

ECHR, Khatsiyeva v. Russia

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: European Court of Human Rights, Case of Khatsiyeva and others v. Russia, Application no. 5108/02, Judgement, 17 January 2008, available at www.echr.coe.int. Footnotes omitted]

CASE OF KHATSIYEVA AND OTHERS v. RUSSIA

(Application no. 5108/02) [...]

JUDGMENT

STRASBOURG 17 January 2008

FINAL 07/07/2008

In the case of Khatsiyeva and Others v. Russia,

The European Court of Human Rights (Fifth Section), sitting as a Chamber [...]

Having deliberated in private on 11 December 2007,

Delivers the following judgment, which was adopted on the last mentioned date:

PROCEDURE

1. The case originated in an application (no. 5108/02) against the Russian Federation, lodged with the Court under [...] the [European] Convention for the Protection of Human Rights and Fundamental

Freedoms ("the Convention") by seven Russian nationals, [...] on 25 September 2001.

[...]

1. The applicants complained, in particular, of the death of their relatives in an attack by State agents [...].

[...]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

1. [...] The applicants live in the village of Arshty in the Sunzhenskiy District of the Republic of Ingushetia. This district borders on the Chechen Republic. [...]

A. The facts

[...]

1. Attack of 6 August 2000

1. The facts surrounding the death of the applicants' two relatives are disputed by the parties.

(a) The applicants' version

1. The applicants did not witness the events described below and the following account is based on eyewitness statements submitted by them.
2. In August 2000 the residents of Arshty were cutting grass. The work was done collectively by all villagers in small groups of five to six people.
3. On 6 August 2000 about a hundred people divided into small groups were working in the surrounding hills. One of the groups was formed by Khalid Khatsiyev, Kazbek Akiyev, their cousin Ilyas Akiyev, and three men who had come to Arshty as internally displaced persons from Chechnya – Baymurza Aldiyev, Aslambek Imagamayev, and Aslambek Dishniyev.
4. Aslambek Imagamayev stated that while working they had seen several helicopters bombing a forest area near the village of Bamut in Chechnya, about ten kilometres away from them.
5. Around 1.00 or 1.30 p.m. the group in which the applicants' relatives were working had decided to go home for lunch, when two military helicopters appeared from the direction of Bamut and started circling low above the field. Aslambek Imagamayev identified them as MI-24s. One of the helicopters fired a burst from an aircraft machine-gun at a spot situated 40-50 metres from the men. They were scared and, throwing down their scythes, ran to a white Niva car and drove down the hill in the direction of Arshty. Baymurza Aldiyev and Aslambek Imagamayev claimed that the helicopters had flown away but then reappeared and the men saw them right above the car, hovering at low altitude. They stopped the vehicle and ran for cover in different directions.
6. The helicopters launched non-guided missiles and strafed the Niva car with aircraft machine-guns with

the result that its back tyres were flattened. They then chased the men. One of the helicopters fired a missile at the place where Khalid Khatsiyev and Kazbek Akiyev were hiding. They were both killed and Ilias Akiyev, who was nearby, was wounded by shrapnel in his leg.

7. Aslambek Imagamayev stated that he had run through the forest to tell the villagers what had happened. He stated that he had heard the helicopters shooting for some time. Baymurza Aldiyev testified that he had run towards the river and had hidden there in a bush. He estimated that the attack on the Niva car had continued for about an hour and a half. After the helicopters had left, he returned to the vehicle and found the bodies of Khalid Khatsiyev and Kazbek Akiyev about fifty metres away from the car.

[...]

(b) The Government's version

1. According to the Government, since the beginning of the counter-terrorist operation within the territory of the Chechen Republic, the civil and military authorities had taken all necessary steps to secure the safety of civilians residing in the North Caucasus. The residents of the Republic of Ingushetia had been notified, through the television and press, of the risk of being at the administrative border with Chechnya as well as of the actions they should perform when in the area of a counter-terrorist operation so as to indicate that they did not belong to illegal armed groups. In particular, once they had established "visual contact" with representatives of the federal forces, residents were supposed to stop moving, mark themselves with a piece of white cloth and wait for the arrival of a group of servicemen for an identity check.
2. On 6 August 2000 the authorities carried out a special operation aimed at searching for the base camp, eight kilometres to the south of the village of Arshty, of a group of around 250 illegal fighters, who were to be detained. The operation was planned and commanded by senior officers of the Western Group of the United Group Alignment [...]. The Government refused to indicate the names of those officers or provide details of the operation, stating that disclosure of the information might be harmful to the State's national security interests. According to them, "in the materials of the preliminary investigation file there was no information" as to whether the residents of Arshty had been warned in advance about the operation in question, or whether the military personnel involved had been instructed to avoid civilian casualties.
3. During the operation, a federal transport MI-8 helicopter was hit by fire from members of illegal armed groups in the vicinity of the village of Arshty and crashed to the ground. Orders were given to evacuate the crew and servicemen on board the helicopter from the site of the crash. The Government alleged, with reference to the findings of the Chief Military Prosecutor's Office, that servicemen who had arrived to evacuate those injured also came under fire from illegal fighters. The airspace above the area of the rescue operation was patrolled in shifts by a pair of military MI-24 helicopters.
4. At about 1 p.m., while patrolling over the area situated four kilometres to the west of Arshty and four kilometres from the site of the crash of the MI-8 helicopter, the pilots of the MI-24 helicopters saw a Niva car and a group of at least five men with light machine-guns. In the Government's submission, the pilots observed the men through a target control system of tenfold magnification, from a distance of two kilometres and at an altitude of 100-150 metres.
5. According to the Government, the pilots reported this to the command centre and having received the

respective order fired warning shots at a spot situated fifty metres away from the car and the people. The men immediately got into the car and started driving away, instead of staying where they were and waiting for the arrival of ground troops for an identity check. The pilots again reported to their superiors, received the respective order and fired warning shots for the second time, but the car continued moving. In order to prevent the Niva car with unidentified armed men inside from driving further without authorisation in the close vicinity of the zone of the rescue operation, the pilots, pursuant to their superiors' order, fired at the car with the result that Khalid Khatsiyev and Kazbek Akiyev were killed and Ilias Akiyev was wounded.

6. The Government also submitted that "there was no information in the materials of the preliminary investigation file" as to whether the attacked men had used the firearms against the pilots, and that "according to its technical description, a light machine-gun [was] ineffective for hitting a target at a distance of over one kilometre".

2. *Official investigation*

1. According to the Government, after the rescue operation in respect of the crashed MI-8 helicopter had been completed, the servicemen had inspected the area near the crash site and found a Niva car as well as hand grenades, spent cartridges from light machine-guns and a bloodstained ammunition belt near the car.
2. In the evening of 6 August 2000 several officials from the prosecutor's office of the Sunzhenskiy District ([...] "the Sunzhenskiy Prosecutor's Office") and the prosecutor's office of the Republic of Ingushetia ([...] "the Republican Prosecutor's Office") arrived at the scene of the incident. They also brought a forensic expert from the city of Nalchik, in the Republic of Kabardino-Balkaria. The officials questioned the witnesses to the attack, inspected the scene of the incident and collected pieces of shrapnel and damaged scythes. No firearms or ammunition were found at the scene of the incident. The officials also examined the bodies and noted the wounds caused by shrapnel and by large-calibre guns.

[...]

THE LAW

[...]

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

1. The applicants complained of the killing of their relatives and of the domestic authorities' failure to carry out an effective investigation in this connection. They relied on Article 2 of the Convention, which provides as follows:
 1. "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - a. in defence of any person from unlawful violence;

- b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- c. in action lawfully taken for the purpose of quelling a riot or insurrection.”

A. Alleged failure to protect the right to life

[...]

2. The Court's assessment

1. [...] The situations where deprivation of life may be justified are exhaustive and must be narrowly interpreted. The use of force which may result in the deprivation of life must be no more than “absolutely necessary” for the achievement of one of the purposes set out in Article 2 § 2 (a), (b) and (c). This term indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is “necessary in a democratic society” under paragraphs 2 of Articles 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of State agents who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination [...].
2. In the present case, it is common ground between the parties that Khalid Khatsiyev and Kazbek Akiyev were killed by State agents as a result of the intentional use of lethal force against them. The State's responsibility is therefore engaged.
3. The Court must next ascertain whether the force used against the applicants' relatives by the federal servicemen could be said to have been absolutely necessary and therefore strictly proportionate to the achievement of one of the aims set out in paragraph 2 of Article 2.
4. The Court observes that it is in dispute between the parties whether the six men who came under attack, including the applicants' two relatives, had been armed with firearms at the moment of the attack. The applicants insisted that it had been obvious that the six men had been unarmed civilians cutting grass, whilst the Government advanced controversial arguments on the issue. On the one hand, the Government seemed ready to admit that the applicants' relatives had been unarmed local residents, but insisted that they had been attacked because of their own negligence, since they had failed to mark themselves as civilians. On the other hand, the Government also stated that the six men, who had been detected by the military pilots in the field close to the site where a federal helicopter had been hit, had been armed with light machine-guns and therefore could have belonged to a group of illegal fighters.
5. In the absence of any evidence [...], the Court retains certain doubts as to whether the group of six men, including Khalid Khatsiyev and Kazbek Akiyev, were armed when they were attacked, given in particular that no firearms had ever been found on the scene of the incident [...]. No evidence has been produced that the victims fired at the helicopter or otherwise endangered the lives of the pilots. In any event, it does not consider it necessary to establish the facts in this respect for the following reasons.
6. The Court is aware of the difficult situation at the material time in the neighbouring region, the Chechen Republic, which called for exceptional measures on the part of the State to suppress the illegal armed insurgency [...]. With this in mind, and assuming that the federal pilots honestly believed that the

applicants' two relatives and the other four men had machine-guns, when they spotted them, the Court nevertheless does not consider that this fact, by itself, can justify the use of lethal force against them and that a number of circumstances surrounding the incident should be taken into account.

7. The Court notes first of all that a substantial body of evidence in its possession consistently suggests that the pilots did not take the decision to destroy the vehicle with the people of their own motion, but acted pursuant to their superiors' order which was binding on them [...]. The Court must therefore ascertain whether when taking that decision the commanding officers exercised the necessary degree of caution and appropriate care to be expected from law-enforcement personnel in a democratic society [...] for the purposes of Article 2 of the Convention, and in particular, whether the instructions they gave to the pilots, rendering inevitable the use of lethal force, adequately took into consideration the right to life of the applicants' two relatives.
8. The materials in the Court's possession reveal that the pilots reported to the command centre that they could see a group of at least five men with light machine-guns standing near a Niva vehicle. The command centre replied that the identity of those men would be established and then 15 minutes later ordered that the car and people be destroyed, this order having been confirmed upon the pilots' request. It does not appear from the submitted documents, and was not alleged by the Government, that the pilots provided the command centre with any details regarding the men other than those mentioned above. Moreover, it does not appear, and was not alleged by the Government, that the officers from the command centre sought any further details to enable them adequately to assess the situation and take an appropriate decision. In particular, the pilots were not asked to provide any information as to visibility in the area, the distance between the site of the crash of the federal helicopter and the allegedly armed group, whether the area was populated, whether the pilots had or could have come under an armed attack, whether the men found by the pilots had tried to escape and whether the situation required any urgent measures to be taken by the pilots, or any other details. It is furthermore highly doubtful that the authorities in command established the identity of the applicants' two relatives and the other men before giving the order to destroy them, given the very tight period that elapsed between the pilots' first report and the order. Indeed, there is nothing in the submitted materials to suggest that they did or even attempted to do so.
9. The Court considers that all these circumstances suggest a lack of appropriate care by the authorities in assessing the situation reported by the pilots and giving them an order to attack the six men, including Khalid Khatsiyev and Kazbek Akiyev, who were killed as a result.
10. Having regard to the above, the Court is not persuaded that the killing of Khalid Khatsiyev and Kazbek Akiyev, even assuming that they were armed, constituted a use of force which was no more than absolutely necessary in pursuit of the aims provided for in Article 2 § 2 (a) and (b) of the Convention.
11. Moreover, assuming that the group of six men, including the applicants' relatives, were unarmed when attacked by the State agents, as alleged by the applicants, the Court notes at the outset the Government's argument that the applicants' relatives were deprived of their lives because of their own negligence, and notably as a result of their failure to comply with instructions concerning personal safety in an area where State agents were conducting a counter-terrorist operation. Leaving open the question whether a State could be justified under Article 2 § 2 of the Convention in using lethal force against civilians for mere failure to comply with official safety instructions in an area of an armed conflict, the Court cannot in any event perceive any justification for the use of lethal force in the circumstances of the present case, given that the authorities had never warned the residents of Arshty about the operation of 6 August 2000 [...] and that it is highly doubtful that the residents of the Republic of Ingushetia, and in

particular the inhabitants of Arshty, were ever apprised of the conduct required when confronted with federal servicemen [...].

12. There has accordingly been a violation of Article 2 of the Convention in this connection.

Discussion

1.
 - a. (*Paras 21 and 134*) Does the Court qualify the situation? Was an armed conflict in progress at the time of the events described above? [See Russian Federation, Chechnya, Operation Samashki] Assuming that there is an armed conflict in the neighbouring Chechen region, are the said events related to the conflict? Is IHL applicable to the situation? If yes, which provisions apply? If the case was to be decided under IHL, would it matter whether the conflict is or is not of an international character?
 - b. Does the Court directly apply IHL? Could it have done so? Should it have done so? Would the conclusion have been different? Does the Court refer to principles of IHL?
2. (*Paras 132-138*)
 - a. Does the Court qualify the status of the applicants' relatives?
 - b. Under IHL, considering the lack of precise information on their identity, was it lawful for the government forces to shoot at them?
 - c. Does the Court consider it as important whether the victims were armed, or were members of an armed group, or had fired at the helicopter? Would that matter under IHL?
 - d. Under the IHL of international armed conflicts, if the relatives had been combatants, would it have been lawful to target them without any further precautions? Independently of whether the relatives were armed and whether they actually attacked government forces at the moment when the relatives were targeted?
 - e. Under the IHL of non-international armed conflicts, if the victims had been armed, as the government argues, could they have been directly targeted without any further precautions? If they were members of an armed group? If they had a fighting function within an armed group? Only if the victims actually attacked government forces at the moment when they were targeted? (P II, Art. 13(3); CIHL, Rules 1 and 6) [See Interpretive Guidance on the Notion of Direct Participation in Hostilities]
 - f. Is your answer to questions 2c. and 2d. the same under HRL as under IHL? If not, which law prevails? Why?
3.
 - a. (*Paras 21 and 139*) May a party to a conflict request civilians to mark themselves as such? May it request civilians to perform certain actions so as to be distinguished from armed groups? If a person does not comply with the instructions given, may the forces of that party consider him or her as a legitimate target? What are the dangers of such methods of differentiation? (P I, Art. 57(2)(c); P II, Art. 13; CIHL, Rule 20)
 - b. (*Paras 21 and 139*) Does the fact that the civilian population has been given orders as to actions to perform when encountering federal forces relieve the latter of the obligation to verify that their target is a legitimate one? May the persons who do not follow those orders and therefore fail to prove that they are civilians be automatically considered as members of armed groups who may be directly shot at? (P II, Art. 13; P I, Arts 51 and 57; CIHL, Rules 1, 15-16, 19)
4. (*Para. 129*) Is the requirement, under HRL, that force shall be "strictly proportionate to the achievement of the permitted aims" similar to the proportionality principle set out in Article 51(5)(b) of P I? Under IHL,

must expected casualties among combatants and other fighters be considered when assessing the proportionality of an attack? Are they taken into account, under HRL, when assessing whether the use of force was strictly proportionate to the achievement of the permitted aims? (P I, Art. 51(5)(b); CIHL, Rule 14)

5.
 - a. (*Paras 135-138*) Why does the Court conclude that the principle that “the use of force shall not be more than is absolutely necessary” had been violated by Russia? Under IHL, does an attack become unlawful when all the necessary precautionary measures have not been taken? (P I, Art. 57; CIHL, Rules 15, 21)
 - b. Under IHL, does an attack become unlawful because the attacker did not verify whether the target was a legitimate one?
6. If the Court had also applied IHL, what would have been different in its decision? Would it then have been necessary to establish whether the victims were armed? Whether they were members of an armed group?