Enforcement of the Notion of Due Diligence in the Report of the Human Rights Commissioner of the Council of Europe Regarding his Visit to the Autonomous Basque Community

Fernando Lozano Contreras
Associate Lecturer of Public International Law
University of Alicante

CONTENTS

I. Introduction: the Figure of the Human Rights Commissioner; II. Compliance with the *EHRC* in the Autonomous Basque Community According to the *HRC*; III. The Alleged Lack of Due Diligence on the Part of the Authorities in the Prevention and Suppression of Attacks ou Human Rights: 1. The *Kale Borroka*: definition and legal assessment; 2. Possible legal consequences in light of *EHRC* and *ECHR* case law; IV. Final Considerations.

I. INTRODUCTION: THE FIGURE OF THE HUMAN RIGHTS COMMISSIONER

Within the framework of the specific human rights protection regime set up by the Council of Europe there is a new figure known as the "Human Rights Commissioner" (hereafter *HRC*). The idea of incorporating this institution arose at the Second Summit of Heads of State and Government of the Council of Europe held in Strasbourg on 10–11 October 1997. Definitive creation took place through Resolution (99) 50 approved by the Committee of Ministers on 7 May 1999 at their 104th Session held in Budapest.[1]

The *HRC* may, upon his own initiative, visit those places where it is known that violations of rights and freedoms set out in the European Human Rights Convention (hereafter *EHRC*) are being committed. In this role he carries out a study or inspection of the situation *in situ* and drafts, as necessary, recommendations, opinions or

[1] This Resolution is comprised of a Preamble or Declaration of Intentions followed by 12 articles regulating the principle aims and functions of the *HRC*, see *http://www.coe.int.*

reports that he submits to the Parliamentary Assembly and to the Committee of Ministers of the Council of Europe. This latter body has the authority to publish any recommendation, opinion or report drafted by the *HRC* and, in so doing, brings the control mechanism to a close.

This new body, of a marked political-diplomatic nature, is under obligation to carry out its functions with total independence and impartiality and is conceived as a non-jurisdictional means[2] of guaranteeing and advancing the human rights and fundamental freedoms set forth in the *EHRC*.

As of February 2003, the *HRC* had made a number of visits.[3] At the beginning of 2001 he travelled to the Autonomous Basque Community (Spain) and drafted the report that is the focus of our study. In the preparation of this study we have used the following means or instruments:

- First of all, the *HRC* report and the specific regulations regime under which the *HRC* operates (*EHRC* and additional Protocols). On this point we took the initiative, in light of the legal framework within which the situation has developed, to analyse the work of the European Court of Human Rights (hereafter *ECHR*), with a view to verifying whether a problem similar to the one described in the Report had arisen in any case law precedent and, if so, to examine the way in whieh it was resolved.
- Second, and with a view to clarifying some of the legal concepts and categories which we have come across, we have turned our attention to Public International Law especially focusing on the latest reports on the international responsibility of States drafted by the International Law Commission (hereafter *ILC*).
- In third place, with a view to obtaining a balanced view of the situation, we turned our sights to the *Contrainforme* (Counter-report) issued by the Government of the Autonomous Basque Community.

---

[2] Article 1 Section 1 of the Resolution asserts that: "The Commissioner shall be a non-judicial institution to promote education in, awareness of and respect for human rights, as embodied in the human rights instruments of the Council of Europe"; Article 3 lists its principle functions regarding which it may officially intervene. They include the following of which special mention should be made of the following with respect to this case: "... identify possible shortcomings in the law and practice of member States concerning the compliance with human rights as embodied in the instruments of the Council of Europe, promote the effective implementation of these standards by member States and assist them, with their agreement, in their efforts to remedy such shortcomings", *ibid.*

[3] Chechnya, Daghestan and Ingoushetia, Georgia, Moldova, Andorra, Norway, Slovak Republic, Finland, Moscow, Turkey, Bulgaria, Greece, Hungary, Kosovo, Romania.

II. COMPLIANCE WITH THE *EHRC* IN THE AUTONOMOUS BASQUE COMMUNITY ACCORDING TO THE *HRC*

In response to numerous complaints[4] received through a number of different channels from residents in the Basque country as well as from citizens from all over Spain, the current *HRC*, Mr. Álvaro Gil Robles, visited Spain's Basque Country on 5–8 February to carry out a study of the human rights situation in that Autonomous Community.

In his Report,[5] sent to the Council of Europe's Committee of Ministers as well as to the Parliamentary Assembly, the Commissioner underlined the ongoing violation of certain rights and freedoms taking place in the Autonomous Basque Community and in the rest of Spanish territory as well.

In his Report the *HRC* highlights, as the principal direct causes of the violation of some fundamental individual rights and of the free exercise of certain civil and political rights,[6] the direct action of the terrorist group *ETA*;[7] and the urban violence

---

[4] The term "complaint" used in this context should not be confused with the notion of an "individual or personal complaint" given that, as stated in the Resolution creating this body (Article 1 Section 2) "The Commissioner shall not take up individual complaints.", in light of the fact that this is a body lacking jurisdictional competence. It may have been more correct to use the term "information" (see Article 5 of the Resolution.).

[5] The Report was passed by unanimous decision in the Council of Europe's Committee of Ministers held on 21 March 2001. It was originally published in French and is comprised of the following five sections: I. Introduction; II. General Approach; III. On the practical causes of human rights violations in the Basque Country; IV. Other issues relating to protection of, and respect for, human rights raised by the organisations representing the families of detainees and prisoners accused in connection with acts of terrorism, and by their legal representatives; V. Final Considerations. The report may be viewed in English, French and Spanish at: *http://www.commissioner.coe.int.* There is also a Spanish version in the section entitled "*Temas*" of the El Pais digital newspaper at *http://www.elpais.es*; but we have doubts as to whether this is an official translation since we have found some substantial differences with respect to terminology used in the version that we have worked with (English version). In response to the report, the Basque Government issued a counter-report on 10 April 2001 directed at the Council of Europe expressing its discontent with the partiality and lack of precision in some of the affirmations made by the Commissioner. This counter-report was provided to us by the Basque Government itself (Presidency; Secretariat-General for Foreign Action), official versions in Basque, Spanish, English and French. It is divided into three sections: I. Introduction; II. Refutations by the Basque Government; III. Conclusions.

[6] It is the view of the Commissioner that in this situation a number of rights are violated including: the right to life (Article 2 *EHRC*; Article 15 *CE*), to liberty and security of person (Article 5 *EHRC*; Article 17 *CE*), to thought and conscience (Article 9 *EHRC*; Articles 16 and 20 *CE*), to assembly and association (Article 11 *EHRC*; Articles 21 and 22 *CE*), to freedom of expression and information (Article 10 *EHRC*; Article 20 *CE*), etc. All of these rights are recognised as fundamental by the *EHRC* (Section I) as well as by the Spanish Constitution (Section I, Ch. II) and are also included in the majority of the international instruments to which Spain is party.

[7] *Euskadi Ta Askatasuna.*

perpetrated by groups closely associated with *ETA* (activity that goes by the name *Kale Borroka*).

Second of all, the *HRC* mentions another set of factors that, although they may not be the cause they do at least contribute to the present climate of instability ". . . in a member state (of the European Council) which has a fully democratic system and which has appropriate institutional mechanisms to determine its political life in peace and freedom" (Section I, paragraph 1.).

In this sense the *HRC* refers to a fundamental factor that we are going to deal with here and that constitutes the central theme around which this work revolves: the ever-present passivity manifested by autonomous community political bodies and police corps when it comes to the prevention and suppression of actions perpetrated by violent radical groups.

III. THE ALLEGED LACK OF DUE DILIGENCE ON THE PART OF THE AUTHORITIES IN THE PREVENTION AND SUPPRESSION OF ATTACKS ON HUMAN RIGHTS

As was indicated above, one of the main aspects drawing the attention of the *HRC* (expressed in Section III of his Report) is the alleged passivity or lack of action taken to prevent or suppress the acts of street violence[8] known as *Kale Borroka* characterising not only the conduct of the Autonomous Basque Police force (*Ertzaintza*) but also that of the competent political authorities.[9] The fact is that the *HRC* reaches the conclusion, through diverse testimony furnished,[10] that the violence in the Autonomous

---

[8] We should bear in mind the dual nature of the objective element of the due diligence standard: on the one hand it embodies an *ex ante facto* obligation (preventive aspect or facet) consisting of the State's obligation to prevent, within the framework envisioned under international law, certain detrimental conducts and, on the other hand, it includes an *ex post facto* obligation (suppressive aspect or facet) consisting of the obligation to suppress such conducts. Failure to comply with one of these two obligations (or both) could give rise to an international responsibility on the part of the State.

[9] The mission of keeping watch over public law and order in the Basque Country is a competence that, for internal or *ad intra* purposes, has been expressly attributed to the authorities of the Autonomous Basque Community. See Articles 9 and 17 of the Statute on Basque Autonomy (*LO* 3/1979 of 18 December, *BOE* 306, 22.12.1979); Articles 5, 6, 7, 8 and Final Provision 1 of *LO* 2/1986 of 13 March, Regulating State Security Forces and Corps of the Autonomous Community and Local police forces (*BOE* 63, 14.3.1986); and Chapter II (Deontological Code, Articles 29 to 38) of the Law of the Autonomous Basque Community 4/1992 of 7 July on Police Planning (*BOPV* 155, 11.8.1992).

[10] The climate of instability and violence caused by terrorist activity is selective. Actions carried out by these groups tend to be waged against certain sectors of society among which the following, as pointed out by the *HRC*, can be found: elected political officials belonging to non-nationalist groups, judges and prosecutors, State security bodies and forces, military personnel, journalists that do not happen to share radical nationalist ideals, university professors, prison employees . . ., in short, those who publicly or privately ". . . have adopted

Basque Community is perpetrated amidst a climate of almost total impunity; the majority of these criminal acts being neither suppressed nor investigated. He thus concludes Section III of his Report with the following affirmation:

> "In light of what has been said above, it is clear that the Basque government bears some responsibility for the failure to provide sufficient and effective protection of citizens' fundamental rights, but it must not be forgotten either that, in pursuance of Article I of the *ECHR*, the Spanish State is responsible for securing 'to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention', so it is also under an obligation to adopt or strengthen the measures needed to guarantee the fundamental rights of all Basque citizens".

1. *The* Kale Borroka: *definition and legal assessment*

Those acts of urban or street violence, perpetrated by groups of young people (some not yet of legal age) taking place within the territory of the Autonomous Basque Community (and sporadically in the Autonomous Community of Navarre), can be defined as *Kale Borroka.*

These groups of young people, ideologically aligned with the ideas of radical Basque nationalism and organically related to the *ETA* terrorist group through indirect channels or networks, go by different names, *inter alia: Grupos Y, Jarrai* or *Haika.*

Their violence causes an environment of generalised fear among certain sectors of the Basque population[11] and a climate of instability that interferes with the state of social peace throughout the region. The demonstrations in which they participate

---

cont.

positions which are favourable to the constitutional order in force, as well as those who have expressed in speech or in writing opinions critical of nationalism or opposed to the terrorist group *ETA* . . .". Although the *HRC* already had the testimony of several people from the sectors under threat, it decided to delve deeper into the affair by calling for the opinion of the competent authorities and of the autonomous Basque police. In this respect, as is also pointed out in the Report, we were surprised to find that although the competent authorities who were interviewed by the *HRC* (regional Minister for Internal Affairs and the *Lehendakari* or President of the Basque Government) ". . . vehemently denied this allegation . . ."; "*ERNE*, the trade union which represents the majority of *Ertzainta* members, remains highly critical of the force's leaders, whom it accuses of failing to order action against *kale borroka* . . .", despite having, in the view of the Police Commissioner, effective means to do so. This last point was harshly criticised in one of the sections under the second point of the counter-report drafted by the Basque Government [Point II (Refutations of the Basque Government); Section a) Fight against *ETA* and street violence], in which it reproaches the *HRC* for his lack of impartiality for not wanting to interview any police official or bother to examine the "objective systems" of orders and instructions of the *Ertzaintza.*

[11] See note 10 and statistical data furnished by the Spanish Home Ministry at *http://www.mir.es/oris.*

generally end with the destruction and burning of public or private property (banking entities; automobile dealerships in France; the private businesses and homes of people belonging to non-nationalist political parties that do not share their radical ideas . . .), or with aggression, threats or coercion directed not only against people that they accuse of being "*españolistas*" or "constitutionalists" (defenders of the Spanish Constitution and of the unity of the Spanish State), but also against their families.

These events, difficult to categorise from the viewpoint of Public International Law, cannot be described as mere sporadic or isolated outbreaks of violence[12] in light of the increasingly less isolated and more organised nature of the actions;[13] nor can they be described strictly in terms of internal violence[14] given that they are not acts in which these groups use or have used arms in the perpetration of the violence.[15]

---

[12] International practice offers some examples of this type such as the disturbances that took place in January and February 1998 in Indonesia brought on by the serious economic recession (see *Keesings* 1998, pp. 42007 and 42073); those that took place in Algeria in the Gran Cabilia region during the months of April and May 2001 caused by the protest and uprising of the Berber minority in light of the harsh methods of repression used by the Algerian police at several different demonstrations (*ibid.*, 2001, pp. 44130 and 44182); in Nepal in June of that same year in the aftermath of the mysterious assassination of most of the members of the royal family under circumstances that have yet to be made completely clear (*ibid.*, 44209–44210) or more recently in Venezuela (*ibid.*, 2002, 44667).

[13] According to the report filed by the Prosecutor's office of the National Court on year 2000 events, generously furnished by the State Public Prosecutor's Office, "It is materially impossible to determine the exact number of 'urban terrorist' acts perpetrated in the Basque Country. The figure of 630 terrorist acts during the year 2000 can, however, be extrapolated from information received from the State's Security Forces; a figure far surpassing the approximately 350 street violence attacks registered in 1999. Practically all of them in the year 2000 took place in the Basque Country and very few (less than 20) in Navarre", p. 23. These figures differ from those furnished by the Home Ministry through their Press and Informative Documentation Service. This latter body provided the figure of 581 total acts of street violence registered in the year 2000 in Spanish territory (compared with 390 in the year 1999); the majority (479) perpetrated in the Autonomous Basque Community while the rest (102), took place in the Autonomous Community of Navarre (99) and in other Spanish communities (2). This same trend continued in 2001: a total of 552 acts of street violence were registered; 468 in the Autonomous Basque Community and 84 in the Autonomous Community of Navarre. There was not a significant change in 2002 although the figures do confirm a downward turn: the total number of acts of street violence registered (now referred to as "urban terrorism") reached 448 (410 in the Autonomous Basque Community and 38 in the Autonomous Community of Navarre). According to statistical data by province, the province that has been hit the least over the last four years is Alava while the ones suffering the greatest number of attacks are Vizcaya (1999 and 2000) and Guipúzcoa (2001 and 2002). As concerns the number of arrests, if we compare the last two years (no data is available for earlier years) we can observe a constant albeit timid increase in the number of arrests related to these acts. See *http://www.mir.es/oris.*

[14] Situations that have plagued or continue to plague countries such as Colombia or the Philippines to cite some recent examples.

[15] For a study on the situation of internal violence in Spanish doctrine see, Jiménez Piernas, C., "La calificación y regulación jurídica internacional de las situaciones de violencia interna",

This is a social and political phenomenon somewhere between the two categories mentioned (sporadic outbreaks and internal violence) which we will refer to as "low intensity terrorism". This is a sub-species of terrorism that the central governmental authorities are trying to combat with the same constitutional means used in the fight against *ETA*: criminal law; legislation that is periodically amended in order to provide an appropriate and effective response to these types of actions.[16]

2. *Possible legal consequences in light of EHRC and ECHR case law*

Having established the circumstances underlying this affair, we now propose to analyse the possible legal consequences that the passivity demonstrated by the autonomous Basque authorities with respect to these acts of organised violence could have for Spain in light of the *EHRC* and *ECHR* decisions.

As is already known, Article 1 of the *EHRC*[17] states that: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".

The *ECHR*, in compliance with its obligation to interpret and enforce attributed to it by the Convention itself, has had the opportunity to express itself on a number of different occasions with respect to the nature and content of this provision. In the *Case of Ireland v. the United Kingdom* (Judgement of 18 January 1978)[18] the Court arrived at a number of conclusions including the following:

> "Article 1 (Art. 1), together with Articles 14, 2 to 13 and 63 (Art. 14, Art. 2, Art. 3, Art. 4, Art. 5, Art. 6, Art. 7, Art. 8, Art. 9, Art. 10, Art. 11, Art. 12, Art. 13, Art. 63), demarcates the scope of the Convention *ratione personae, materiae* and *loci*; it is also one of the many Articles that attests to the binding character of the Convention. Article 1 (Art. 1) is drafted by reference to the provisions contained in Section I and thus comes into operation only when taken in conjunction with them; a violation of Article 1 (Art. 1) follows automatically from, but adds nothing to, a breach of those provisions; hitherto, when the Court has found such a breach, it has never held that Article 1 (Art. 1) has been violated".[19]

---

cont.

Anuario Hispano-Luso-Americano de Derecho Internacional, vol. 14 (2000), 33–75, pp. 36–51.

[16] *LO* 7/2000 of 22 December (*BOE* 307, 23.12.2000) amends some precepts of the Criminal Code regulating terrorism and other related crimes (Articles 40, 266, 346, 351, 504, 505, 551, 577 to 579), as well as certain norms of the Law regulating the criminal responsibility of minors, *LO* 5/2000 of 12 December (*BOE* 1, 13.1.2000).

[17] See, Wyler, E., *L'illicite et la condition des personnes privées*, París, 1995, pp. 105–119.

[18] See, *Ireland v. United Kingdom Case*, 18.1.1978, at *http://hudoc.echr.coe.int/hudoc*. A Spanish version can also be found in *Tribunal Europeo de Derechos Humanos. 25 años de Jurisprudencia 1959–1983* (*BJC*, Publicaciones de las Cortes Generales), pp. 369–432.

[19] *Ibíd.*, paragraph 238. In this same sense see, *Neumeister Case*, 27.6.1968, paragraph 15, and p. 44; *"Belgian Linguistic" Case*, 23.7.1968, pp. 70 *in fine* and 87, paragraph 1;

The Court then adds that "by substituting the words 'shall secure' for the words 'undertake to secure' in the text of Article 1 (Article 1), the drafters of the Convention also intended to make it clear that the rights and freedoms set out in Section 1 would be directly secured to anyone within the jurisdiction of the Contracting States";[20] and the most important, "The Convention does not merely oblige the higher authorities of the Contracting States to respect for their own part the rights and freedoms it embodies; as is shown by Article 14 (Art. 14) and the English text of Article 1 (Art. 1) ('shall secure'), the Convention also has the consequence that, in order to secure the enjoyment of those rights and freedoms, those authorities must prevent or remedy any breach at subordinate levels".[21]

Three conclusions may be drawn from the Court's opinion regarding Article 1 of the *EHRC*:

a) The first is that Article 1 is a general provision that, along with the other provisions that the Court lists (Articles 14, 2 to 13 and 63), delimits the Convention's scope of application. This precept establishes that an allegation of non-compliance with the *EHRC* may only be filed when the violation is produced within the jurisdiction of the contracting States.[22]
b) The second is that Article 1 does not recognise any right or freedom. It is a provision based on which it is not possible to claim non-compliance *per se* but rather in relation with one or several of the provisions set out in Section I of the Convention[23] (regulations in which rights and freedoms are indeed recognised).
c) The third is that, as is pointed out by the *HRC* himself, Article 1 contains a duty, an obligation; the duty or obligation that all States that are party to the *EHRC* have of guaranteeing, within their jurisdictional scope, respect for and compliance

---

cont.

Stögmüller Case, 10.11.1969, p. 45; *De Wilde, Ooms and Versyp Case*, 18.6.1971, p. 43, paragraph 80, and p. 47, paragraph 4; *Ringeisen Case*, 16.7.1971, p. 45, paragraph 109 *in fine*, and p. 46, paragraphs. 5–6; *Golder Case*, 21.2.1975, p. 20, paragraph 40 *in fine*, p. 22, paragraph 45 *in fine*, and p. 23, paragraphs 1–2; *Engel and others Case*, 8.6.1976, p. 29, paragraph 69 *in fine*, p. 37, paragraph 89 *in fine*, and p. 45, paragraphs 4, 5 and 11; *Osman v. United Kingdom Case*, 28.10.1998, paragraph 116, at *http://hudoc.echr.coe.int/hudoc.*

[20] See *Ireland v. United Kingdom Case . . ., loc. cit.*, paragraph 239.

[21] *Ibid.*

[22] With respect to the question of whether a State that is party to the Convention should answer for acts carried out by its bodies in foreign territory or in an area void of all jurisdiction, see Wyler, E., *L'illicite et la condition . . ., op. cit.*, pp. 105–108.

[23] Article 1 of the *EHRC* and Article 1 of the American Convention on Human Rights have very similar content. In the inter-American system protecting human rights, however, in contrast to the European system, constant individual and expressed references are made to the violation of Article 1 in the guilty verdicts delivered by the Inter-American Court of Human Rights. This fact can be confirmed by simply turning to the latest judgements of the Inter-American Court, see *Cantos Case*, 28.11.2002 and *Cinco Pensionistas Case* (resolution point 3), 28.3.2003, at *http://www.corteidh.or.cr*. See Gros Espiell, H. "La Convention américaine et la Convention européenne des droits de l'homme. Analyse comparative", in *Rec. des C.*, t. 218 (1989), 167–411, pp. 231–240.

with the rights and freedoms outlined in Section I; a duty that must be enforced if that which was quoted above is to be complied with "at all levels".[24]

As was stated earlier, one of the most salient factors of the *HRC*'s Report was the passivity or omission manifested by the Basque autonomic authorities when it came to providing effective protection of certain rights and freedoms recognised under Section I of the *EHRC*. These authorities, in the view of the *HRC*, fail to employ the means available to them to *ex ante facto* prevent or *ex pos facto* suppress acts perpetrated by these groups of individuals[25] (persons belonging to or collaborating with the *Kale Borroka*) that periodically wage attacks against those rights and freedoms; official bodies that, in short, do not diligently comply with the obligations that they have undertaken in their internal system by virtue of the Autonomy Statute of the Basque Country.

The main issue arising from this situation is determining whether said omission or passivity, which the autonomic community authorities boast of with respect to certain acts perpetrated by groups of individuals, may be in conflict with the duty to provide a blanket guarantee imposed by the regulation analysed (Article 1) in connection, as is required by the Court, with the provisions that deal with the rights or freedoms that may have been violated;[26] and whether there is a possibility that this attitude, or more precisely this lack of action on the part of the Basque authorities, once having met all of the requirements both in letter and spirit set out by the *EHRC*,[27] could be reason enough to call Spain's international responsibility[28] into question for an infraction of the *EHRC*.

---

cont.

[24] See *Drozd and Janousek v. France and Spain Case (Merits). Joint Dissenting Opinion of Judges Pettiti, Valticos and Lopes Rocha. Approved by Judges Walsh and Spielman*, 26.6.1992, at *http://hudoc.echr.coe.int/hudoc*.

[25] Article 11 of the draft text of the *ILC* articles on responsibility of the States approved at the first reading covered the case of acts carried out by individuals not acting on behalf of the State (private acts), See *Report of the International Law Commission on the work of its 48th session*, A/51/10, p. 128. In his first report the current rapporteur, J. Crawford, felt that the wording of the precept lacked precision in that it was redundant and meandering and he thus decided to eliminate it and provide it with a new wording by drafting a new article (Article 15 bis), see *First Report on State Responsibility*, A/CN.4/490/Add.5, pp. 31–33; A/CN.4/490/Add. 6, pp. 5 and 7. The Rapporteur's proposal was included in current Article 11 of the draft articles passed at the second reading, "Conduct acknowledge and adopted by a State as its own", see *Report of the International Law Commission on the work of its 53rd session*, A/56/10, p. 118.

[26] See note 5.

[27] See Article 35.1 of the *EHRC*.

[28] The general rules of international law, specifically Article 1 of the *ILC* draft articles on the international responsibility of States for internationally wrongful acts affirm that "Every internationally wrongful act of a State entails the international responsibility of that State"; moreover, Article 2 adds that there is an internationally wrongful act of a State when conduct consisting of an act or omission is attributable to the State and constitutes a breach of an international obligation. See, *Report of the International Law Commission on the work of its 53rd session*, A/56/10, p. 63 and 68.

In order to resolve this issue we turn once again to *ECHR* case law in search of a relevant precedent in which a complaint was filed against a Member State on these same or similar grounds.

The *ECHR* has indeed had the opportunity to rule not on one but rather on several cases that, *mutatis mutandi*, focus on a problem similar to the one arising from this case; controversies in which the complainant claims lack of due protection or, depending on the case, suppression, from the competent authorities as regards violations of certain rights and freedoms contained in Section I of the Convention perpetrated by other individuals (i.e. lack of due diligence on the part of the authorities in the prevention or sanctioning of damaging behaviour.).[29]

The *Osman v. the United Kingdom Case* (28.10.1998)[30] especially stands out. Despite the arguments presented by the complainant focusing on the fact that the United Kingdom failed to comply with its obligation to adequately protect the right to life of Mr. Osman set out in Article 2 of the Convention, the view of the *ECHR* in the end was that the behaviour of the British authorities was not an infringement of the *EHRC*. The Court reiterates that this duty to prevent and suppress attacks against persons is an obligation that does in fact exist and affects all States that are party to the Convention but, in order to prove non-compliance, one must satisfactorily show that the authorities, cognoscente of the risk that (in this case) was encroaching upon the right to life, or cognoscente of the identity of the person or persons who had committed this attack, failed to take the measures that, within their reasonable range of possibilities, should have resulted in the suppression of the risk or the imprisonment of the guilty parties.[31] In this same ruling the Court affirmed that it would have been considered sufficient proof if the complainant had demonstrated that the authorities did not do all that could reasonably be expected of them to preclude that

---

[29] See, among others: *Eckle v. Germany Case*, 15.7.1982, paragraph 84; *Colozza v. Italy Case*, 12.2.1985, paragraph 28 *in fine; F.C.B. v. Italy Case*, 28.8.1991, paragraph 33; *T. v. Italy Case*, 12.10.1992, paragraph 29; *Ogur v. Turkey Case*, 20.5.1999, paragraph 88; *Tanrikulu v. Turkey Case*, 8.7.1999, paragraph 101, at *http://hudoc.echr.coe.int/hudoc.*

[30] See *Osman Case . . ., loc. cit.*

[31] *Ibíd.*, paragraph 116: "In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right of life in the context of their above mentioned duty to prevent and suppress offences against the person (see paragraph 115 above), it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life (see paragraph 107 above) such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2."

immediate and real life threat that they were or should have been cognoscente of.[32]

The *Osman Case* is a clear example of the *ECHR*'s use of an international legal standard:[33] the due diligence.[34] This is a concept that, as far as general international law is concerned, made its debut in the 19th century in the regulatory sector of neutrality law[35] and that subsequently evolved thanks to all of the effort made through international case law in spheres traditionally linked with the international responsibility of States.[36]

This standard of due diligence constitutes a category that, despite the multiple interpretations that have been made regarding its content and limits, continues to lack clear definition. This vagueness was referred to by the European Court itself when it asserted that the issue of whether the authorities ruled or not in compliance with their duty to guarantee the Convention's provisions, is a question that can only be answered by taking a casuistic approach in light of all the circumstances of each particular case.[37]

In the *Osman Case* the *ECHR* held the view that the British authorities had acted diligently despite the fact that Mr. Osman's right to life was violated in the end. As the Court correctly pointed out (and this can counterbalance attempts to provide the standard with content the scope of which goes too far) no international regulation can be interpreted in such a way that it imposes an objective that is impossible for the target State to comply with;[38] *ad impossibile nemo tenetur.*

---

[32] *Ibid.*: "For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge."

[33] The term 'standard' is used in the sense of a guideline or common criteria comprised of founded criteria regarding what seems to be normal (from a statistical or descriptive point of view) and acceptable (from a dogmatic point of view) for the international society in the moment at which a certain act must be judged. See Rials, S. "Les standards, notions critiques du droit", in Perelman, Ch., and Vander Elst, R. (Eds), *Les notions à contenu variable en droit*, Brussels, 1984, 39–53; pp 43–44.

[34] The defunct European Human Rights Commission applied this notion to other cases. See *W. v. United Kingdom Case*, 28.2.1983, Decisions and Reports, vol. 32, pp. 190 and subsequent.

[35] The classic precedent that is usually cited in this context is the Alabama arbitration. See Stowell, E. C. and Munro, H. F. (Eds), *International Cases. Arbitrations and Incidents Illustrative of International Law as Practised by Independent States*, Volume II (War and Neutrality), Cambridge, 1916, pp. 336–345.

[36] Especially as concerns the due protection of the person and goods of foreign nationals. An overall vision in this respect can be found in Mazzeschi, R. P., *Due Diligence e Responsabilità Internazionale degli Stati*, Milan, 1989, Cap. III, pp. 193–288 and in Zannas, P. A., *La responsabilité internationale des Etats pour les actes de négligence*, (thesis), Montreux, 1952, pp. 71 and subsequent.

[37] See *Osman Case . . ., loc. cit., ibid.*, "This is a question which can only be answered in the light of all the circumstances of any particular case"

[38] *Ibid.*, paragraph 116, "For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices

We are operating within a sector in which the due diligence standard is perfectly enforceable because it is implicitly deduced from a general regulation, basic to the system, that contains a duty or obligation to act and non-compliance with said duty or obligation can give rise to a situation of international responsibility;[39] something that occurs in other specific regimes in which the standard is also used.[40]

Returning to the case at hand (the violence perpetrated by the *Kale Borroka* in the Autonomous Basque Community), it would seem that here, in contrast with the *Osman Case*, the urban violence that the *HRC* refers to in his Report, together with the passivity characterising the autonomic authorities as concerns the suppression of such violence, could in fact lead the *ECHR*, in the event that a complaint were filed, to rule in favour of non-compliance with the due diligence standard as regards the material aspect.[41]

Although in many cases the widespread or unexpected nature of the objectives of the *Kale Borroka* could make it very difficult to prove non-compliance with said stan-

---

which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities". In light of this passage one cannot help but to reflect on the circumstances precluding wrongfulness.

[39] In the case we are assuming that, by virtue of Article 1, the standard affects each and every one of the regulations of the *EHRC* that focus on rights or freedoms that may be violated by individuals outside of or not dependent upon the State organisation.

[40] The due diligence standard has been used with greater or lesser success by other regional international judicial authorities. On the European level, the Court of Justice of the European Communities, in its judgement of 9.12.1997, *Comisión c. Francia*, as. C-265/95, Rec. p. I-6990 (case involving the free movement of goods) implicitly offers us an example of a poor use or incorrect application of the standard. See Jiménez Piernas, C., "El Incumplimiento del Derecho Comunitario por los Estados Mienbros cuando niedian actos de particulares: Una aportación al debate sobre la interdependencia entre Derecho Comunitario y Derecho Internacional", *Revista de Derecho Comunitario Europeo*, number. 7 (2000), 15–48, pp. 39–44; on the American side, the use of the standard has been more fortunate; the Inter-American Court of Human Rights in its judgement of 29.7.1988, *Velásquez Rodríguez Case*, Series C, n. 4, paragraph 151, bears witness to that fact.

[41] Jiménez Piernas already elaborated on this dual aspect of the standard when dealing with the topic of due treatment for foreigners. In that respect the following passage is *mutatis mutandi* particularly enlightening: "The double diligence standard in its dual aspect of diligent prevention and suppression of acts perpetrated against foreigners in violation of the domestic or international legal system does, in fact, contain a dual requirement as concerns action taken by the State presumably responsible for such acts. On the one hand, the legal requirement that its internal legal system adequately complies with a standard established by means of comparison with the respective national legal systems, always in relation with international rules, paying specific attention to their treatment of foreigners; and on the other hand, the material requirement obliging the competent authorities to sufficiently abide by and respect their own legal system and to have the means by which to assure compliance. In other words, the rule of law principle by virtue of which, for example, the competent bodies must investigate, pursue and on occasion compensate all punishable acts in accordance with their own legal system": See Jiménez Piernas, C., *La Conducta Arriesgada y la Responsabilidad Internacional del Estado*, Alicante, 1988, pp. 65–66.

dard, this non-compliance is unequivocally attributable internationally to Spain (as a country party to the *EHRC* and as a member of the Council of Europe) and this is so despite the ambiguous use of the term "responsibility" made by the *HRC* himself in his Report. After a biased or partisan reading of the paragraph cited above, this ambiguity could lead to the mistake of trying to attribute international responsibility to the Basque government for this lack of diligence but from our perspective this is inadmissible.

Regardless of whether the specific regulatory regime applying to this case or the general regulatory regime on attribution foreseen in international law is considered, there can be no doubt as to the fact that Spain is the only subject with sufficient capacity to be held internationally responsible for these events.[42] From an international legal standpoint, this affirmation renders useless and sterile all reasoning and arguments used by central government officials that, with a view to exempting Spain from responsibility in relation to these events, waged the argument that in accordance with the distribution of competences based on domestic law, it was the Basque government that should answer to these claims.[43]

As we are well aware, when it comes to attributing an internationally illegal act to a State, the organic structure adopted by said State is normally considered irrelevant in the eyes of international law.[44] At any rate, the legal responsibility of the

---

[42] The Preamble and Article 1 of the *EHRC* leave no doubt in this respect. From them it can be clearly deduced that the only subjects with capacity for non-compliance with the provisions of the Convention are the States that are party to such Convention. Moreover, the general regime on international responsibility leaves no possible doubt either. Article 4.1 of the current *ILC* draft articles affirms that: "The conduct of any State organ shall be considered an act of that State . . .whatever position it holds in the organization of the State and whatever its character as an organ of the central government or of a territorial unit of the State." See *Report of the International Law Commission on the work of its 53rd session, loc. cit.*, p. 84.

[43] In a public statement printed in the *El País* newspaper the Home Minister used this argument (flawed from the perspective of international law) in asserting that "It is the Basque government that is responsible for protecting the security of the citizens in the Basque Country and the jurisdiction of the State in these matters is contained in the Basque Statute and in the Constitution . . .": *El País Digital*, 16–3–2001, at *http://www.elpais.es.*

In contrast the Basque Government, in its counter-report of 10 April 2001, affirmed that "In the case of the *ETA* organisation, the prime target is the Spanish state itself. The State, however, has never once been accused of ineffectiveness and of having a degree of responsibility as concerns a lack of sufficient and effective protection of the fundamental rights of the citizens", *loc. cit.*, p. 3.

[44] As concerns attribution, international law may occasionally take into consideration some of the situations existing in internal law of each State. That fact, however, does not lessen nor does it condition its complete autonomy when it comes to attributing, on the international plane, this act to the State because in the perspective of international law, the organic organisation of the State remains a mere circumstance, *Cf. PCIJ Case concerning certain German interests in Polish Upper Silesia (Judgment)*, 1926, Series A, n. 7, p. 19. Following this same reasoning, the internationally wrongful nature of a state act can only be derived from the infraction of an international legal obligation by that State. The description of that

Basque government is an issue that should be resolved or settled legally *ad intra* within the framework of the applicable constitutional system.[45]

IV. FINAL CONSIDERATIONS

In summary, the following observations can be made:

It is our understanding that, in accordance with the *HRC*'s Report and in light of the rules regarding this issue provided for under general international law and particular international law, the sort of low intensity terrorism plaguing the Autonomous Basque Community could lead to cases of non-compliance. We could find ourselves faced with, as long as the stumbling block of sufficient proof is overcome, a clear example of non-compliance with the due diligence standard; non-compliance that would affect the human rights regulatory regime in force on the European continent established by the *EHRC*, a scope within which the standard operates thanks especially to the interpretive effort carried out by the *ECHR*.[46]

In accordance with the general rules on attribution that prevail both within the scope of general international law as well as the affected particular international law (the European), we feel that in the hypothetical event that the case reached the judicial level and non-compliance were declared by the *ECHR*, said non-compliance would be attributable solely and exclusively to the State party to the *EHRC* involved in the matter; in this case, Spain. We therefore hold that any type of argument, based on the decentralised structure of the Spanish State, made with the sole purpose or objective of attempting to avoid the possible consequences that would arise from a probable declaration of international responsibility, is legally inadmissible.

We would also like to highlight the already mentioned use made in the Report as well as in *ECHR* case law cited of certain concepts and categories that are elements of general international law. This undoubtedly is one more example of the phenomenon of proximity and interdependence that exists between the regulatory regime of general international law and the specific regimes that tend to operate on a regional level,[47] and of the good service that general international law can

---

cont.

act by the legal system itself is of little or no consequence. On this latter point, Article 3 of the current *ILC* draft articles on international responsibility establishes that: "The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law." See *Report of the International Law Commission on the work of its 53rd session, loc. cit.*, p. 43.

[45] See Articles 2, 93 to 97 and 149.1.3 *CE* and note 9 herein.

[46] It is our understanding that the due diligence standard employed by the competent regional international judicial authorities with respect to human rights, is not essentially different from that employed in general international law.

[47] For example, the treatment given to the notion of due diligence in general international case law and by the Inter-American Court of Human Rights and the European Court of

and should provide to such specific regimes through said concepts and categories.[48]

To date we have no knowledge of any individual who has used the protection mechanisms set out under the *EHRC* when turning to the *ECHR* to defend their fundamental rights and freedoms allegedly violated by the low intensity terrorism plaguing the Autonomous Basque Community.[49]

---

cont.

Human Rights has been very similar in the essence although not identical as concerns the form. The Inter-American Court of Human Rights has proven through its decisions that it has a more in-depth awareness of the notion than the *ECHR*; solid proof of this being the courage and precision with which it traditionally treats this notion. In contrast the *ECHR*, when it comes to constructing and developing the notion, has by and large taken more reticent, aseptic and less developed stances. The basis for this different sort of treatment is clear. It is our understanding that the Inter-American Court of Human Rights has never feared gazing into the mirror of general international case law, the field in which this notion has undergone the most significant development. The Inter-American Court of Human Rights has made use of and has been instrumental in tailoring its arguments to the content of these decisions and this undoubtedly speaks in its favour. See the *Velásquez Rodríguez Case . . ., loc. cit., ibid.*

[48] Something already highlighted with respect to Community law by some Spanish authors. See Díez-Hochleitner, J., "La interdependencia entre el derecho internacional y el derecho de la unión europea", in *Cursos de Derecho internacional de Vitoria-Gasteiz*, 1998, pp. 39–88; Jiménez Piernas, C., *El Incumplimiento del Derecho Comunitario . . ., loc. cit.*, pp. 15–21.

[49] Spanish legislation provides for a compensation and indemnity system for damages caused by this sort of crime. This fact, that does not prevent nor does it preclude the opportunity that individual victims have of turning to the *ECHR* in defence of their fundamental rights and freedoms, could, to a certain degree, account for this lack of claims filed on the international level. The victims of terrorist acts or of acts perpetrated by a person or persons forming part of armed gangs or groups or that act with the aim of seriously altering the citizens' sense of peace and security, shall be eligible for compensation from the Spanish State that, on a case by case basis, shall distribute such compensation in the form of civil responsibility. In these cases the Spanish State does not assume any subsidiary responsibility whatsoever but rather subrogates in victims' rights in the exercise of the corresponding civil suits against the perpetrators of the crimes. Both physical as well as psychophysical damages suffered by victims are eligible for compensation. Act 32/1999 of 8 October on Solidarity with the victims of terrorism (*BOE* 242, 9.10.1999) in the wording provided by Additional Provision nine of Act 14/2000 of 29 December (*BOE* 313, 30.12.2000) and by Act 2/2003 12 March (*BOE* 62, 13.3.2003) regulating these aspects.