

MODERN STUDIES IN EUROPEAN LAW



THE USE OF FORCE AND ARTICLE 2 OF THE ECHR IN LIGHT OF EUROPEAN CONFLICTS

HANNAH RUSSELL

B L O O M S B U R Y

THE USE OF FORCE AND ARTICLE 2 OF THE ECHR IN LIGHT OF EUROPEAN CONFLICTS

Article 2 of the European Convention on Human Rights (ECHR) in its current form is incomplete and outdated. Due to significant developments at a legislative and judicial level, the right to life spans beyond what is enumerated within Article 2. With the belief that Article 2 is still relevant, this book investigates how the right to life can be better protected within Europe. It advocates for the modernisation of Article 2 through codifying legislative and judicial developments relevant to this provision in the form of guidelines. It also considers the improvements that can be made by the Council of Europe (CoE) bodies—the European Court of Human Rights (ECtHR), the Committee of Ministers (CoM), the Parliamentary Assembly of the Council of Europe (PACE) and the CoE Commissioner for Human Rights—to encourage adherence to Article 2 and promote effective remedies to prevent future violations. It uses the experience from four internal European conflicts—the Basque conflict, the Chechen conflict, the Northern Ireland Troubles and the Turkish–Kurdish conflict—to illustrate its points.

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The Use of Force and Article 2 of the ECHR in Light of European Conflicts

Hannah Russell



• H A R T •
PUBLISHING

OXFORD AND PORTLAND, OREGON

2017

Hart Publishing
An imprint of Bloomsbury Publishing Plc

Hart Publishing Ltd
Kemp House
Chawley Park
Cumnor Hill
Oxford OX2 9PH
UK

Bloomsbury Publishing Plc
50 Bedford Square
London
WC1B 3DP
UK

www.hartpub.co.uk
www.bloomsbury.com

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA

www.isbs.com

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First published 2017

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British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN: HB: 978-1-50991-181-3
ePDF: 978-1-50991-179-0
ePub: 978-1-50991-180-6

Library of Congress Cataloguing-in-Publication Data

Names: Russell, Hannah, author.

Title: The use of force and article 2 of the ECHR in light of European conflicts / Hannah Russell.

Description: Portland, Oregon : Hart Publishing, 2017. | Series: Modern studies in European law ;
volume 81 | Includes bibliographical references and index.

Identifiers: LCCN 2017025635 (print) | LCCN 2017027014 (ebook) | ISBN 9781509911806 (Epub) |
ISBN 9781509911813 (hardback : alk. paper)

Subjects: LCSH: Right to life—Europe. | Convention for the Protection of Human Rights
and Fundamental Freedoms (1950 November 5) | Human rights—Europe.

Classification: LCC KJC5186 (ebook) | LCC KJC5186 .R87 2017 (print) | DDC 342.2408/5—dc23

LC record available at <https://lcn.loc.gov/2017025635>

Typeset by Compuscript Ltd, Shannon

To find out more about our authors and books visit www.hartpublishing.co.uk. Here you will find extracts,
author information, details of forthcoming events and the option to sign up for our newsletters.

Acknowledgements

Thank you to Hart Publishing for their faith in this project, supporting it to completion and producing these pages, particularly Sinead Moloney, Emily Braggins and Christopher Long. Gratitude is also due to the School of Law, Queen's University Belfast and the Department for Employment and Learning NI for the resources that enabled the completion of a PhD on this topic.

This book evolved from a PhD, but there are many people who inspired appreciation for and cultivated understanding of human rights who are owed a debt of gratitude—my family who encouraged and showed through example that each individual has a responsibility to look beyond themselves, and show compassion and respect towards others—Mum, Dad, Julie, Eve, Nana, Naneen and Papa. Teachers and mentors throughout my primary, secondary and third-level education who generously imparted their knowledge, expertise and advice that enabled a deeper understanding of the complexities, usefulness and applicability of human rights. Particular mention to Dr Catherine Donnelly for inspiring an interest in this particular area of law and, for their vital input and guidance into this project—Professor Brice Dickson; Dr Natasa Mavronicola; Dr Onder Backircioglu; Professor Colin Harvey; Professor Javid Rehman; Professor Philip Leach; Professor Françoise Hampson; Professor Bill Bowring; and the anonymous reviewers. Those who offered the opportunity, support and encouragement in my career to date that helped to develop the skill set to complete this project—Blanaid O'Shea; Dr Colin Harper; Dr Bronagh Byrne; Dr Nizar Ayoub; Dr David Russell; Professor Monica McWilliams; and Maha Abu-Dayyeh. The intermediaries and interviewees who agreed to be part of this project and offered their time and opinions; the dedication and strength that they demonstrate in their challenging, and often dangerous, work is inspirational. To friends around the world and extended family (especially Ann, Brian and Conor) who offered encouragement, experiences and new perspectives. Finally, Aidan, my partner in everything.

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Table of Abbreviations

ADPDM	American Declaration on the Rights and Duties of Man 1948
AG	Attorney General
AI	Amnesty International
APT	Association for the Prevention of Torture
Behatokia	The Basque Observatory of Human Rights
BVE	Batallón Vasco Español
CAJ	Committee on the Administration of Justice
CCPR	United Nations Human Rights Committee
CCRC	Northern Ireland Criminal Cases Review Commission
CGPJ	General Council of the Judiciary (<i>Consejo General del Poder Judicial</i>)
CICS	Criminal Injuries Compensation Scheme
CIRA	Continuity Irish Republican Army
CLAHR	Committee on Legal Affairs and Human Rights
CoE	Council of Europe
CoM	Committee of Ministers
CPDS	Centre for Peace and Development Studies
CPI	Centre for International Protection
CPJ	Committee to Protect Journalists
CPS	Crime Prevention Studies
CRC	Convention on the Rights of the Child 1989
CSNI	Coroners Service for Northern Ireland
CSRC	Conflict Studies Research Centre
CVS	Commission for Victims and Survivors
DEECHR	Department for the Execution of the European Court of Human Rights Judgments
DHSSPS	Department of Health, Social Services and Public Safety
DOJ	Department of Justice
DPI	Democratic Progress Institute

DPP	Director of Public Prosecutions
ECHR	European Convention on Human Rights 1950
ECommHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
EHRAC	European Human Rights Advocacy Centre
EHRC	Equality and Human Rights Commission
EU	European Union
FRU	Force Research Unit
FSB	Federal Security Service of the Russian Federation
GAL	Grupos Antiterroristas de Liberación
GFA	Good Friday (Belfast) Agreement 1998
HCP	High Contracting Party
HET	Historical Enquiries Team
HIU	Historical Investigations Unit
HRA	Human Rights Act 1998
HRAA	Human Rights Agenda Association (Turkey)
HRAHIHS	Human Rights Advocacy and the History of International Human Rights Standards European Center for Constitutional and Human Rights
HMIC	Her Majesty's Inspectorate of Constabulary
HRSJRI	Human Rights and Social Justice Research Institute
HRW	Human Rights Watch
IAC	International Armed Conflict
IACommHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights 1966
ICED	International Convention for Protection of All Persons from Enforced Disappearances 2006
ICL	International Criminal Law
ICPC	Independent Commission for Police Complaints
ICRC	International Committee of the Red Cross
IFHR	International Federation of Human Rights
IGJS	Inspectorate General of Judicial Services

IHL	International Humanitarian Law
IHOP	Human Rights Joint Platform (<i>Insan Haklari Ortak Platform</i>)
IHRL	International Human Rights Law
INLA	Irish National Liberation Army
IPCC	Independent Police Complaints Commission
IRA	Irish Republican Army
JCJEDWR	Joint Committee on Justice, Equality, Defence and Women's Rights
JITEM	Turkish Gendarmerie Intelligence Organisation (<i>Jandarma Istihbarat ve Terörle Mücadele</i>)
LC	Law Commission
LIB	Legacy Investigation Branch
LVF	Loyalist Volunteers Force
Memorial	Memorial Centre for Human Rights
Minnesota Protocol	Model Autopsy Protocol in the United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions 1999
MRF	Military Reaction Force
NI	Northern Ireland
NIAC	Non-international Armed Conflict
NICTS	Northern Ireland Courts and Tribunal Services
NIHRC	Northern Ireland Human Rights Commission
OAS	Organisation of American States
ÖHD	Turkish Special Operations Department (<i>Özel harekat Dairesi</i>)
OSGPSH	Office of the Secretariat General for Peace and Social Harmony
OTR	On the Runs Scheme
OV	Orange Volunteers
PACE	Parliamentary Assembly of the Council of Europe
PC	Privy Council
PCB	Northern Ireland Police Complaints Board
PICJ	Permanent Court of International Justice

PKK	Kurdish Workers' Party
PONI	Police Ombudsman for Northern Ireland
PP	Public Prosecutors
PSNI	Police Service of Northern Ireland
Real IRA	Real Irish Republican Army
RHD	Red Hand Defenders
RJI	Russian Justice Initiative
Rome Statute	Rome Statute of the International Criminal Court 1998
RUC	Royal Ulster Constabulary
SACHR	Standing Advisory Committee on Human Rights
SIU	Special Investigative Unit
SRU	Special Reconnaissance Unit
Taoiseach	Irish Prime Minister
TJI	Transitional Justice Institute
UDA	Ulster Defence Association
UDHR	Universal Declaration of Human Rights 1948
UFF	Ulster Freedom Fighters
UK	United Kingdom
UN	United Nations
UNCPCTO	United Nations Congress on the Prevention of Crime and the Treatment of Offenders
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities 2006
UNESC	United Nations Economic and Social Council
UNOHCHR	Office of the United Nations High Commission for Human Rights
UNSC	United Nations Security Council
UVF	Ulster Volunteers Force
VSS	Victim and Survivors Service
1989 Principles	Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions 1989

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Introduction

The European Convention on Human Rights should be an instrument of development and improvement rather than an 'end game' treaty which froze the state of affairs that existed 60 years ago.

Kanstantsin Dzehtsiarou¹

THE WORDS OF Dzehtsiarou ring true when considering Article 2 of the European Convention on Human Rights (ECHR), a provision that in its current form is incomplete and outdated. This raises the question of whether Article 2 as it stands is enough to protect the right to life. Unjustified killings, by state actors and due to state omissions, are continuing in Europe, making the words 'never again' that inspired the birth of human rights² and the ECHR appear disingenuous. Should we just accept that death is a fact of life,³ and that 'violence is inherently a human potential'?⁴ Or can more be done within the Council of Europe (CoE)'s legal system to deter this human potential and ensure that it remains 'the exception [rather] than the norm'?⁵ With the belief that Article 2 is still relevant, this book investigates how the right to life can be better protected within Europe. It considers this within the time frame from when the ECHR entered into force on 3 September 1953 to the cut-off point for this book's investigations on 31 March 2017.

This book begins with the premise that Article 2 of the ECHR is outdated. Due to significant development at a legislative and judicial level, the right to life spans beyond what is enumerated within this provision. The book advocates modernisation of Article 2 through codifying developments in the form of guidelines. The guidelines, as a soft law instrument, are not binding. Yet they do clarify the scope of the enumerated and unenumerated minimum standards set by Article 2.⁶ Reflecting the ECHR's format, and out of respect for the principle of subsidiarity,

¹ K Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the ECHR' (2011) 12(10) *German Law Journal* 1730, 1730.

² E McClean, 'The Dilemma of Intervention: Human Rights and the UNSC' in M Odello and S Cavandoli (eds), *Emerging Areas of Human Rights in the 21st Century: The Role of the UDHR* (Routledge, 2012) 24.

³ P Wong, 'Meaning Management Theory and Death Acceptance' in A Tomer et al (eds), *Existential and Spiritual Issues in Death Attitudes* (Psychology Press, 2013) 66.

⁴ A Beyer, *Inequality and Violence: A Re-appraisal of Man, the State and War* (Ashgate Publishing Ltd, 2014) 39.

⁵ *ibid.*

⁶ Enumerated standards are expressly set out within the wording of Art 2. Unenumerated standards are standards that are implied within the text of Art 2. The unenumerated standards look at what

2 Introduction

the provisions proposed are generalised and relate to obligations of the state. This makes it easier to gain the state support required for the proposed guidelines' implementation. It also ensures that the correct balance is struck in terms of the 'specification parameter'.⁷ This book looks beyond legislation and considers what improvements can be made by the CoE bodies—the European Court of Human Rights (ECtHR), the Committee of Ministers (CoM), the Parliamentary Assembly of the Council of Europe (PACE) and the CoE Commissioner for Human Rights—to encourage adherence to Article 2 and promote effective remedies to prevent future violations.

The book focuses on the use of force. It uses the experience from four internal European conflicts—the Basque conflict, the Chechen conflict, the Northern Ireland (NI) Troubles and the Turkish-Kurdish conflict—to illustrate its points. The use of force poses the greatest threat to life. It is also an issue where the greatest consensus was reached. The book does not tackle more contentious questions such as when life begins (the termination of pregnancy debate) or if the right to life includes the right to die (the assisted suicide/euthanasia debate). Nevertheless, its findings are not limited to instances where force is used. The discussions on the scope of the negative and positive obligations have a more general application. Consequently, the guidelines aim to provide guidance on how to improve fulfilling, respecting and protecting the right to life in all contexts. They consider the minimum standards required to adequately protect life, to remedy a violation and to prevent future violations. This includes standards that the ECtHR offer clear guidance on, and those that require further clarification. The proposed guidelines are set out in the Appendix. The chapters preceding the Appendix justify the chosen wording.

I. METHODOLOGY

This research adopts a qualitative approach.⁸ A “qualitative observation” identifies the presence or absence of something, in contrast to “quantitative observation”, which involves measuring the degree to which some feature is present.⁹ Qualitative research ‘unfolds—it develops as the researcher learns more’.¹⁰ Due to the regional nature of this project and to ensure that this research is relevant and effective, a comparative element was introduced through looking at four case studies—the

standards the ECtHR interpreted the right to life to contain. There are additional unenumerated standards that the ECtHR does not provide clear guidance on, but which are developed by other bodies such as the UN and the Inter-American Court of Human Rights. The CoE should consider these standards for inclusion within the proposed guidelines.

⁷ N Mavronicola, ‘What is an “Absolute Right”? Deciphering Absoluteness in the Context of Article 3 of the ECHR’ (2012) 12(4), *Human Rights Law Review* 723, 741–45.

⁸ J Kirk and M Miller, *Reliability and Validity in Qualitative Research* (Sage, 1986) 9; L Webley, ‘Qualitative Approaches to Empirical Legal Research’ in P Cane and H Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP, 2010) 932.

⁹ Kirk and Miller (n 8) 9.

¹⁰ Webley (n 8) 932.

Basque country, Chechnya, NI and the Kurdish issue in Turkey. Comparative law is 'the only reliable way of accumulating knowledge of reality of law, and assessing problems that may arise ... and giving warning signals where need be'.¹¹ Comparative law can also:

provide knowledge about 'law as rules', 'law in context' and 'law as culture', thus enabling us to have comprehensive and in-depth knowledge of the legal phenomena and their interactions in society. Comparative law draws from the pool of models to illustrate the general points it is making ... Comparative law gives us a tool of communication.¹²

It is a 'tool for the export of legal ideas and institutions and aiding law reform'.¹³ Comparative analysis also offers 'new ways of finding solutions to legal problems and requires you to confront any assumptions (often unconscious) you may be holding about how legal systems should operate'.¹⁴ Thus it is a good fit for this research, which considers how the right to life can be better protected within Europe.

A. Justification for the Chosen Case Studies

Conflict-related case studies raise challenges to the right to life which are not easily resolved by taking a superficial approach to Article 2. This right is most tested during times of conflict. The situations where force is used are increased, and the confusion that is created during such times of unrest can lead to intentional and unintentional disregard for life. Times of conflict offer the most overt examples of situations where the right to life is under threat and provide significant (often extreme) cases for analysis. The focus is on internal conflicts, as these have been the main source of unrest within Europe since World War II and offer the widest range of case law.

It is limited to Article 2 of the ECHR (human rights instrument), as the states involved in the four case studies refused to recognise that an armed conflict existed within their jurisdiction. The states have viewed the oppositions' actions as acts of terrorism and their response as counter-terrorism operations. Consequently they have denied that international humanitarian law (IHL) applies, while acceding that the full range of international human rights law (IHRL) applies. This is counterintuitive for states. IHRL places more restrictions on states than IHL treaties and limits their military capabilities to deal with opposition. This approach is for political as opposed to legal reasons. To 'apply IHL is to tacitly concede that there is another "party" wielding power in the putatively sovereign State'.¹⁵ In other words, the benefits of legal compliance with IHRL outweigh 'the political costs of

¹¹ E Özücü, 'Unde Venit, Quo Tendit Comparative Law?' in A Harding and E Özücü (eds), *Comparative Law in the 21st Century* (Kluwer Academic Publishers, 2002) 5.

¹² *ibid* 45.

¹³ *ibid* 6; H Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (CUP, 1946) 2.

¹⁴ C Morris and C Murphy, *Getting a PhD in Law* (Hart Publishing, 2011) 37.

¹⁵ W Abresch, 'A Human Rights Law of Internal Armed Conflict: The ECtHR in Chechnya' (2005) 16(4) *European Journal of International Law* 741, 756.