Just Satisfaction) no.22492/93, Court (First Section) (28 March 2000) para.98; Bowring, B. (2013) *supra* note 78, pp.454f.
[88] *Timishev v Russia supra* note 52.

also of those who were merely perceived as belonging to that ethnic group.' [89] Discrimination based on ethnicity and racial discrimination overlap: 'Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds.'[90] The act in question was identified as racial discrimination and therefore a 'particularly invidious kind of discrimination'.[91] A violation of the right to education (Article 2 Protocol 1 to the ECHR) of the applicant's children was found as well.[92]

The 2007 case of *D.H. and Others v the Czech Republic* concerned the segregation of Roma pupils by placing them in special schools. [93] The Chamber dismissed the claim of discrimination in conjunction with the right to education. [94] The Grand Chamber however, overturned this decision. On indirect discrimination, it held that '[d]espite being couched in neutral terms, the relevant statutory provisions therefore had considerably more impact in practice on Roma children than on non-Roma children and resulted in statistically disproportionate numbers of placements of the former in special schools.'[95] Consequently, the applicants did not have to prove discriminatory intent on behalf of the authorities.[96] The Court found a violation of Article 2 Protocol 1 to the ECHR in conjunction with Article 14 ECHR.

The Court added, significantly, towards the end of the judgment: 'Lastly, since it has been established that the relevant legislation as applied in practice at the material time had a disproportionately prejudicial effect on the Roma community, the Court considers that the applicants as members of that community necessarily suffered the same discriminatory treatment. Accordingly, it does not need to examine their individual cases.' [97] All eighteen applicants were awarded the same amount of non-pecuniary damage without considering their individual case any further.[98] The Court's emphasis

[89] *Timishev v Russia supra* note 52, para.54.
[90] *Timishev v Russia supra* note 52, para.55.
[91] *Timishev v Russia supra* note 52, para.56.
[92] *Timishev v Russia supra* note 52, para.63ff.
[93] *D.H. and Others v the Czech Republic* (Grand Chamber) *supra* note 26.
[94] *D.H. and Others v the Czech Republic* (Merits) no.57325/00, Court (Second Section) (7 February 2006).
[95] *D.H. and Others v the Czech Republic* (Grand Chamber) *supra* note 26, para.193.
[96] *D.H. and Others v the Czech Republic* (Grand Chamber) *supra* note 26, para.194f.
[97] *D.H. and Others v the Czech Republic* (Grand Chamber) *supra* note 26, para.209.
[98] *D.H. and Others v the Czech Republic* (Grand Chamber) *supra* note 26, para.212ff.

on the affiliation with a specific community and the consequences arising therefrom represent a significant development. In effect, the Court acknowledged the collective aspect of the case and treated the applicants as a group, discussing the situation of the Roma community in the Czech Republic and not so much the individual circumstances. With regards to a prohibition of collective punishment under the ECHR, this assessment of the underlying collective aspects of a case shows the Court's general ability to address group rights and perhaps an increasing willingness to do so.

In the 2010 case *Oršuš and Others v Croatia,* Roma pupils were placed in Roma-only classes not on the ground of any actual or presumed disability as in *D.H. and Others v the Czech Republic*, but because of the absence of command of the Croatian language.[99] The Chamber found no violation, stating that the measure was justified. By a narrow margin of nine votes to eight, the Grand Chamber overturned that judgment and held that there were 'no adequate safeguards in place capable of ensuring … a reasonable relationship of proportionality between the means used and the legitimate aim'.[100] Therefore the measure was disproportionate and constituted a violation of the right to education in conjunction with the prohibition of discrimination.[101]

In the case *Sejdić and Finci v Bosnia and Herzegovina* decided in 2009, the Court held that the eligibility criteria to stand for presidential elections enshrined in the Constitution of Bosnia and Herzegovina discriminated against persons not declaring their affiliation with a 'constituent people'. This judgment is one of the rare instances where the Court has found a violation of Article 1 Protocol 12 to the ECHR, which features the same understanding of discrimination as Article 14 ECHR, but enlarges its scope to 'any right set forth by law'.[102]

---

[99] *Oršuš and Others v Croatia supra* note 25; Bowring, B. (2013) *supra* note 78, pp.450ff.
[100] *Oršuš and Others v Croatia supra* note 25, para.184.
[101] *Oršuš and Others v Croatia supra* note 25, para.184ff; see also: *Horváth and Kiss v Hungary* (Merits and Just Satisfaction) no.11146/11, Court (Second Section) (29 January 2013).
[102] *Sejdić and Finci v Bosnia and Herzegovina supra* note 82; CETS 177 Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 2000) Article 1; Bowring, B. (2013) *supra* note 78, pp.455ff; Bowring, B. (2015). Case-Law of the European Court of Human Rights Concerning the Protection of Minorities, July 2012 to August 2014, *European Yearbook of Minority Issues*, 12, pp.197-222, pp.203ff; see also: *Pilav v Bosnia and Herzegovina* (Merits and Just Satisfaction) no.41939/07, Court (Fifth Section) (9 June 2016); *Zornić v Bosnia and Herzegovina* (Merits and Just Satisfaction) no.3681/06, Court (Fourth Section) (15 July 2014); Henrard, K. (2016). Case Law of the European Court on Human Rights Concerning Ethnic, Religious and Linguistic Minorities during 2014: About Differential Margins of Appreciation and the Role of the Prohibition of Discrimination, *European Yearbook of Minority Issues Online*, 13, pp.248–282, pp.263ff.

Bearing in mind the focus on collective punishment, cases on forced evictions and the destruction of settlements of Roma are of particular interest. As shown in the two case studies, the destruction of homes represents a commonly used form of collective punishment.

The 2012 case *Yordanova and Others v Bulgaria* concerned a group of Roma who were facing eviction from the land where some of them lived for over forty years. Although they did not deny that the buildings erected in a neighbourhood of the Bulgarian capital Sofia were built without permit, the local authorities had tolerated them for decades. However, in 2000, non-Roma neighbours started voicing complaints about the settlements to which they referred as 'ghettos' and the authorities issued eviction orders which, at the time of the judgment, were not yet enforced. The Court found that enforcing the eviction order would amount to a violation of Article 8 ECHR, the right to private and family life. However, it did not consider Article 8 in conjunction with Article 14 ECHR and dismissed any other discrimination implications by reference to a domestic claims mechanism on the protection against discrimination which 'apparently functions in practice' and to which the applicants did not resort.[103]

Another case in point is *Winterstein and Others v France,* decided in 2013.[104] The applicants, 25 Roma and the non-governmental organisation ATD Fourth World argued that the forced eviction from the land where they lived for many years and the demolition of caravans and sheds violated Articles 3, 8 and 14 ECHR. Again, while confirming a violation of Article 8 ECHR, the Court did not consider it necessary to elaborate on the implications regarding Article 14 ECHR and discrimination. In a partly dissenting opinion Judge Power-Forde criticised the lack of an investigation into Article 14 ECHR and called for 'heightened vigilance' of authorities regarding any 'unacceptable treatment of a vulnerable minority'.[105] Furthermore, she held that 'a greater readiness on the part of the Court to scrutinise, thoroughly, complaints of discrimination in such circumstances would encourage national authorities to pay greater attention to the

[103] *Yordanova and Others v Bulgaria* (Merits and Just Satisfaction) no.25446/06, Court (Fourth Section) (24 April 2012) para.160;
[104] *Winterstein and Others v France* (Merits) no.27013/07, Court (Fifth Section) (17 October 2013).
[105] *Winterstein and Others v France supra* note 104, partly dissenting opinion Judge Power-Forde.

procedural aspects of Article 14. Such procedural obligations are of critical importance in the challenge to eliminate discrimination.'[106]

In *Fedorchenko and Lozenko v Ukraine* in 2012, the Court ruled on the destruction of three houses belonging to persons of Roma origin.[107] The arson attack killing several people apparently targeted drug dealers selling drugs in one of these houses. Looking behind that pretext, the Court pointed to the widespread discrimination of Roma in Ukraine and found a violation of Article 2 ECHR, the right to life in conjunction with Article 14 ECHR since 'it cannot be excluded that the decision to burn the houses of the alleged drug traffickers had been additionally nourished by ethnic hatred'.[108]

Looking at these three cases together, it is difficult to form a conclusion on the Court's general direction of travel. Although the Court has cited ECSR cases, it did not take note of the ECSR's stance on discrimination as 'inseparable from the other violations alleged' in two of the three cases and was criticised for this omission in a powerful dissenting opinion.[109] As Judge Power-Forde rightly asked about the treatment of minorities, it is difficult to understand why the Court has shied away from addressing Article 14 ECHR. Finding a violation of Article 8 ECHR in those two cases, it confirmed that harm was done to the applicants, but did not address the underlying discrimination. In the third case however, the Court found a violation of Article 14 ECHR. Apart from being a good addition to the Court's still modest body of case law on non-discrimination, this case would, in my view, fit the remit of a prohibition of collective punishment as well. The homes of members of the Roma community were burnt down due to the allegation that one member of this group was involved in drug trafficking. However, as the Court found, rightly, the arson attack was not directed against 'drug dealers' but targeted the Roma community collectively. This case represents another example of the difficult delineation of acts of collective punishment from acts of, as the Court has put it, 'ethnic hatred' in practice. However, the case also shows the viability of addressing group related situations in practice.

---

[106] *Winterstein and Others v France supra* note 104, partly dissenting opinion Judge Power-Forde; Bowring, B. (2015) *supra* note 102, pp.209ff.
[107] *Fedorchenko and Lozenko v Ukraine* (Merits and Just Satisfaction) no.387/03, Court (Fifth Section) (20 September 2012).
[108] *Fedorchenko and Lozenko v Ukraine supra* note 107, para.68; Bowring, B. (2015) *supra* note 102, p.219.
[109] *Médecins du Monde - International v France*, no.67/2011 *supra* note 52, para.41.

Further discrimination cases regarding Chechens include *Makhashevy v Russia* (2012)[110] and *Antayev and Others v Russia* (2014).[111] The first case concerned brothers of Chechen origin living in Kabardino-Balkaria who were beaten and verbally abused by security forces after being arrested for allegedly hurting a Karbardinian security guard in a night club. The racist verbal insults were based on their Chechen ethnicity and included terms such as 'faggots' and 'animals'.[112] The Court found a violation of the procedural and substantive limb of Article 3 ECHR, the prohibition of torture, in conjunction with Article 14 ECHR as the authorities had 'failed to do what was in their power to investigate the possible racist motives behind the events' and had failed 'to put forward any arguments showing that the incident was ethnically neutral'.[113]

The case *Antayev and Others v Russia* concerned two families of Chechen origin who were physically and verbally abused during a search of their homes by security forces. The racist insults based on their ethnicity by the security forces led the Court to find a violation of Article 3 ECHR in conjunction with Article 14 ECHR on similar grounds as in *Makhashevy v Russia.* In particular, the Court pointed to the 'recurrent reference to internal police instructions to treat suspects of Chechen ethnic origin in a particular manner'.[114] Those two cases again indicate that the Court is aware of the discrimination Chechens face in Russia.

In 2014, the Court ruled on three cases concerning the families of alleged terrorists who were killed during the second non-international armed conflict in Chechnya, some in the course of sweeping operations. The families complained that the bodies of their relatives had not been returned by the authorities so that they might bury them according to their traditions and customs, violating Article 8 ECHR in conjunction with Article 14 ECHR. Even though the Court found a violation of Article 8 ECHR, it dismissed the discrimination claim stating that it could not prove any direct discrimination and did not examine whether there was evidence of indirect discrimination.[115] Commenting on the

[110] *Makhashevy v Russia* (Merits and Just Satisfaction) no.20546/07, Court (First Section) (31 July 2012).
[111] *Antayev and Others v Russia supra* note 26.
[112] *Makhashevy v Russia supra* note 110, para.9,24,26.
[113] *Makhashevy v Russia supra* note 110, para.145, 179; Bowring, B. (2015) *supra* note 102, pp.217f.
[114] *Antayev and Others v Russia supra* note 26, para.127; Bowring, B. (2015) *supra* note 102, p.218.
[115] *Abdulayeva v Russia* (Merits and Just Satisfaction) no.38552/05, Court (First Section) (16 January 2014); *Kushtova and Others v Russia* (Merits and Just Satisfaction) no. 21885/07, Court (First Section) (16 January 2014); *Zalov and Khakulova v Russia* (Merits and Just Satisfaction) no.7988/09, Court (First Section) (16 January 2014).

case, Henrard criticised the fact that the Court's ''avoidance' of indirect discrimination is a steady feature in cases on religious themes'.[116]

Recent cases regarding discrimination based on ethnicity by and large follow the established case law of the Court.[117] In addition, the Court has found violations of Article 14 ECHR in relation to the freedom of expression and assembly of the LGBT community in several cases.[118] For instance in 2017, in *Bayev and Others v Russia* the Court found that legislation favouring opposite-sex relationships discriminated against the homosexual minority in Russia.[119]

Having reviewed several specific cases, a look at some broader developments in the discrimination and minority case law of the Court might be useful. According to Peroni and Timmer, a new concept is emerging in the Court's jurisprudence which they identify as 'vulnerable groups'.[120] The Court employed this concept first in cases concerning Roma such as in *D.H. and Others v the Czech Republic* where it referred to the 'vulnerable position of Roma/Gypsies' and found that 'as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority'.[121] Other groups the Court has described as vulnerable include asylum seekers, people living with HIV or people with mental disabilities.[122]

Although the Court itself has not so far provided any definitions of 'vulnerable groups', Peroni and Timmer define the characteristics of the concept as relational, particular and

---

[116] Henrard, K. (2016) *supra* note 102, p.279.
[117] See eg: *M.F. v Hungary* (Merits and Just Satisfaction) no.45855/12, Court (Fourth Section) (31 October 2017); *Grigoryan and Sergeyeva v Ukraine* (Merits and Just Satisfaction) no.63409/11, Court (Fourth Section) (28 March 2017); *Škorjanec v Croatia* (Merits and Just Satisfaction) no.25536/14, Court (Second Section) (28 March 2017); *Boacă and Others v Romania* (Merits and Just Satisfaction) no.40355/11, Court (Fourth Section) (12 January 2016); *Balázs v Hungary* (Merits and Just Satisfaction) no.15529/12, Court (Second Section) (20 October 2015); *Ciorcan and Others v Romania* (Merits and Just Satisfaction) nos.29414/09, 44841/09, Court (Third Section) (27 January 2015).
[118] *Identoba and Others v Georgia* (Merits and Just Satisfaction) no.73235/12, Court (Fourth Section) (12 May 2015).
[119] *Bayev and Others v Russia* (Merits and Just Satisfaction) nos.67667/09, 44092/12, 56717/12, Court (Third Section) (20 June 2017).
[120] Peroni, L. & Timmer, A. (2013) *supra* note 53.
[121] *D.H. and Others v the Czech Republic* (Grand Chamber) *supra* note 26, para.181f; see also: *Chapman v the United Kingdom* (Merits) no.27238/95, Court (Grand Chamber) (18 January 2001).
[122] Peroni, L. & Timmer, A. (2013) *supra* note 53, p.1057; *M.S.S. v Belgium and Greece* (Merits and Just Satisfaction) no.30696/09, Court (Grand Chamber) (21 January 2011); *Kiyutin v Russia* (Merits and Just Satisfaction) no.2700/10, Court (First Section) (10 March 2011); *Alajos Kiss v Hungary* (Merits and Just Satisfaction) no.38832/06, Court (Second Section) (20 May 2010).

harm-based.[123] As seen in the Court's understanding of Roma as vulnerable group due to their 'turbulent history', the concept of group vulnerability is relational in the sense that it addresses the broader social circumstances and context. This means that individual vulnerability is linked to the 'social or institutional environment, which originates or sustains the vulnerability of the group she is (made) part of.'[124] The concept is particular as its subjects are members of 'particularly vulnerable groups'.[125] Finally, the harm-based characteristic originates from '(historical) prejudice and stigmatization'.[126]

Although the relational character of the concept of vulnerable groups sounds appealing and transferrable to the understanding of human rights and the interdependence of individuals as social beings, the general concept has its risks too.[127] Peroni and Timmer do not shy away from addressing them and point to essentialism, stigmatisation and paternalism as main factors.[128] In order to minimise those risks, they suggest the Court should assess group vulnerability first on the collective and then on the individual level: 'Otherwise, the Court may end up essentializing vulnerable groups and stereotyping the individuals from these groups, thereby reinforcing their vulnerability rather than lessening it.'[129]

However, despite their efforts to limit the potential negative effects of the group vulnerability concept, it is still at odds with the notion of group empowerment emphasised throughout this thesis. The present focus is on groups as subjects who actively engage in changing their living conditions and pursue their struggle for justice. Defining a group as vulnerable places it in an inferior position in need of protection. On the other hand, the broader notion of group rights places these groups in an active position asserting rights. An aspect of group vulnerability that might be beneficial to the present thesis' approach is the collective element that was discussed by Peroni and Timmer. The willingness of the Court to take the broader social context into account might indicate a certain acceptance of the widening scope of human rights beyond the individual. Furthermore, the fluctuating case law of the ECtHR on cases with a collective

[123] Peroni, L. & Timmer, A. (2013) *supra* note 53, pp.1063ff.
[124] Peroni, L. & Timmer, A. (2013) *supra* note 53, p.1064; Fineman, M. (2008). The Vulnerable Subject: Anchoring Equality in the Human Condition, *Yale Journal of Law & Feminism*, 20 (1), Article 2, pp.12ff.
[125] Peroni, L. & Timmer, A. (2013) *supra* note 53, p.1064; *Alajos Kiss v Hungary supra* note 122, para.42; *Kiyutin v Russia supra* note 122, para.74.
[126] Peroni, L. & Timmer, A. (2013) *supra* note 53, pp.1065ff; Fraser, N. (2000). Rethinking Recognition, *New Left Review*, 3, pp.107-120, pp.110ff.
[127] See chapter on group rights as human rights.
[128] Peroni, L. & Timmer, A. (2013) *supra* note 53, pp.1070ff.
[129] Peroni, L. & Timmer, A. (2013) *supra* note 53, p.1073.

context as seen in the house destruction cases shows that the law in this area is not yet settled and that non-discrimination cannot encompass all of the arising aspects of such group related cases.

5.2.5 The ECHR in context

This last section tries to gather together the findings on the FCNM, ESC and ECHR in order to support a prohibition of collective punishment under the ECHR. Further assistance is coming from the African Charter on Human and Peoples' Rights where non-governmental organisations can file applications on behalf of groups whose collective rights have been violated. As will be shown, although interpretation of the ECHR in a broader social context can be a powerful tool, the current ECHR framework is not capable of addressing collective punishment. However, with the contextual support of this broader interpretation and state consent on the prohibition of collective punishment in the area of armed conflict, a new rule on such a prohibition under the ECHR might be feasible.

5.2.5.1 Interpretation of the ECHR in the light of other human rights instruments

Emphasising the references the ECtHR has made so far to other human rights instruments, in particular the FCNM, Pentassuglia has seen an emerging 'integrated mode of interpretation' of the Court with regards to minority rights.[130] He based his remarks on the ECHR being a 'living instrument' and cited cases such as *Muñoz Díaz v Spain*, where the Court held that 'the force of the collective beliefs of a community that is well-defined culturally cannot be ignored'.[131] The concept of 'living instrument' developed by the Court demands that the Convention 'must be interpreted in the light of present-day conditions.'[132]

On this broader interpretation of Convention rights, Pentassuglia commented:

> 'While there is evidence to suggest that progressive interpretations of human rights treaties informed by external instruments may be based on minimum standards clauses linked to state consent (one of which can be found in Article

[130] Pentassuglia, G. (2012). The Strasbourg Court and Minority Groups: Shooting in the Dark or a New Interpretive Ethos?, *International Journal on Minority and Group Rights*, 19, pp.1-23, pp.13ff; *D.H. and Others v the Czech Republic* (Grand Chamber) *supra* note 26, para.66ff; *Chapman v the United Kingdom supra* note 121, para.55ff; *Gorzelik and Others v Poland* (Merits) no.44158/98, Court (Grand Chamber) (17 February 2004) para.45ff.
[131] Pentassuglia, G. (2012) *supra* note 130, pp.13f; *Muñoz Díaz v Spain* (Merits and Just Satisfaction) no.49151/07, Court (Third Section) (8 December 2009) para.59.
[132] *Tyrer v the United Kingdom* (Merits) no.5856/72, Court (Chamber) (25 April 1978) para.31.

> 53 ECHR), systemic readings (including the ones supported by the Court itself) generally rest on wider views of human rights developments irrespective of state consent.'[133]

With regards to the interpretation of minority rights, he held:

> 'When looking at such a bourgeoning case law comprehensively, one might argue that the broader question is not so much the role of the Court in theoretically defining minority groups as the role of the Court in generating practical protection for minority groups generally. … They [general human rights treaties] create comprehensive frameworks which allow for flexibility and creative judging across systems.'[134]

As the ESC and ECHR case reviews have shown, there is an existing consent of CoE member states regarding the protection of group rights as laid out by the Revised ESC – at least of those 34 states which have ratified it.[135] Furthermore, this consent has been strengthened by the adoption of the FCNM and its 39 member states.[136] Turning to the interpretation of the ECHR in the light of these other CoE instruments, one might argue that the consent reached in related fora cannot be ignored in the ECHR context.

As I have shown above, provisions of the ESC, FCNM and ECHR and their case law are cross-referenced by their supervising bodies. As of April 2018, a search on the ECtHR's database revealed 218 judgments mentioning the ESC and 108 mentioning the FCNM.

The most significant acknowledgement by the ECtHR of such an 'integrated mode of interpretation' as Pentassuglia calls it, might be found in the 2008 case *Demir and Baykara v Turkey* mentioned above. The Court focused on the 'continuous evolution in the norms and principles applied in international law or in the domestic law of the

---

[133] Pentassuglia, G. (2012) *supra* note 130, p.15.
[134] Pentassuglia, G. (2012) *supra* note 130, p.18; see also: Pentassuglia, G. (2013). Protecting Minority Groups through Human Rights Courts: The Interpretive Role of European and Inter-American Jurisprudence, in Vrdoljak, A. (ed.). *The Cultural Dimension of Human Rights*. Oxford, Oxford University Press, pp.73-116.
[135] Council of Europe, State Parties to the Revised ESC, online available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163/signatures?p_auth=6WKmbcgT (accessed on 15/04/18).
[136] Council of Europe, State Parties to the FCNM, online available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/157/signatures?p_auth=ZuYF6lVq (accessed on 15/04/18).

majority of member States of the Council of Europe' and on the indication 'that there is common ground in modern societies.'[137]

This statement is in line with the 'living instrument' understanding of the ECHR and offers support for a broader interpretation of existing ECHR rights. However, as previously noted, existing ECHR rights do not cover the specific wrong done by collective punishment. Nevertheless, these progressive developments relating to non-discrimination and groups within the Court's current remit provide a useful foundation for any debate on further rights and freedoms to be included in the ECHR.

Additional procedural support for the realisation of a prohibition of collective punishment under the ECHR comes from the ACHPR. As laid out in the chapter on collective punishment and human rights law, the ACHPR contains a section devoted to group rights. The question of how the African Court on Human and Peoples' Rights (ACtHPR) tackles the issue of groups as applicants is relevant in the context of this chapter. Apart from the African Commission on Human and Peoples' Rights, involved state parties and intergovernmental organisations, individuals and non-governmental organisations can submit cases to the Court if the state in question has made a declaration accepting the jurisdiction of the Court in this regard.[138]

Although the ACHPR enshrines individual and group rights, the jurisdiction does not enable individuals and groups to file applications, but individuals and non-governmental organisations. This in turn could be relevant for the present endeavour to translate the prohibition of collective punishment into human rights law and more specifically, the ECHR framework. The ECtHR accepts applications made by non-governmental organisations. And the way in which the ACtHPR deals with applications claiming the violation of group rights could serve as an illustrative example and could be taken into account as part of an 'integrated mode of interpretation' by the ECtHR.

---

[137] *Demir and Baykara v Turkey supra* note 67, para.86 (in-text references omitted); see also: *Marckx v Belgium supra* note 69, para.41; *Airey v Ireland supra* note 69, para.26.

[138] OAU/LEG/MIN/AFCHPR/PROT.(1) Rev.2 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Assembly of Heads of State and Government of the Organization of African Unity, Ougadougou, Burkina Faso (June 1998) Articles 5 and 34 (6); Eno, R.W. (2002). The Jurisdiction of the African Court on Human and Peoples' Rights, *African Human Rights Law Journal*, 2, pp.223-233, pp.229ff; Mutua, M. (2000). The African human rights system: A critical evaluation, Background Paper to the UNDP 2000 Human Development Report, online available at: http://hdr.undp.org/sites/default/files/mutua.pdf (accessed on 15/04/18) p.28.

To highlight the viability of this approach in practice, the *Endorois* case is significant. As this case has been examined in the chapter on collective punishment and human rights law, it will not be discussed here in detail. It suffices to state the first lines of the judgment:

> 'The complaint is filed by the Centre for Minority Rights Development (CEMIRIDE) with the assistance of Minority Rights Group International (MRG) and the Centre on Housing Rights and Evictions (COHRE - which submitted an amicus curiae brief) on behalf of the Endorois community. The Complainants allege violations resulting from the displacement of the Endorois community, an indigenous community, from their ancestral lands, the failure to adequately compensate them for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practise their religion and culture, as well as the overall process of development of the Endorois people.'[139]

A similar route was taken in the recent *Ogiek* case, where the African Commission filed the application after receiving a communication from the Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRG) on behalf of the Ogiek community.[140] This approach represents a viable option of addressing group rights which could be taken up by the ECtHR without any major changes to its jurisdiction *ratione personae* or its procedure.

Although recourse to interpretive aids from the ESC, FCNM and ACHPR enables a broader debate on group rights on the substantive as well as procedural level, an 'integrated mode of interpretation' cannot compensate for a genuine gap in protection in the ECHR framework as left by collective punishment. For this reason, the potential

---

[139] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council Others v Kenya (Endorois),* Communication No. 276/2003, 27th Activity Report (2009) para.1; Baldwin, C. & Morel, C. (2008). Group Rights, in Evans, M. D. & Murray, R. (eds.). *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006.* 2nd edition. Cambridge, Cambridge University Press.pp.244-288, pp.246ff; the relevant application procedure under the newly created but not yet active African Court of Justice and Human Rights stays relatively the same: African Union, Protocol on the Statute of the African Court of Justice and Human Rights (1 July 2008), online available at: http://www.african-court.org/en/images/Basic%20Documents/ACJHR_Protocol.pdf (accessed on 15/04/18); Kane, I. & Motala, A.C. (2008). The creation of a new African Court of Justice and Human Rights, in Evans, M. D. & Murray, R. (eds.). *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006.* 2nd edition. Cambridge, Cambridge University Press.pp.406-440, pp.429ff

[140] *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogiek),* Application No. 006/2012, Judgment (26 May 2017).

form such a new rule could take and previous attempts to widen the scope of the ECHR regarding collective rights will be addressed in the following.

5.2.5.2 New rule

In the 1990s, the adoption of an additional protocol to the ECHR regarding national minorities was discussed.[141] However, this stalled, as did a similar initiative in 1961 calling for the adoption of a minority rights provision.[142] Although the FCNM was adopted in the 1990s to remedy the lack of CoE instruments on minority protection, its relative weakness when compared with the ECHR led to the resurfacing of the debate on a protocol on minorities in 2009.[143] However, the Committee of Ministers turned these new demands down saying that it 'does not consider that there is a need for new normative work in this field' and that 'it does not consider it appropriate to accompany the ECHR with additional protocols setting out a range of rights applicable to specific groups of people.'[144]

Likewise, there was an earlier attempt in 1999 to adopt an additional protocol to the ECHR on social rights.[145] A working group on social rights had been set up to examine the issue, but it was discontinued in 2005 'because it did not lead to any specific outcome

[141] Berry, S.E. (2016). The Siren's Call? Exploring the Implications of an Additional Protocol to the European Convention on Human Rights on National Minorities, *International Journal on Minority and Group Rights*, 23, pp.1-38, pp.2ff; PACE, Recommendation 1134 (1990) On the rights of minorities, (1 October 1990); PACE, Recommendation 1201 (1993) On an additional protocol on the rights of national minorities to the European Convention on Human Rights (1 February 1993); PACE, Recommendation 1492 (2001) On the rights of minorities (23 January 2001).

[142] PACE, Recommendation 285 (1961) Rights of National Minorities (28 April 1961); PACE (Doc.1299) Committee on Legal Affairs, Report on Rights of National Minorities (26 April 1961).

[143] PACE (Doc.11897) Drafting an additional protocol to the European Convention for Human Rights: Basic Standards for National Minorities, Motion for a recommendation presented by Mr Frunda and others (5 May 2009); PACE, Resolution 1994 (2012) On an additional protocol to the European Convention on Human Rights on national minorities (9 March 2012); PACE, Resolution 1866 (2012) On an additional protocol to the European Convention on Human Rights on national minorities (9 March 2012).

[144] Committee of Ministers (Doc.13097) An additional protocol to the European Convention on Human Rights on national minorities Reply to Recommendation 1994 (2012) (21 January 2013) para.2.

[145] PACE, Recommendation 1415 (1999) Additional protocol to the European Convention on Human Rights concerning fundamental social rights (23 June 1999); PACE (Doc. 8357) Additional protocol to the European Convention on Human Rights concerning fundamental social rights, Report (23 March 1999); PACE (Doc. 8433) Additional protocol to the European Convention on Human Rights concerning fundamental social rights, Opinion (2 June 1999); see also: PACE, Recommendation 1354 (1998) Future of the European Social Charter (28 January 1998).

nor brought up the need to launch a new additional protocol to the European Convention on Human Rights'.[146]

Regarding the inclusion of collective rights in the ECHR, the opinion from 1999 on the report concerning the additional protocol held:

> 'With regard to the possible inclusion of collective rights in the European Convention on Human Rights, it should be borne in mind that the Convention was intended for individuals, who have to prove that they have been the "victims" of a violation of their rights. To include collective rights would be to change the nature of the Convention, even though certain individual rights — such as freedom of assembly and association — are necessarily exercised collectively. Think, for example, of the problems that would be thrown up by introducing a right of appeal for national minorities as such.'[147]

Apart from failing to name the problems arising from a right of appeal for national minorities, the statement contradicts an earlier passage included in the same opinion describing a set of criteria for new rights to be considered for inclusion into the ECHR: '[T]he rights must be fundamental ones and generally recognised and … they must be capable of sufficiently precise formulation to give rise to legal obligations on the part of the state rather than merely setting a general standard.'[148] This definition does not preclude collective rights. Furthermore, the argument that collective rights would not be compatible with the ECHR as they lack a "victim" is circular.[149] This status would be fulfilled as soon as there is a provision in the ECHR granting rights to groups. Being subject of those rights, groups would be "victims" of violations of their rights.

---

[146] CM/AS(2008)Rec1795-final Monitoring of commitments as regards social rights – Parliamentary Assembly Recommendation 1795 (2007) (Reply adopted by the Committee of Ministers on 21 May 2008 at the 1027th meeting of the Ministers' Deputies) (26 May 2008) para.5; see also: CM/Del/Dec(2001)750/4.3 Future of the European Social Charter and Additional protocol to the European Convention on Human Rights concerning fundamental social rights – Parliamentary Assembly Recommendations 1354 (1998) and 1415 (1999) (32 April 2001).

[147] PACE (Doc. 8433) Additional protocol to the European Convention on Human Rights concerning fundamental social rights *supra* note 145, para.36.

[148] PACE (Doc. 8433) Additional protocol to the European Convention on Human Rights concerning fundamental social rights *supra* note 145, para.19; PACE (Doc. 4213) Widening the scope of the European Convention on Human Rights, Report (27 September 1978); PACE, Recommendation 838 (1978) Widening the scope of the European Convention on Human Rights (27 September 1978).

[149] PACE (Doc. 8433) Additional protocol to the European Convention on Human Rights concerning fundamental social rights *supra* note 145, para.28.

Although the debate on adopting a protocol on national minorities intensified only in the 1990s, a 1973 report of the Committee of Experts already addressed the issue and held that 'there appears to be no overriding obstacle of a legal character to prevent this from being done.'[150] This again points to the essentially political reluctance of CoE member states and reaffirms that the ECHR framework would, as I have argued, be capable of encompassing group rights from a legal perspective.

The argument for the rejection of an additional protocol on social and economic rights largely focused on historical reasons and their stance in the 'hierarchy of rights', referring to the generations of human rights.[151] When looking at human rights in this generational context, the punishment of a group for acts allegedly committed by one or some of its members, for which they do not bear individual responsibility and with the intent to punish this specific group collectively, appears to be firmly rooted in the civil and political rights arena due to its content. Social, economic or cultural rights of groups and their members are rather facilitated by fundamental safeguards such as a prohibition of collective punishment.

Returning to the criteria for rights to be considered for incorporation into the ECHR, the prohibition of collective punishment can be considered a 'fundamental' right and given its status in the law of armed conflict also as 'generally recognised'.[152] Furthermore, its elements are 'sufficiently precise' to 'give rise to legal obligations on the part of the state rather than merely setting a general standard.'[153] Regarding the question of obligations and consequently, compensation for groups whose right to freedom from collective punishment has been violated, I suggest a fresh look at the Court's 'general measures'. According to the Rules of Court, the pilot-judgment procedure allows the ECtHR to adopt general measures in case of the 'existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications.'[154] Such

[150] DH/Exp (73) 47 Report of the Committee of Experts on Human Rights to the Committee of Ministers (9 November 1973) para.12.
[151] PACE (Doc. 8433) Additional protocol to the European Convention on Human Rights concerning fundamental social rights *supra* note 145, para.3ff.
[152] See chapter on collective punishment and the law of armed conflict.
[153] PACE (Doc. 8433) Additional protocol to the European Convention on Human Rights concerning fundamental social rights *supra* note 145, para.19; PACE (Doc. 4213) Widening the scope of the European Convention on Human Rights, Report (27 September 1978); PACE, Recommendation 838 (1978) Widening the scope of the European Convention on Human Rights (27 September 1978).
[154] ECtHR, Rules of Court, Registry of the Court, Strasbourg (14 November 2016) Rule 61 (1); European Court of Human Rights (2017). Factsheet – Pilot Judgments, Press Unit, online available at: http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf (accessed on 15/04/18).

general measures have led to changes in domestic law, sometimes even on constitutional level.[155] This is not a call for an automatic pilot-judgment procedure in cases involving collective punishment, but rather a suggestion that the Court could make use of general measures on a broader scale to provide an effective remedy. General measures appear useful in the context of collective punishment as policies in favour of such practices might be widespread and therefore would require abstract measures going beyond the facts of the case at hand to prevent recurrence. Also, when looking at the rejection of a national minorities protocol by the Committee of Ministers in 2013, it is apparent that they were criticising the adoption of rights for specific groups of people. However, a prohibition of collective punishment would not be limited to national or ethnic minorities, as it does not require a discriminatory element. The group affected by collective punishment only has to be identifiable. A group is identifiable or sufficiently distinct if it is being punished as a whole for an act committed by one of its members. As mentioned previously, this rather neutral understanding of the term "group" will often overlap in practice with groups based on a shared identity such as in the case studies. Although the groups directly affected by collective punishment are the families whose houses are destroyed, those acts are often only another piece in the ongoing discriminatory treatment they are exposed to as members of a bigger group or community, namely the Palestinians or Chechens. Although one could refer to the groups protected by the prohibition of discrimination (for instance based on ethnicity, religion or sex) to illustrate which groups might be affected by collective punishment in practice, this would not represent an exhaustive list nor a limitation to groups based on those criteria.

Setting aside political debates about those issues in the CoM, the Court itself has already addressed questions relevant to collective punishment. As shown in the case review in the chapter on collective punishment and human rights law, the Court is well aware of the concept of collective punishment. It has referred to it in 46 cases so far, some of them even in the Chechen context.[156] In addition, the cases reviewed in this chapter point out two things. Firstly, the Court is able to address cases filed by non-governmental organisations understood in a broad sense. Secondly, the Court has started to use Article

[155] See eg: 1259 meeting (7-9 June 2016) (DH) - Action report (18/03/2016) - Communication from Slovenia concerning the case of Kurić and others against Slovenia (no.26828/06); for constitutional changes following judgments see eg: Resolution DH (95) 211 of 11 September 1995 on *Demicoli v Malta* (Merits and Just Satisfaction) no.13057/87, Court (Chamber) (27 August 1991); Lambert Abdelgawad, E. (2008). *The execution of judgments of the European Court of Human Rights*. 2nd edition. Strasbourg, Council of Europe Publishing, pp.28ff.
[156] See chapter on human rights and collective punishment, number of cases as of April 2018.

14 ECHR more frequently and called for the consideration of the broader context of cases. Together with the cross-references made to the FCNM and the ESC, the Court has enriched this broader context with a reading of the social aspects of individual cases, which could prove to be fertile ground for a prohibition of collective punishment under the ECHR or an additional protocol to it.

A prohibition of collective punishment under the ECHR could prove useful in cases relating to state-sponsored marginalisation of specific groups, in particular when legislation targeting specific groups is involved. Examples of such situations could be the Chechen house destructions and the law requiring relatives of alleged terrorists to pay compensation for damages arising from terrorist acts addressed in the second case study, or the 2017 case *Bayev and Others v Russia* and the so-called 'gay propaganda law'.[157] In these instances, groups are punished for acts allegedly committed by one or some of its members. The question of evidence could be handled in a way similar to Article 14 ECHR. After *prima facie* evidence of a collective punishment policy had been provided by the applicants showing that a sanction was imposed on an identifiable group as such in response to one of its members committing a certain act, the respondent state would have to show that the respective law or the incident in the present case was 'neutral' and was not targeting a specific group collectively by proving that the sanctions or other measures were imposed based on the individual responsibility of the perpetrators.

Furthermore, a case on collective punishment could feature a number of applicants. Firstly, there would be a non-governmental organisation representing the group and claiming the violation of the group's freedom from collective punishment. Secondly, there could be additional individual applicants claiming violations of the rights regularly violated in the course of collective punishment such as the right to life, the prohibition of torture, right to private and family life or the right to property in conjunction with Article 14 ECHR, the prohibition of discrimination. As indicated above, it is expected that most of the groups in those cases will overlap with groups based on a shared identity such as minorities and general discriminatory practices used against them by state authorities, making the judgement of those cases and the delineation of acts involved challenging for the Court. However, the claim brought by the non-governmental organisation on behalf of the group and the claims brought by individual members of

[157] See chapter on the Chechen case study; *Bayev and Others v Russia supra* note 119.

that group would mutually reinforce each other as they provide the substance and background to each other's claims.

A draft prohibition of collective punishment could be along the following lines:

> "Prohibition of collective punishment.
>
> The punishment of a group as such for acts committed by one of its members for which they bear no individual responsibility is prohibited."

The question of allegedly committed acts and the commission of those by more than one of the members of the group would be left to the explanatory remarks to the prohibition. As seen in the case studies, authorities have often only accused members of an identifiable group to have committed a certain act (for example shots coming from the direction of a certain village, hiding of insurgents on their premises) without proving their allegations. If the "act committed" would be limited to crimes under the relevant domestic laws for which a member of the group has been found guilty, the collective punishment of groups based on allegations made by the authorities against members of the group would fall outside its scope. This represents an unnecessary limitation of the prohibition of collective punishment. Therefore, the collective punishment of a group based on an act allegedly committed by one of its members should be seen as within the remit of the prohibition as long as the act the member is accused of is sufficiently linked to the punishment of the group. Otherwise, the imposition of sanctions on a group for other reasons such as their shared identity, represents rather discriminatory treatment of the group in a broader sense, pointing again at the potential overlap of those issues in the context of collective punishment. The phrase "one of its members" does not exclude the imposition of collective punishment on a group as such for acts (allegedly) committed by one of its members but encompasses the commission of acts by more than one member as well.

The term "group as such" is broad. However, this decision is due to the relatively neutral understanding of it as it includes any identifiable group. Whether or not a group is identifiable, is shown by the facts of the case. A group is identifiable if it was punished collectively for the act of one of its members, which means the group is sufficiently distinct to determine who is a member of it and to attribute them to the group. Although this definition does not include any additional elements based on discrimination or a shared identity, the groups affected by collective punishment in practice are likely to overlap with groups or broader communities based on such shared identities. As shown

in the case studies, the group directly affected by collective punishment is the family of the accused. Yet this family also belongs to a broader group or community which is based on a shared identity and subject to discriminatory treatment by the authorities in general. The question of defining the broad notion of the identifiable group would be up to the Court and decided on a case-by-case basis.

Summing up, I contend that there is promising ground for a prohibition of collective punishment under the ECHR. Previous unsuccessful efforts regarding the incorporation of minority rights or social rights into the ECHR framework do not, in my view, inhibit a prohibition of collective punishment. A prohibition of collective punishment would represent a fundamental, generally recognised and sufficiently precise defined group right able to address the group dimension of collective punishment.

5.2.6 Conclusion

CoE member states have already agreed in different fora to the protection of collective rights by adopting the ESC and FCNM. By way of interpretation, the ECtHR has taken note of FCNM reports and case law of the ECSR showing that it is following these developments. However, interpretive aids will not suffice to tackle collective punishment. After analysing the collective complaints procedure of the ESC and the complaints procedure under the ACHPR as well as non-discrimination cases of the ECSR and the ECtHR, the establishment of a new rule under the ECHR framework prohibiting collective punishment appears viable and necessary.

In contrast to a broad interpretation of already existing rights, the adoption of a new rule requires state involvement and political support. However, the reasons for the rejection of an additional protocol on minority rights and on social rights are not present in the context of collective punishment in the same manner, as it is understood as a non-exclusive and fundamental right. A prohibition of collective punishment is not limited to one specific group such as national minorities as it applies to any identifiable group and is not based on a discriminatory element. Furthermore, the prohibition of collective punishment is situated in the civil and political spectrum of human rights. A group's freedom from punishment for acts committed by one or some of its members is a fundamental right facilitating and contributing to the enjoyment of other rights such as social and economic rights. Finally, the prohibition of collective punishment enjoys broad political support under the law of armed conflict and therefore it is unlikely that states will openly reject such a prohibition under human rights law, which is necessary

due to instances of collective punishment occurring in situations outside the scope of armed conflict.

As Bowring observed, '[t]he founding documents of the Council of Europe displayed a certain allergy to minority or group rights.'[158] He traced this attitude back to the Western aversion to communist ideology: '[T]he Western European states wished to demonstrate that they were as serious about the "first generation" civil and political rights as the USSR and its allies undoubtedly were with regard to the "second generation" social and economic rights.'[159] However, the time when states could have said that collective rights would be nothing they would ever agree to is long over. They have agreed to collective rights in the ESC, including a collective complaints system and like the ECHR, part of the human rights instruments of the Council of Europe. Therefore, collective rights in the CoE human rights context are nothing new anymore.

Combining this state consent with procedural and substantive support gathered from a range of sources including the FCNM, ESC, ACHPR and ECHR, a prohibition of collective punishment under the ECHR seems possible and as shown by the case study on Chechnya, is very much needed.

[158] Bowring, B. (2013) *supra* note 78, p.439.
[159] Bowring, B. (2013) *supra* note 78, p.440.

6 Conclusion

Collective punishment of a group as such for an act allegedly committed by one or some its members has traversed from situations of armed conflict to situations governed by human rights law. Although collective punishment has been imposed in the colonial and post-conflict context before, the adoption of a law in peacetime introducing collective punishment without any reference to armed conflict or a state of emergency adds to the urgency of addressing collective punishment in times governed by human rights law. In order to provide the legal background, the thesis started with an account of the legal regulation of collective punishment in the law of armed conflict. Collective punishment is prohibited in times of international as well as non-international armed conflict by the 1949 Geneva Conventions and their 1977 Additional Protocols. Although a minority of states was reluctant to agree, these rules are widely accepted which is reflected by their status as customary international law. Yet the unwillingness of certain states to afford guarantees to actors other than states, in particular national liberation movements or peoples, indicates a suspicion towards such groups and rights or guarantees for them in a broader sense.

The research question posed at the beginning asked about the relationship between the state policies on collective punishment and the legal regulation thereof under the law of armed conflict and human rights law and the effects of this relationship on the protection and empowerment of affected groups. Was the substantive prohibition of collective punishment under the law of armed conflict successful in preventing punitive house demolitions in the Occupied Palestinian Territories? If not, why would a prohibition of collective punishment under human rights law fare any better? Faced with state practice violating the prohibition of collective punishment, one could question the rule's effectiveness and influence on state practice as well as its contribution to the empowerment of groups.

However, the prohibition of collective punishment under the law of armed conflict has to be seen in the broader context, as illustrated by the case study on the Occupied Palestinian Territories. Although the substantive rule against collective punishment alone will not bring about a change in state behaviour and empowerment for affected groups, it is an important part in a concerted effort working towards that aim. Together with other domestic and international mechanisms based on the law of armed conflict,

international criminal law and human rights law, the prohibition of collective punishment has the potential to make a difference. The Palestinians have brought a number of cases against Israeli authorities regarding punitive house demolitions in the Gaza Strip and the West Bank. In this context, the prohibition of collective punishment provided the basis for these court cases and denied legality to any legal regulation brought in by Israeli authorities to justify collective punishment. In that sense, the prohibition of collective punishment under the law of armed conflict contributes to the empowerment of Palestinians as it provides them with a tool to actively participate in their struggle for justice.

After laying the foundation for an analysis of collective punishment, the thesis continued with a survey of human rights instruments containing any explicit or implicit traces of a prohibition of collective punishment. Yet this survey has proved unsuccessful. Although the human rights instruments reviewed such as the ICCPR, the ECHR or the ACHPR do mention related concepts such as the principle of individual responsibility and group rights, they do not address collective punishment as such. The only explicit reference to collective punishment was found in a General Comment to the ICCPR regarding the declaration of states of emergency. This reference showed how closely entwined situations of armed conflict and situations governed by human rights law can become and strengthened the call for a consideration of collective punishment under human rights law.

States of emergency highlight the fluid transition between the law of armed conflict and human rights law, in particular when it comes to the aftermath of non-international armed conflicts. At the moment, human rights instruments can only deal with violations of specific individual human rights going hand in hand with collective punishment during such periods of transition. In other words, they only address the "symptoms" of collective punishment. These can range from violations of the right to life, the prohibition of torture, the right to private life or the right to property in conjunction with the prohibition of discrimination. However, they do not address the cause, the act of collective punishment itself. The ECtHR, which was the focus of attention due to its connection to the Chechen case study, has already referred to the term "collective punishment" in several cases dealing amongst others with the treatment of prisoners, non-refoulement (including a Chechen case), references to international law standards including collective punishment and the treatment of Kurds in Turkey. Although it has not decided on collective punishment as such so far, due to the lack of a prohibition, these

cases show that the Court is familiar with the concept of collective punishment and that it has not objected to the use of this term either.

The impact of the inability of human rights law to address collective punishment can be seen in Chechnya today. The two non-international armed conflicts fought with Russia since the beginning of the 1990s as well as the local repressive regime loyal to the Federal government have facilitated the imposition of collective punishment in a number of ways. During the second non-international armed conflict, whole villages were subjected to sweeping operations, *zachistkas*, which were accompanied by extrajudicial killings, disappearances, torture, looting and property destruction. These operations as well as following measures of collective punishment are directed against alleged members of the Chechen insurgent movement, now equated with terrorists by the authorities. Today, collective punishment is taking the form of house burnings and collective expulsion.

In addition to these practices of Chechen security forces, Russian-wide legislation calling for the responsibility of family members of alleged terrorists to pay for damages arising from terrorist attacks has effectively introduced collective punishment. Such laws are facilitated by the lack of an explicit prohibition of collective punishment outside armed conflict and highlight the importance of addressing collective punishment under human rights law. As outlined in the case review, the ECtHR is already familiar with collective punishment. It is explicitly familiar with collective punishment in the Chechen context, as some of the cases brought before the Court show. However, the Court could again only rule on the specific rights violated in the course of collective punishment and not on the act itself.

Although the substantive rule prohibiting collective punishment under the law of armed conflict has only a limited capacity to influence state practice on its own, its existence contributes to a broader framework aiming to hold the perpetrators to account in domestic and international fora. A prohibition of collective punishment under human rights law could fulfil a similar purpose and might even go beyond that as human rights instruments such as the ECHR could offer redress to groups affected by collective punishment. The gap in human rights law concerning collective punishment has so far rather facilitated collective punishment policies as seen in the Chechen case study and therefore it would be timely for human rights law to fill this gap and challenge state practice in favour of collective punishment.

After establishing the necessity of addressing collective punishment under human rights law, the thesis looked at possible ways to include a prohibition of collective punishment under human rights law, in particular under the ECHR. First, the theoretical approaches of the law of armed conflict and human rights law were compared. The collective character of the law of armed conflict stands in stark contrast to human rights law's focus on the individual. However, human rights law is able to encompass group rights from a theoretical perspective by conceiving of individuals as 'social beings'.[1] This means that the 'individual human being and his group or community are *ontologically* interdependent'. [2] Taking on Newman's theory of collective rights, groups can be rightholders or right-bearing entities whose rights are derived from collective interests that are irreducible to the individual members of the group.

Following this theoretical account of the viability of collective human rights or human rights held by groups, the last chapter of the thesis examined potential solutions to close this gap in human rights law. This gap does not only represent a gap in protection, but it leaves affected groups without tools to confront the perpetrators of collective punishment. Focussing again on the ECHR, other human rights instruments of the Council of Europe were reviewed for potential interpretative aid and ways for addressing group claims. The ESC proved to be particularly insightful in this regard. Although the ESC's social rights do not address collective punishment in its substantive aspects, these rights can be claimed only by groups via a collective complaints mechanism. This mechanism and the ECSR's handling of such cases showed that there are no technical or procedural impediments to adjudicating group rights. Furthermore, the ECHR itself could accommodate claims brought by groups if they are represented by non-governmental organisations in a way similar to the ESC's collective complaints procedure.

Although the procedural framework for group rights under the ECHR can be mapped out, the question whether a substantive prohibition of collective punishment under the ECHR is possible remains. Several attempts at the adoption of a protocol to the ECHR regarding national minority rights and social and economic rights have failed in the past. However, the question of including national minority rights or social and economic rights in the

[1] Felice, W.F. (1996). *Taking Suffering Seriously: The Importance of Collective Human Rights*. New York, State University of New York Press, p.19.
[2] Segesvary, V. (1995). Group rights: The definition of group rights in the contemporary legal debate based on socio-cultural analysis*, International Journal on Group Rights*, 3, pp.89-107, p.93.

ECHR framework is not the same as the question of including a prohibition of collective punishment. While the main reason for rejecting national minority rights was their limitation in scope, the main reason for rejecting social and economic rights was their status as "second generation rights" in contrast to the "first generation rights" covered by the ECHR. Yet a prohibition of collective punishment would not face these two criticisms. Firstly, the prohibition of collective punishment is not limited to a specific group but based on the broad notion of an identifiable group without a discriminatory element. Secondly, the prohibition of collective punishment is a fundamental right that is generally recognised, at least in the context of the law of armed conflict, and sufficiently precise in its formulation to create legal obligations. This means, that the prohibition of collective punishment would fulfil the criteria for inclusion in the ECHR framework.

Acknowledging the fact that the adoption of a new rule, the inclusion of the prohibition of collective punishment in the ECHR framework, requires state support, a look back at the analysis of collective punishment under the law of armed conflict reaffirmed the customary law character of said prohibition. Although this support is present in a different forum, the law of armed conflict, it is unlikely that states would openly object to a prohibition of collective punishment under human rights law on its substantive grounds. Similarly, any remaining suspicions towards rights held by groups have to stand against the facts on the ground. CoE member states have already agreed to collective rights by adopting the ESC and FCNM and although the theoretical debate might well continue, this is a powerful sign towards a general acceptance of rights held by collectivities among CoE member states. This consent should not be ignored and can help facilitate a prohibition of collective punishment under the ECHR.

As the case study on Chechnya has shown, this endeavour is not solely theoretical in nature. It is a call for action, a challenge to the ECHR to contribute to the empowerment of groups affected by collective punishment, to enable them to actively participate in their struggle for justice. This is not just about the destruction of houses, this is about the treatment of groups and about the chance to give them rights that go beyond lump-sum payments for rebuilding their homes, but enable them to seek justice and reinforce trust in human rights instruments which recognise them not as objects of protection, but as active rightholders building their own future.

While this thesis is only the starting point for further discussion and future research on the question of a prohibition of collective punishment under human rights law and the

ECHR in particular; and for a reconsideration of group rights in human rights law in general, it is hoped that it has offered enough reasons to continue this debate and to work towards the empowerment of groups affected by collective punishment.

7 Bibliography

7.1 Monographs

Agamben, G. (2005). *State of Exception* (translated by Attell, K.). Chicago, University of Chicago Press

Alter, K.J. (2014). *The New Terrain of International Law: Courts, Politics, Rights*. Princeton, Princeton University Press

Anderson, D. (2005). *Histories of the Hanged: Britain's Dirty War in Kenya and the End of Empire.* London, Weidenfeld & Nicolson

Barker, E. (1942). *Reflections on Government*. New York, Oxford University Press (reprinted 1958)

Benelhocine, C. (2012). *The European Social Charter*. Strasbourg, Council of Europe Publishing

Berkeley, G. (1948–1957). *The Works of George Berkeley*. Edited by Luce, A.A. & Jessop, T.E. (9 Volumes). London, Thomas Nelson and Sons

Bisaz, C. (2012). *The Concept of Group Rights in International Law: Groups as Contested Right-Holders, Subjects and Legal Persons*. Leiden, Martinus Nijhoff

Bix, B.H. (2015). *Jurisprudence: Theory and Context*. 7th edition. London, Sweet & Maxwell

Bowring, B. (2008). *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics*. Abingdon, Routledge-Cavendish

Breaking the Silence (2012). *Our Harsh Logic: Israeli Soldiers' Testimonies from the Occupied Territories, 2000-2010*. New York, Metropolitan Books

Chadwick, E. (1996). *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict.* Leiden, Martinus Nijhoff

Cornell, S.E. (2001). *Small Nations and Great Powers: A Study Of Ethnopolitical Conflict In The Caucasus*. London, Routledge Curzon

Darcy, S. (2003). *Israel's Punitive House Demolition Policy: Collective Punishment in Violation of International Law*. Ramallah, Al-Haq

Darcy, S. (2007). *Collective Responsibility and Accountability under International Law*. Leiden, Martinus Nijhoff

Dershowitz, A.M. (2002). *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*. New Haven, Yale University Press

Dewey, J. (1910). *How we think*. New York, D.C. Heath and Company

Dewey, J. (1916). *Essays in Experimental Logic*. Chicago, University of Chicago Press

Dewey, J. (1938). *Logic – The Theory of Inquiry*. New York, Henry Holt and Company

Dicker, G. (2004). *Kant's Theory of Knowledge: An Analytical Introduction*. Oxford, Oxford University Press

Dinstein, Y. (2009). *The International Law of Belligerent Occupation*. Cambridge, Cambridge University Press

Donnelly, J. (2013). *Universal Rights in Theory and Practice*. 3rd edition. Ithaca, Cornell University Press

Duxbury, N. (1997). *Patterns of American Jurisprudence*. Oxford, Oxford University Press

Dworkin, R. (1978). *Taking Rights Seriously*. Cambridge, Harvard University Press

Dworkin, R. (1986). *Law's Empire*. Cambridge, Harvard University Press

Dworkin, R. (2006). *Justice in Robes*. London, Harvard University Press

Elkins, C. (2005). *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya*. New York, Holt

Eskridge, W.N. Jr. (1994). *Dynamic Statutory Interpretation*. London, Harvard University Press

Felice, W.F. (1996). *Taking Suffering Seriously: The Importance of Collective Human Rights*. New York, State University of New York Press

Finnis, J. (1980). *Natural Law and Natural Rights*. Oxford, Clarendon Press

Finnis, J. (2011). *Natural Law and Natural Rights*. 2nd edition. Oxford, Oxford University Press

Fuller, L. (1969). *The Morality of Law*. New Haven, Yale University Press

George, R.P. (1999). *In Defense of Natural Law*. Oxford, Oxford University Press

Gilligan, E. (2010). *Terror in Chechnya: Russia and the Tragedy of Civilians in War*. Princeton, Princeton University Press

Gould, C.C. (1978). *Marx's Social Ontology*. Cambridge, MIT Press

Gould, C.C. (1988). *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy, and Society*. Cambridge, Cambridge University Press

Griffin, J. (2008). *On Human Rights*. Oxford, Oxford University Press

Hannikainen, L. (1988). *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status*. Helsinki, Finnish Lawyers' Publishing Company

Hookway, C. (2012). *The Pragmatic Maxim: Essays on Peirce and Pragmatism*. Oxford, Oxford University Press

Hume, D. (2000). *An Enquiry concerning Human Understanding*. Edited by Beauchamp, T.L. Oxford, Clarendon Press

Jovanović, M. (2012). *Collective Rights: A Legal Theory*. Cambridge, Cambridge University Press

Kant, I. (2009). *Critique of Pure Reason*. Translated and edited by Guyer, P. & Wood, A.W. Cambridge, Cambridge University Press

Kelsen, H. (1992). *Introduction to the Problems of Legal Theory: The Pure Theory of Law*. Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law by Litschewski Paulson, B. & Paulson, S.L. with an Introduction by Paulson, S.L. Oxford, Oxford University Press

Klose, F. (2009). *Menschenrechte im Schatten kolonialer Gewalt: Die Dekolonisierungskriege in Kenia und Algerien 1945-1962.* München, Oldenbourg Wissenschaftsverlag

Knop, K. (2002). *Diversity and Self-Determination in International Law*. Cambridge, Cambridge University Press

Kothari, C.R. (2004). *Research Methodology: Methods and Techniques*. 2nd edition. New Delhi, New Age

Kretzmer, D. (2002). *The Occupation of Justice*. Albany, State University of New York Press

Kymlicka, W. (1989). *Liberalism, Community, and Culture.* Oxford, Clarendon Press

Kymlicka, W. (1996). *Multicultural Citizenship: A Liberal Theory of Minority Rights.* Oxford, Clarendon Press

Lambert Abdelgawad, E. (2008). *The execution of judgments of the European Court of Human Rights*. 2nd edition. Strasbourg, Council of Europe Publishing

Lemkin, R. (1944). *Axis Rule in Occupied Europe*. Washington, Carnegie Endowment for International Peace

Levie, H.S. (1977). *Prisoners of War in International Armed Conflict*. Newport, Naval War College Press

Llewellyn, K.N. (1960). *The Bramble Bush: The Classic Lectures on the Law and Law School.* Oxford, Oxford University Press

MacIntyre, A. (1988). *Whose Justice? Which Rationality?.* Notre Dame, University of Notre Dame Press

MacKinnon, C. (1989). *Toward a Feminist Theory of the State*. Cambridge, Harvard University Press

Maitland, F.W. (1903). *Moral Personality and Legal Personality*, in Fisher, H.A.L. (1911)(ed). *The Collected Papers of Frederic William Maitland.* Cambridge, Cambridge University Press

Mannheim, H. (1998). *Group Problems in Crime and Punishment*. 2nd edition. London, Routledge

Masalha, N. (2007). *The Bible and Zionism: Invented Traditions, Archaeology and Post-Colonialism in Palestine-Israel*. London, Zed Books

McDowall, D. (2004). *A Modern History of the Kurds*. 3rd edition. London, I.B. Tauris

Moir, L. (2002). *The Law of Internal Armed Conflict*. Cambridge, Cambridge University Press

Newman, D. (2011). *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups*. Oxford, Hart

Nowak, M. (2005). *U.N. Covenant on Civil and Political Rights: CCPR Commentary*. 2nd edition. Kehl, N.P. Engel Verlag

O'Brien, W.V. (1991). *Law and Morality in Israel's War with the PLO*. London, Routledge

O'Nions, H. (2007). *Minority Rights Protection in International Law: The Roma of Europe*. Farnham, Ashgate

Oberleitner, G. (2015). *Human Rights in Armed Conflict*. Cambridge, Cambridge University Press

Open Society Justice Initiative (2010). *From Judgment to Justice: Implementing International and Regional Human Rights Decisions.* New York, Open Society Foundations

Plater-Zyberk, H. (2014). *Russia's Contribution as a Partner in the War on Terrorism.* Carlisle Barracks, US Army War College, Strategic Studies Institute

Provost, R. (2002). *International Human Rights and Humanitarian Law*. Cambridge, Cambridge University Press

Rawls, J. (1971). *A Theory of Justice*. Cambridge, Harvard University Press

Raz, J. (1986). *The Morality of Freedom*. Oxford, Clarendon Press

Russell, J. (2007). *Chechnya – Russia's 'War on Terror'*. Abingdon, Routledge

Sadan, E. (2004). *Empowerment and Community Planning: Theory and Practice of People-Focused Social Solutions.* Tel Aviv, Hakibbutz Hameuchad Publishers

Schabas, W.A. (2006). *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone*. Cambridge, Cambridge University Press

Schabas, W.A. (2015). *The European Convention on Human Rights: A Commentary*. Oxford, Oxford University Press

Schelsky, H. (1980). *Die Soziologen und das Recht*. (The Sociologists and the Law). Wiesbaden, Springer

Simpson, A.W.B. (2004). *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*. revised edition. Oxford, Oxford University Press

Snetkov, A. (2015). *Russia's Security Policy under Putin: A critical perspective.* Abingdon, Routledge

Souleimanov, E. (2007). *An Endless War: The Russian-Chechen Conflict in Perspective*. Frankfurt am Main, Peter Lang

Suter, K. (1984). *An International Law of Guerrilla Warfare: The Global Politics of Law-Making*. London, Frances Pinter

Tamanaha, B.Z. (1997). *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law.* Oxford, Oxford University Press

Thomas, E.W. (2005). *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles.* Cambridge, Cambridge University Press

Von Glahn, G. (1957). *The Occupation of Enemy Territory.* Minneapolis, University of Minnesota Press

Von Jhering, R. (1913). *Law as a Means to an End*. Translated by Husik, I. and edited by Drake, J.H., Lamm, H. & Geldart, W.M. Boston, Boston Book Company

Von Jhering, R. (1915). *The Struggle for Law.* 2nd edition. Translated from the 5th German edition by Lalor, J.J. Chicago, Callaghan and Company

Von Jhering, R. (1997). *Der Kampf um's Recht*. (The Struggle for Law). 18th edition. Edited and introduction by Ermacora, F. Wien, Propyläen Verlag

Wilhelmsen, J. (2017). *Russia's Securitization of Chechnya: How War Became Acceptable.* Abingdon, Routledge

Yin, R. K. (2012). *Applications of Case Study Research*. 3rd edition. Thousand Oaks, Sage

Yin, R. K. (2014). *Case Study Research: Design and Methods*. 5th edition. Thousand Oaks, Sage

Zurcher, C. (2007). *The Post-Soviet Wars: Rebellion, Ethnic Conflict, and Nationhood in the Caucasus.* New York, New York University Press

7.2 Collections and collaborations

Arnold, R. & Quénivet, N. (eds)(2008). *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law*. Leiden, Martinus Nijhoff

Barnett, M. N. & Duvall, R. (eds.)(2005). *Power in Global Governance*. Cambridge, Cambridge University Press

Ben-Naftali, O. (ed.)(2011). *International Humanitarian Law and International Human Rights Law*. Oxford, Oxford University Press

Bothe, M., Partsch, K.J. & Solf, W.A. (2013). *New rules for victims of armed conflicts: commentary on the two 1977 protocols additional to the Geneva Conventions of 1949*. 2nd edition. Leiden, Martinus Nijhoff

Brunée, J. & Toope, S.J. (2010). *Legitimacy and Legality in International Law: An International Account.* Cambridge, Cambridge University Press

Cane, P. & Kritzer, H.M. (eds.)(2010). *The Oxford Handbook of Empirical Legal Research*. Oxford, Oxford University Press

Carey, J., Dunlap, W.V. & Pritchard, R.J. (eds.)(2003). *International Humanitarian Law: Origins.* Leiden, Martinus Nijhoff

Clapham, A., Gaeta, P. & Sassòli, M. (eds)(2015). *The 1949 Geneva Conventions: A Commentary*. Oxford, Oxford University Press

Council of Europe Publishing (ed)(2004). *Mechanisms for the Implementation of Minority Rights*. Strasbourg, Council of Europe Publishing

Cruft, R., Liao, S.M. & Renzo, M. (eds)(2015). *Philosophical Foundations of Human Rights*. Oxford, Oxford University Press

De Beco, G. (ed)(2012). *Human Rights Monitoring Mechanisms of the Council of Europe*. London, Routledge

De Búrca, G., De Witte, B. & Ogertschnig, L. (eds)(2005). *Social Rights in Europe*. Oxford, Oxford University Press

De Preux, J. (ed.)(1960). *III Geneva Convention relative to the Treatment of Prisoners of War.* Geneva, International Committee of the Red Cross

Denzin, N. K. & Lincoln, Y. S. (eds.)(2011). *The SAGE Handbook of Qualitative Research*. 4th edition. Thousand Oaks, Sage

Dubber, M.D. & Hörnle, T. (eds.)(2014). *The Oxford Handbook of Criminal Law*. Oxford, Oxford University Press

Dunoff, J.L. & Pollack, M.A. (eds.)(2013). Interdisciplinary Perspectives on International Law and International Relations: The State of the Art. Cambridge, Cambridge University Press

Evans, M. & Murray, R. (eds.)(2008). *The African Charter on Human and Peoples' Rights: The System in Practice 1986 – 2006.* 2nd edition. Cambridge, Cambridge University Press

Evans, M.D. (ed.)(2014) *International Law*. 4th edition. Oxford, Oxford University Press

Fleck, D. (ed.)(2013). *The Handbook of International Humanitarian Law*. 3rd edition. Oxford, Oxford University Press

Fottrell, D. & Bowring, B. (eds)(1999). *Minority and Group Rights in the New Millennium*. The Hague, Kluwer Law International

Francioni, F. (ed.)(2007). *Access to Justice as a Human Right*. Oxford, Oxford University Press

Freeman, M. & Harrison, R. (eds.)(2007). *Law and Philosophy*. Oxford, Oxford University Press

Golding, M.P. & Edmundson, W. A. (eds.)(2005). *The Blackwell Guide to the Philosophy of Law and Legal Theory*. Oxford, Blackwell

Hart, H.M. Jr. & Sacks, A.M. (1994). *The Legal Process: Basic Problems in the Making and Application of Law*. New York, Foundation Press

Henckaerts, J.M. & Doswald-Beck, L. (eds.) (2005). *Customary International Humanitarian Law*. Volume 1. Cambridge, Cambridge University Press

Henckaerts, J.M. & Doswald-Beck, L. (eds.) (2005). *Customary International Humanitarian Law*. Volume 2. Cambridge, Cambridge University Press

Hunold, A. (ed)(1961). *Freedom and Serfdom: An Anthology of Western Thought*. Dordrecht, D. Reidel

Joseph, S., Schultz, J. & Castan, M. (2004). *The International Covenant on Civil and Political Rights: Cases, Material, and Commentary*. 2nd edition. Oxford, Oxford University Press

Lawless, R.M., Robbennolt, J.K. & Ulen, T.S. (2009). *Empirical Methods in Law.* New York, Aspen

Malachowski, A. (ed.)(2013). *The Cambridge Companion to Pragmatism*. Cambridge, Cambridge University Press

O'Connell, M.E. (ed.)(2012). *What Is War? An Investigation in the Wake of 9/11*.Leiden, Martinus Nijhoff

Olson, R.W. (ed.)(1996). *The Kurdish Nationalist Movement in the 1990s: Its Impact on Turkey and the Middle East*. Kentucky, University Press of Kentucky

Patterson, D. (ed.)(1996). *A Companion to Philosophy of Law and Legal Theory*. Oxford, Blackwell

Playfair, E. (ed.)(1992). *International Law and the Administration of Occupied Territories.* Oxford, Oxford University Press

Sakwa, R. (ed.)(2005). *Chechnya: From Past to Future*. London, Anthem Press

Sandoz, Y., Swinarski, C. & Zimmermann, B. (eds.)(1987). *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Geneva, Martinus Nijhoff

Seale, C. (ed.)(2012). *Researching Society and Culture*. 3rd edition. London, Sage

Shaffer, G. (ed.)(2015). *Transnational Legal Ordering and State Change*. Cambridge, Cambridge University Press

Sheeran, S. & Rodley, N. (eds.)(2013). *Routledge Handbook of International Human Rights Law*. Abingdon, Routledge

Shelton, D. (ed.)(2013). *The Oxford Handbook of International Human Rights Law*. Oxford, Oxford University Press

Ssenyonjo, M. (ed.)(2012). *African Regional Human Rights System*. Leiden, Martinus Nijhoff

Stahn, C., Easterday, J.S & Iverson, J. (eds.)(2014). *Jus Post Bellum: Mapping the Normative Foundations*. Oxford, Oxford University Press

Stapleton, J. (ed)(1995). *Group Rights: Perspectives since 1900*. Bristol, Thoemmes Press

Stephen, A. & Xanthaki, A. (eds)(2011). *Reflections on the UN Declaration on the Rights of Indigenous Peoples*. Oxford, Hart

Thornberry, P. & Estébanez, M. (2004). *Minority Rights in Europe*. Strasbourg, Council of Europe Publishing

Tilley, V. (ed.) (2009). *Occupation, Colonialism, Apartheid? A re-assessment of Israel's practices in the occupied Palestinian territories under international law.* Cape Town, Middle East Project of the Democracy and Governance Programme, Human Sciences Research Council of South Africa

Tilley, V. (ed.)(2012). *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories*. London, Pluto Press

Tuck, R. (ed.)(2005). *The Rights of War and Peace, Book II by Hugo Grotius (1583-1645).* Indianapolis, Liberty Fund

Uhler, O.M. & Coursier, H. (eds.) (1958). *IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*. Geneva, International Committee of the Red Cross

Verstichel, A, Alen, A., De Witte, B. & Lemmens, P. (eds)(2008). *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?.* Antwerp, Intersentia

Vrdoljak, A. (ed.)(2013). *The Cultural Dimension of Human Rights*. Oxford, Oxford University Press

Weller, M. (ed)(2005). *The Rights of Minorities in Europe: A Commentary on the European Framework Convention for the Protection of National Minorities*. Oxford, Oxford University Press

Weller, M. (ed)(2007). *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies*. Oxford, Oxford University Press

Weller, M. & Nobbs, K. (eds.)(2010). *Asymmetric Autonomy and the Settlement of Ethnic Conflicts.* Philadelphia, University of Pennsylvania Press

White, N. & Henderson, C. (eds.)(2013). *Research Handbook on International Conflict and Security Law*. Cheltenham, Edward Elgar

7.3 Journal articles

Abbas, T. & Yigit, I.H (2016). Perspectives on Ethno-National Conflict Among Kurdish Families With Members in the PKK, *Terrorism and Political Violence*, 28 (2), pp.297-315

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

Alexander, A. (2015). A Short History of International Humanitarian Law, *European Journal of International Law*, 26 (1), pp.109-138

Amodu, T. (2008). 'For the Record'? Understanding Regulatory Processes through Archival Materials: The Example of Planning Agreements, *Journal of Law and Society*, 35, pp.183-200

Aronson, G. (2005). Issues Arising from the Implementation of Israel's Disengagement from the Gaza Strip, *Journal of Palestine Studies*, 34 (4), pp.49-63

Ashamu, E. (2011). Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya: A Landmark Decision from the African Commission, *Journal of African Law*, 55 (2), pp.300-313

Bekker, G. (2013). The protection of asylum seekers and refugees within the African regional human rights system, *African Human Rights Law Journal*, 13, pp.1-29

Benmelech, E., Berrebi, C. & Klor, E.F. (2015). Counter-Suicide-Terrorism: Evidence from House Demolitions, *Journal of Politics*, 77 (1), pp.27-43

Berry, S.E. (2016). The Siren's Call? Exploring the Implications of an Additional Protocol to the European Convention on Human Rights on National Minorities, *International Journal on Minority and Group Rights*, 23, pp.1-38

Besson, S. (2012). Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: "It Takes Two to Tango in the Council of Europe", *American Journal of Comparative Law*, 60 (1), pp.147-180

Bowring, B. (2009). Fragmentation, Lex Specialis and the Tensions in the Jurisprudence of the European Court of Human Rights, *Journal of Conflict & Security Law*, 14 (3), pp.485-498

Bowring, B. (2012). What reparation does a torture survivor obtain from international litigation? Critical reflections on practice at the Strasbourg Court, *International Journal of Human Rights*, 16 (5), pp.755-772

Bowring, B. (2013). Protecting Minority Rights through an Individual Rights Mechanism: The Strasbourg Court and some Significant Developments to June 2012, *European Yearbook of Minority Issues*, 10, pp.437-460

Bowring, B. (2015). Case-Law of the European Court of Human Rights Concerning the Protection of Minorities, July 2012 to August 2014, *European Yearbook of Minority Issues*, 12, pp.197-222

Bruinessen van, M. (1990). The Kurds in Turkey: Further Restrictions of Basic Rights, *International Commission of Jurists Review*, 45, pp.46-52

Churchill, R.R. & Khaliq, U. (2004). The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?, *European Journal of International Law*, 15 (3), pp.417-456

Crawford, J. (1985). The Rights of Peoples: Peoples or Governments, *Bulletin of the Australian Society of Legal Philosophy*, 9 (2), pp. 136-147

Dannreuther, R. (2014). Shifting Dynamics of the Insurgency and Counterinsurgency in the North Caucasus, *Ethnopolitics*, 13 (4), pp.377-395

Darcy, S. & Reynolds, J. (2010). An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law, *Journal of Conflict & Security Law*, 15 (2), pp.211-243

Darcy, S. (2010). Prosecuting the War Crime of Collective Punishment: Is it Time to Amend the Rome Statute?, *Journal of International Criminal Justice*, 8, pp.29-51

Dewey, J. (1924). Logical Method and Law, *Cornell Law Quarterly*, 10 (1), pp.17-27

Dezalay, Y. & Madsen, M.R. (2012). The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law, *Annual Review of Law and Social Science*, 8, pp.433-452

Dinstein, Y. (1978). The International Law of Belligerent Occupation and Human Rights, *Israel Yearbook on Human Rights*, 8, pp.104-143

Donnelly-Lazarov, B. (2012). Dworkin's Morality and its Limited Implications for Law, *Canadian Journal of Law and Jurisprudence*, 25 (1), pp.79-95

Doswald-Beck L. & Vité, S. (1993). International Humanitarian Law and Human Rights Law*, International Review of the Red Cross*, 33 (Special Issue 293), pp.94-119

Doswald-Beck, L. (1997). International and humanitarian law and the Advisory Opinion of the ICJ on the legality of the threat or use of nuclear weapons, *International Review of the Red Cross*, 316, pp.35-55

Dotan, Y. (1999). Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice during the Intifada*, Law & Society Review*, 33 (2), pp.319-363

Dugard, J. & Reynolds, J. (2013). Apartheid, International Law, and the Occupied Palestinian Territory, *European Journal of International Law*, 24 (3), pp.867-913

Eno, R.W. (2002). The Jurisdiction of the African Court on Human and Peoples' Rights, *African Human Rights Law Journal*, 2, pp.223-233

Erlanger, H. et al (2005). New Legal Realism Symposium: Is it Time for a New Legal Realism?: Foreword*, Wisconsin Law Review*, 2005 (2), pp.335-364

Fineman, M. (2008). The Vulnerable Subject: Anchoring Equality in the Human Condition, *Yale Journal of Law & Feminism*, 20 (1), Article 2

Finnis, J. (2012). Natural Law Theory: Its Past and its Present, *American Journal of Jurisprudence*, 57, pp.81-102

Fletcher, G.P. (2004). Collective Guilt and Collective Punishment, *Theoretical Inquiries in Law*, 5, pp.163-178

Flyvbjerg, B. (2006). Five misunderstandings about case-study research, *Qualitative Inquiry*, 12 (2), pp.219-245

Fraser, N. (2000). Rethinking Recognition, *New Left Review*, 3, pp.107-120

Freeman, M. (1995). Are there Collective Human Rights?, *Political Studies,* 43 (1), pp.25-40

Fryer, E.D. (1977). Applicability of International Law to Internal Armed Conflicts: Old Problems, Current Endeavors, *The International Lawyer*, 11 (3), pp.567-572

Gaeta, P. (1996). The Armed Conflict in Chechnya before the Russian Constitutional Court, *European Journal of International Law*, 7 (4), pp.563-570

Garner, J.W. (1917). Community Fines and Collective Responsibility, *American Journal of International Law*, 11 (3), pp.511-537

Garth, B. & Mertz, E. (2016). Introduction: New Legal Realism at Ten Years and Beyond, *UC Irvine Law Review*, 6, pp.121-136

George, R.P. (2008). Natural Law, *Harvard Journal of Law and Public Policy*, 31 (1), pp.171-196

Goldman, O.Q. (1994). The need for an independent international mechanism for the protection of group rights: A case study of the Kurds, *Tulsa Journal of Comparative & International Law*, 2, pp.45-89

Green, M.S. (2007). Dworkin v. the Philosophers: A Review Essay on Justice in Robes, *University of Illinois Law Review*, 5, pp.1477-1504

Grise, J.E., Gelter, M. & Whitman, R. (2012). Rudolf von Jherings's influence on Karl Llewellyn, *Tulsa Law Review*, 48 (1), pp.93-116

Gross, O. & Ni Aoláin, F. (2001). From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights, *Human Rights Quarterly*, 23 (3), pp.625-649

Guiora, A.N. (2006). Transnational Comparative Analysis of Balancing Competing Interests in Counter-Terrorism, *Temple International & Comparative Law Journal*, 20 (2), pp.363-393

Harpaz, G. (2015). When Does a Court Systematically Deviate from its Own Principles? The Adjudication by the Israel Supreme Court of House Demolitions in the Occupied Palestinian Territories, *Leiden Journal of International Law*, 28, pp.31-47

Harrington, C. & Yngvesson, B. (1990). Interpretive Sociolegal Research, *Law and Social Inquiry*, 15 (1), pp.135-148

Harroff-Tavel, M. (2014). The International Committee of the Red Cross and the promotion of International Humanitarian Law: Looking back, looking forward, *International Review of the Red Cross,* 96 (895/896), pp.817-857

Hart, H.L.A. (1958). Positivism and the Separation of Law and Morals, *Harvard Law Review*, 71 (4), pp.593-629

Hartman, J.F. (1985). Working Paper for the Committee of Experts on the Article 4 Derogation Provision Symposium: Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights: Commentary, *Human Rights Quarterly*, 7 (1), pp.89-131

Hartney, M. (1991). Some Confusions Concerning Collective Rights, *Canadian Journal of Law and Jurisprudence*, 4 (2), pp.293-314

Hawkins, D. & Jacoby, W. (2010). Partial Compliance: A Comparison of the European and Inter-American American Courts for Human Rights, *Journal of International Law and International Relations*, 6 (1), pp.35-85

Hegtvedt, K.A. (2005). Doing Justice to the Group: Examining the Roles of the Group in Justice Research, *Annual Review of Sociology*, 31, pp.25-45

Henrard, K. (2016). Case Law of the European Court on Human Rights Concerning Ethnic, Religious and Linguistic Minorities during 2014: About Differential Margins of Appreciation and the Role of the Prohibition of Discrimination, *European Yearbook of Minority Issues Online*, 13, pp.248–282

Holder, C. (2006). Self-Determination as a Universal Human Right, *Human Rights Review*, 7 (4), pp.5-18

Holtermann, J.V.H. & Madsen, M.R. (2015). European New Legal Realism and international law: how to make international law intelligible, *Leiden Journal of International Law*, 28 (2), pp.211-230

Humphreys, S. (2006). Legalizing Lawlessness: On Giorgio Agamben's State of Exception, *European Journal of International Law*, 17 (3), pp.677-687

International Law Association (1985). Paris Minimum Standards of Human Rights Norms in a State of Emergency, *American Journal of International Law*, 79, pp.1072-1081

Jacoby, T. (2005). Semi-Authoritarian Incorporation and Autocratic Militarism in Turkey, *Development and Change*, 36 (4), pp.641-665

Jongerden, J. (2010). Village evacuation and reconstruction in Kurdistan (1993 – 2002), *Études Rurales*, 186, pp.77-100

Joseph, S. (2002). Human Rights Committee: General Comment 29, *Human Rights Law Review*, 2 (1), pp.81-98

Jovanović, M. (2013). Review of C. Bisaz, The Concept of Group Rights in International Law – Groups as Contested Right-Holders, Subjects and Legal Persons, *International Journal on Minority and Group Rights*, 20, pp.577-583

Kelsen, H. (1941). The Pure Theory of Law and Analytical Jurisprudence, Harvard Law Review, 55 (1), pp.44-70

Klose, F. (2011). The Colonial Testing Ground: The International Committee of the Red Cross and the Violent End of Empire, Humanity: An International Journal of Human Rights, *Humanitarianism, and Development*, 2 (1), pp.107-126

Kreutz, J. (2010). How and when armed conflicts end: Introducing the UCDP Conflict Termination dataset, *Journal of Peace Research*, 47 (2), pp.243-250

Kuperman, R.D. (2001). The impact of internal politics on Israel's reprisal policy during the 1950s, Journal of Strategic Studies, 24 (1), pp.1-28

Kurki, M. & Sinclaire, A. (2010). Hidden in plain sight: Constructivist treatment of social context and its limitations, *International Politics*, 47, pp.1-25

Kwakwa, E. (1990). Belligerent Reprisals in the Law of Armed Conflict, *Stanford Journal of International Law*, 27, pp.49-81

Lang, A. (2015). New legal realism, empiricism, and scientism: the relative objectivity of law and social science, *Leiden Journal of International Law*, 28 (2), pp.231-254

Lewin, N. (2002). Deterring Suicide Killers, *Sh'ma: A Journal of Jewish Responsibility*, pp.11-12

Llewellyn, K.N. (1930). A Realistic Jurisprudence – The Next Step, *Columbia Law Review,* 30 (4), pp.431-465

Llewellyn, K.N. (1931). Some Realism About Realism - Responding to Dean Pound, *Harvard Law Review*, 44, pp.1222-1264

Llewellyn, K.N., Adler, M.J. & Cook, W.W. (1931). Law and the Modern Mind: A Symposium, *Columbia Law Review*, 31 (1), pp.82-115

Macaulay, S. (2005). The New versus the Old Legal Realism: 'Things Ain't What They Used to Be', *Wisconsin Law Review*, 2005 (2), pp.365-403

Macdonald, I. (1989). Group Rights, *Philosophical Papers*, 18 (2), pp.117-136

Machover, D. & Maynard, K. (2006). Prosecuting Alleged Israeli War Criminals in England and Wales, *Denning Law Journal*, pp.95-114

Malloy, T.H. (2014). National Minorities between Protection and Empowerment: Towards a Theory of Empowerment, *Journal on Ethnopolitics and Minority Issues in Europe*, 13 (2), pp.11-29

Marchisio, S. (1998). The Priebke Case before the Italian Military Tribunals: A Reaffirmation of the Principle of Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, *Yearbook of International Humanitarian Law*, 1, pp.344-353

Marks, S. (1995). Civil Liberties at the Margin: The UK Derogation and the European Court of Human Rights, *Oxford Journal of Legal Studies*, 15 (1), pp.69-95

Martines, F. (1998). The Defences of Reprisals, Superior Orders and Duress in the Priebke Case before the Italian Military Tribunal, *Yearbook of International Humanitarian Law*, 1, pp.354-361

McEvoy, A.F. (2005). A New Legal Realism for Legal Studies, *Wisconsin Law Review*, 2005 (2), pp.433-454

Merry, S.E. (2006). New Legal Realism and the Ethnography of Transnational Law, *Law & Social Inquiry*, 31 (4), pp.975-995

Mertz, E. & Suchman, M. (2010). Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism, *Annual Review of Law and Social Science*, 6, pp.555-579

Mitchell, A.D. (2001). Does one illegality merit another? The law of belligerent reprisals in international law, *Military Law Review,* 170, pp.155-177

Mustafa, M. (2005). The Israeli Disengagement from the Gaza Strip: An End of the Occupation?, *Yearbook of International Humanitarian Law*, 8, pp.356-368

Newman, D. (2013). Value Collectivism, Collective Rights, and Self-Threatening Theory, *Oxford Journal of Legal Studies*, 33 (1), pp. 197–210

Nourse, V. & Shaffer, G. (2009). Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory, *Cornell Law Review*, 95, pp.61-138

Nourse, V. & Shaffer, G. (2014). Empiricism, Experimentalism, and Conditional Theory, *Southern Methodist University Law Review*, 67, pp.141-184

O'Donnell, D. (1985). Commentary by the Rapporteur on Derogation Symposium: Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights: Commentary, *Human Rights Quarterly*, 7 (1), pp.23-34

O'Loughlin, J. & Witmer, F.D.W. (2012). The diffusion of violence in the North Caucasus of Russia, 1999–2010, *Environment and Planning A*, 44, pp.2379-2396

Olkowksi, D. (2005). The Myth of the Individual, *Dialogue and Universalism*, 15 (3/4), pp.9-18

Patton, E. & Appelbaum, S. H. (2003). The case for case studies in management research, *Management Research News*, 26 (5), pp.60-71

Pentassuglia, G. (2012). The Strasbourg Court and Minority Groups: Shooting in the Dark or a New Interpretive Ethos?, *International Journal on Minority and Group Rights*, 19, pp.1-23

Peroni, L. & Timmer, A. (2013). Vulnerable groups: The promise of an emerging concept in the European Human Rights Convention law, *International Journal of Constitutional Law*, 11 (4), pp.1056-1085

Priel, D. (2015). Toward Classical Legal Positivism, *Virginia Law Review*, 101, pp.978-1022

Quinn, J.M., Mason, D. & Gurses, M. (2007). Sustaining the peace: Determinants of civil war recurrence, *International Interactions,* 33(2), pp.167-193

Reidy, A., Hampson, F. & Boyle, K. (1997). Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey, *Netherlands Quarterly of Human Rights*, 15 (2) pp.161-173

Rezvani, B. (2014). Reflections on the Chechen Conflict: Geopolitics, Timing and Transformations, *Middle Eastern Studies*, 5 (6), pp.870-890

Robins, P. (1993). The Overlord State: Turkish Policy and the Kurdish Issue, *International Affairs*, 69 (4), pp.657-76

Sambanis, N. (2004). What Is Civil War? Conceptual and Empirical Complexities of an Operational Definition, *Journal of Conflict Resolution,* 48 (6), pp.814-858

Schauer, F. (2015). The Path-Dependence of Legal Positivism, *Virginia Law Review*, 101, pp.957-976

Scobbie, I. (2004/05). An Intimate Disengagement: Israel's Withdrawal from Gaza, the Law of Occupation and of Self-Determination, *Yearbook of Islamic and Middle Eastern Law*, 11, pp.3-31

Seagle, W. (1945). Rudolf von Jhering: Or Law as a Means to an End, *University of Chicago Law Review*, 13 (1), pp.71-89

Segesvary, V. (1995). Group rights: The definition of group rights in the contemporary legal debate based on socio-cultural analysis*, International Journal on Group Rights*, 3, pp.89-107

Shael, H. (1982). Llewellyn the Civilian: Speculations on the Contribution of Continental Experience to the Uniform Commercial Code, *Tulane Law Review*, 56 (4), pp.1125-1170

Shaffer, G. & Ginsburg, T. (2012). The Empirical Turn in International Legal Scholarship, *American Journal of International Law*, 106, pp.1-46

Shaffer, G. (2015). The new legal realist approach to international law, *Leiden Journal of International Law,* 28 (2), pp.189-210

Shamgar, M. (1971). The Observance of International Law in the Administered Territories, reprinted in Dinstein, Y. & Domb, F. (eds.)(2011). *The Progression of*

International Law: Four Decades of the Israel Yearbook on Human Rights – An Anniversary Volume. Leiden, Martinus Nijhoff, pp.429-446

Sheeran, S.P. (2013). Reconceptualizing States of Emergency under International Human Rights Law, *Michigan Journal of International Law*, 34 (1), pp.491-557

Shehata, S. (2005). Losing Hearts and Minds: Understanding America's Failure in Iraq, *Georgetown Journal of International Affairs*, 6 (1), pp.71-80

Simma, B. & Paulus, A.L. (1999). The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View, *American Journal of International Law*, 93, pp.302-316

Simon, D. (1994). The Demolition of Homes in the Israeli Occupied Territories, *Yale Journal of International Law,* 19 (1), pp.1-79

Sivakumaran, S. (2010). War Crimes before the Special Court for Sierra Leone, *Journal of International Criminal Justice*, 8, pp.1009-1034

Sivakumaran, S. (2011). Re-envisaging the International Law of Internal Armed Conflict, *European Journal of International Law*, 22 (1), pp.219-264

Smith, K.J.M. & McClaren, J.P.S. (2001). History's living legacy: an outline of "modern" historiography of the common law, *Legal Studies*, 21 (2), pp.251-324

Souleimanov, E.A. & Aliyev, H. (2014). Asymmetry of Values, Indigenous Forces, and Incumbent Success in Counterinsurgency: Evidence from Chechnya, *Journal of Strategic Studies*, pp.1-26

Spencer, M. (2008). Excavating Official Archives: The Separation of Powers and Policy Advice from Judges*, Journal of Law and Society*, 35, pp.167-182

Ssenyonjo, M. (2015). The Development of Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights by the African Commission on Human and Peoples' Rights, *International Human Rights Law Review*, 4, pp.147-193

Sultany, N. (2007). The Legacy of Justice Aharon Barak: A Critical Review, *Harvard International Law Journal Online*, 48, pp.83-92

Tamanaha, B.Z. (2009). Understanding Legal Realism, *Texas Law Review*, 87, pp.731-785

Tamanaha, B.Z. (2015). The Third Pillar of Jurisprudence: Social Legal Theory, *William & Mary Law Review*, 56 (6), pp.2235-2277

Thompson, J. (2015). Can Groups Have Human Rights?, *Ethical Perspectives*, 22 (2), pp.291-313

Trubek, D. & Esser, J. (1989). Critical Empiricism in American Legal Studies: Paradox, Program or Pandora's Box?, *Law and Social Inquiry*, 14, pp.3-52

Trubek, D. (1984). Where the Action Is: Critical Legal Studies and Empiricism, *Stanford Law Review*, 36, pp.575-622

Van Dyke, V. (1974). Human Rights and the Rights of Groups, *American Journal of Political Science*, 18 (4), pp.725-741

Van Dyke, V. (1975). Justice as Fairness: For Groups?, *American Political Science Review*, 69, pp.607-614

Van Dyke, V. (1982). Collective Entities and Moral Rights: Problems in Liberal-Democratic Thought, *Journal of Politics*, 44 (1), pp.21-40

Wa Mutua, M. (1999). Limitations on Religious Rights: Problematizing Religious Freedom in the African Context, *Buffalo Human Rights Law Review*, 5, pp.75-105

Wallace, G. (2012). Regulating Conflict: Historical Legacies and State Commitment to the Laws of War, *Foreign Policy Analysis*, 8, pp.151-172

Walter, B. (2004). Does conflict beget conflict? Explaining recurring civil war, *Journal of Peace Research*, 41(3), pp.371-388

Whitman, J. (1987). Commercial Law and the American Volk: A Note on Llewellyn 's German Sources for the Uniform Commercial Code, *Yale Law Journal*, 97, pp.156-175

Whittaker, H. (2015). Legacies of Empire: State Violence and Collective Punishment in Kenya's North- Eastern Province, c. 1963–Present, *Journal of Imperial and Commonwealth History*, 43 (4), pp.641-657

Williams, S. (2012). Arresting Developments? Restricting the Enforcement of the UK's Universal Jurisdiction Provisions, *Modern Law Review*, 75 (3), pp. 368-386

Wilner, A.S. (2011). Deterring the Undeterrable: Coercion, Denial, and Delegitimization in Counterterrorism, *Journal of Strategic Studies*, 34 (1), pp.3-37

Wynn, D. Jr. & Williams, C.K. (2012). Principles for Conducting Critical Realist Case Study Research in Information Systems, *MIS Quarterly*, 36 (3), pp.787-810

Yingling, R.T. & Ginnane, R.W. (1952). The Geneva Conventions of 1949, *American Journal of International Law*, 46 (3), pp.393-427

Çali, B. (2010). The Logics of Supranational Human Rights Litigation, Official Acknowledgment, and Human Rights Reform: The Southeast Turkey Cases before the European Court of Human Rights, 1996-2006, *Law & Social Inquiry*, 35 (2) pp.311-337

8 Table of documents and cases

8.1 United Nations texts and documents

970 UNTS 31, Convention (I) for the amelioration of the condition of the wounded and sick in armed forces in the field, Geneva (12 August 1949)

971 UNTS 85, Convention (II) for the amelioration of the condition of the wounded, sick and shipwrecked members of the armed forces at sea, Geneva (12 August 1949)

75 UNTS 135, Convention (III) relative to the Treatment of Prisoners of War, Geneva (12 August 1949)

75 UNTS 287, Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva (12 August 1949)

1125 UNTS 3, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva (8 June 1977)

1125 UNTS 609, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva (8 June 1977)

Final Record of the Diplomatic Conference of Geneva of 1949, Volume II

Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977), Volume II, List of Participants

Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977), Volume III

Official Records of the Diplomatic Conference on the Reaffirmation and Development of the law of armed conflict Applicable in Armed Conflicts, Geneva (1974–1977), Volume VI

Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977), Volume VII

Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977), Volume VIII

Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977), Volume IX

S/RES/955 Statute of the International Tribunal for Rwanda (8 November 1994)

A/51/22 Report of the Preparatory Committee on the Establishment of an International Criminal Court (13 September 1996) Volume II

Statute of the Special Court for Sierra Leone, annexed to the Special Court Agreement (16 January 2002) in accordance with S/RES/1315 (2000)

A/RES/61/295 United Nations Declaration on the Rights of Indigenous Peoples (13 September 2007)

A/HRC/7/17 Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard (21 January 2008)

A/RES/62/181 Permanent sovereignty of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab population in the occupied Syrian Golan over their natural resources (31 January 2008)

A/RES/63/96 Operations of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (18 December 2008)

S/RES/1860 Middle East, including the Palestinian question (8 January 2009)

A/HRC/12/37 Human Rights Situation in Palestine and Other Occupied Arab Territories (19 August 2009)

A/HRC/12/48 Report of the United Nations Fact-Finding Mission on the Gaza Conflict (25 September 2009)

A/RES/67/19 Status of Palestine in the United Nations (4 December 2012)

A/HRC/25/NGO/156 Written statement submitted by the Society for Threatened Peoples, a non-governmental organization in special consultative status (4 March 2014)

32IC/15/11 Report: International humanitarian law and the challenges of contemporary armed conflicts Document prepared by the International Committee of the Red Cross, Geneva for the 32nd International Conference of the Red Cross and the Red Crescent, Geneva, Switzerland 8-10 December 2015 (October 2015)

A/HRC/31/73 Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 (11 January 2016)

8.2 League of Nations texts and documents

118 LNTS 343, Convention relative to the Treatment of Prisoners of War, Geneva (27 July 1929)

League of Nations, C. 529. M. 314. 1922. VI, Mandate for Palestine (12 August 1922)

8.3 Other international texts and documents relating to the law of armed conflict

Regulations concerning the Laws and Customs of War on Land, annexed to Convention (II) with Respect to the Laws and Customs of War on Land, The Hague (29 July 1899)

Regulations concerning the Laws and Customs of War on Land, annexed to Convention (IV) respecting the Laws and Customs of War on Land, The Hague (18 October 1907)

The Proceedings of the Hague Peace Conferences, translation of the official texts under the supervision of Scott, J.B. (1920). New York, Oxford University Press

C029 Convention concerning Forced or Compulsory Labour, Geneva, 14th ILC session (28 June 1930)

8.4 International Court of Justice cases

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p.226

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p.136

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, ICJ Reports 2005, p.168

8.5 International Criminal Court cases

Prosecutor v Lubanga (Decision on the Confirmation of Charges) ICC-01/04-01/06 (29 January 2007)

8.6 International Criminal Tribunal for the Former Yugoslavia cases

Prosecutor v Dusko Tadić a/k/a "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995)

Prosecutor v Dusko Tadić a/k/a "Dule" (Opinion and Judgment) IT-94-1-T (7 May 1997)

Mucić et al. "Čelebići Camp" (Judgment) IT-96-21-T, Trial Chamber (16 November 1998)

Prosecutor v Delalić, Mucić, Delić and Landzo (Judgment) IT-96-21-T (16 November 1998)

Prosecutor v Duško Tadić (Appeal Judgment) IT-96-21-A (15 July 1999)

Prosecutor v Zlatko Aleksovski (Appeal Judgment) IT-95-14/1-A (24 March 2000)

Prosecutor v Delalić, Mucić, Delić and Landzo (Appeal Judgment) IT-96-21-A (20 February 2001)

Prosecutor v Ljube Boškoski and Johan Tarčulovski (Judgment) ICTY-04-82-T (10 July 2008)

Prosecutor v Ljube Boškoski and Johan Tarčulovski (Judgment) ICTY-04-82-A (19 May 2010)

Prosecutor v Ante Gotovina, Ivan Čermak, Mladen Markač (Judgment) IT-06-90-T (15 April 2011)

Prosecutor v Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj (Judgment) T-04-84bis-T (29 November 2012)

8.7 International Criminal Tribunal for Rwanda cases

Prosecutor v Akayesu (Trial Chamber Judgment) ICTR-96-4 (2 September 1998)

Prosecutor v Rutaganda (Trial Chamber Jugdement) ICTR-96-3 (6 December 1999)

8.8 Special Court for Sierra Leone cases

Brima, Kamara and Kanu (SCSL-2004-16-PT) Judgment, Trial Chamber II (20 June 2007)

Fofana and Kondewa (SCSL-04-14-T) Judgment, Trial Chamber I (2 August 2007)

Fofana and Kondewa (SCSL-04-14-A) Judgment, Appeals Chamber (28 May 2008)

8.9 National cases relating to the law of armed conflict

Trial of Hans Albin Rauter, Netherlands Special Court in 's-Gravenhage (The Hague) (4 May 1948) and Netherlands Special Court of Cassation (12 January 1949) reprinted in United Nations War Crimes Commission (1949). Law Reports of Trials of War Criminals. Volume 14. London, His Majesty's Stationery Office

United States v First Lieutenant William L. Calley, Jr. (Judgment) 46 Court of Military Review 1131 (16 February 1973)

Priebke case (Judgment) Military Tribunal of Rome, Cassazione penale [1998] 668 (22 July 1997)

Mustafic v the Netherlands, The Hague Court of Appeal, Case No. 200.020.173/01, Judgment (5 July 2011)

8.10 Israeli Supreme Court cases

HCJ 1125/16 Mer'i et al v Military Commander of IDF Forces in the West Bank (Judgment) 31 March 2016, Opinion Justice Naor, para.12ff, unofficial English translation online available at: http://www.hamoked.org/files/2016/1125_16_eng.pdf (accessed on 15/04/18)

HCJ 4597/14 'Awawdeh et al v West Bank Military Commander (Judgment) 1 July 2014, unofficial English translation online available at: http://www.hamoked.org/images/1158437_eng.pdf (accessed on 15/04/18)

HCJ 4597/14 'Awawdeh et al v West Bank Military Commander (Response) 30 June 2014, para.27, unofficial English translation online available at: http://www.hamoked.org/images/1158435_eng.pdf (accessed on 15/04/18)

HCJ 4597/14 'Awawdeh v the Military Commander (Updating Notice) 1 July 2014, unofficial English translation online available at: http://www.hamoked.org/files/2014/1158439_eng.pdf (accessed on 15/04/18)

HCJ 5290/14, 5295/14, 5300/14 Qawasmeh et al v Military Commander of the West Bank Area (Judgment) 11 August 2014, unofficial English translation online available at: http://www.hamoked.org/files/2014/1158616_eng.pdf (accessed on 15/04/18)

HCJ 6696/02 Amar et al v IDF Commander in the West Bank (Judgment) 6 August 2002

HCJ 7040/15, 7076/15, 7077/15, 7079/15, 7081/15, 7082/15, 7084/15, 7085/15, 7087/15, 7092/15, 7180/15 Haj Hamed et al v The Military Commander of the West Bank Area (Judgment) 12 November 2015, unofficial English translation online

available at: http://www.hamoked.org/files/2015/1159915_eng.pdf (accessed on 15/04/18)

HCJ 7733/04 Mahmud 'Ali Nasser et al v Commander of IDF Forces in the West Bank (Judgment) 20 June 2005, unofficial English translation online available at: http://www.hamoked.org/files/2011/110740_eng.pdf (accessed on 15/04/18)

HCJ 8091/14 HaMoked - Center for the Defence of the Individual et al v Minister of Defense et al (Judgment) 31 December 2014, unofficial English translation online available at: http://www.hamoked.org/files/2014/1159007_eng.pdf (accessed on 15/04/18)

HCJ 8091/14 HaMoked - Center for the Defence of the Individual et al v Minister of Defense et al (Petition for Order Nisi) 27 November 2014, unofficial English translation online available at: http://www.hamoked.org/files/2014/1159000_eng.pdf (accessed on 15/04/18)

HCJ 8091/14 HaMoked: Center for the Defence of the Individual et al v Minister of Defense et al (Petition for Order Nisi) 27 November 2014, unofficial English translation online available at: http://www.hamoked.org/files/2014/1159000_eng.pdf (accessed on 15/04/18)

HCJ 8150/15, 8154/15, 8156/15 Abu Jamal et al v GOC Home Front Command (Judgment) 22 December 2015, unofficial English translation online available at: http://www.hamoked.org/files/2015/1160003_eng.pdf (accessed on 15/04/18)

HCJ 8150/15, 8154/15, 8156/15 Abu Jamal et al v GOC Home Front Command (Judgment) 22 December 2015, unofficial English translation online available at: http://www.hamoked.org/files/2015/1160003_eng.pdf (accessed on 15/04/18)

HCJ 9353/08 Abu Dheim et al v GOC Home Front Command (Judgment) 5 January 2009, unofficial English translation online available at: http://www.hamoked.org/items/110991_eng.pdf (accessed on 15/04/18)

HCJ 9353/08 Abu Dheim et al v GOC Home Front Command (Petition for Order Nisi) 6 November 2008, unofficial English translation online available at: http://www.hamoked.org/items/110468_eng.pdf (accessed on 15/04/18)

HCJFH 360/15 HaMoked - Center for the Defence of the Individual et al v Minister of Defense (Request for Further Hearing) 15 January 2015, unofficial English translation

online available at: http://www.hamoked.org/files/2015/1159120_eng.pdf (accessed on 15/04/18)

HCJFH 360/15 HaMoked - Center for the Defence of the Individual et al v Minister of Defense (Response) 12 February 2015, unofficial English translation online available at:http://www.hamoked.org/files/2015/1159121_eng.pdf (accessed on 15/04/18)

HCJFH 360/15 HaMoked et al v Minister of Defense et al (Judgment) 12 November 2015, unofficial English translation online available at: http://www.hamoked.org/files/2015/1159125_eng.pdf (accessed on 15/04/18)

8.11 National legislation Israel

Defence (Emergency) Regulations, 27 September 1945, Palestine Gazette (No. 1442), Supp. No. 2, pp.1055-1109, p.1089

Israel, Laws of War in the Battlefield, Manual, Military Advocate General Headquarters, Military School, 1998

8.12 National legislation Russia

Russia, Instructions on the Application of the Rules of International Humanitarian Law by the Armed Forces of the USSR, Appendix to Order of the USSR Defence Minister No. 75, 1990

Federal Law of the Russian Federation on November 2, 2013 N 302-FZ "On Amendments to Certain Legislative Acts of the Russian Federation" Федеральный закон Российской Федерации от 2 ноября 2013 г. N 302-ФЗ "О внесении изменений в отдельные законодательные акты Российской Федерации" online available at: http://www.rg.ru/2013/11/06/izmenenia-dok.html (accessed on 15/04/18)

8.13 Russian State Duma documents

Transcript of the meeting on 15 October 2013, online available in Russian at: http://transcript.duma.gov.ru/node/3933/ (accessed on 15/04/18)

Chronicle of the meeting on 25 October 2013, online available in Russian at: http://transcript.duma.gov.ru/node/3948/ (accessed on 15/04/18)

8.14 International Covenant on Civil and Political Rights texts and documents

993 UNTS 3 International Covenant on Economic, Social and Cultural Rights (16 December 1966)

999 UNTS 171 International Covenant on Civil and Political Rights (16 December 1966)

HRI/GEN/1/Rev.9 (Vol. I) General Comment No.5: Derogations (Article 4) (31 July 1981) (replaced by General Comment 29)

E/CN.4/1985/4 (Annex) The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (28 September 1984)

CCPR/C/21/Rev.1/Add.5 General Comment No.23: Rights of Minorities (Article 27) (26 April 1994)

E/CN.4/Sub.2/1997/19 Tenth annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37 (23 June 1997)

E/CN.4/2000/145 Letter dated from the head of the delegation of Sweden, 56th session (4 April 2000) Annex: CCPR/C/66/R.8

CCPR/C/SR.1874 Summary Record of the 1874th Meeting, 70th session (24 October 2000)

CCPR/C/21/Rev.1/Add.11 General Comment No.29: States of Emergency (Article 4) (31 August 2001)

E/CN.4/Sub.2/2005/14 Working paper by Ms. Hampson and Mr. Salama on the relationship between human rights law and international humanitarian law (21 June 2005)

CCPR/C/RUS/CO/6 Concluding observations of the Human Rights Committee: Russian Federation (24 November 2009)

CCPR/C/RUS/CO/7 Concluding observations on the seventh periodic report of the Russian Federation (31 March 2015) advance unedited version adopted at the 3157th meeting (CCPR/C/SR.3157)

8.15 Human Rights Committee cases

CCPR/C/13/D/24/1977 *Lovelace v Canada* (024/1977) (30 July 1981)

CCPR/C/70/D/547/1993 *Mahuika et al v New Zealand* (547/93) (27 Oct 2000)

8.16 African Charter on Human and Peoples' Rights texts and documents

African (Banjul) Charter on Human and Peoples' Rights (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986)

OAU/LEG/MIN/AFCHPR/PROT.(1) Rev.2 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Assembly of Heads of State and Government of the Organization of African Unity, Ougadougou, Burkina Faso (June 1998)

African Union, Protocol on the Statute of the African Court of Justice and Human Rights (1 July 2008), online available at: http://www.african-court.org/en/images/Basic%20Documents/ACJHR_Protocol.pdf (accessed on 15/04/18)

African Commission on Human and Peoples' Rights, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (24 October 2011)

8.17 African Commission on Human and Peoples' Rights and African Court on Human and Peoples' Rights cases

Legal Resources Foundation v Zambia, Communication 211/98, 14th Activity Report (2001), AHG/229(XXXVII)

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (Endorois case) Communication 276/2003, 27th Activity Report (2009)

Malawi Africa Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants Droit, Association mauritanienne des droits de l'Homme v Mauritania (Mauritanian case), Communications 54/91, 61/91, 98/93, 164/97-196/97, 210/98 (11 May 2000), AHG/222 (XXXVI Add.) 13th Activity Report (1999-2000)

African Commission on Human and Peoples' Rights v Republic of Kenya (Ogiek), Application No. 006/2012, Judgment (26 May 2017)

8.18 Organization of American States texts and documents

Organization of American States (OAS), American Convention on Human Rights, 'Pact of San Jose', Costa Rica, (22 November 1969)

8.19 Inter-American Court of Human Rights cases and documents

I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79

I/A Court H.R., Case of Kichwa Indigenous People of Sarayaku v Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245

8.20 Council of Europe texts and documents

DH(56)4 European Commission of Human Rights, Preparatory Work on Article 15 of the European Convention of Human Rights (22 May 1956)

PACE (Doc.1299) Committee on Legal Affairs, Report on Rights of National Minorities (26 April 1961)

PACE, Recommendation 285 (1961) Rights of National Minorities (28 April 1961)

DH/Exp (73) 47 Report of the Committee of Experts on Human Rights to the Committee of Ministers (9 November 1973)

PACE, Recommendation 838 (1978) Widening the scope of the European Convention on Human Rights (27 September 1978)

PACE (Doc. 4213) Widening the scope of the European Convention on Human Rights, Report (27 September 1978)

Derogation contained in a letter from the Permanent Representation of Turkey, dated 6 August 1990, registered at the Secretariat General on 7 August 1990, online available at: http://www.coe.int/en/web/conventions/search-on-reservations-and-declarations/-/conventions/declarations/results?_coeconventions_WAR_coeconventionsportlet_formDate=1453195415220&_coeconventions_WAR_coeconventionsportlet_searchBy=state&_coeconventions_WAR_coeconventionsportlet_codePays=TUR&_coeconventions_WAR_coeconventionsportlet_numSTE=&_coeconventions_WAR_coeconventionsportlet_codesMatieres=&_coeconventions_WAR_coeconventionsportlet_enVigueur=false&_coeconventions_WAR_coeconventionsportlet_dateDebut=05%2F05%2F1949&_coeconventions_WAR_coeconventionsportlet_dateStatus=19%2F01%2F2016&_coeconventions_WAR_coeconventionsportlet_numArticle=&_coeconventions_WAR_coeconventionsportlet_codeNature= (accessed on 15/04/18)

PACE, Recommendation 1134 (1990) On the rights of minorities, (1 October 1990)

Resolution DH (95) 211 of 11 September 1995 on *Demicoli v Malta* (Merits and Just Satisfaction) no.13057/87, Court (Chamber) (27 August 1991)

PACE, Recommendation 1201 (1993) On an additional protocol on the rights of national minorities to the European Convention on Human Rights (1 February 1993)

Resolution 1096 (1996) On Measures To Dismantle The Heritage Of Former Communist Totalitarian Systems, adopted by the Assembly on 27 June 1996 (23rd Sitting) (Doc. 7568, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Severin)

PACE, Recommendation 1354 (1998) Future of the European Social Charter (28 January 1998)

PACE (Doc. 8357) Additional protocol to the European Convention on Human Rights concerning fundamental social rights, Report (23 March 1999)

PACE (Doc. 8433) Additional protocol to the European Convention on Human Rights concerning fundamental social rights, Opinion (2 June 1999)

PACE, Recommendation 1415 (1999) Additional protocol to the European Convention on Human Rights concerning fundamental social rights (23 June 1999)

PACE, Recommendation 1492 (2001) On the rights of minorities (23 January 2001)

CM/Del/Dec(2001)750/4.3 Future of the European Social Charter and Additional protocol to the European Convention on Human Rights concerning fundamental social rights – Parliamentary Assembly Recommendations 1354 (1998) and 1415 (1999) (32 April 2001)

CommDH(2002)7 Opinion 1/2002 of the Commissioner for Human Rights, Mr Alvaro Gil-Robles, on certain aspects of the United Kingdom 2001 derogation from Article 5 par. 1 of the European Convention on Human Rights (28 August 2002)

CM/AS(2004)Rec1623-final Rights of national minorities – Parliamentary Assembly Recommendation 1623 (2003) (Reply adopted by the Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers' Deputies) (21 December 2004)

CM/AS(2008)Rec1795-final Monitoring of commitments as regards social rights – Parliamentary Assembly Recommendation 1795 (2007) (Reply adopted by the Committee of Ministers on 21 May 2008 at the 1027th meeting of the Ministers' Deputies) (26 May 2008)

Recommendation CM/Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008

PACE (Doc.11897) Drafting an additional protocol to the European Convention for Human Rights: Basic Standards for National Minorities, Motion for a recommendation presented by Mr Frunda and others (5 May 2009)

Resolution 1713 (2010) Minority Protection in Europe: best practices and deficiencies in implementation of common standards, adopted by the Standing Committee, acting on behalf of the Assembly, on 12 March 2010 (Doc. 12109, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Cilevičs)

PACE, Resolution 1866 (2012) On an additional protocol to the European Convention on Human Rights on national minorities (9 March 2012)

PACE, Resolution 1994 (2012) On an additional protocol to the European Convention on Human Rights on national minorities (9 March 2012)

Resolution 1866 (2012) An Additional Protocol to the European Convention on Human Rights on National Minorities, adopted by the Standing Committee, acting on behalf of the Assembly, on 9 March 2012 (see Doc. 12879, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Frunda)

Committee of Ministers (Doc.13097) An additional protocol to the European Convention on Human Rights on national minorities Reply to Recommendation 1994 (2012) (21 January 2013)

CM/AS(2014)Rec2040-final "The situation and rights of national minorities in Europe" – Parliamentary Assembly Recommendation 2040 (2014) (Reply adopted by the Committee of Ministers on 17 September 2014 at the 1207th meeting of the Ministers' Deputies) (19 September 2014)

1259 meeting (7-9 June 2016) (DH) - Action report (18/03/2016) - Communication from Slovenia concerning the case of Kurić and others against Slovenia (no.26828/06)

Resolution CM/ResChS(2017)9: Collective Complaint No. 111/2014: *Greek General Confederation of Labour (GSEE) v Greece* (5 July 2017)

8.21 European Convention on Human Rights texts and documents

CETS 177 Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 2000)

ECtHR, Rules of Court, Registry of the Court, Strasbourg (14 November 2016)

8.22 European Court of Human Rights cases

48 Kalderas Gipsies v Federal Republic of Germany and the Netherlands (Decision) nos. 7823/77, 7824/77, Commission (Plenary) (6 July 1977)

A and others v the United Kingdom (Merits and Just Satisfaction) no. 3455/05, Grand Chamber (19 February 2009)

A.P., M.P. and T.P. v Switzerland (Merits and Just Satisfaction) no.19958/92, Court (Chamber) (29 August 1997)

Abdulayeva v Russia (Merits and Just Satisfaction) no.38552/05, Court (First Section) (16 January 2014)

Abdulaziz, Cabales and Balkandali v the United Kingdom (Merits and Just Satisfaction) nos.9214/80, 9473/81, 9474/81, Court (Plenary) (28 May 1985)

Ādamsons v Latvia (Merits and Just Satisfaction) no.3669/03, Court (Third Section) (24 June 2008)

Aggül and Others v Turkey (Decision) no. 33324/96, Court (First Section) (19 September 2000)

Agrotexim and Others v Greece (Merits) no. 14807/89, Court (Chamber) (24 October 1995)

Ahmet (Son of Mehmet), Ahmet (Son of Sabri) and Isiyok v Turkey (Decision) no. 22309/93, Commission (Plenary) (3 April 1995)

Ahmet Ökzan and Others v Turkey (Merits and Just Satisfaction) no.21689/93, Court (Second Section) (6 April 2004)

Airey v Ireland (Merits) no.6289/73, Court (Chamber) (9 October 1979)

Akdivar and Others v Turkey (Merits and Just Satisfaction) no.21893/93, Grand Chamber (16 September 1996)

Akhmadov and Others v Russia (Merits and Just Satisfaction) no.21586/02, Court (First Section) (14 November 2008)

Akhmadova and Sadulayeva v Russia (Merits and Just Satisfaction) no.40464/02, Court (First Section) (10 May 2007)

Aksoy v Turkey (Merits and Just Satisfaction) no. 21987/93, Chamber (18 December 1996)

Aksu v Turkey (Merits and Just Satisfaction) nos. 4149/04, 41029/04, Court (Grand Chamber) (15 March 2012)

Alajos Kiss v Hungary (Merits and Just Satisfaction) no.38832/06, Court (Second Section) (20 May 2010)

Al-Jedda v United Kingdom (Merits and Just Satisfaction) no. 27021/08, Grand Chamber (7 July 2011)

Al-Skeini and Others v the United Kingdom (Merits and Just Satisfaction) no. 55721/07, Court (Grand Chamber) (7 July 2011)

Altinok v Turkey (Decision) no. 31846/96, Court (First Section) (30 May 2000)

Altun v Turkey (Decision) no. 24561/94, Commission (Plenary) (11 September 1995)

Anguelova v Bulgaria (Merits and Just Satisfaction) no. 38361/97, Court (First Section) (13 June 2002)

Antayev and Others v Russia (Merits and Just Satisfaction) no.37966/07, Court (First Section) (3 July 2014)

Arvanitaki-Roboti and Others v Greece (Merits and Just Satisfaction) no.27278/03, Court (First Section) (18 May 2006)

Asker v Turkey (Decision) no. 23185/94, Commission (Plenary) (28 November 1994)

Askharova v Russia (Merits and Just Satisfaction) no.13566/02, Court (First Section) (4 December 2008)

Aslan v Turkey (Decision) no. 22497/93, Commission (Plenary) (20 February 1995)

Assanidze v Georgia (Merits and Just Satisfaction) no. 71503/01, Court (Grand Chamber) (8 April 2004)

Athary v Turkey (Merits and Just Satisfaction) no. 50372/09, Court (Second Section) (11 December 2012)

Ayder and Others v Turkey (Merits and Just Satisfaction) no. 23656/94, Court (First Section) (8 January 2004)

Ayder, Lalealp, Doman, Biçer and Ekmekçi v Turkey (Decision) no. 23656/94, Commission (Plenary) (15 May 1995)

Aygördü and Others v Turkey (Decision) no. 33323/96, Court (First Section) (19 September 2000)

Balázs v Hungary (Merits and Just Satisfaction) no.15529/12, Court (Second Section) (20 October 2015)

Bayev and Others v Russia (Merits and Just Satisfaction) nos.67667/09, 44092/12, 56717/12, Court (Third Section) (20 June 2017)

Baysayeva v Russia (Merits and Just Satisfaction) no.74237/01, Court (First Section) (5 April 2007)

Begheluri and Others v Georgia (Merits and Just Satisfaction) no. 28490/02, Court (Fourth Section) (7 October 2014)

Bilen v Turkey (Merits and Just Satisfaction) no.34482/97, Fourth Section (21 February 2006)

Bilgin v Turkey (Decision) no. 23819/94, Commission (Plenary) (15 May 1995)

Blokhin v Russia (Merits and Just Satisfaction) no. 47152/06, Grand Chamber (23 March 2016)

Boacă and Others v Romania (Merits and Just Satisfaction) no.40355/11, Court (Fourth Section) (12 January 2016)

Brannigan and McBride v the United Kingdom (Merits and Just Satisfaction) nos. 14553/89 14554/89, Plenary (26 May 1993)

Bulut v Turkey (Decision) no. 43599/98, Court (Third Section) (1 June 2006)

Işçi v Turkey (Decision) no. 31849/96, Court (First Section) (20 March 2001)

Carson and Others v the United Kingdom (Merits) no.42184/05, Court (Grand Chamber) (16 March 2010)

Çelik v Turkey (Decision) no. 23655/94, Commission (Plenary) (15 May 1995)

Chapman v the United Kingdom (Merits) no.27238/95, Court (Grand Chamber) (18 January 2001)

Cichopek and Others v Poland (Decision) nos. 15189/10, 10011/11, 10072/11... Court (Fourth Section) (14 May 2013)

Ciorcan and Others v Romania (Merits and Just Satisfaction) nos.29414/09, 44841/09, Court (Third Section) (27 January 2015)

Čonka et Ligue des Droits de L'homme c Belgique (Decision) no. 51564/99, Court (Third Section) (13 March 2001)

D.H. and Others v the Czech Republic (Merits) no.57325/00, Court (Second Section) (7 February 2006)

D.H. and Others v the Czech Republic (Merits and Just Satisfaction) no.57325/00, Court (Grand Chamber) (13 November 2007)

Demir and Baykara v Turkey (Merits and Just Satisfaction) no.34503/97, Court (Grand Chamber) (12 November 2008)

Demir v Turkey (Decision) no. 22280/93, Commission (Plenary) (9 January 1995)

Denmark, Norway, Sweden, and the Netherlands v Greece (1) nos.3321/67, 3322/67, 3323/67, 3344/67, European Commission of Human Rights (5 November 1969)

Dündar v Turkey (Decision) no. 23182/94, Commission (Plenary) (28 November 1994)

E.L., R.L. and J.O.-L. v Switzerland (Merits and Just Satisfaction) no.20919/92, Court (Chamber) (29 August 1997)

East African Asians v the United Kingdom nos.4403/70-4419/70, 4422/70, 4423/70, 4434/70, 4443/70, 4476/70-4478/70, 4486/70, 4501/70, 4526/70-4530/70, Commission Report (14 December 1973)

Esmukhambetov and Others v Russia (Merits and Just Satisfaction) no.23445/03, Court (First Section) (29 March 2011)

Estamirov and Others v Russia (Merits and Just Satisfaction) no.60272/00, Court (First Section) (12 October 2006)

Estemirova v Russia (Communicated Case) no.42705/11 (16 November 2015)

F.H. v Sweden (Merits) no. 32621/06, Court (Third Section) (20 January 2009)

Fedorchenko and Lozenko v Ukraine (Merits and Just Satisfaction) no.387/03, Court (Fifth Section) (20 September 2012)

Fejzić and Others v Serbia (Communicated Case) no. 4078/15 (15 April 2015)

G. and E. v Norway (Decision) nos.9278/81, 9415/81, Commission (Plenary) (3 October 1983)

Gorzelik and Others v Poland (Merits) no.44158/98, Court (Grand Chamber) (17 February 2004)

Grande Oriente d'Italia di Palazzo Giustiniani v Italy (Merits and Just Satisfaction) no. 35972/97, Court (Fourth Section) (2 August 2001)

Greece v the United Kingdom (Volume II) Report (31) no. 176/56, Commission (Plenary) (26 September 1958)

Grigoryan and Sergeyeva v Ukraine (Merits and Just Satisfaction) no.63409/11, Court (Fourth Section) (28 March 2017)

Güleç v Turkey (Merits and Just Satisfaction) no. 21593/93, Court (Chamber) (27 July 1998)

Güven v Turkey (Decision) no. 31847/96, Court (First Section) (30 May 2000)

Haralambie v Romania (Merits and Just Satisfaction) no.21737/03, Court (Third Section) (27 October 2009)

Hasan and Chaush v Bulgaria (Merits and Just Satisfaction) no. 30985/96, Grand Chamber (26 October 2000)

Hassan v United Kingdom (Merits) no. 29750/09, Grand Chamber (16 September 2014)

Hazar, Tektas, Bekiroglu, Pekol, Bozkus, Tektas, Atman, Isik, Aksucu, Doster, Demirhan and Sahin v Turkey (Decision) nos. 62566/00, 62567/00, 62568/00..., Court (First Section) (10 January 2002)

Hirst v the United Kingdom (No. 2) (Merits and Just Satisfaction) no.74025/01, Court (Grand Chamber) (6 October 2005)

Horváth and Kiss v Hungary (Merits and Just Satisfaction) no.11146/11, Court (Second Section) (29 January 2013)

Hyde Park and Others v Moldova (No. 4) (Merits and Just Satisfaction) no. 18491/07, Court (Fourth Section) (7 April 2009)

Hyde Park and Others v Moldova (Nos. 5 and 6) (Merits and Just Satisfaction) nos. 6991/08, 15084/08, Court (Fourth Section) (14 September 2010)

I.K. v Austria (Merits and Just Satisfaction) no. 2964/12, Court (First Section) (28 March 2013)

Identoba and Others v Georgia (Merits and Just Satisfaction) no.73235/12, Court (Fourth Section) (12 May 2015)

Ilhan v Turkey (Merits and Just Satisfaction) no.22277/93, Court (Grand Chamber) (27 June 2000)

Ince and Others v Turkey (Decision) no. 33325/96, Court (First Section) (19 September 2000)

Ipek v Turkey (Merits and Just Satisfaction) no.25760/94, Court (Second Section) (17 February 2004)

Ireland v the United Kingdom (Merits and Just Satisfaction) no.5310/71, Plenary (18 January 1978)

Isayeva v Russia (Merits and Just Satisfaction) no. 57950/00, Court (First Section) (24 February 2005)

Isigova and Others v Russia (Merits and Just Satisfaction) no.6844/02, Court (First Section) (26 June 2008)

J. and Others v Austria (Merits and Just Satisfaction) no. 58216/12, Court (Fourth Section) (17 January 2017)

Janowiec and Others v Russia (Merits and Just Satisfaction) nos.55508/07 29520/09, Court (Grand Chamber) (21 October 2013)

Kamenica and Others v Serbia (Decision) no. 4159/15, Court (Third Section) (4 October 2016)

Khadzhialiyev and Others v Russia (Merits and Just Satisfaction) no. 3013/04, Court (First Section) (6 November 2008)

Khamzayev and Others v Russia (Merits and Just Satisfaction) no. 1503/02, Court (First Section) (3 May 2011)

Khashiyev and Akayeva v Russia (Merits and Just Satisfaction) nos. 57942/00, 57945/00, Court (First Section) (24 February 2005)

Kiliç v Turkey (Merits and Just Satisfaction) no.22492/93, Court (First Section) (28 March 2000)

Kinay v Turkey (Decision) no. 31890/96, Court (First Section) (30 May 2000)

Kiyutin v Russia (Merits and Just Satisfaction) no.2700/10, Court (First Section) (10 March 2011)

Krivova v Ukraine (Merits and Just Satisfaction) no. 25732/05, Court (Fifth Section) (9 November 2010)

Kushtova and Others v Russia (Merits and Just Satisfaction) no. 21885/07, Court (First Section) (16 January 2014)

Laçin v Turkey (Decision) no. 23654/94, Commission (Plenary) (15 May 1995)

Lagardère v France (Merits and Just Satisfaction) no.18851/07, Court (Fifth Section) (12 April 2012)

Lawless v Ireland (No.3) (Merits) no. 332/57, Chamber (1 July 1961)

Luluyev and Others v Russia (Merits and Just Satisfaction) no. 69480/01, Court (First Section) (9 November 2006)

M.F. v Hungary (Merits and Just Satisfaction) no.45855/12, Court (Fourth Section) (31 October 2017)

M.H. v Sweden (Decision) no. 10641/08, Court (Third Section) (21 October 2008)

M.S.S. v Belgium and Greece (Merits and Just Satisfaction) no.30696/09, Court (Grand Chamber) (21 January 2011)

Magomed Musayev and Others v Russia (Merits and Just Satisfaction) no.8979/02, Court (First Section) (23 October 2008)

Mahmut Kaya v Turkey (Merits and Just Satisfaction) nos.22535/93, 22535/93, Court (First Section) (28 March 2000)

Makaratzis v Greece (Merits and Just Satisfaction) no.50385/99, Court (Grand Chamber) (20 December 2004)

Makhashevy v Russia (Merits and Just Satisfaction) no.20546/07, Court (First Section) (31 July 2012)

Mamedova v Russia (Merits and Just Satisfaction) no. 7064/05, Court (First Section) (1 June 2006)

Marckx v Belgium (Merits and Just Satisfaction) no.6833/74, Court (Plenary) (13 June 1979)

Maskhadova and Others v Russia (Merits and Just Satisfaction) no. 18071/05, Court (First Section) (6 June 2013)

Matyjek v Poland (Merits and Just Satisfaction) no.38184/03, Court (Fourth Section) (24 April 2007)

McFeeley et al. v the United Kingdom (Decision) no. 8317/78, Commission (Plenary) (15 May 1980)

Metropolitan Church of Bessarabia and Others v Moldova (Merits and Just Satisfaction) no.45701/99, Court (First Section) (13 December 2001)

Moldovan and Others v Romania (No.2) (Merits and Just Satisfaction) no.41138/98 64320/01, Court (Second Section) (12 July 2005)

Muñoz Díaz v Spain (Merits and Just Satisfaction) no.49151/07, Court (Third Section) (8 December 2009)

Musayev and Others v Russia (Merits and Just Satisfaction) no.57941/00, 58699/00 and 60403/00, Court (First Section) (26 July 2007)

Musayeva v Russia (Merits and Just Satisfaction) no.12703/02, Court (First Section) (3 July 2008)

Nada v Switzerland (Merits and Just Satisfaction) no. 10593/08, Grand Chamber (12 September 2012)

Nosov v Russia (Decision) no. 30877/02, Court (First Section) (20 October 2005)

Orhan v Turkey (Merits and Just Satisfaction) no.25656/94, Court (First Section) (18 June 2002)

Oršuš and Others v Croatia (Merits and Just Satisfaction) no.15766/03, Court (Grand Chamber) (16 March 2010)

Ovat v Turkey (Decision) no. 23180/94, Commission (Plenary) (3 April 1995)

Petrovic v Austria (Merits and Just Satisfaction) no.20458/92, Court (Chamber) (27 March 1998)

Pilav v Bosnia and Herzegovina (Merits and Just Satisfaction) no.41939/07, Court (Fifth Section) (9 June 2016)

Preussische Treuhand Gmbh and Co. Kg a. A. v Poland (Decision) no. 47550/06, Court (Fourth Section) (7 October 2008)

Rassemblement Jurassien and Unite Jurassienne v Switzerland (Decision) no. 8191/78, Commission (Plenary) (10 October 1979)

Religionsgemeinschaft der Zeugen Jehovas and Others v Austria (Merits and Just Satisfaction) no.40825/98, Court (First Section) (31 July 2008); *Fusu Arcadie and Others v the Republic Of Moldova* (Merits and Just Satisfaction) no.22218/06, Court (Third Section) (17 July 2012)

Sahin v Germany (Merits and Just Satisfaction) no.30943/96, Court (Grand Chamber) (8 July 2003)

Salakhov and Islyamova v Ukraine (Merits and Just Satisfaction) no.28005/08, Court (Fifth Section) (14 March 2013)

Sanchez Navajas v Spain (Decision) no.57442/00, Court (Fourth Section) (21 June 2001)

Sejdić and Finci v Bosnia and Herzegovina (Merits and Just Satisfaction) nos. 27996/06, 34836/06, Court (Grand Chamber) (22 December 2009)

Selçuk and Asker v Turkey (Merits and Just Satisfaction) no.23184/94, Chamber (24 April 1998)

Sidabras and Džiautas v Lithuania (Merits and Just Satisfaction) nos.55480/00 and 59330/00, Court (Second Section) (27 July 2004)

Škorjanec v Croatia (Merits and Just Satisfaction) no.25536/14, Court (Second Section) (28 March 2017)

Sõro v Estonia (Merits and Just Satisfaction) no.22588/08, Court (First Section) (3 September 2015)

Streletz, Kessler and Krenz v Germany (Merits) nos. 34044/96 35532/97 44801/98, Grand Chamber (22 March 2001)

Timishev v Russia (Merits and Just Satisfaction) nos.55762/00, 55974/00, Court (Second Section) (13 December 2005)

Trivkanović v Croatia (Merits and Just Satisfaction) no. 12986/13, Court (First Section) (6 July 2017)

Turluyeva and Khamidova v Russia (Merits and Just Satisfaction) no.12417/05, Court (First Section) (14 May 2009)

Turluyeva v Russia (Merits and Just Satisfaction) no.63638/09, Court (First Section) (20 June 2013)

Tyrer v the United Kingdom (Merits) no.5856/72, Court (Chamber) (25 April 1978)

Vallianatos and Others v Greece (Merits and Just Satisfaction) nos. 29381/09, 32684/09, Court (Grand Chamber) (7 November 2013)

Varnava and Others v Turkey (Merits and Just Satisfaction) nos.16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Court (Grand Chamber) (18 September 2009)

Winterstein and Others v France (Merits) no.27013/07, Court (Fifth Section) (17 October 2013)

X. and Y. v the United Kingdom (Decision) no. 5302/71, Commission (Plenary) (11 October 1973)

X. v Norway (Decision) no. 2369/64, Commission (Plenary) (3 April 1967)

Yasar v Turkey (Decision) no. 22281/93, Commission (Plenary) (3 April 1995)

Yilmaz v Turkey (Decision) no. 23179/94, Commission (Plenary) (15 May 1995)

Yordanova and Others v Bulgaria (Merits and Just Satisfaction) no.25446/06, Court (Fourth Section) (24 April 2012)

Yöyler v Turkey (Merits and Just Satisfaction) no.26973/95, Court (Fourth Section) (24 July 2003)

Z.D. v Turkey (Decision) no. 25801/94, Commission (Plenary) (23 May 1996)

Zalov and Khakulova v Russia (Merits and Just Satisfaction) no.7988/09, Court (First Section) (16 January 2014)

Zdjelar and Others v Croatia (Merits and Just Satisfaction) no. 80960/12, Court (First Section) (6 July 2017)

Zornić v Bosnia and Herzegovina (Merits and Just Satisfaction) no.3681/06, Court (Fourth Section) (15 July 2014)

Zulpa Akhmatova and Others v Russia (Merits and Just Satisfaction) nos.13569/02, 13573/02, Court (First Section) (9 October 2008)

8.23 European Social Charter texts and documents

CETS 035 European Social Charter (adopted on 18 October 1961, entry into force on 26 February 1965)

CETS 158 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (adopted on 9 November 1995, entry into force on 1 July 1998)

CETS 163 European Social Charter (revised) (adopted on 3 May 1996, entry into force 1 July 1999)

8.24 European Committee on Social Rights cases

Autism-Europe v France (Merits) no.13/2002 (4 November 2003)

Centre on Housing Rights and Evictions (COHRE) v France (Merits) no.63/2010 (28 June 2011)

Centre on Housing Rights and Evictions (COHRE) v Italy (Merits) no.58/2009 (25 June 2010)

Confederation of Swedish Enterprise v Sweden (Merits) no.12/2002 (15 May 2003)

European Council of Police Trade Unions v Portugal (Merits) no.11/2001 (21 May 2002)

European Roma and Travellers Forum (ERTF) v France (Merits) no.64/2011 (24 January 2012)

European Roma Rights Centre (ERRC) v Bulgaria (Merits) no.31/2005 (18 October 2006)

European Roma Rights Centre (ERRC) v Bulgaria (Merits) no.46/2007 (3 December 2008)

European Roma Rights Centre (ERRC) v France (Merits) no.51/2008 (19 October 2009)

European Roma Rights Centre (ERRC) v Italy (Merits) no.27/2004 (7 December 2005)

European Roma Rights Centre (ERRC) v Portugal (Merits) no.61/2010 (30 June 2011)

European Roma Rights Centre v Greece (Merits) no.15/2003 (8 December 2004)

International Commission of Jurists v Portugal (Merits) no.1/1998 (9 September 1999)

International Federation of Human Rights (FIDH) v Belgium (Merits) no.62/2010 (21 March 2010)

Médecins du Monde - International v France (Merits) no.67/2011 (11 September 2012)

8.25 European Framework Convention on the Protection of National Minorities texts and documents

CETS 157 Framework Convention for the Protection of National Minorities (adopted on 1 February 1995, entry into force on 1 February 1998)

Resolution (97)10 Rules adopted by the Committee of Ministers on the Monitoring Arrangements under Articles 24 to 26 of the Framework Convention for the Protection of National Minorities (17 September 1997)

ACFC/INF (98)2 Rules of Procedure of the Advisory Committee on the Framework Convention for the Protection of National Minorities (29 October 1998)

ACFC/44DOC(2012)001rev Thematic Commentary No. 3: The Language Rights of Persons Belonging to National Minorities under the Framework Convention (adopted on 24 May 2012)

ACFC/56DOC(2016)001 The Framework Convention: a key tool to managing diversity through minority Rights, Thematic Commentary No. 4 The Scope of Application of the Framework Convention for the Protection of National Minorities (27 May 2016)

Advisory Committee on the Framework Convention for the Protection of National Minorities, 10th Activity Report covering the period 1 June 2014 - 31 May 2016

8.26 Austrian Federal Administrative Court cases

BVwG 09.05.2017, W226 2105945-2, online available in German at: https://www.ris.bka.gv.at/Dokumente/Bvwg/BVWGT_20170509_W226_2105945_2_00/BVWGT_20170509_W226_2105945_2_00.pdf (accessed on 15/04/18)

9 Online sources

African Union, Protocol on the Statute of the African Court of Justice and Human Rights (1 July 2008), online available at: http://www.african-court.org/en/images/Basic%20Documents/ACJHR_Protocol.pdf (accessed on 15/04/18)

Aliyev, H. (2013). New Anti-Terrorism Law to Target Families of North Caucasus Insurgents, online available at: http://www.cacianalyst.org/publications/analytical-articles/item/12876-new-anti-terrorism-law-to-target-families-of-north-caucasus-insurgents.html (accessed on 15/04/18)

Arutunyan, A. (2013). Paying for Terror in Russia, online available at: http://themoscownews.com/russia/20131114/192050210/Paying-for-terror-in-Russia.html (accessed on 15/04/18)

Austrian Legal Information Database (Rechtsinformationssystem), online available in German at: https://www.ris.bka.gv.at/Ergebnis.wxe?Abfrage=Bvwg&Entscheidungsart=Undefined&SucheNachRechtssatz=True&SucheNachText=True&GZ=&VonDatum=01.01.2014&BisDatum=13.06.2017&Norm=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=tschetschenien+kollektivbestrafung&Position=1 (accessed on 15/04/18)

Avocats Sans Frontières (2011). Enforcing Housing Rights: The Case of Sheikh Jarrah – Report of the fact-finding mission to Israel and the Occupied Palestinian Territory, online available at: http://www.asf.be/wp-content/publications/ASF%20Housing%20Rights%20Report%20(May%202011).pdf (accessed on 15/04/18)

B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories (2016). Statistics on punitive house demolitions, online available at: http://www.btselem.org/punitive_demolitions/statistics (accessed on 15/04/18)

B'Tselem (2017). Innocents punished: Israeli military demolishes three homes and seals another, Ramallah District, online available at: http://www.btselem.org/photoblog/innocents-punished-israeli-military-demolishes-three-homes-and-seals-another-ramallah-dist (accessed on 15/04/18)

Bader, M. (2018). The State of Palestine Lodges an Interstate Complaint against Israel under the Convention on the Elimination of All Forms of Racial Discrimination, Ministry of Foreign Affairs of the State of Palestine, online available at: http://www.mofa.pna.ps/en/2018/04/24/the-state-of-palestine-lodges-an-interstate-complaint-against-israel-under-the-convention-on-the-elimination-of-all-forms-of-racial-discrimination/ (accessed on 15/07/18)

Balmforth, T. (2015). Russian Duma To Consider Criminal Accountability For Militant Families, online available at: http://www.rferl.org/content/russia-duma-criminal-accountability-militant-families/26792038.html (accessed on 15/04/18)

BBC News (4 July 2016). Israeli politician Tzipi Livni 'summonsed by UK police', online available at: http://www.bbc.co.uk/news/world-middle-east-36697324 (accessed on 15/04/18)

Ben-Naftali, O., Harpaz, G., Shany, Y. & Kremnitzer, M. (2014). Expert Opinion: The Lawfulness of Israel's House Demolition Policy under International Law and Israeli Law, unofficial English translation online available at: http://www.hamoked.org/files/2014/1159001_eng.pdf (accessed on 15/04/18)

Caucasian Knot (2015). Chechen Parliament submits to Russian State Duma bill on punishment of terrorists' family members, online available at: http://eng.kavkaz-uzel.ru/articles/30509/ (accessed on 15/04/18)

Caucasian Knot (2015). Infographics. Total number of victims in Northern Caucasus in 2010-2014 under the data of the Caucasian Knot, online available at: http://eng.kavkaz-uzel.ru/articles/30858/ (accessed on 15/04/18)

Caucasian Knot (2016). Infographics. Statistics of victims in Northern Caucasus for 2015 under the data of the Caucasian Knot, online available at: http://www.eng.kavkaz-uzel.eu/articles/34527/ (accessed on 15/04/18)

Caucasian Knot (2016). Villagers demand to expel family members of suspected militant from Chechnya, online available at: http://www.eng.kavkaz-uzel.eu/articles/37909/ (accessed on 15/04/18)

Caucasian Knot (2016). Жители Чечни пожаловались на "духовную паспортизацию" под видом анкетирования, online available at: http://www.kavkaz-uzel.eu/articles/278238/ (accessed on 15/04/18)

Caucasian Knot (2017). Infographics. Statistics of victims in Northern Caucasus in Quarter 1 of 2017 under the data of the Caucasian Knot, online available at: http://www.eng.kavkaz-uzel.eu/articles/39081/ (accessed on 15/04/18)

Caucasian Knot (2017). Infographics. Statistics of victims in Northern Caucasus for 2016 under the data of the Caucasian Knot, online available at: http://www.eng.kavkaz-uzel.eu/articles/38325/ (accessed on 15/04/18)

Caucasian Knot (2017). MMA World Champion, who complained about torture in Chechnya, detained near Bryansk, online available at: http://www.eng.kavkaz-uzel.eu/articles/39628/ (accessed on 15/04/18)

Caucasian Knot (2017). Murad Amriev says his rights are observed in Chechnya, online available at: http://www.eng.kavkaz-uzel.eu/articles/39702/ (accessed on 15/04/18)

Caucasian Knot (2017). North Caucasus – statistics of victims, online available at: http://www.eng.kavkaz-uzel.eu/rubric/601 (accessed on 15/04/18)

Caucasian Knot (2017). Rights defenders explain Amriev's statements as compromise with Chechen law enforcers, online available at: http://www.eng.kavkaz-uzel.eu/articles/39705/ (accessed on 15/04/18)

Committee for the Prevention of Torture (2017). заявителю Комитета по предотвращения пыток урожает опрасность, online available at: http://www.pytkam.net/press-centr.novosti/4574 (accessed on 15/04/18)

Council of Europe (2016). Collective Complaints Procedure, online available at: https://edoc.coe.int/en/european-social-charter/7252-european-social-charter-collective-complaints-procedure.html (accessed on 15/04/18)

Council of Europe, Agreement between the United Nations Interim Administration Mission in Kosovo (UNMIK) and the Council of Europe on technical arrangements related to the Framework Convention for the Protection of National Minorities, 890th meeting (30 June 2004) online available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805dc82d (accessed on 15/04/18)

Council of Europe, State Parties to the Convention, online available at: http://www.coe.int/en/web/minorities/etats-partie (accessed on 15/04/18)

European Council on Refugees and Exiles (2011). *Guidelines on the Treatment of Chechen Internally Displaced Persons (IDPs), Asylum Seekers and Refugees in Europe*, online available at: http://www.ecre.org/topics/areas-of-work/returns/174.html (accessed on 15/04/18)

European Court of Human Rights (2017). Factsheet – Pilot Judgments, Press Unit, online available at: http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf (accessed on 15/04/18)

Goodwin-Gill, G. (2011). Palestine, Statehood and the Challenges of Representation, EJIL: Talk!, online available at: http://www.ejiltalk.org/palestine-statehood-and-the-challenges-of-representation/ (accessed on 15/04/18)

Grant, T.D. (2010). Chechnya, *Max Planck Encyclopedia of Public International Law*

HC Deb 21 December 1956 vol 562 cc1609-40, Cyprus (Emergency Regulations) Mr.Robinson, para.1613, online available at: http://hansard.millbanksystems.com/commons/1956/dec/21/cyprus-emergency-regulations (accessed on 15/04/18)

HCJ 9132/07 Al Basyouni et al v The Prime Minister et al (Judgment) 30 January 2008, unofficial English translation online available at: http://www.hamoked.org/items/9862_eng.pdf (accessed on 15/04/18)

HL Deb 26 November 1952 vol 179 cc586-634, Collective Punishment in Kenya, Earl of Listowel, online available at: http://hansard.millbanksystems.com/lords/1952/nov/26/collective-punishment-in-kenya#S5LV0179P0_19521126_HOL_90 (accessed on 15/04/18)

Hookway, C. (2013). Pragmatism, Stanford Encyclopedia of Philosophy, online available at: http://plato.stanford.edu/entries/pragmatism/ (accessed at 22/02/2016)

Human Rights Foundation of Turkey (1994). Turkey Human Rights Report 1993, online available at: http://en.tihv.org.tr/wp-content/uploads/2015/08/Ra1993HumanRightReport.pdf (accessed on 15/04/18)

Human Rights Watch (2000). February 5: A Day of Slaughter in Novye Aldi, 12 (9), online available at: https://www.hrw.org/reports/2000/russia_chechnya3/ (accessed on 15/04/18)

Human Rights Watch (2005). “Still critical”: Prospects in 2005 for Internally Displaced Kurds in Turkey, online available at: https://www.hrw.org/reports/2005/turkey0305/turkey0305.pdf (accessed on 15/04/18)

Human Rights Watch (2009). “What Your Children Do Will Touch Upon You” – Punitive House-Burning in Chechnya, online available at: http://www.hrw.org/sites/default/files/reports/chechnya0709webwcover_1.pdf (accessed on 15/04/18)

Human Rights Watch (2014). Burning Down the House in Chechnya, online available at: http://www.hrw.org/news/2014/12/10/dispatches-burning-down-house-chechnya-0 (accessed on 15/04/18)

Human Rights Watch (2014). Human Rights Watch Concerns and Recommendations on Russia: Submitted to the UN Human Rights Committee on the occasion of its Pre-Sessional Review of Russia, online available at: http://www.hrw.org/sites/default/files/related_material/2014_Russia_HRCsubmission.pdf (accessed on 15/04/18)

Human Rights Watch (2016). "Like Walking a Minefield": Vicious Crackdown on Critics in Russia’s Chechen Republic, online available at: https://www.hrw.org/sites/default/files/report_pdf/chechnya0816_1.pdf (accessed on 15/04/18)

Interfax (2014). Bill on criminal liability for terrorists’ relatives unlikely to be considered in State Duma – official, online available at: http://russialist.org/interfax-bill-on-criminal-liability-for-terrorists-relatives-unlikely-to-be-considered-in-state-duma-official/ (accessed on 15/04/18)

International Committee of the Red Cross (2016). Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. 2nd edition, online version available at: https://ihl-databases.icrc.org/ihl/full/GCI-commentary (accessed on 15/04/18)

International Crisis Group (2012). The North Caucasus: The Challenges of Integration (II), Islam, the Insurgency and Counter-Insurgency, Europe Report N°221, online available at: http://www.crisisgroup.org/~/media/Files/europe/caucasus/221-the-

north-caucasus-the-challenges-of-integration-ii-islam-the-insurgency-and-counter-insurgency.pdf (accessed on 15/04/18)

International Crisis Group (2015). Chechnya: The Inner Abroad, online available at: https://d2071andvip0wj.cloudfront.net/236-chechnya-the-inner-abroad.pdf (accessed on 15/04/18)

Israel Ministry of Foreign Affairs (2003). Forgotten Facts About the West Bank and Gaza Strip, online available at: http://mfa.gov.il/MFA/MFA-Archive/2003/Pages/DISPUTED%20TERRITORIES-%20Forgotten%20Facts%20About%20the%20We.aspx (accessed on 15/04/18)

Israel Ministry of Foreign Affairs (2007). Security Cabinet Declares Gaza Hostile Territory, online available at: http://www.mfa.gov.il/mfa/pressroom/2007/pages/security%20cabinet%20declares%20gaza%20hostile%20territory%2019-sep-2007.aspx (accessed on 15/04/18)

Jones, P., Group Rights, The Stanford Encyclopedia of Philosophy (Summer 2016 Edition), Edward N. Zalta (ed.), online available at: https://plato.stanford.edu/archives/sum2016/entries/rights-group/ (accessed on 15/04/18)

Keane, D. (2018). ICERD and Palestine's Inter-State Complaint, EJIL Talk!, online available at: https://www.ejiltalk.org/icerd-and-palestines-inter-state-complaint/ (accessed on 15/07/18)

Medien-Servicestelle (2015). Rund 30.000 TschetschenInnen in Österreich, online available in German at: http://medienservicestelle.at/migration_bewegt/2015/02/26/rund-30-000-tschetscheninnen-in-oesterreich/ (accessed on 15/04/18)

Meduza News (2017). Сбежавшего на Украину чемпиона мира по ММА задержали и хотят доставить в Чечню. Там его раньше пытали, online available at: https://meduza.io/feature/2017/06/05/sbezhavshego-na-ukrainu-chempiona-mira-po-mma-zaderzhali-i-hotyat-dostavit-v-chechnyu-tam-ego-ranshe-pytali (accessed on 15/04/18)

Memorial Human Rights Centre (2007). Counter Terror: Russian Practice, Reports of human rights organizations hearings of International Commission of Jurists 29-30

January 2007, online available at: http://old.memo.ru/s/267.html (accessed on 15/04/18)

Memorial Human Rights Centre (2008). Special Operations "*Zachistka*", online available at: http://www.memo.ru/2008/09/04/0409081eng/part5.htm (accessed on 15/04/18)

Memorial Human Rights Centre (2014). Чечня: силовики сожгли дома родственников боевиков, online available at: https://memohrc.org/ru/news/chechnya-siloviki-sozhgli-doma-rodstvennikov-boevikov (accessed on 15/04/18)

Memorial Human Rights Centre (2016). Counter-terrorism in the North Caucasus: a human rights perspective. 2014 – first half of 2016, online available at: https://memohrc.org/sites/all/themes/memo/templates/pdf.php?pdf=/sites/default/files/doklad_severnyy_kavkaz_-_angl.pdf (accessed on 15/04/18)

Memorial Human Rights Centre (2016). Counter-terrorism in the North Caucasus: a human rights perspective. 2014 – first half of 2016, online available at: https://memohrc.org/sites/all/themes/memo/templates/pdf.php?pdf=/sites/default/files/doklad_severnyy_kavkaz_-_angl.pdf (accessed on 15/04/18)

Memorial Human Rights Centre (4 February 2010). Clean-up operation in New Aldy. To the 10th Anniversary of the Tragedy. Press-conference, online available at: http://www.memo.ru/eng/news/2010/02/03/0302101.htm (accessed on 15/04/18)

Mutua, M. (2000). The African human rights system: A critical evaluation, Background Paper to the UNDP 2000 Human Development Report, online available at: http://hdr.undp.org/sites/default/files/mutua.pdf (accessed on 15/04/18)

Nikitenko, T. (2016). 'Это государственный терроризм'. Игорь Каляпин о том, почему в Чечне сжигают дома, Open Russia, online available at: https://openrussia.org/post/view/14983/ (accessed on 15/04/18)

Obrazkova, M. (2013). Proposed Russian law targets terrorists' families, online available at: http://rbth.co.uk/politics/2013/10/21/proposed_russian_law_targets_terrorists_families_30985.html (accessed on 15/04/18)

OC Media (2017). 'Citizens council' expels families of slain militants in Chechnya, online available at: http://oc-media.org/citizens-council-expels-families-of-slain-militants-in-chechnya/ (accessed on 15/04/18)

OC Media (2017). Collective responsibility in Chechnya; an ineffective method of influence, online available at: http://oc-media.org/collective-responsibility-in-chechnya-an-ineffective-method-of-influence/ (accessed on 15/04/18)

Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II), ratification details, online available at: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f3cb8 (accessed on 15/04/18)

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), ratification details, online available at: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f3586 (accessed on 15/04/18)

Rabbat, P. & Mehring, S. (2011). Collective Punishment, Max Planck Encyclopedia of Public International Law

Radio Free Europe/Radio Liberty (2013). Caucasus Report: Russia To Hold Relatives Of 'Terrorists' Financially Responsible For Material Damage, online available at: http://www.rferl.org/content/russia-terrorism-law-terrorists-financial-liability/25157756.html (accessed on 15/04/18)

Radio Free Europe/Radio Liberty (2016). House Of Chechnya Whistle-Blower Reportedly Burned, online available at: https://www.rferl.org/a/russia-chechnya-whistle-blower-house-burned/27732868.html (accessed on 15/04/18)

Radio Liberty (13 January 2015). Russian Duma To Consider Criminal Accountability For Militant Families, online available at: http://www.rferl.org/content/russia-duma-criminal-accountability-militant-families/26792038.html (accessed on 15/04/18)

Roadstrum Moffett, M. (1989). Perpetual Emergency: A Legal Analysis of Israel's Use of the British Defence (Emergency) Regulations, 1945, in the Occupied Territories. Ramallah, Al-Haq, online available at: http://www.alhaq.org/publications/publications-index/item/perpetual-emergency-a-

legal-analysis-of-israel-s-use-of-the-british-defense-emergency-regulations-1945-in-the-occupied-territories (accessed on 15/04/18)

Roudik, P. (2013). Russia: Law Requires Terrorists to Compensate Their Victims, Global Legal Monitor, online available at: http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403734_text (accessed on 15/04/18)

Shnayderman, R. (2004). Through no fault of their own - Punitive House Demolitions during the al-Aqsa Intifada, B'Tselem Information Sheet, online available at: http://www.btselem.org/download/200411_punitive_house_demolitions_eng.pdf (accessed on 15/04/18)

TASS Russian News Agency (2014). Bill on criminal liability of terrorists' relatives submitted to Russia's Duma, online available at: http://tass.ru/en/russia/714054 (accessed on 15/04/18)

Tumanov, G. (2016). В Чечне ввели «духовно-нравственный паспорт», Kommersant News, online available at: http://www.kommersant.ru/doc/2919256 (accessed on 15/04/18)

UN High Commissioner for Refugees (2012). Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, online available at: http://www.refworld.org/docid/503489533b8.html (accessed on 15/04/18)

Vatchagaev, M. (2013). New Russian Legislation Codifies Collective Punishment, *Eurasia Daily Monitor*, 10 (195), online available at: http://www.jamestown.org/single/?tx_ttnews%5Btt_news%5D=41553&no_cache=1#.VS5N7fmG_hB (accessed on 15/04/18)

Welchman, L. (1993). A Thousand and One Homes: Israel's Demolition and Sealing Of Houses in the Occupied Palestinian Territories. Ramallah, Al-Haq, online available at: http://www.alhaq.org/publications/publications-index/item/a-thousand-and-one-homes?category_id=10 (accessed on 15/04/18)

Zakonia (online portal on Russian law) (2014). Семейная ответственность за теракт. Противодействие терроризму или расплата «за компанию»?, online available at: http://www.zakonia.ru/theme/semejnaja-otvetstvennost-za-terakt-protivodejstvie-terrorizmu-ili-rasplata-za-kompaniju-15-01-2014 (accessed on 15/04/18)

официальной публикации итогов Всероссийской переписи населения 2010 года, население по национальности и владению русским языком по субъектам Российской Федерации, 2010 Russian population census report, online available in Russian at: http://www.gks.ru/free_doc/new_site/perepis2010/croc/Documents/Vol4/pub-04-04.pdf (accessed on 15/04/18)

ЧИСЛО РАЙОНОВ, ГОРОДСКИХ И СЕЛЬСКИХ НАСЕЛЕННЫХ ПУНКТОВ ПО СУБЪЕКТАМ РОССИЙСКОЙ ФЕДЕРАЦИИ (numbers deriving from the 2010 population census), online available in Russian at: http://www.gks.ru/free_doc/new_site/perepis2010/croc/Documents/Vol1/pub-01-03.pdf (accessed on 15/04/18)