

European Inter – University Center for Human Rights and Democratisation

E.MA Master Thesis

2012 - 2013

The Hostage as a Modern Lamb to the Slaughter

The Paradigm of the Lawful Sacrifice of Innocents Against the Right to
Life Guaranteed Under the European Convention on Human Rights

University of Helsinki – Faculty of Law

Arnaud Emery

Written under the supervision of:

Magdalena Kmak

Alejandro Lorite Escorihuela

Declaration against plagiarism¹

To be signed and placed at the beginning of the thesis

Name of the student: Arnaud EMERY

Second semester host university: University of Helsinki

Name of the supervisor: Magdalena Kmak and Alejandro Lorike Escorihuela

Title of the E.MA thesis: The Hostage as a Modern Lamb to the Slaughter. The Paradigm of the Lawful Sacrifice of Innocents against the Right to life guaranteed under the ECHR

Academic year: 2012-2013

I certify that the attached is all my own work.

I understand that I may be penalised if I use the words of others without acknowledgement.

A. me
(Signature)

¹ Art. 5.1.i of the E.MA Rules of Assessment: The thesis shall consist of an academic piece of work, written individually and independently by the student. It shall be different from work previously undertaken by the student outside the framework of the E.MA Programme, e.g. in another Master's programme. It shall be written in English. The student may write the thesis in French upon prior approval of the E.MA director of the second semester University. [...]

Abstract

Hostage takings have been a growing form of terrorism over the last fifty years. Taking someone has a hostage is considered all over the world as one of the most heinous crimes as it exploits human's most sensible weakness, their need for others, their emotional bonds with other. Taking people as hostages in a standoff aimed at blackmailing a government is also taken as a direct insult to the government. It will be shown that it is often not so much the preservation of the hostages' lives as the quick elimination of the hostage takers that motivates armed rescue operations launched by governments all over the world.

The purpose of this master thesis will be to analyze, after demonstrating the specificity of the modern hostage as a singular and exceptional subject of international law, his status and his right to life as defined and protected by the European Convention on Human Rights and the case law of the European Court of Human Rights. It aims at raising awareness and starting a reflection on the importance of the hostage's life above all other political and national interests.

Acknowledgment

The author would like to express his deepest gratitude toward the people without whom this master thesis would never have been possible.

A thousand thanks to Magdalena Kmak and Alejandro Lorite Escorihuela, not only for their patient guidance and supervision, but also for being the first researchers to demonstrate a real interest toward the subject of Hostage Takings.

The responsibility of the supervision was left to them; the subject of hostages had never been treated before; they were, at best, very unfamiliar with the topic at the beginning. And, their supervisee had little if any clue where to start. Their enthusiasm, constant support, and kindness in sharing their precious time and advice made for the best supervision that this author could have hoped for.

Many thanks to Shane Sanders, for accepting on such short notice to be the proofreader of this thesis. The correction was a superb piece of work. Her recommendation and her precious time meant a lot to the author.

The author is very thankful for the constant support of Christine Donovan, Stefan van Uden, Monika Bartoszewicz, John Reynolds and Angela Melchiorre, to overcome the difficulties that marked the beginning of this thesis.

The author is also very thankful for Jan Klabbers' proposition and acceptance to research in the Erik Castrén Institute for his second semester.

The author wishes to express his deepest appreciation toward the numerous people who helped him build this thesis by discussing the subject with him. Offering their views and feelings on hostages, helping him with administrative issues or simply sharing a coffee or a drink lightened his mood and meant a lot to him. In that prospect, many thanks to

Alice, Anna-Kaisa, Damarys, Eliska, Lauri, Manuel, Pamela, Paolo, Ukri, Veronica, Walter and all the members of the Eric Castrén Institute for their warm welcome and kindness.

Gratitude is also expressed for the unceasing and unwavering moral and emotional support of the proponent's family and friends.

Finally the author is thankful for all the helping hands lent by one and all in his first research adventure.

Table of Content

Abstract	3
Acknowledgment	4
Introduction	8
A. The hostage as an overlooked subject of human rights	8
B. A narrative of hostage takings: the Munich massacre	9
C. Research questions and outline of the thesis	14
Chapter 1: Hostages, the uniqueness of the denying of their human condition.....	16
A. Actors: The hostage; the weakest member of a deadly tripod	16
B. Typologies of hostage taking situations	18
C. The unique denying of one's human condition	20
D. A global phenomenon marked by the diversity of response possibilities	23
E. The necessity of a legal analysis of right to life of the hostage	25
Chapter 2: Right to life of the hostage: Analysis on the basis of the European Convention on Human Rights.....	28
A. Traditional mapping of the right to life	29
B. A spectrum of foreseeable situations covered by a quasi-absolute right.....	30
1. <i>Lower limit of the spectrum, the definition of the beginning of life</i>	32
2. <i>Lower limit of the spectrum, the definition of the end of life</i>	33
C. Depriving a citizen of its life without breaching the convention: how to?	34
1. <i>The upper limit of the spectrum: The deprivation of life in application of death penalty..</i>	35
2. <i>The absolute necessity criteria required for the use of lethal force and the standard of proof beyond all reasonable doubt</i>	36
3. <i>Procedural aspects of the right to life</i>	37
D. A fundamental distinction between regular law enforcement and secret service involved types of situations.....	39
E. A drift in the spectrum prejudicial to the hostage.....	42

Chapter 3: Finogenov vs. Russia, the legal coronation by the European Court of Human Rights of the aggravating condition of hostages	45
A. An indisputable shyness of the Court in the fact analysis	46
1- <i>Agreed-upon Facts</i>	46
2. <i>The Debated facts</i>	47
B. A disputable decision regarding the right to life of the hostage	51
1. <i>The chemical agent and the law</i>	52
2. <i>The decision-making process and the storming of the Dubrovska theater</i>	57
3. <i>The medically assisted evacuation</i>	64
Conclusion on the Finogenov case.....	70
General conclusion	73
Bibliography.....	78
Annexes.....	85

Introduction

A. The hostage as an overlooked subject of human rights

The practice of hostage taking is as ancient as war; it has broadly evolved through the ages yet it is not a recent phenomenon.¹ As soon as human beings understood that they needed each other for their survival could the life of one become a leverage to force others to do or not do something. A hostage taking is a blackmail of the worst sort as the life of an innocent is in the balance. It is considered in a wide number of countries as one of the most odious crime usually sanctioned by the most severe punishments.² Nonetheless it poses a set of ethic, philosophical and legal questions in our modern societies. Indeed the more individualistic the society, the more chances it has to be victim of hostage takings since the individuals have such a high personal value. In a society where the individual would be meaningless, where everyone would only be devoted to the greater good of the community, hostage takings would be perfectly ineffective to blackmail such a society. If all its members were ready to commit the ultimate sacrifice for the group, a hostage taker to succeed would need to take such an important portion of the community as hostages that it would threaten the very existence of the community. Such a hostage taking is nowadays infeasible due to the size of communities (countries). At least it is not doable without an atom bomb. However since the world is by essence driven by capitalism, by individual freedom,

¹ Irène Herrmann and Daniel Palmieri, 'A haunting figure: the hostage through the ages' p. 137 in International Review of the Red Cross, March 2005 available at:

http://www.mkkk.org/eng/assets/files/other/irrc_857_palmieri.pdf (consulted on 11 July 2013)

² For instance hostage taking itself is punished by twenty to thirty years of imprisonment in France, it can go as far as life imprisonment or death penalty depending on the outcome of the hostage taking in the United States.

French Penal Code, Article 224-1 and 224-4, available in English at:

http://www.legifrance.gouv.fr/content/download/1957/13715/version/4/file/Code_33.pdf (consulted on 11 July 2013)

United State Code, Title 18, Part 1, Chapter 55, section 1203, available at:

<http://uscode.house.gov/download/pls/18c55.txt> (consulted on 11 July 2013)

hostage taking has become a very effective way to spread terror and try to obtain financial, political or ideological demands through blackmail.

A hostage taking is a situation extremely volatile and difficult to handle for the authorities in charge, since it is a generally unpredictable very fast paced operation or set of events that suddenly puts one or many innocent lives at great risk. It is often a highly mediatized situation and the public opinion is very often putting a very important pressure on its leaders to save the hostages. It gives very little time to answer for the decision takers or the crisis-cell; the armed rescue of the hostages is an extremely dicey option with high risks of casualties among them. The compliance with the hostage takers demands is often either politically impossible or undisclosable to the public opinion. However it is crucial to ask what is the place of human rights under those extreme (and fortunately rare) circumstances?

The purpose of this master thesis is to demonstrate that hostages are in a particularly weak position, with very low chances of survival and that they do not benefit from as much protection from the European Convention on Human Rights and more generally from the international community as a regular human being does. Despite the alleged reason of national security, the State authorities and more surprisingly the court fail to understand the peculiarity of a hostage condition. In order to set the stage of this thesis it is essential to come back on a tragic set of events that illustrates particularly well the precariousness of the hostage's condition. The purpose of the first half of this master thesis will be to demonstrate the factual specificity of hostage takings compared to other crimes before demonstrating that there is additionally a legal specificity that urges in favor of a change of mindset when it comes to the hostage status.

B. A narrative of hostage takings: the Munich massacre

Munich, September 4, 1972, the world woke up in astonishment when a Palestinian commando of eight men, claiming to be part of the Black September movement, took

hostage eleven Israeli athletes during the Olympics. The commando, lead by a Palestinian whose nickname was 'Issa', immediately executed two hostages.

It is the first and maybe most topic picture of a hostage crisis meeting a tragic end. It shocked western democracies deeply and marked the beginning of a militarization process of police services across Europe with the creation of dedicated counter-terrorist units. It illustrates as well the very particular and desperately helpless situation a hostage can be plunged in. Arguably a hostage could not face worse odds of survival than what the Israelis faced during the Munich crisis, which justifies going back to this particular set of events.

Shortly after the discovery of the first executed hostage's body by the German police a three-man crisis-cell was appointed. It included the Bavarian ministry of interior, the local chief of police Manfred Schreiber and the German minister of interior. Two of its members were politicians, and only one was a law enforcement officer. Most if not all the decisions made by this crisis-cell led to a tragic end and the execution of the nine remaining hostages during a rescue operation that could not have possibly gone worse.

First and foremost, the Israeli government refused to agree with any of the hostage takers' demands, namely the release of over two hundred twenty Palestinians imprisoned in Israel, and the hostage takers refused any financial offer from the German government. Therefore the crisis would have to end in a rescue operation, since a negotiated outcome was off the table.

Secondly, the Germans at that time had no counter terrorist unit among their police, and law prohibited the intervention of military forces on internal affairs. Furthermore, Willy Brandt, the chancellor, refused the help of a counter terrorist Israeli unit. It meant that the rescue operation was to be executed by regular street policemen.

Thirdly, the crisis-cell forgot to prevent the journalists, who were there in massive numbers due to the Olympics, from accessing the siege zone. It lead to the failure of a

first rescue operation in the Olympic village that was followed live on TV by Issa and his men from the rooms where they were holding the Israelis at gunpoint. At one point the crisis cell even obtained from Issa that two members of the Olympic organizers would enter the building and check on the hostages' condition. They had to secretly count the terrorist to help the crisis cell preparing a rescue. However they counted only five gunmen when there were eight of them, and the whole rescue operation would be based on the assumption that there were five hostage takers. At this stage it seems pretty clear that the situation would turn sour for the hostages, but the it will worsen even more and show how little where the German concerned by the fate of the hostages.

The crisis cell finally allowed two helicopters to take the hostages and the hostage takers to the nearest airport (Fürstenfeldbruck) where they were supposed to take a Boeing and fly to Egypt. However, Schreiber's plan was to launch a rescue operation at the airport in the form of an ambush. It was planned that the crew of the Boeing would be replaced by disguised policemen who were supposed to shoot Issa and his deputy when they would check on the plane. Five snipers were placed near the landing sites of the helicopters and were supposed to neutralize the three remaining hostage takers.

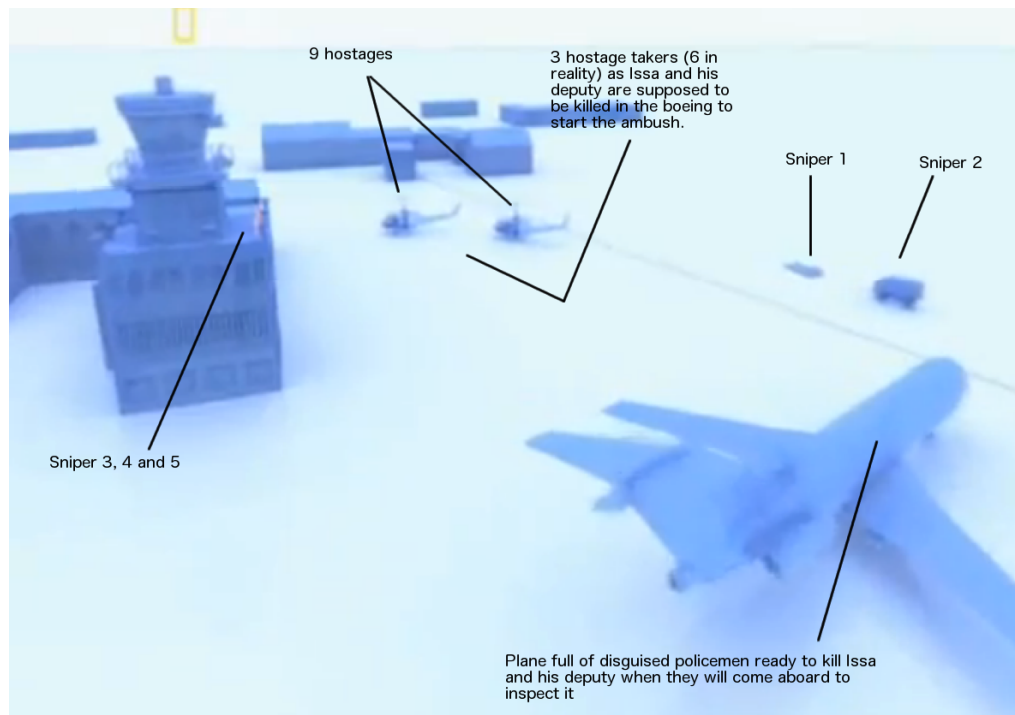


Figure 1: The original ambush plan of Schreiber.³

However the disguised policemen in the plane decided to vote and abandon their posts, scared that there was too much risk for their lives. Even outnumbered and outgunned, Issa and his deputy might have time to throw a grenade during the shooting, in a fully fueled Boeing it would mean the instant death of all the policemen, one of them said after the events.⁴ Additionally the pilots of the helicopters were supposed to land sideways to the west of the control tower to give a clear line of fire to the three sharpshooters up there and the two down on the ground (see figure 1), but they eventually landed for some reason facing the tower (see figure 2). Those two remaining sharpshooters (sniper 4 and 5) behind the landing site were incapable of doing anything due to the positioning of the helicopters. They now were in direct line of fire of snipers

³ National Geographic, Seconds to disasters, Season 3 Episode 10, 'The Munich Olympic Massacre', (annotated by the author) 39:06, available at http://www.youtube.com/watch?v=Rr_F_r2Fv1I (consulted on 11 July 2013)

⁴ National Geographic, Seconds to disasters, Season 3 Episode 10, 'The Munich Olympic Massacre', 38:09, testimony of Heinz Hohensinn available at http://www.youtube.com/watch?v=Rr_F_r2Fv1I (consulted on 11 July 2013)

3, 4 and 5. This situation is all the more surprising as the German army snipers were renowned and feared all over the globe during World War II for their ability to do precise shootings at extreme distances. But, due to the German law, those experienced snipers were not allowed to intervene. Instead, three regular policemen without scopes, or infrared lenses, nor bulletproof vest or steel helmet, nor proper training or adequate rifles were left to deal by night with eight, not five, hostage takers from the control tower. The operation was obviously doomed to fail.

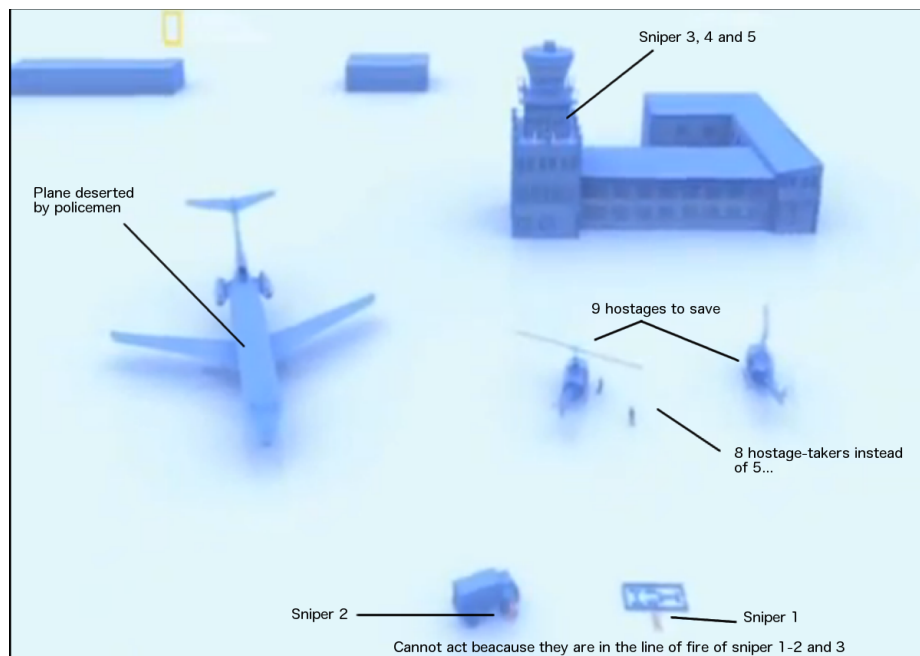


Figure 2: How the rescue operation effectively took place.⁵

When Issa discovered the plane empty, the hostage takers understood it was an ambush and a gun battle started with the three policemen on the top of the control tower. The hostage-takers executed the nine remaining hostages; five members of Black September, including Issa, died in the hour-long shooting that ensued and three were captured (but released two months later after the hijacking of a German plane by another commando of Black September). One German policeman eventually died. For over forty years the

⁵ National Geographic, Seconds to disasters, Season 3 Episode 10, 'The Munich Olympic Massacre', 38:51 (annotated by the author) available at http://www.youtube.com/watch?v=Rr_F_r2Fv1I (consulted on 11 July 2013)

German authorities maintained absolute secrecy over the events and the responsibilities for the tragic outcome. None of the policemen were ever charged for abandoning their post, nor the crisis cell held accountable for any actions and decisions taken.

Germany had ratified the European Convention on Human Rights in 1952, twenty years before the tragic events of the Munich Olympics. Nevertheless it can hardly be assumed, knowing how the German authorities dealt with the Israelis hostages' rescue, that Germany did fully respect the right to life of those persons under its jurisdiction as guaranteed by the ECHR, and that a real enquiry was then made to identify the responsibilities in this tragic set of events.

It appears that when all those pieces of information are taken into account, one cannot deny that the Israelis hostages could not have faced worse odds of survival from the very start. Those persons were alive, but given the circumstances and the will not to negotiate of their own government, they were dead at the same time as they had little if any chances of survival from the very beginning. In the opinion of the author, it calls for an international reflection on the legal status of hostages.

C. Research questions and outline of the thesis

Given the absence of any kind of legal literature, this thesis will attempt at setting some foundations on the topic for future research. Therefore to fully understand the precariousness of the hostage's condition a certain number of questions need to be laid down. First what is a hostage and what makes his condition so special? What are the factual specificities of a hostage taking? Then what are the legal specificities of hostage takings? Given the fact that this thesis will be focused on the right to life of the hostage it is important to define what is the right to life under the European Convention on Human Rights and where is the hostage located in its scope? Then it will be asked how did the European Court of Human Rights in the *Finogenov and others vs. Russia* as a first case dealt with the question of Hostage takings and whether or not this judgment is fully satisfactory considering the importance of the issues the Court was dealing with?

It shall be reminded that this essay will try to apprehend the situation from a human right perspective and not from a counter-terrorism perspective, which follows a far different logic.

Finally, it will be demonstrated that the issues between human rights and hostage taking situations are more numerous, complex and intricate than what first meet the eye and that there are several other questions that remain unanswered in this field of study. The subject is, however, far too broad and unstudied to be entirely covered in a single master thesis.

In order to give as much an answer as possible to all those questions, this master thesis will be divided into three distinctive chapters. First it will be demonstrated that the tragedy of the hostage's condition lies in the unique denying of his humanity and will attempt at showing the factual specificity of hostage takings. Then a second chapter will focus on the right to life in the European Convention on Human Rights as interpreted by the European Court of Human Rights and the location of the hostage in its scope. Finally a third chapter will consist in the analysis of the single case related to hostage takings the European Court of Human Rights ever dealt with, *Finogenov and others vs. Russia*, and how it is from a human right perspective a half satisfactory and improvable judgment.

Chapter 1: Hostages, the uniqueness of the denying of their human condition

It is interesting to note at this point that the subject of hostage takings is quite strangely deprived of any legal literature. This master thesis will be a humble attempt at laying the foundations for future researchers on the topic. This subject is particularly relevant in the opinion of the author as multiple hostage taking cases show how little governments are concerned by the fate of the hostages and the value of their lives. Indeed, it will be demonstrated that the situation is not a bilateral opposition between ‘criminals’ and ‘law enforcement officers’ but that it is a triangular relationship in which the role of the Hostage cannot be neglected (A). Secondly, it will be shown that the hostage taking situations can be very different (B) yet all of them are marked by the desperateness of the hostage’s condition and the denying of its human dignity (C). If the phenomenon is global and the type of responses of the negotiating authorities very varied (D) all those crisis bring havoc on communities stricken and call for a legal analysis of the hostage’s status and his right to life (E).

A. Actors: The hostage; the weakest member of a deadly tripod

A hostage taking is a triangular confrontation involving three parties. First, the hostage is a passive actor in the sense that he has not chosen to play any role in the events and has little if any, control on their course. Yet he is an active actor as he (or she) is at the core of the events by being the reason and the cause, he cannot be considered as a regular bystander of the action.

Second the hostage taker(s), the initiator(s) of the action, who obviously play a key role in the triangle given that the hostages are only living as long as the hostage takers have the will to preserve their lives. They have an almost absolute control over other human being’s fate.

The local authorities, or negotiating authorities, form the third corner of the triangle. They have been brought, often against their will, into the bargain at the same time as the hostages. But, unlike them, the authorities have a real control of the events. First, they can step out of the situation at any time; second, they do not risk their own lives; third, they can actively access or deny the hostage takers' demands; fourth, practice shows that whatever the outcome of the crisis is, the personal responsibility of the authorities' decision makers is never engaged. Furthermore the outcome of the crisis is, often (if not always) politically exploited at the advantage of the government. And a very important fact that governments tend to ignore is that every single action they take in favor or against the hostage takers is going to have an impact on the hostage, an impact that can be the difference between their life and their death.

The hostage is consequently caught between hostage takers and the respondent State, both of which have a direct responsibility over his fate. It leads to a number of legal consequences that will be studied later in this thesis and that governments clearly tend to omit, principally related to the right to life of the hostage.

When the actions of one are a matter of life and death for another human being, one should be very careful and take utmost precautions to protect his fellow's life. From a human rights perspective nothing but the protection of life at all cost should be the top priority of all negotiating parties. But that would imply agreeing on all the hostage takers demands, as the surest way to obtain a peaceful solution to the crisis. However the current policy of governments is the exact opposite. 'We do not negotiate with terrorists' is now the leitmotiv of most governments. It is crystal-clear: There are priorities above the right to life of a hostage, such as national security, 'war on terror', not encouraging more hostage takings, preserving financial or political interests and so on and so forth. Are any of those principles be another human right that could have the potential to overcome the most precious and last things the hostages have, their right to life? Probably not. But would it be realistic to place on the government's shoulders the burden to save hostages at all cost, including giving in to the hostage takers demands (and pushing forward, to protect the life of the hostage takers as well)? Human rights

seen as ideals to strive for, and not rational norms, would tend to place the lives of all the protagonists over everything else, including the object of the quarrel between the hostage takers and the government. As a matter of fact, no human right can be fulfilled without the fulfillment of the right to life.

One of the main issue is that it looks as if governments were considering those people as a tradable good that they would be willing to exchange or sacrifice for various interests such as national security, political reasons or international prestige for instance. It seems that no one realizes that those hostages are people who are the victims of an infamous bargain in which they have never asked to play any part. Most of them are used as political leverage against a government they sometimes have never voted for, or political ideas they do not share. It can be considered that they are held accountable and responsible by both the hostage takers and their government for the action of their nation. Furthermore, it is even more striking to point out that legally and biologically speaking those people are very much alive. For most hostage-takers, hostages are only worth something as long as they are alive (even if their death can sometimes put some pressure on the negotiation counter-party). However, many governments seem to consider the hostages as dead already, and whatever their fate turns out to be, no one among the government will be held responsible. Should they be released somehow, the government will get full political credit for it and will be praised by its public. Are they killed? The government will not be responsible for it. Indeed, it will most likely profit from a higher esteem in the public opinion by pointing the finger at terrorism. And, by playing on the people's fear, it will unite the nation against 'barbarism' and 'ruthless terrorism'.

B. Typologies of hostage taking situations

It needs to be pointed out that according to the author of this thesis, hostage-taking crisis can be divided into three distinct categories depending of the motives leading to the hostage taking. This typology is very important as it links each situation to a different type of shared responsibilities of the hostage takers and the negotiating

authorities over the hostage's fate. Depending of which are the motives behind his hostage taking a hostage, his chances of survival and the impact the government can have on them will quite seriously vary.

First it can be the result of 'an act of folly' when an individual usually having psychological troubles suddenly decides to take others as hostages. If the individual is not going straight on a killing spree (like what happened several times on American campuses) and rather decides to take hostages,⁶ those scenarios are usually the easiest to deal with for the governments and can be fairly often negotiated through with a low risk for the hostages' lives.

Second it can be motivated by greed (money or the need for some political influence). Typical examples are the hostage takings in South America such as the one performed by the FARCS in Colombia.⁷ Those cases are usually the longest but the hostages are worth absolutely nothing for the terrorists once they are executed, hence their lives are not threatened too much as long as they represent some kind of value.⁸

The last category represents the least negotiable kind of hostage crisis, when the hostage taking is either motivated by unacceptable or unachievable political demands (such as the Chechen claims during the Nord-Ost Siege for instance) or by religious extremism. The first case induces a fairly important risk for the hostages' lives, as they are disposable from the hostage takers point of view to put pressure on the government.

⁶ See for instance the Human Bomb case, Neuilly Primary School Hostage Taking, May 13th 1993, France.

Julian Nundy, 'France honours teacher heroine in nursery siege: Julian Nundy reports from Paris on the dramatic climax to a 46-hour hostage ordeal for schoolchildren as police kill 'human bomb' gunman' The Independent, 16 May 1993 available at:

<http://www.independent.co.uk/news/world/france-honours-teacher-heroine-in-nursery-siege-julian-nundy-reports-from-paris-on-the-dramatic-climax-to-a-46hour-hostage-ordeal-for-schoolchildren-as-police-kill-human-bomb-gunman-2323142.html> (consulted on 11 July 2013)

⁷ In Spanish: Fuerzas Armadas Revolucionarias de Colombia translated in English as Revolutionary Armed Forces of Colombia.

⁸ See for instance, the Ingrid Betancourt's case, hostage in Colombia from 23 February 2002 to 2 July 2008.

'Colombia hostage Ingrid Betancourt Freed' BBC News, 3 July 2008, available at: <http://news.bbc.co.uk/2/hi/7486552.stm> (consulted on 11 July 2013)

From what has been recorded, hostage takings motivated by unachievable political demands are here used for exacting something distinct from State authorities, or involving a fourth actor, like other states, or the general public, the media, etc. It is more properly an act of so-called ‘terrorism’ (i.e. use of popular fear as a weapon for political ends) as it intends to create fear or terror out of staged killings.

This second case is by far the worst, ideological and religious extremists tend to start hostage takings with the sole purpose of executing as many hostages as possible in order to create terror. In that case the hostages lives are in immense danger, and their hopes of survival usually lie within two scenarios: a rescue operation by armed forces or a release by the hostage takers either if they are themselves not targets of the ideological goal⁹ or if the release of some hostages is necessary to facilitate the ultimate goal the hostage takers have in mind (usually the staging of the execution of the remaining hostages).¹⁰

C. The unique denying of one’s human condition

One can only be concerned the hostages are human beings used as leverage by hostage takers against an authority, used as something they can dispose of. *Ipsa facto* they are denied their human condition, as one human being cannot belong to someone else since the prohibition of slavery. Yet when study is made of the authorities’ behavior regarding the hostage, it appears blatantly that they consider it the same way hostage takers do, as a disposable thing. Otherwise they would always negotiate; the refusal to negotiate immediately implies risking the hostages’ lives. When the choice is made to protect a political or national interest and abandon the hostages to their fate or to put their lives in greater risks than their current already risky situation, it undeniably means that the hostages are (unfortunately) ‘disposable’ from the authorities’ perspective. Hence the hostage is denied his human condition by both the hostage takers and the

⁹ See for instance the rapid release of local Iraqi drivers and employees captured alongside foreigners like American or British journalists.

¹⁰ See for instance the release of 65 hostages during the Air France Flight AF8969 hostage taking, 24 – 26 December 1994, in Alger and in Marseille.

government, which supposed duty is to protect him. The worst is, however, yet to come and will be amply studied in this thesis: when the European court of Human Rights refuses to take a stand in favor of a more favorable and protective hostage status, endorsing the government's analysis of their status, it implicitly treats the hostages the exact same way the hostage takers and the authorities do, as a 'disposable human being', denying the essence of their humanity.

This is what the public opinion of western democracies, their medias and governments, and up to their monitoring bodies have failed to understand this far: A hostage situation is a situation that knows nothing alike and that requires a specific set of rules to be addressed. A hostage is a fully living innocent human being, facing such terrible odds of survival that he or she is potentially dead already. Hostages have absolutely no control over their own fate, and so many different other human beings have a certain or even absolute control over their fate. Comparison can be made between a hostage and a newborn in the sense that both of them completely relies on another for their survival, with two major differences. First, a newborn has not experienced autonomy and hence his ability to decide for himself, his freedom has not just been taken away. Second, a new-born is normally in the hands of other human beings who want to protect him, a mother, a family, while a hostage is surrounded by people who express little if any concern for the value of his life and are ready to trade it for various other interests.

A hostage situation is not comparable to bombings in Chechnya, for instance, when a civilian population is sometimes considered as a collateral damage to a military operation targeting military objectives. In that case the civilians are bystanders, they are in full possession of their freedom, they are not in the center of a conflict as a hostage is, they are on the side and will be ignored as much as possible. It's impossible to ignore a hostage whose life is the very shield of the hostage taker against the negotiating authority. A hostage situation is not comparable either to a regular arrest of a suspected criminal as those operations only imply governmental forces and the suspect, sometimes unfortunately bystanders. The bystanders are accidents whereas the hostages are part of the situation against their will from the beginning to the end. Every action taken by both

parties has foreseeable and expectable consequences on the fate of the hostages, whereas it is not the case with bystanders as those people are unpredictable complications to a situation. Therefore a court and a government must apply a far stronger standard of scrutiny and protection when it comes to the right to life of a hostage than when it comes down to accidental casualties. One cannot be satisfied when the highest human right court in Europe, out of deference for a member State, simply refuses to analyze the right to life of a hostage, abiding by the government's analysis of its status, accepting tacitly that he is a 'disposable human being'.

Observing hostage-takings from that perspective, when the liberation of the hostages will in most cases cost something to the government as part of a bargain (either political or financial) or at least imply a risky military rescue operation, it seems far more profitable to let things go ill and reject all responsibility afterwards. One might even wonder what even a few hundred lives in a country of dozens of million of inhabitants are worth. Thousands of citizens are born and die everyday for various reasons.¹¹ From a purely demographic perspective, those lives are worth little, if anything. However in most cases the hostages are worth as much political benefit dead than alive, and the first option is usually cheaper from the government's perspective. From a human rights perspective, this situation is not tolerable and this appreciation of the hostage's status is to be fought in order to maintain the dignity and the right to life and freedom of every hostage at the center of the decisions that are to have a terrible impact of their chances of survival.

¹¹ For a better understanding of the demographic impact of hostage takings, it can be said that for instance, in France (a country of over 65 million inhabitants), as of March 2013 around 2,200 babies were born every day, and over 1,800 persons died for various reasons the same month. Even a massacre as big as 400 hostages in a single day would not affect the rising of the demographic curve.

Institut National de la Statistique et des Etudes Economiques website in French (National Institute of Statistics and Economical Studies in English)

'Démographie - Nombre de naissances vivantes – France' available at:

<http://www.insee.fr/fr/bases-de-donnees/bsweb/serie.asp?idbank=001641601> (consulted on 11 July 2013)

'Démographie - Nombre de décès – France' available at :

<http://www.insee.fr/fr/bases-de-donnees/bsweb/serie.asp?idbank=001641603> (consulted on 11 July 2013)

D. A global phenomenon marked by the diversity of response possibilities

It's interesting to broaden the study of the status of the hostage out of the single Russian case that has eventually been scrutinized by the European Convention on Human Rights to demonstrate that this is not a lonely case. All over the world hostages are taken, all over the world they are deprived of everything and left at the mercy of their captors and the negotiating authorities. All over the world those authorities show more or less concern for their fate and sometimes take very risky decisions to bring as many of them home safely, or sometimes they rather choose to abandon them to their sorry fate. All over the world there is a body of concurring evidence that shows the urgent need to place, at long last, the duty to protect the hostage's life at the center of the government's obligations.

In Djibouti in 1976 a school bus filled with 31 children of the French military is taken hostage by Somali hostage takers and stationed on the frontier between Somalia and Djibouti, it was known later as the Loyada's hostage taking.¹² The demand was the immediate independence of Djibouti and the withdrawal of the French army. When the GIGN (The elite French counter terrorist unit) arrived on the spot of the crisis it was the worse situation possible; the bus was besieged for hours on the border with the French foreign legion on one side and the Somali forces on the other side, loyal to the hostage takers.

The GIGN took a very big gamble that day to end the crisis. It decided to execute the six hostage takers with six of their snipers, at long range within one single second not allowing them time to retaliate on the children. Against all odds the plan succeeded and the six hostage takers were killed within a second. However, a hidden hostage taker had not been previously counted and was able to kill one kid and fatally wound another before being neutralized. This shows that, firstly, big gambles can be taken on the hostages' lives, even if in this particular case most commentators agreed that the plan

¹² 'Groupe d'Intervention de la Gendarmerie Nationale' (GIGN) website, in French, available at: <http://www.gign.org/groupe-intervention/?p=3572> (consulted on 11 July 2013)

was exceptional and, despite the death of two of the 31 kids, was an unexpected success. Secondly, it must be pointed out that the right to life of the hostage takers is not even considered. The very aim of the plan was to kill them all before doing anything else. This is a consequence of the militarization of the police, when regular policemen are trained not to use their guns or to use them only in very specific cases, such as legitimate defense with the sole aim of capturing the suspect alive. The military is trained to kill, and not to cease-fire until death.¹³ The logic behind the use of lethal forces by police and army is very different and the implication of armed forces into hostage situation should be considered with utmost care. The data gathered for the purpose of this thesis supports the claim that hostages are too often considered as a tradable good, that hostages fare much better if they are taken in a western democracy with a powerful public opinion than in an authoritarian state, that the survival rate of the hostage takers is close to zero and that the hostages are in a very precarious situation with terrible death rates far higher than what they would face free and alive daily living in their country.

As the data provided in annex 1 clearly shows, the hostage is handled differently depending on the negotiating authority. For instance, it is very interesting to compare the number of hostages killed compared to the number of hostage takers killed in an operation led by governmental armed forces.¹⁴ It is shown that in the two most recent mass hostage takings in Russia the figures are extremely troubling. In the Nord Ost Siege around 3,4 hostage lives were lost for every single hostage taker neutralized (killed or captured). In Beslan the proportions are even more dramatic, as the figures jump to more than 12 lives lost for every single hostage taker neutralization. However when it comes to the United Kingdom or France for instance suddenly the figures are much lower, The Iranian Embassy siege in London led to a ratio of 0,33 and the rescue operation itself to a ratio of 0,16 hostages lost / hostage taker neutralized¹⁵. The AF8969 assault, led by the French with 170 hostages on board got a perfect ratio, without losing

¹³ European Court of Human Rights, *McCann and others vs. United Kingdom*, 27 September 1995

¹⁴ Annex, Hostage Taking Statistics Table 2/3

¹⁵ Annex, Hostage Taking Statistics Table 3/3

a single hostage life or even armed forces lives; the four hostage takers were neutralized.

Another statistics which can prove how different the chances of the survival of hostages are around the globe is that 33% of the Hostage in Beslan died during the assault, 12% in the Dubrovka theater, 12% in the assault of the Palace of Justice in Colombia, 100% during the Munich Massacre, whereas 1.39% only in Lima in 1997, 4.17% in the Iranian Embassy of London, 6.45% in Djibouti.¹⁶

The statistics clearly shows that different hostage takings, occurring all over the planet for different reasons, have a common point: the hostage is often, if not always, neglected by both the State and the Hostage takers which calls for a change of mindset regarding his status by the negotiating authorities.

E. The necessity of a legal analysis of right to life of the hostage

Kidnapping (or hostage taking) is considered as one of the most heinous crimes, right after murder, and is usually punished with equivalent sentences.¹⁷ One must wonder though what can possibly justify that the right to life, and more generally the legal protections granted to the victims and their relatives, of hostage is much thinner than what is recognized to the victims of common criminals.

Indeed another important point when it comes to the necessity of the strengthening of the legal protection granted to the status of the hostage is to study its impact on our traditional western societies. As it has been shown previously, the hostage taking process has widely evolved throughout history. If the practice of hostage takings is ancient, its '*modus operandi*' and its '*raison d'être*' have drastically changed. It used to target only the members of the nobility during the '*ancien régime*' in order to guarantee

¹⁶ Annex, Chart 1, Death ratio among hostages during rescue operations.

¹⁷ In France article 224-4 of the Penal Codes punishes Kidnapping and hostage taking by 30 year of imprisonment. Murder is punished of 30 years as well by the article 221-1 of the Penal Code.

the respect of a treaty for instance, with the rise of the 'nation state' where citizens are equals in value (at least in theory) the pool of potential hostages has grown drastically in each country. When the motives are political or ideological, when the aim is to blackmail a government and by extension a whole nation, and a public opinion, every citizen has a valuable potential from the hostage taker's point of view.

Some may argue that there are so few hostages and people who have experienced hostage takings in their lives that their condition, however horrible it may be, should unfortunately remain the way it is to protect the government's freedom of action to combat, what is often called, 'terrorism'.

However small the number of hostages seems, the tragedy of their condition is that when it strikes it usually devastates an entire community.

In that sense the social impact of an isolated killing in the United States is not comparable to a mass murder like what happened in Aurora in 2012, in Columbine in 1999 or in Norway in Utøya in 2011. Somehow the same happens with hostage takings. A hostage taking by its very nature does not pick here and there random individuals across a country. It suddenly picks a bunch of people gathered at a given place at a given time, it is very likely that those people are there for a reason, and share something with a least part of the other hostages, if not with all of them. Hence if a tragedy happens, it will not have a limited impact in the sense that one can lose in the same event, not one but many members of its family or community. For instance: the Iranian Hostage Crisis, all the hostages there were co-workers, friends sometimes and some of them were married with another hostage. The Dubrovka crisis saw people gathered there with family and friends to enjoy a show been suddenly placed on a very dangerous situation. The Beslan's incident saw families and kids of the same school being dragged altogether in a traumatizing and deadly set of events. In those two late Russian cases many were the people who knew more than one hostage, who suffered the long wait with their loved ones placed in a deadly situation. They saw them abandoned by their government who did not care as much for their lives as it cared to end the crisis as soon

as possible, with arms if necessary. Many were those who lost several members of their family in the same crisis. The reader might have to wonder that if he is unlucky enough to live one day the hostage taking of one of his relative, it is very likely that more than one of his relatives will be held at gunpoint that day, maybe 2, maybe 5. Will he or she be able to say that day, that the government should have as much freedom as they need to deal with the 'hostage takers' even to the extent of considering his or her relatives as something that can be lawfully sacrificed? One can doubt it.

From a human right perspective, no one can say that it is a necessary evil in a democratic society that some of its innocent members have to be sacrificed in order for the country to maintain its international prestige and not to bend to the blackmail of hostage takers...

However, it appears that one of the core-problems raised by a hostage-taking situation is the legal status of the hostage and its right to life. Hence this study will be mainly focused on trying to figure out what the current legal situation of an hostage is, whether or not this situation is satisfactory from a human right perspective, and how it happened that nowadays a living and innocent human being can be 'lawfully sacrificed' in a rule of Law country.

The hostage will be located in the jurisprudence of the right to life after a preliminary mapping of this right according to the European Court of Human Rights. Then the different issues posed by his current status will be indentified and tackled from a legal and human right perspective.

Chapter 2: Right to life of the hostage: Analysis on the basis of the European Convention on Human Rights

The article 2 of the European Convention on Human Rights is a very specific article on many aspects and many among the scholars do not agree for instance whether or not it is an absolute right. It is a necessity to depict the general outline of the right to life as understood and interpreted by the European Court of Human Rights before trying to locate the status of the hostage and the hostage takers in its frame.

As a starter it is important to analyze the text itself of the article 2 of the European Convention on Human Rights, it states that:

- ‘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 defense 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.’*

What are the main concerns nowadays regarding the right to life as interpreted by the European Court of Human Rights and how is it possible to map this right and locate within it the hostage's condition? In order to locate the hostage in the right to life guaranteed by the European Convention on Human Rights it will be first recalled how the article 2 is traditional mapped by scholars (A) before proposing an alternative reading of the right to life as a spectrum, built by the jurisprudence, covering a set of potential breaches of article 2, and providing a varying margin of appreciation to the

member states (B and C). It should help to identify the difficulties posed by the Hostage as a subject of human rights. Finally a distinction will be made between the regular law enforcement situations and the situations where secret services are involved (D) before showing thanks to a chart how the drift of the hostage in the spectrum is prejudicial to his condition (E)

A. Traditional mapping of the right to life

It is important to recall here that the article 2 of the European Convention on Human Rights is traditionally mapped by scholars into two branches, on one hand the negative obligations which are considered as the duty to respect the right to life by not interfering (understand depriving) one's right to life. The duty to respect usually includes the abolishment of death penalty, the restriction of the use of lethal force in law enforcement situations (with the notable exclusion of war) furthermore the lives of perpetrators are placed under this duty to respect. The state is forbidden to interfere with their lives outside of the very limited exceptions provided by article 2. On the other hand are the positive obligations and the duty to protect by taking active measures. This duty to protect usually includes positive obligations, the procedural obligations of due diligence, of investigating into and condemning (if appropriate) every deprivation of life occurring on the jurisdiction of the member state. It also includes, at the discretion of the State and under its margin of appreciation, the protection of the mothers and the fetus through the abortion legislation, the protection of a weakened person asking for euthanasia. It asks for a positive involvement from the state. And, usually the State is granted more margin of appreciation by the Court in its duty to protect than in its duty to respect. This duality between duty to respect and duty to protect derives from the case *L.C.B vs. United Kingdom*.¹⁸ According to Frederic Sudre, the duty to respect is naturally born from the text of the Convention whereas the duty to protect is a creation built by the case law of the Court.¹⁹

¹⁸ European Court of Human Rights, *L.C.B vs. United Kingdom*, 9 June 1998

¹⁹ Frédéric Sudre, *Droit européen et international des droits de l'homme*, Presse Universitaire de France 10ème édition, 2011 p. 305

This thesis is going to prove that the State and the court tacitly place the hostage in the duty to protect as it is a political question and it gives much more freedom to the State when the hostage is by essence a human being whose life cannot be interfered with under any circumstances by the state without violating the convention, hence he should be placed under the duty to respect and benefit from a high degree of scrutiny and very little deference from the Court toward the responsible member State. This mapping, though accurate, does not fully grasp the complexity of the hostage situation and the hostage's condition. In order to offer a different reading of the hostage's condition and to better understand how its status has been dramatically shifting from a human being as a victim to an object of bargain, a second mapping of the right to life will be proposed below in the form of a spectrum.

B. A spectrum of foreseeable situations covered by a quasi-absolute right

This right can also be seen as a spectrum, a spectrum of involvement expected from the state part. Through this spectrum the court is going to analyze the facts and take certain decisions depending on how the judges choose to locate the case in the spectrum. It can be said that it is a prism to analyze the decisions of the court and shifting the angle of this prism through which the case is analyzed will have a tremendous impact on the legal protection granted to hostages. For instance on one hand the least required amount of involvement from the state part is the negative obligation not to kill. It can be easily fulfilled by abolishing death penalty and condemning any state agent who commits murder. On the other hand, issues that require positive obligations or a wide margin of appreciation from the state to take the appropriate legislation will be considered as the maximum involvement required by the court on the basis of this right, as it is where the barrier between violation and non violation are the least clear i.e. the beginning and the end of life.

Therefore it is important to first explain how the spectrum works and then to locate the place the hostage seem to have *de facto* in that spectrum, and the place they should *de jure* have from a human right perspective.

First and foremost is the article 2 an absolute right? Some will argue that it cannot be, as the article itself provides exceptions, unlike articles 3 or 4 that suffer none. Others will put forward the argument that without the absoluteness of this right, the whole convention loses all its interest and meaning as the right to life is the first of the rights, and no other rights can be protected or needs be protected if the right to life can be violated with full impunity. The court position is rather clear on this point at it states in *McCann and others vs. United Kingdom* that the article 2 ‘*ranks as one of the most fundamental provisions in the Convention - indeed one which, in peacetime, admits of no derogation under Article 15*’.²⁰ Taking into consideration that since World War II no State has been at war according to article 15 on its own territory, it can be agreed that the article 2 is *ad minima* an absolute right in practice if not an absolute right in general. It is time to set the limits of the situations covered by the spectrum of the right to Life. It can be agreed that it ranges from the most intrusive questions through the placing of positive obligations on the shoulder of States to protect life to the minimal and most basic negative obligation a State has: not to deprive anyone of his life. The thinnest and most advanced limits nowadays of positive obligations are related to the beginning and end of life questions, on ethics and bioethics and are rather vague limits, as it will be shown below. The maximal obligation for a State is not to interfere with the right to life, Death penalty can be considered as the clearest deprivation of life that falls into the right to Life and that is ‘allowed’ even if as it will be demonstrated later, it has lost much of its value. In the middle lie questions such as the positive obligations to protect third parties, procedural obligations including due diligence, but also the scrutiny of law enforcement operations and under which conditions is a government violating or not violating its obligations regarding right to life and the question of counter terrorist operations. It makes a huge difference depending through which prism of the spectrum the courts decide to analyze the situations. Should it consider the situation at hand as a regular question of positive obligations and protection of third parties, the attention granted to the status of hostages will be much more important than if it considers that it

²⁰ European Court of Human Rights, *McCann and others vs. United Kingdom*, 27 September 1995, paragraph 147

has to analyze the situation as a law enforcement situation or even worse for the hostage: as a counter terrorist situation.

1. Lower limit of the spectrum, the definition of the beginning of life

The second issue to rise is by essence a very controversial one and tends to discuss the definition of life that marks the lowest limit of the spectrum. When does life starts? When does life ends? Those questions have a potentially tremendous impact on European societies as they are closely linked to bio-ethics, cultural traditions, and religious beliefs. As the judges Mularoni and Strážnická pointed out²¹, the '*Travaux préparatoires*' of the convention fail to help the court in taking a stand on those grounds as they are utterly silent on the scope the authors intended to give to the words '*everyone*' and '*life*' and whether or not the article was applicable priori to birth.²² Hence the court has always shown extreme care in tackling the issue and refused in most cases to be pro-active as it has been on other rights, such as private life for instance. The question of the beginning of life has an impact on the question of abortion, or medical research on the fetus as well as the potential penalization of accidental miss carriage for instance.

Regarding abortion one of the most recent decisions from the court dates back to December 16th 2010 in *A. B. C. vs. Ireland* where the court refused to proclaim a right to abortion²³. It demonstrated at this occasion an unusual self-restrain in the sense that for once it placed the national margin of appreciation of member States and their traditional values (on the limits to fix to abortion) above both an undeniable European consensus in favor of a right to abortion and the individual rights of women.

²¹ European Court of Human Rights, *Vo vs. France*, 8 July 2004, dissenting opinion by judge Mularoni joined by judge Strážnická

²² European Court of Human Rights Website, '*Travaux préparatoires*' of the convention. It has to be pointed out that no document regarding the article 2 is available on the online version provided at <http://www.echr.coe.int/library/COLENTravauxPrep.html> (consulted on 11 July 2013)

²³ European Court of Human Rights, *A. B. and C. vs. Ireland*, 16 December 2010

Regarding the beginning of life and the status of an embryo or a fetus, the decision of the court not to take any stand on the question has been made particularly clear in the case *Vo vs. France* in 2004²⁴ when the court stated '*Having regard to the foregoing, the Court is convinced that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention*'.²⁵ It does not call for much comments, only further proves how the court can be cautious when it comes to the diversity of the core values of western democracies, one may say that the court is even deferential at times. It is however interesting to note that out of the seventeen judges composing the grand chamber in that case, ten of them have either emitted a separate or a dissenting opinion; dissenting opinions being emitted by the judges from Slovakia, San Marino, and Germany which shows that this issue is very controversial and is not the result of a geographically identifiable conception of life.

2. Lower limit of the spectrum, the definition of the end of life

Regarding the end of life the most topic case is arguably the case of *Diane Pretty vs. United Kingdom* in 2002. Diane Pretty was enduring for several years a motor neurone disease and although she had her full mind she was completely paralyzed and asked the United Kingdom's government the possibility for her husband to assist her into committing suicide without any risk of criminal prosecution against him. She argued that in the name of a right to a decent life she had the right to die. After having exhausted the local remedies and been turned down by the United Kingdom she went in front of the European Court of Human Rights where she was turned down again when the court refused to recognize a right to die.²⁶ She eventually died eleven days after the court's decision. Even though several countries of the Council of Europe have legalized the possibility to obtain euthanasia it is interesting to note that in *Pretty vs. United Kingdom* there was no dissenting opinion and the court's refusal to recognize a right to death was unanimous '*The Court accordingly finds that no right to die, whether at the*

²⁴ European Court of Human Rights, *Vo vs. France*, 8 July 2004 paragraphs 82, 83, 84 and 85

²⁵ European Court of Human Rights, *Vo vs. France*, 8 July 2004 paragraph 85

²⁶ European Court of Human Rights, *Pretty vs. United Kingdom*, 29 April 2002.

hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention'.²⁷ Those issues regarding the exact meaning and the content that is to be given to the right to life are much disputed across Europe and the legislations widely differ from one member state to another.

It is very helpful to consider this limit when it comes to hostage takings because this lower and vague limit of the right to life, the refusal of the court to decide whether or not a fetus deserves the full protection of article 2, or the refusal of the court to decide if States have a positive duty to protect or not a weakened person from his/her relatives regarding euthanasia, show how cautious can the court be when it comes to defining the subjects of the right to life. It will come as no surprise to see how the court will eventually conveniently omit to discuss the status of a hostage and its right to life, as it is almost as polemical an issue as the status of the embryo or the question of euthanasia.

The upper limit of the spectrum remains however to be seen and how the governments argue they can indiscriminately use lethal force, under certain circumstances, even against innocents, without breaching the convention.

C. Depriving a citizen of its life without breaching the convention: how to?

It is interesting to linger on the eventual conditions under which the death of a citizen could occur without having a breach of the article 2 by the respondent member state and see if, for the purpose of this master thesis, the hostage and the hostage takers, and in a broader sense a hostage taking situation could fit in one of those limited 'scenarios'. Under those the article is not breached if and only if the State has used the strict minimum amount of lethal force required to the achievement of one of them.

²⁷ European Court of Human Rights, *Pretty vs. United Kingdom*, 29 April 2002 paragraph 40.

1. The upper limit of the spectrum: The deprivation of life in application of death penalty

The first of those scenarios where the use of lethal force would not be incompatible with the article two of the European Convention on Human Rights is “*in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law*”. It also marks the clearest ‘legal’ interference with one’s life by a member State that is still regarded as legal on the sole basis of article 2. However the study of this limit if still considered useful, is more theoretical than practical, as death penalty has been abolished in times of peace and war by protocols 6 (abolition of death penalty in time of peace) and 13 (abolition in time of war as well).

This provision of article 2 has lost almost all (if not all) its values as death penalty has been abolished in times of peace as well as in times of war by the protocol 13 of the European Convention on Human Rights. Nevertheless for the purpose of the current study it has to be pointed out that Russia is the only country with Azerbaijan, which did not even signed it, Poland and Armenia signed it without ratifying it this far.²⁸ But to underline how the right to life can be a much disputed right, it has to be said that France waited until 2007 to ratify a protocol signed in 2002 when death Penalty has been abolished in law in France since 1981. As soon as it touches to a core feature of national sovereignty, States tend to become very careful before ratifying anything hence France waiting for the approval of the ‘*Conseil Constitutionnel*’ (the French constitutional court) before ratifying it.

Is it however even possible to argue that the death of a hostage during the Nord-Ost siege was in application of a punishment provided by law after a lawful and fair trial? It appears rather surrealistic regarding the hostage status, as well regarding the hostage taker as no trial had taken place before the assault. Hence it shall be admitted that the death of a hostage or a hostage taker resulting from an assault by governmental forces

²⁸ It has to be pointed out however that Russia passed in 2010 a moratoria suspending capital punishment for an indefinite period of time.

to end a hostage taking situation is not due to a use of lethal force in execution of a capital punishment (banned all around Europe) and then does not escape from the scope of article 2 through this mean. It has to be agreed then that the hostage is not located either at the end of the scope of situations covered by article 2, but somewhere in the middle, probably between law enforcement situations and counter terrorism.

2. The absolute necessity criteria required for the use of lethal force and the standard of proof beyond all reasonable doubt

Beside the fact that lethal force must have been rendered absolutely necessary²⁹ (which is a very much disputable qualification in a hostage crisis as it usually only depends of the appreciation the crisis-cell has of the situation at a given time), the other exceptions to the quasi-absolute prohibition of the deprivation of life are listed in the second paragraph. The problem is to underline the intention of the authors of the convention regarding those exceptions. Indeed for instance deprivation of life would not be a violation of article 2 in defense of any person from unlawful violence. But it has to be asked whether or not the deprivation only concerns the life of the author of the said ‘unlawful violence’ or if it applies to any life. To take an example, is the convention violated if to protect an innocent citizen X from the ‘unlawful violence’ committed by citizen Y a member State accidentally deprives an innocent citizen Z of his life? The same question could be raised if the purpose followed by the authorities is either to effect a lawful arrest or to quell a riot or an insurrection. This question is of the essence when it comes to hostage takings situations since innocent’s casualties are unfortunately common and sometimes extremely high.

To appreciate a violation of article 2, the Court usually asks the applicant to prove the violation “beyond all reasonable doubt”. Nevertheless in general the burden of proof has been rendered more flexible by the court *‘To assess this evidence, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow*

²⁹ European Court of Human Rights, McCann and others vs. United Kingdom, 27 September 1995 paragraph 149

from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact'.³⁰ Furthermore the court has clearly shown that the attitude of the parties regarding the gathering of the pieces of evidence itself participates to the concordant inferences. On one hand in *Kaya vs. Turkey* the applicant did not come to the meeting with the delegates from the commission who came in Turkey to investigate and it reduced the efficiency of the arguments he put forward in front of the court.³¹ On the other hand in the case *Isayeva vs. Russia*³² where there was a lack of cooperation of the government, which refused to disclose a certain number of information, it was considered prejudicial to its defense by the court. The same happened in *Ergi vs. Turkey*.³³

3. Procedural aspects of the right to life

There is as well a procedural aspect with the right to life, the necessity to launch an effective investigation after a deprivation of life by a state agent. It aims at assessing of its lawfulness and condemning the persons responsible if proven unlawful.³⁴ This aspect is as well important in the Nord-Ost siege as the applicants complained of the inefficiency of the investigation led by the Russian prosecutor. To an extent it becomes a very important notion since serious and public investigation are close to non-existent when it comes to facts dealt by secret services. After forty years for instance, no one has been held responsible by the German authorities for anything in the Munich Massacre that has been shown previously in this thesis as a terrible disaster marked by numerous human mistakes. One of the many reasons that could explain such a deafening silence is the fact that almost all the hostage takings related documents are classified for decades before being available to justice. In most cases prescription has covered the events since then.

³⁰ European Court of Human Rights, *Ireland vs. United Kingdom* 18 January 1978, paragraph 161

³¹ European Court of Human Rights, *Kaya vs. Turkey*, 19 February 1998

³² European Court of Human Rights, *Isayeva vs. Russia*, 24 February 2005

³³ European Court of Human Rights, *Ergi vs. Turkey*, 28 July 1998

³⁴ European Court of Human Rights, *McCann and others vs. United Kingdom*, 27 September 1995, paragraphs 138-140

Finally another very interesting point when it comes to hostage takings and secret services, in *Khashiev and Akaïeva vs. Russia* the court stated that it is not to the defending government to decide unilaterally whether or not certain documents requested by the Court are or are not relevant to the case. It also took note that the government referred in its observations to documents undisclosed to the court. The court concluded by stating that inferences can be drawn from the Government's conduct in this respect.³⁵

The final question that has to be asked is: if the hostage's deprivation of life is not susceptible to evade the scope of article 2 through its first exception, can it escape it through its second and third exceptions? Arguably one could say regarding the hostage takers that they have been killed during an attempt to quell a riot or an insurrection or during their lawful arrest. Even though, it remains to be proven that the amount of lethal force was the minimum required to achieve this goal in order not to breach the obligations of the State under article 2. It has been shown that this is improvable by governments, as the use of force is in most cases excessive if not ruthless against the hostage takers³⁶. The court has yet to pronounce itself on the matter as no relatives of the hostage takers (so-called terrorist) yet complained of the demise of their relatives in front of its jurisdiction. Regarding the hostage themselves the question is much more complicated. Are they the misfortunate actors of an insurrection or a riot triggered by the hostage takers that needs quelling? Can some of them be sacrificed in order to arrest or stop the hostage takers? If the answer to this last question is positive, one has then to wonder at what rate can their lives be lost before it becomes a violation of article 2. It is then necessary to briefly overview the differences between a counter terrorist and a standard law enforcement situation from the court's point of view.

³⁵ European Court of Human Rights, *Khashiev and Akaïeva vs. Russia*, 24 February 2005, paragraphs 138-139

³⁶ During the assault of the Japanese Embassy in Lima, Roli Rojas was executed with several rounds shot in the head following a "take no prisoner order" according to the report of the Defense Intelligence Agency.

'Commando execution of MRTA hostage takers and "take no prisoners" order' Defense Intelligence Agency Information Report, 10 June 1997, paragraphs 2 and 5, available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB237/document1.pdf> (consulted on 11 July 2013)

D. A fundamental distinction between regular law enforcement and secret service involved types of situations

One global trend of the right to life as interpreted by the European Court of Human Rights when it comes to law enforcement situations is that focus is made on the perpetrators of a crime and not on the bystanders. The main reason behind that is that bystanders are very rarely involved in a law enforcement operation; there are very little if any casualties among the bystanders as they are not part of the operation itself. However one must keep in mind that accident happens, but as long as it is so minor and so scarce one cannot realistically expect the court to focus on the bystanders. The article 2 in its provisions clearly shows a neat focus on the perpetrators as its provisions states that right to life is not violated if lethal force is used “*In defense of any person from unlawful violence*” which means that the aim is to stop someone from perpetrating unlawful violence. But also ‘*In order to effect a lawful arrest or to prevent the escape of a person lawfully detained*’ demonstrate that the center of attention is the detainee or the suspect and no bystanders is mentioned.

However, if the bystander is not mentioned by the convention, should he be ignored by the Court? If in a hostage taking situation, from a pure law-enforcement perspective, one could analyze the situation as a standoff between police forces and criminals with bystanders in the middle. It has been demonstrated earlier in the thesis that this assumption is utterly wrong and profoundly detrimental to the hostage. The hostage is always at least an equal actor of the crisis. Even, though his options and his control over the situation are close to zero, he is no bystander; he is an actor against his will of the unfolding drama. One cannot consider that in 2004 in Moscow for instance there was a standoff between 40 Chechens and a few hundred member of the Russian army with over 850 bystanders. It would simply make no sense, as a bystander is, by essence, an unforeseen potential casualty whereas no one can say that the hostage is an “unforeseen” complication. Therefore the court and the convention cannot afford to ignore the hostage as it largely ignores the by-stander both in the texts and in practice.

One point should draw a particular attention when it comes to hostage takings: those situations are highly unusual and highly specific as it has been previously demonstrated, hence they often involve unusual response means, such as secret services as regular law enforcement officers are generally not able to handle such an explosive situation as a hostage taking.³⁷

However this has a relatively important impact on the hostages as the Court will show much more deference toward the accused government and will use a much lighter standard of scrutiny when unusual response means are used than when it faces a regular law enforcement situation, handled by regular policemen. It has to be questioned whether or not this stance of the court is favorable to the right of the applicants and if it is legally acceptable from a human right perspective.

One of the major decisions of the court when it comes to the right to life and the positive obligation to protect life placed upon States through the behavior of their police is arguably the case opposing the remaining members of the Osman family to the United Kingdom,³⁸ which set a landmark in the jurisprudence of the European Court of Human Rights. To sum up very briefly the facts of the case, mister Paget Lewis a British teacher had for a relatively long time a very strange behavior with one of his pupils, Ahmet Osman son of Ali Osman. Among other things he had his name changed to match his pupil's and had uttered various cryptic threats toward the Osman family. Despite a regular police investigation on his behavior he eventually went to the Osman's house and killed Ali the father. It was not disputed that there was a positive obligation from the United Kingdom to protect the lives of the people under its jurisdiction. Nonetheless the court in order to look for a breach of the convention went very deep into the study of the facts. It scrutinized whether or not the police officers had done everything that could have been reasonably expected from them to ensure the protection of the Osman's family, given the information they knew. Eventually the court recognized that the police had done as much as what could have been expected from them. It was not persuaded that at any stage the police knew or ought to have

³⁷ See the Munich massacre handled by regular street policemen.

³⁸ European Court of Human Rights, *Osman vs. United Kingdom*, 28 October 1998.

known that there was a direct, immediate and real risk on the Osman's. Consequently no breach was found. The court stating that a member State has '*not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction*'³⁹ clearly set a positive obligation to protect the right to life on the shoulders of member States.

But what matters here in the case is that after sixty paragraphs of facts, the Court did a very fact orientated analysis of the case between paragraph 113 and 122. Afterwards the Court concluded that, given the facts, the British law enforcement officers conduct had not led to any breach of article 2 of the European Convention on Human Rights. Even though concessions were made to the State by reminding that '*such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities*'⁴⁰ the court has not been deferential and has applied a very careful scrutiny based on facts before judging the case. This seems as a very rational and fair way of handling the case. However, when it comes to hostage takings, the Finogenov case is going to show that suddenly for a violation of the exact same right, under the motive that the court refuses to deal with counter terrorism and national security (which are among other concepts, very much disputable and disputed in democratic societies). Almost no fact-scrutiny will be exercised and the court will escape from its responsibility of dealing with the hostages' lives and the action taken by Russia, showing evident deference. The sole reason for this is that in the spectrum of situations covered by the right to life, the situation shifts from a normal law enforcement situation to a counter terrorist and highly sensitive political situation. In the Court's and State's opinion it leads the hostage to slide from a relatively well protected position to a 'no protection zone'.

³⁹ European Court of Human Rights, Osman vs. United Kingdom, 28 October 1998, paragraph 115

⁴⁰ European Court of Human Rights, Osman vs. United Kingdom, 28 October 1998, paragraph 116

E. A drift in the spectrum prejudicial to the hostage

As the chart below clearly illustrates, the drift of the Hostage's position from the duty to respect to the duty to protect is extremely prejudicial to the hostage and extremely convenient for the government and the Court. First, it gives a way for the Court to offload the problem of the Hostage to the State by sending him into the set of situations where the States are usually a relatively wide margin of appreciation and where the judges have little if anything to say.

It allows to avoid political issues and confronting human rights with a possibly stronger opponent the '*raison d'État*' and broader, the 'counter terrorism war'. Counter terrorism is a subject States still believe to be so intimately linked to their national sovereignty that no institution or legal body is entitled to discuss the legality and the legitimacy of their decisions made in that field.

Lower limit of the spectrum	Duty to protect	Counter terrorism situations	Law enforcement situations	Duty to respect	Upper limit of the spectrum
	Positive obligations Abortion / Euthanasia Wide margin of appreciation	Highly political Perpetrators de facto not protected by the court Little if any scrutiny from the court, high deference toward the member State Relatively wide margin of appreciation	Use of lethal force prohibited unless rendered absolutely necessary under limited exceptions, Perpetrator protected by the convention as well as bystanders High scrutiny from the Court	Negative obligations Abolition of death penalty Prohibition to interfere with one's life unless under very limited exceptions Very small margin of appreciation (if any) High scrutiny from the court, with no deference.	
		Hostage's position <i>de facto</i> according to the State with the blessing of the Court		Hostage's position <i>de jure</i> (As it should be)	

Spectrum of situations covered by the article 2 of the European Convention on Human Rights

However, this situation is very detrimental to the hostage as he shifts from the level of protection granted by the convention to any normal people under the member State's jurisdiction to the level of protection granted to alleged criminals whose stopping is not possible without the use of lethal force. It is a quite drastic, dramatic and unfair shift for someone perfectly innocent, 'guilty' of being taken as a hostage against the society he lives in.

One must wonder what differences there are between those two situations that would justify such deference and caution from the court. Is there any difference between the value of a regular citizen's life and the value of a hostage's life? Are the obligations of States regarding those two persons different? Is a hostage taker any different human being from any other 'criminal'? Are the secret services allowed anywhere in the convention much more freedom to deal with the individual's life than regular law enforcement officers? Would the court refuse to recognize a violation of right to life if during a regular law enforcement operation, for every single criminal neutralized three to four casualties occurred among innocent bystanders? Is the brand 'terrorism', used at the discretion of the State, a new alternative way for States to escape from their obligations under the European Convention on Human Rights and for the court a new way to escape its duty? All those questions seem to demand answers and justify by themselves the '*raison d'être*' of this master thesis.

The problem that States nowadays face with hostages is that those people are somewhere in the spectrum between the killing of somebody and the letting die of somebody. The hostage should be recognized and granted the same status and the same degree of protection as a victim of unlawful violence.

It must be understood that indeed it is very probable that, led by interests different from the sole will of getting as many hostages back alive as humanly possible, the State faces a very difficult choice⁴¹ and somehow has to violate the convention in one way or another if it does not chooses to place the hostage's life above any other interest. It seems unfortunately rather unrealistic and utopic to demand that priority be always given by the State to the hostages' lives. However one can wonder whether or not the Court should allow itself, given the circumstances and the absolute reluctance of State to have their counter-terrorist measures monitored, to simply give up and turn a blind eye on the hostage's condition.

⁴¹ The European Court of Human Rights qualified the decisions to be made in such a time of hostage crisis as '*agonising decisions*'.
European Court of Human Rights, Case of *Finogenov and others vs. Russia*, 20 December 2011, paragraph 213

After this brief overview of the right to Life as interpreted by the European Court of Human Rights it is necessary to plunge into the first and single decision taken this far by the court regarding the right to life of hostages, the case opposing the relatives of the hostages killed in the rescue operation launched by the Spetznatz to try to end the Moscow Theater Crisis.

Chapter 3: Finogenov vs. Russia, the legal coronation by the European Court of Human Rights of the aggravating condition of hostages

October 23rd 2002, began one of the biggest hostage takings in modern day history when forty members of a Chechen commando took over the Nord-Ost Theater in Moscow and held hostage around 850 spectators, men, women, children, foreigners and Russians alike. The extent of this massive hostage taking has only been outmatched once since then, when another Chechen commando stormed the Beslan School number one in 2004 in north Ossetia and held hostage 1,100 people. It is worth mentioning it at this stage since this far the European Court of Human Rights has only issued a judgment on the Moscow Theater Crisis (also known as the Nord-Ost Siege) in the case *Finogenov and others vs. the Federation of Russia*. Nevertheless a number of complaints have been lodged in 2007 against the Federation of Russia for its responsibility in the event of Beslan in 2004 under the name of *Tagayeva and others vs. Russia*. The decision of the court is still to be expected and could shed a new light on the following analysis.

The chart previously proposed highlights what is missing on the case, the discussion and arguments of the Court and the Government to justify the drift of the hostage in the spectrum from the protection granted by the duty to respect, to the relative leeway let to States in their counter terrorism policies.

The decision *Finogenov and others vs. Russia* will be the core study of this chapter; its analysis will be done from a legal point of view. Nonetheless considering the number of mass hostage takings that Russia faced during the past twenty years it will be necessary to put in perspective the events of the Nord-Ost siege and its legal consequences with similar events that were not necessarily controlled by the European Court of Human Rights or where no legal literature yet exists. A number of questions will pop up during

this chapter; as far as it is possible this thesis will try to provide an answer to them. However sometimes it will only be possible to offer discussable theories and it will be up to the reader to make up his opinion on the subject. The Finogenov case is a very interesting starting point in that prospect since it raises often more questions than it provides answers.

A. An indisputable shyness of the Court in the fact analysis

For the sake of clarity the fact studying will be divided into two parts, on one hand the facts that are agreed upon by all parties of the case and on the other hands the facts that remain surrounded by shadows and which are disputed by the parties. One cannot assert for sure the truth of the second category; even the European Court of Human Rights could only work on assumption as the Russian Authorities chose not to cooperate by shedding full light on those events. It's is of the essence to note that the facts constitute a body of concurring indicia that tends to demonstrate the lack of concern of the Russian authorities regarding the hostages' fates.

1- Agreed-upon Facts

The facts of the case are still much disputed even a decade after the events took place and the European Court of Human Rights itself recognized that it could not provide an answer to everything. What seems accepted for facts now by both sides is that around forty to fifty Chechen hostage takers entered the Dubrowka Theater during the Act II of a sold out Nord-Ost play (a Russian musical theater production) at around 9 PM on the 23rd of October 2002. The theater is located about four kilometers away south east of the Kremlin in a zone normally highly secured by the police. The hostage takers took between 850 and 900 hostages (the exact number is unknown since not all the surviving hostages reported at the authorities after their release). The commando held them at gunpoint for around 55 hours. Most of the females among the hostage takers wore explosives belts. Their demand was mainly political and of a military nature since they wanted the withdrawal of the Russian armed forces from Chechnya and the end of the second Chechnya War. They also wanted to talk with political leaders.

It is confirmed that several people were shot or executed by the hostage takers during the siege it is however unclear whether or not those persons were hostages as such. Indeed several persons were able to enter the building long after the siege began.

The hostage takers accepted food and water to satisfy the basic needs of their hostages. They also released about two hundred hostages shortly after the siege, mainly foreigners, pregnant women, kids, Muslims, and some people requiring health treatment⁴².

It is agreed by everyone that the situation lasted until the early morning of the 26 October 2002 when at about 5-5.30 a.m an unknown narcotic gas was pumped in the main auditorium by the Russian security forces. Nonetheless the means of this pumping or the content of this gas are still unclear.

After that, the Russian armed forces stormed the building and the rescue operation as such began. It is agreed upon that all hostage takers died at one point between the pumping of the gas and the end of the assault. It is also acknowledged that a little more than 120 former hostages died between the pumping of the gas and the next hours following the rescue operation. This is almost everything that is, more than ten years later, considered as hard truth by every party. The questions regarding the exact reasons of the death of the hostages and the hostage takers, the planning of the rescue operation, and numerous other details of the events are still very much disputed.

2. The Debated facts

First and foremost it is important to note here that the facts which are going to be laid down here are widely debated, the European Court of Human Rights gave its interpretation for some of them without being able to close the debate. Consequently the

⁴² 'Seven hostages freed in Moscow siege' BBC 25 October 2002 04:14 GMT available at: <http://news.bbc.co.uk/2/hi/europe/2359491.stm> (consulted on 11 July 2013)

author will try to present both versions and encourages the reader to make his own opinion out of it.

The first question is related to the nature of the chemical agent used by the Russian authorities. The Russian always refused to disclose the formula of the gas they used despite being explicitly questioned about it by foreign embassies in Moscow shortly after the events, and later by the European Court of Human Rights. On one hand, post-event analyses by medical experts assess it to be a narcoleptic gas or incapacitating gas, that could derivate from Fentanyl. On the other hand, the medical teams who took part in the rescue operation considered it to be a morphine derivative at that time. Some foreign pieces of expertise state that it could have been a nerve gas, as the international media assumed at one point. However, it would have been a massive breach of international conventions. Yuri Shevchenko, Russia's Health Minister later admitted the substance was based on a derivative of Fentanyl. Fentanyl is a man made opioide like morphine, a common painkiller; nevertheless several different foreign counter-expertise highly questioned that Russian statement.

A second question is related to the means used to pump the chemical agent in. Some hostages eye-witnessed the pumping of the gas, however their reports differ significantly. Some hostages said that the building ventilation system was the vector, other that it emerged from a hole in the wall and others that it emerged from under the main scene. Nonetheless the one piece of information that is certain is that both hostage and hostage takers saw the agent or at least understood what was happening. Some witness said it looked like the smoke of a fire, other that it looked like a green caustic smoke. It is also known for a fact that it scared a lot of hostages as some of them called in a state of panic the local radio about the gas with their cell-phones. They begged for help when they saw the gas.⁴³

⁴³ 'Hostages speak of storming terror' BBC NEWS World Edition, Saturday 26 October 2002, available at: <http://news.bbc.co.uk/2/hi/europe/2363679.stm> (consulted on 11 July 2013)

A third question aims at shedding light on the reason that caused the death of around 130 hostages during the rescue operation. It is one of the most debated fact but most of the victims are certain that the gas is the main factor responsible for those deaths. The Russian authorities however always defended that the gas was inoffensive and hence those people would have died of exhaustion after three days of stress, some of them being in a state of extreme weakness, or having a poor medical condition according to them. It is yet impossible to assess anything with certainty without the formula of the chemical agent used. The Court made its own assumption on that matter which will be explained later on. It has to be underlined though that those death have to be linked somehow to the events. And, since those death are not imputable to gun fire or explosions⁴⁴ an alternative reason has to be found.

Another troubling point is that there still is a list of sixty-seven names, all of them were hostages but no one knows what happened to them. They were not on the hospital listings, nor on the official death toll. It has to be considered that they could have somehow escaped and never reported to the authorities or that they could have met their end during the crisis.

Moreover many observers wonder what exactly happened to the hostage takers. To this day nobody really knows. It is agreed that at least 39 to 41 of them died. The procurator's report states that 52 hostage takers stormed the building. Furthermore Mr. Ign., a member of the crisis cell informed the journalists that: *'the special squad had stormed the building and killed some terrorists and arrested others'*.⁴⁵ Additionally the BBC reported that: *'A handful of surviving fighters were led away in handcuffs. Authorities later said that others might have had escaped'*.⁴⁶ Nevertheless various versions of the facts assess that all 41-hostage takers were killed. Still it does not match

⁴⁴ 'Gas 'killed Moscow hostages'' BBC News World Edition, 27 October 2002, available at: <http://news.bbc.co.uk/2/hi/europe/2365383.stm> (Consulted on 11 July 2013)

⁴⁵ European Court of Human Rights, *Finogenov and others vs. Russia* paragraphs 23 and 174

⁴⁶ 'How special forces ended siege' BBC News World Edition, 29 October 2002, available at: <http://news.bbc.co.uk/2/hi/europe/2363601.stm> (Consulted on 11 July 2013)

with the 52 hostage takers who stormed the building, according to the Moscow procurator.⁴⁷

A controversy exists as well on whatever really happened during the rescue operation. This point is the most debated in front of the Court and will receive the most attention from the judges.

Finally it is worth mentioning at this stage as well that several alternative theories exist to explain the hostage taking. Some may call that conspiracy theories, most of them have little, if any, beginning of proof to support their claim. However, it is crucial to keep them in a corner of one's mind as they offer different interesting and alternative reading of the hostage's condition. The most debated of those theories in Europe is that the FSB would have known and staged the hostage taking. It comes from Anna Politkovskaya a Russian journalist who interviewed a Chechen man named Khanpash Terkibayev, he was a man close to the Kremlin's official and close to the Chechen's separatist movement as well. He claimed to be part of the commando that stormed the Dubrovka Theater on October 22nd 2002 and that the FSB manipulated the terrorist into organizing this hostage taking. He would have led the terrorist and been the only one to escape before the storming according to his testimony. What followed is however at least a troubling set of coincidences: On April 17th 2003, Sergei Yushenkov, a Russian politician is shot dead in Moscow. Shortly after, Alexander Litvinenko, a former FSB agent living in London, claimed to have passed to Yushenkov a file on Terkibayev only a few days before he was shot. On October 2003 Terkibayev dies in a car accident in Chechnya. Anna Politkovskaya found it extremely well timed as he was supposed to speak with the CIA on the morning of his accident (The CIA was investigating the events of the Nord-Ost siege as some American citizens were among the hostages and even on the death toll). Late 2006, Anna Politkovskaya is shot dead down her apartment. A few weeks later, Alexander Litvinenko is poisoned with

⁴⁷ 'Moscow theater Siege: Questions remain unanswered' BBC News Europe, 24 October 2002, available at: <http://www.bbc.co.uk/news/world-europe-20067384> (Consulted on 11 July 2013)

Polonium and dies in London.^{48 49} Proof is too scarce to make this theory trustworthy and all its actors have found death in criminal or accidental conditions. However, it is impossible to discard it completely. It is important to know of its existence since this chapter will be an attempt at defining government's obligations regarding the right to life of the hostages and the implication of a government into staging a hostage-taking would be, if proven, a terrible infringement of many human rights conventions and principles. On a side note, it would not be the first time that a government would be 'accused' of staging a hostage taking or of facilitating its occurring.⁵⁰ According to Vyacheslav Izmailov (footnote 47) the FSB also knew of a hostage taking incoming from at least two sources (Achyad Baisarov and Apti Batlov).

Now that a basic set of events has been retraced, it is necessary to raise a number of legal questions regarding these events and the interpretation the European Court of Human Rights gave of them on December 20, 2011.

B. A disputable decision regarding the right to life of the hostage

The Court had to focus on the right to life, as it was the main ground raised by the applicants. According to them their relatives '*had suffered and died as a result of a storming conducted by the Russian security forces*'.⁵¹ The application of article 2 in general and more specifically throughout the Finogenov case does not seem to appreciate the difference between the hostage and the hostage takers. And, according to what has been previously shown regarding the spectrum there is a need for analyzing

⁴⁸ Shaun Walker 'Passion, deadly secrets and betrayal in Putin's Russia', The Independent, 21 April 2009, available at: <http://www.independent.co.uk/news/world/europe/passion-deadly-secrets-and-betrayal-in-putins-russia-1671597.html> (Consulted on 11 July 2013)

⁴⁹ Vyacheslav Izmailov "Nord-Ost": Unpublished details about the terror act' Nord-Ost Website, 7 June 2007, available at: http://www.nord-ost.org/today/nord-ost-unpublished-details-about-the-terror-act_en.html (Consulted on 11 July 2013)

⁵⁰ Two guerrilleros were arrested by the Army on 17 October 1985, a few weeks before the attack of the Palace of Justice in Bogota on 6 November 1985. They were drawing plans on how to attack the palace of Justice.

Martin Prieto 'Muerte en el Palacio de Justicia' EL PAÍS, 17 April 1986 (in Spanish) available at: http://elpais.com/diario/1986/04/17/internacional/514072805_850215.html (Consulted on 11 July 2013)

⁵¹ European Court of Human Rights, Finogenov and others vs. Russia paragraph 165

the place and the protection granted to the hostages' lives regarding the chemical agent, the decision to storm the building and the planning of the medical evacuation.

The analysis of the decision will be divided into three distinctive parts. First and foremost, the questions related to the gas, as it is and has been arguably the biggest threat for the right to life of the hostages. Secondly, light will be shed on the decision to storm the building and the conduct of the negotiations. Finally it is important to discuss the rescue operation and the organization of the medics as the last facet of this analysis.

1. The chemical agent and the law

The first problem is, if as the government claimed the gas was not responsible for the death of the hostages and those had died of natural causes, then there was no ground on the basis of article 2. However, how is it possible to determine whether or not the gas is responsible for those deaths without revealing its exact formula? The Court admits that there may be legitimate reasons for keeping the formula of the gas secret.⁵² Arguably those '*legitimate reasons*' can be questioned from a human rights perspective at least. Surely counter-terrorist experts will stress how important it is to keep this formula a secret, to protect the state's scope of responses from an ever-evolving terrorist threat. It is commonly admitted that this threat has neither shape nor head and adapts rather quickly to the western defenses and systems of response. However, everyone now knows that Russia will not hesitate to use a gas in a hostage situation. Everyone also knows that the one protection against an incapacitating gas is a mask. And hence the protection is already common knowledge. Furthermore any gas that could be used and bypass a mask would most certainly be an internationally prohibited chemical weapon like Sarin gas that pierces the skin and kills. Then what possible reason is there to keep the formula a secret if it is not a weapon? Is it to maintain a technological and scientific advancement over the rest of the western world (given the tragic results it can be doubted that it really is an advancement in counter-terrorism)? Or is it not to disclose that someone from the crisis cell or the government authorized the Spetznatz to

⁵² European Court of Human Rights, *Finogenov and others vs. Russia*, 20 December 2011 paragraph 200

use a lethal weapon (even maybe prohibited as a chemical weapon) against a civilian population? From a human rights perspective, if indeed the gas was harmless the Russian Authorities should cooperate fully with the European Convention on Human Rights and give as much details as possible in order to prove that they did not commit any interference with one's right to life protected under article two of the convention.

It is not for the European Convention on Human Rights to judge individuals as International Penal Law does according to Humanitarian Law.⁵³ ⁵⁴ Therefore the Court is not supposed to judge potential war crimes. If the formula of the gas was to prove that it is either a prohibited chemical weapon or at least's sufficiently dangerous a tool that the crisis cell could not ignore that it would massively kill hostages. However, without going that far nothing prevents from the Court from reversing the burden of the proof. It should be admitted that, given the circumstances, there is a body of concordant indicia tending to prove that the gas was a lethal weapon as it killed over a hundred hostages. Therefore the Court should have condemned Russia for a breach of article 2.

The stand taken by the Court on that matter is very much disputable for a Human rights defender. The European Court of Human Rights had then and there a unique opportunity to set basic Human rights rules in the field of counter terrorism. But also, on the use of dangerous weapons against weakened population; and it seems that it missed it. The minimum the Court could have done is to apply its former jurisprudence *Isayeva vs. Russia*⁵⁵ where the lack of cooperation of the government, which refused to

⁵³ It has to be reminded that in international law and in the European Convention on Human Rights there is the *lex generalis*, human right law that applies in times of peace, and the *lex specialis*, the humanitarian law that is only applicable in times of war and supplants human rights law as it is specifically designed for wartimes. However even though the Russian politics always say they are at war with the Chechen' if it was internationally recognized that there is a situation of internal conflict there, it would trigger the humanitarian law and people committing war crimes on both sides could be prosecuted (by the International Criminal Court).

United Nations Treaty Collection, Rome Statute of the International Criminal Court, entry into force on 1 July 2002, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=XVIII-10&chapter=18&lang=en (Consulted on 11 July 2013)

⁵⁴ The notion of International Humanitarian Law as *lex specialis* of wartimes has emerged with the International Court of Justice's opinion on the legality of the threat or use of Nuclear weapons, July 8 1996, available at: <http://www.icj-cij.org/docket/files/95/7495.pdf> (Consulted on 11 July 2013)

⁵⁵ European Court of Human Rights, *Isayeva vs. Russia*, 24 February 2005

disclose a certain number of information, was considered prejudicial to its defense by the Court. The same happened in *Ergi vs. Turkey*.⁵⁶ But in the case at hand not even, the Court is very deferential in the current case and simply refuses to deduce anything from Russia's refusal of cooperation. As it has been previously shown in the "disputed facts", there are many shadowy areas surrounding the Nord-Ost siege. It seems that it is a habit to have murky crime scenes when secret services from any country are involved in anything. A human right defender though would expect the Court to pierce through the mist as far as possible in order to enforce human rights on fields where they receive generally little, if any, consideration. In that prospect one can hope that the Court will fully take its role as spearhead against human rights abuses in the Beslan case that it is about to rule. It is of the essence that it uses every means at its disposal to make full light on those events and hence guarantee that the people under Russia's jurisdiction, and by extent under the whole Council of Europe member States' jurisdiction, taken as innocent hostages, will be given every possible chance of survival. The Court should condemn the use of any means that would significantly put them further into harm's way. This gas had never been used officially by the Russian authorities; at best it has been tested into a laboratory. The use of gas poses an interesting set of questions to counter-terrorist experts and human rights defenders: Can human beings be considered as 'guinea pigs'? Can a '*potentially fatal*'⁵⁷ new set of weapon be tested for the first time on a crisis situation where over eight hundred innocent hostages are held at gunpoint without violating article 2? As a State is going to purposely put some of the people, whose life he is bound to protect, in harm's way appears to be a formidable bet on the lethality of its new tool.

Second question of a more philosophical value, can a hostage be considered by a government as a perishable value that is tradable against political influence, international prestige and so on and so forth without breaching article 2? As the defense claimed and the newspaper of the time report, if Vladimir Putin, the head of state at that time, had any personal concern for the lives of the hostages he did remarkably well in

⁵⁶ European Court of Human Rights, *Ergi vs. Turkey*, 28 July 1998

⁵⁷ European Court of Human Rights, *Finogenov and others vs. Russia* 20 December 2011 paragraph 202

hiding it. He kept claiming that the first aim was to ‘*prevent the erosion of the prestige of Russia on the international arena*’.⁵⁸ The public prosecutor later used the exact same formula to justify his refusal to investigate into the government’s action. And the Court was very deferential toward Russia all along. The Court also stated that by themselves these declarations were insufficient to uphold the allegations of bad faith. However, everything would suggest according to the Court that: ‘*one of the authorities’ main concern was to preserve the lives of the hostages*’.⁵⁹ It seems that this point is particularly weak in the Court’s reasoning for several reasons. First of all, the Court has absolutely no idea of the nature of the chemical agent used. Secondly, this agent has never been used during a mass hostage-taking situation. Consequently, it seems rather disturbing when hostages are used as ‘guinea pigs on a live scale experience’ to consider that the main concern was to protect them. Thirdly, the medical rescue as it will be shown later has been a massively unprepared failure that contradicts by itself the concern of the authorities for the hostage lives.

The lack of concern for the hostage lives is all the more sticking by knowing the precedent of the 1996-1997 hostage taking in Peru. Seven hundred persons were taken hostages by fourteen hostage takers in the Japan Embassy of Lima. The Peruvians through hard negotiations obtained the release of 628 hostages over 126 days. They eventually managed to save 71 of the 72 remaining hostages during an assault prepared and coordinated with the help of the British SA on April 22 1997, killing the fourteen terrorist and loosing two special forces agents. But at one point when around 400 hostages remained, the Peruvians asked the American if it was wise to use Fentanyl. The American response was crystal clear, it would be such a high risk for the hostage’s lives that to guarantee the safety of 400 hostages the Peruvians would need to have 1,000 doctors on the spot of the operation ready to intervene within minutes after the delivery of the gas.⁶⁰ This is common knowledge and the Russian authorities should

⁵⁸ European Court of Human Rights, *Finogenov and others vs. Russia* 20 December 2011 paragraphs 100, 167 and 218

⁵⁹ European Court of Human Rights, *Finogenov and others vs. Russia* 20 December 2011 paragraph 218

⁶⁰ European Court of Human Rights, *Finogenov and others vs. Russia* 20 December 2011 paragraph 172

never even have considered less than 2,000 doctors for about 900 hostages if they were to use Fentanyl. The reality proved to be different however.

Undoubtedly there is a body of concordant indicia that tends to prove the Russian lack of concern for the hostage's lives regarding the use of the gas that the European Court of Human Rights simply chose to disregard.

In the Finogenov case the Court finally accepted that the gas was closer to '*a non lethal incapacitating weapon than a firearm*' just before stating that it was '*at best potentially dangerous for an ordinary person, and potentially fatal for a weakened person*'. The Court then followed by saying that the gas '*remained a primary cause of the death of a large number of the victims*'.⁶¹ It appears clearly that the Court refused to decide whether or not a '*lethal force*' had been used against a civilian population, and this is, from a human rights perspective, a regrettable stance of the Court. Indeed the stand the Court took is very much disputable. Without the formula of the gas it seems tremendously difficult for the Court to assess the dangerousness of the chemical agent. Consequently it would seem only legitimate and respectful of its previous jurisprudence⁶² that the gas should be presumed a lethal weapon unless the contrary being proven. It can be done at any time by the government by disclosing the exact formula of the gas so that full light can be made on it, and the appropriate legal consequence be drawn. It is only common sense to admit that if a firearm is a lethal weapon its use can lead to a killing or a lawful arrest, by immobilizing or disarming a suspect with a shot in the hand the arm or the leg that is most probably not going to kill him if executed properly. A weapon does not need to have a hundred percent chances of killing to be lethal; a reasonable chance to kill should be sufficient to consider it as a lethal weapon. A very interesting study on the impact of Chemical Incapacitating

⁶¹ European Court of Human Rights, Finogenov and others vs. Russia 20 December 2011 paragraph 202

⁶² cf. supra Isayeva vs. Russia and Ergi vs. Turkey

Weapons have proven that their capacity to kill equals regular lethal weapons such as hand grenades for instance.⁶³ However the Court decided otherwise.

According to the author, it is an urgent necessity for the Court to reverse the burden of the proof on matters involving means used by secret services and counter terrorism. It would give the State two options: First, to protect its secret services and expose itself to a tougher condemnation from the Court and grant larger and easier compensations to the victims or second: to make full light on every decision and allow the Court to make a proper and informed decision, eventually discarding the government's responsibility. Incidentally it would reinforce the rights of the victims by making their claims easier to prove which is always particularly difficult when they have no access to pieces of evidence because of the involvement of some secret-service.

After having shown that the findings of the Court regarding the gas and the Russian alleged-concern for the lives of the hostages are more than disputable it is necessary to now focus on the decision-making process that led to the storming of the Dubrovka Theater and its tragic ending. The consequences, of this decision-making process, on the right to life of over nine hundred innocent people are something that requires the most careful appreciation and scrutiny by a legal monitoring body.

2. The decision-making process and the storming of the Dubrovka theater

To the opinion of the author, what has to be taken into account here is the time frame of the events and the decision-making process. There are very few situations where a human being or a group of human beings have to take quick decisions based on fragmental information that will have an almost immediate impact on so many lives. Mass hostage-taking situations are one of them and the Court is expected to monitor this part of the process as much as any other.

⁶³ Lynn Klotz, Martin Furmanski and Mark Wheelis, Beware the Siren's Song: Why "Non-Lethal" Incapacitating Chemical Agents are Lethal available at: http://www.fas.org/bwc/papers/sirens_song.pdf (Consulted on 11 July 2013).

The hostage and hostage takers both saw the gas, understood that the raid was incoming and yet the Russian authorities decided to wait between 15 and 60 min between the pumping of the gas and the storming of the building. Indeed, *'The gas was pumped in for 30 minutes before a force of 200 Spetsnaz began their full-scale assault, sources in the force later told Russia's Izvestiya newspaper'*.⁶⁴

It gave ample time for the hostage takers to blow the whole theater up should it be their desire. However, the hostage takers did not choose this path. Instead they decided to fight back the assault team with 13 machineguns and 8 handguns. They could have fired those weapons upon the hostages yet no hostage died of a bullet injury in the course of the rescue operation. This would have at least given some credit to the government's thesis that the hostage takers were 'bloodthirsty terrorists' who clearly had the intention to kill their captives and that an armed assault was the 'lesser evil'. However, this claim falls flat as well.

It has to be carefully considered if the Russians knew the Chechen commando would not blow everything up or if they took a formidable gamble with the hostage's lives by waiting for the gas to act. If they knew that they would not kill their hostages, the only remaining conclusion is that, as the applicants claimed, their aim was not as much to save the hostages but to terminate the standoff and to shoot every single hostage taker in the building. However, if they really thought honestly at the time that their *modus operandi* was the most humane solution to terminate the siege and release as many hostages as possible, how could they take such a risk of using a gas that required dozens of minutes to take effect, that was visible by everyone inside the theater, and how could they wait for so long before letting the Spetsnaz proceed with the storming? It was a formidable gamble to believe that the Hostage Takers would not kill the hostages as

⁶⁴ 'How special forces ended siege' BBC News World Edition, 29 October 2002, available at: <http://news.bbc.co.uk/2/hi/europe/2363601.stm#graphic> (Consulted on 11 July 2013)

soon as they understood what was coming. And they understood immediately what was coming.⁶⁵

‘When the gas penetrated the auditorium Mr B. (the leader of the terrorists) ordered that the windows be smashed for better ventilation. Those terrorists who were in the auditorium started to shoot around; they appeared to be aiming at the windows. The women terrorists sitting among the public did not try to blow up the explosives; they covered their faces with handkerchiefs and lay on the floor with the hostages. Within 10 minutes most of the people in the auditorium were unconscious.’⁶⁶

To give some perspective to this analysis, it is deemed very important to look back at the history of Chechen hostage takings. As a matter of facts in all cases, the Chechens almost never executed any hostage (who did not try to escape) and never committed suicide themselves despite countless declarations of martyrdom.

On June 14th 1995 Shamil Basayev’s led a commandos of a hundred heavily armed men and seized 1,500 hostages in the Hospital of Budyonnovsk. The Elite Russian Alfa team tried to launch an assault that proved to be unsuccessful and led to the death of 50 hostages used by the Chechens as human shields. After a five-day siege, Basayev and his men left the place with 150 ‘voluntary safe-passage hostages’ used as a life insurance policy against the Russians. All the hostages were liberated by Basayev, his commando was welcomed as heroes once they returned home, the Russian were forced to make political concession such as getting involved in peace talks with the Chechens and it remained a traumatizing and humiliating experience for the Russian authorities and their elite Alfa team.⁶⁷ For the record, the same team took part in the assault of the

⁶⁵ ‘The applicants insisted that both the terrorists and the hostages were capable of smelling and seeing the gas’ European Court of Human Rights, *Finogenov and others vs. Russia* 20 December 2011 paragraph 22

⁶⁶ European Court of Human Rights, *Finogenov and others vs. Russia*, 20 December 2011, paragraph 44

⁶⁷ Adam Dolnik and Richard Pilch ‘The Moscow Theater Hostage Crisis: The Perpetrators, their Tactics, and the Russian Response’ in *International Negotiation* vol. 8, no. 3 (2003) p.579 available at:

Nord Ost Theater. However, it has to be pointed out that Basayev did not execute any hostage and took the first opportunity he had to end the operation preserving his life and his men's.

On January 9th 1996 Salman Rudayev took over 2000 hostages in a hospital of Kizlyar in Dagestan with the help of a commando of 250 heavily armed Chechens. They were granted free passage with another group of 'voluntary safe-passage hostages' (143) but were ambushed on their way home by the Russians and had to retreat to a nearby village taking an additional 25 hostages there. A weeklong siege started there and the Chechens completely outgunned out outnumbered managed somehow to hold off a Russian assault due to a lack of coordination on the Russians' side (They received friendly fire from one of their own helicopter). It triggered two additional hostage takings led by Chechens with the sole demand to end the siege of Rudayev's positions. The first one took place on January 16th 1996 when the Eurasia (a Black Sea ferry) and its 255 passenger was hijacked by Chechens who threatened to blow it up unless their demands were met and a Russian power plant was also seized in Grozny with 30 hostages for the same motives: the end of Rudayev's siege. The Russian's moral was so low that members of the Alpha team just left the siege by their own means, and it allowed the Chechen's to escape. The hijackers' of the Eurasia immediately terminated their action and surrender to the Turkish authorities.⁶⁸ Again, all of the Chechen commandos who had made declarations of martyrdom chose to leave and live as soon as an occasion to do so presented itself.

This is an important element to take into consideration when it comes to the analysis of the decision process related to the assault of the Nord Ost siege. First because the Alfa team is once more involved only three years after their last debacle against Chechen barricaded and ten times less numerous. One must wonder if some '*vendetta*' did not

http://www.academia.edu/1498225/the_moscow_theater_hostage_crisis_their_tactics_and_rusain_respon
[se](http://www.academia.edu/1498225/the_moscow_theater_hostage_crisis_their_tactics_and_rusain_respon) (Consulted on 11 July 2013).

⁶⁸ Adam Dolnik and Richard Pilch 'The Moscow Theater Hostage Crisis: The Perpetrators, their Tactics, and the Russian Response' in International Negotiation vol. 8, no. 3 (2003) p. 580, available at: http://www.academia.edu/1498225/the_moscow_theater_hostage_crisis_their_tactics_and_rusain_respon
[se](http://www.academia.edu/1498225/the_moscow_theater_hostage_crisis_their_tactics_and_rusain_respon) (Consulted on 11 July 2013)

took place the day of the storming of the Nord Ost theater, if the hostages' lives were really the center of attention or if other factors could have led the Russian to take such extreme measures.

However to nuance this historical perspective on Chechen's hostage takings as it largely undermines the crisis cell's decision to storm the building it has to be recalled that the hostage takers were led by Mosvar Barayev, son of a murdered Chechen guerilla named Ali Barayev. Their fighters were notoriously violent as the beheading of three Britons and one New Zealander in 1998 clearly demonstrates. It is true that due to obvious political reasons, the European Court of Human Rights could not interfere in the debate as whether or not Chechnya is or is not to be a Russian territory. Hence the Court could only consider most of the demands of the Hostage Takers as unrealistic.⁶⁹ Was it enough though to justify the entire decision making process?

Indeed it appears that several points raised by the Court to prepare the grounds for refusing to investigate much into the decision making process have clearly been overlooked.

First of all, the Court considered that:

“Although hostage taking has, sadly, been a widespread phenomenon in recent years, the magnitude of the crisis of 23-26 October 2002 exceeded everything known before and made that situation truly exceptional. The lives of several hundred hostages were at stake, the terrorists were heavily armed, well-trained and devoted to their cause and, with regard to the military aspect of the storming, no specific preliminary measures could have been taken”⁷⁰

It has been amply proven above that the situation was not exceptional, as a matter of fact mass hostages takings had been performed in recent years on Russian soil on

⁶⁹ European Court of Human Rights, *Finogenov and others vs. Russia*, 20 December 2011, paragraph 223

⁷⁰ European Court of Human Rights, *Finogenov and others vs. Russia*, 20 December 2011, paragraph 213

several occasions. It involved sometimes up to twice as many hostages and Chechen commandos up to five times more numerous. What was certainly exceptional though was how close to the Kremlin and the heart of Moscow the Hostage takers manage to stage their standoff.

Secondly, the Court considered that:

“In such a situation the Court accepts that difficult and agonising decisions had to be made by the domestic authorities. It is prepared to grant them a margin of appreciation, at least in so far as the military and technical aspects of the situation are concerned, even if now, with hindsight, some of the decisions taken by the authorities may appear open to doubt”⁷¹

It is made clear and acknowledged by the Court that the decisions taken were probably difficult or even agonising to make and that with hindsight, some of the decision are disputable. Even though, the Court had multiple opportunities to plant seeds for the debate around hostages’ lives and condition, it chose to remain distant from this problematic as far as possible. If a decision is disputable from a human right perspective, why not at least offer an alternative solution to what has been decided for future references? What did push the Court to abandon the hostages’ fate to the good will of Russia and by extent to the good will of member States in general?

Is it because it ‘*calls into question all anti-terrorist operations, and refers to matters far beyond the competence of this Court*’⁷²? Is it not the task that has been placed upon its shoulders by the Convention? The burden the Court usually places upon its own shoulders even when it is unclear whether or not the scenario is covered by the European Convention on Human Rights? To enforce human rights in areas where they reserve little, if any, consideration? It is very interesting to consider that the Court may think that anti-terrorist operations are not to be all called into question. Would the very

⁷¹ European Court of Human Rights, *Finogenov and others vs. Russia*, 20 December 2011, paragraph 213

⁷² European Court of Human Rights, *Finogenov and others vs. Russia*, 20 December 2011, paragraph 223

nature of some operations (such as hostage takings) protect them from any scrutiny by the monitoring body of the Convention?

The justification given by the Court is at the least striking and the choice of words very interesting. It comes later in the exact same paragraph “*Formulating rigid rules in this area may seriously affect the authorities’ bargaining power in negotiations with terrorists.*”⁷³ The Court steps right into the terrible logic and the vicious circle of hostage takings. States have according to the Court, a ‘*bargaining power in negotiations with terrorists*’. Following that tragic reasoning, hostages, human beings, can be bargained over for different purposes that the Court refuses to investigate into. This simple statement has dreadful consequences, it means that the hostages are denied their human condition, or at least recognized as a tradable asset. They are considered as such by the hostage takers first, which comes has no surprise, by the government then, which is regrettable but unfortunately to be expected, and by the first defender of the Convention at last, the European Court of Human rights which is saddening.

For the purpose of the argument it will be admitted that the decision making process behind the hostage crisis management was so sensible and political that the Court was unfortunately not able to investigate into it. However, due to the absolute characteristic of the right to life, it is deeply regrettable that the Court did not assert that, as a matter of principle, the preservation of the hostages’ lives, the victims’ lives, is to be considered at all time as the leading motive behind the entire decision making process of the crisis cell. That it is up to the government to prove that every action taken was led by the desire of preserving as many lives as possible.

When light is shed on the events, which occurred in the Dubrovka Theater, it seems that the situation was not as straightforward as the Russian authorities might have thought or said to be at the time. Was it a real necessity to use a visible gas, potentially lethal for the hostages, when the hostage takers’ threat could well have been only

⁷³ European Court of Human Rights, *Finogenov and others vs. Russia*, 20 December 2011, paragraph 223

words? Was it necessary to kill them all so none could be interrogated afterwards on the sole ground that they might trigger their explosives (when they had ample time to do so beforehand and for some reason never did such a thing)? Some areas of the case will probably remain surrounded by mist and shadows, but from a human rights perspective, can one be satisfied with the deference shown by the Court and the lack of concern shown regarding the hostage's condition?

Very conveniently however the Court will have a chance to offer the former hostages a proper compensation by scrutinizing the medical downside of the evacuation. It can be considered as a chance for the Court to redeem itself and guarantee a proper compensation for the applicants. But it must not be forgotten that it follows a very disputable stance regarding their right to life in relation with the decision making process or the chemical agent. In itself this operation and scrutiny is no longer related to the very status of the hostage's figure but could apply to any medically assisted rescue operation led by a government. However, as it has still a relatively small part to play in the definition of the hostage status therefore it will be now studied in a third part.

3. The medically assisted evacuation

The medically assisted rescue operation truly begins when the storming is over and when combat has ceased. The details of the evacuation and its many issues, which still form the major part of the Finogenov and others case as they will be the only ground found by the Court to condemn Russia for breaching article 2, are not of utmost importance when it comes to the defining of the hostage status. Furthermore this analysis of the Court could apply to any set of tragic events reasonably foreseeable where a State would have failed to take the necessary measures to prevent further human losses.

However, several points need to be analyzed in this case as they show how little were the authorities concerned by the fate of the hostages when they prepared the storming. It

is very probable that after the end of the storming suddenly the Russian authorities took conscience of the gravity of the situation. Hence their concern for the hostages' lives is normal and probably not questionable after the demise of the hostage takers. Yet what the evacuation plan clearly shows is how little they were concerned by the hostages' fate prior to the storming. It is one of the core purposes of this thesis to demonstrate that the Hostage's fate is not the main and top concern of governments dealing with Hostage taking crisis. The necessity of a change of mindset regarding the hostage's condition is then of prime importance. The evacuation of the Moscow Theater quite amply proves what this thesis attempts at demonstrating.

First and foremost it is important to note that this time the Court clearly refused to exonerate the government on the grounds that those events were so unpredictable that it would discharge it of all responsibility.

'Finally, the more predictable a hazard, the greater the obligation to protect against it: it is clear that the authorities in this case always acted on the assumption that the hostages might have been seriously injured (by an explosion or by the gas), and thus the large number of people in need of medical assistance did not come as a surprise',⁷⁴

This is a first and very important step, indeed the Court showed far less deference toward Russia on those grounds as they are much more familiar to the judges in their own former jurisprudence. It is a simple application of the duty to protect; it is applicable to several scenarios out of any secret service involved situation or out of the terrorism context. However, it seems odd to consider that it could not come as a surprise that a large number of people would be in need of medical assistance after being seriously injured by the gas, and yet considering the gas as a non lethal incapacitating weapon. As it has been previously shown, the gas was probably no less deadly than throwing a hand grenade in a crowd.⁷⁵ The use of non-lethal incapacitating weapons

⁷⁴ European Court of Human Rights, *Finogenov and others vs. Russia*, 20 December 2011, paragraph 243

⁷⁵ cf. *supra* 52

such as tear gas is common in western democracies in the controlling of riot and protests. Yet the medical teams are usually scarce on those events as no serious injury is expected on a massive scale.

There are two main points that shows how little were the deciding authorities concerned by the fate of the hostages. On one hand, there was a clear lack of medical means to assist 850 weakened persons who have been traumatized by a three day long standoff before being gazed and caught in a crossfire between their captors and the security forces of their government. On the other hand, the non-disclosure of the gas to the doctors and the lack of general organization around the evacuation were critical if not fatal for many former hostages. The extracts of the judgment given by the European Court of Human Rights are very enlightening in that prospect:

‘However, the absence of any centralised coordination on the spot was noted by many witnesses’⁷⁶

‘Only one or two individuals are doing something which can be described as “coordination” at the theatre entrance, but they appear to be military personnel’⁷⁷

‘Several doctors testified during the investigation that they had not known what kind of treatment the victims had already received – they had to take decisions on the basis of what they saw’⁷⁸

‘Whereas it is clear that many people received no treatment at all, it is not excluded that some of them received injections more than once, which might in itself have been dangerous. It does not appear that the victims who received injections were somehow marked to distinguish them from those who had not received injections.’⁷⁹

⁷⁶ European Court of Human Rights, *Finogenov and others vs. Russia*, 20 December 2011, paragraph 247

⁷⁷ European Court of Human Rights, *Finogenov and others vs. Russia*, 20 December 2011, paragraph 247

⁷⁸ European Court of Human Rights, *Finogenov and others vs. Russia*, 20 December 2011, paragraph 248

⁷⁹ European Court of Human Rights, *Finogenov and others vs. Russia*, 20 December 2011, paragraph 248

This is, in itself, at least dazzling to an exterior eye. The Russian authorities knew, or ought to have known, that they would release a gas on several hundred people, a gas that they had never tested before on such a massive scale, yet they did not take every single precaution that could have been expected to protect the hostages. Assuming that what they later said about the gas was true, that it was a Fentanyl derivative, it is broadly known that the antidote for Fentanyl poisoning is Naloxone.⁸⁰ Even without revealing the exact content of the gas they should have at least told the medics beforehand that they were to use Naloxone and that they would face victims who were gas poisoned by an opioide derivative.

That first precaution was evidently not taken as several doctors testified they never knew what kind of poisoning their patients were suffering.⁸¹

Secondly, if they were to need Naloxone on a massive scale, they had more than enough time to make sure that every hospital had both a sufficient stock of Naloxone and several toxicologists ready to intervene. Both of those points were overlooked by the Russian authorities, first some hospitals had no stock of Naloxone.⁸² Then the plan was prepared on the assumption that the hostages would probably be evacuated wounded from explosions and gunshots and hence many were the surgeons deployed and ready in the hospitals. The crisis cell knew full well that they would gas everyone inside but they never even took into account that surgeons would be utterly helpless in helping the hostages and that they would need the assistance and the supervision of toxicologists in every hospitals which they did not provided for.⁸³

⁸⁰ There is a spelling mistake in the entire Finogenov case where 'Naloxone' is spelled 'Nalaxone' which is scientifically incorrect. Such a mistake in a European Court of Human Rights' case is quite rare and could support the claim that the judges and the Russian government quite poorly knew what they were using as a chemical agent not to know the name of the antidote.

Found in Vidal: <http://www.vidal.fr/substances/8896/naloxone/> (Consulted on 11 July 2013)

English description of the Vidal: <http://corp.vidal.fr/professionals-products/vidal-drug-compendium> (Consulted on 11 July 2013)

⁸¹ European Court of Human Rights, *Finogenov and others vs. Russia*, 20 December 2011, paragraphs 60, 83 and 248

⁸² European Court of Human Rights, *Finogenov and others vs. Russia*, 20 December 2011, paragraph 80

⁸³ European Court of Human Rights, *Finogenov and others vs. Russia*, 20 December 2011, paragraph 253

Thirdly, the general lack of coordination crystallizes with the non-marking of the victims who received a dose of Naloxone to sort them out from the one who needed injections. Also the sorting out was not done between the one who were already dead from the one who were alive, but that eventually can be a problem that was not exactly foreseeable prior to the intervention. At least it was not as easy to foresee prior to the intervention as the marking of the victims who received Naloxone from the one who did not was. All the more so since its relatively easy to do, a simple mark with a felt-tip pen on the foreheads of the victims who received Naloxone would have done wonders, even a lipstick or anything that marks would have sufficed. The only thing is that doctors need to bring a pen and know that they will have to use Naloxone or at least the coordinator on the scene needs to tell them to do so. However, in the current case there was no coordinator, at least no medical coordinator,⁸⁴ and when the doctors did know they had to use Naloxone, they did not know which victim had received Naloxone and which had not as no filtering was done.⁸⁵ To make things worse, no sorting was done between the living and the dead who were piled up together in buses.⁸⁶ The Court clearly stated that the Russian authorities did not properly thought through the evacuation operation:

‘The Court concludes that this aspect of the rescue operation was not thought through, and that in practice the “sorting” was either non-existent or meaningless.’⁸⁷

In the humble opinion of the author, this strengthens the body of concurring indicia that the crisis cell and the government despite all their declarations of good faith could not commit such growth mistakes if their prime intention, both in the rescue operation and in the decision to use the gas, was the preservation of as many hostages’ lives as

⁸⁴ European Court of Human Rights, *Finogenov and others vs. Russia*, 20 December 2011, paragraph 247 cf. *supra* ⁶⁴

⁸⁵ European Court of Human Rights, *Finogenov and others vs. Russia*, 20 December 2011, paragraphs 248 and 249

⁸⁶ ‘Many witness confirmed that in fact there had been no filtering or that it was inefficient since dead bodies had been placed in the same buses as people who were still alive’

European Court of Human Rights, *Finogenov and others vs. Russia*, 20 December 2011 paragraph 249

⁸⁷ European Court of Human Rights, *Finogenov and others vs. Russia*, 20 December 2011, paragraph 249

possible. They would surely have paid much more attention to planning every detail of the evacuation if they really were worried about the fate of the hostages.

De facto everything in this case looks as if the evacuation operation and in a broader sense everything that was meant to occur after the storming was of little importance to the authorities. It truly looks as if their prime intention was to end a standoff that was eroding ‘*the prestige of Russia in the international arena*’.⁸⁸ The Russians executed every single hostage taker and immediately afterward the government announced the operation to be a stunning success. It had to call it a tragedy hours later, after discovering the death toll among the hostages. This leads to think that the hostages were not their primary concern but the end of the standoff was.

The remaining details of the rescue operation are of little importance to this thesis as only the planning of it can shed a light on the importance given to the hostages’ lives by the Russian authorities. It is however interesting to note that during the domestic procedures the hostages and the relatives of the dead obtained little if any financial compensation which says length on the values the federation of Russia gives to the life of its citizen and the level of responsibilities it had in the tragic set of events which took place in October 2002. Indeed it is shocking to read in the case that the survivors received as ‘*compassionate compensation*’⁸⁹ 50,000 Russian roubles and that the relatives of deceased hostages received 100,000 Russian roubles. Considering the conversion rate in October 2002, 50,000 Russian roubles was worth 1,609 €⁹⁰ for surviving the incident, sometimes suffering of massive trauma and/or partial life-incapacity due to the gas. 100,000 Russian roubles was equivalent to 3,219 €⁹¹ for

⁸⁸ European Court of Human Rights, *Finogenov and others vs. Russia*, 20 December 2011, paragraph 218

⁸⁹ Interesting to note that it is not a ‘responsibility compensation’ but more something like national solidarity than a compensation for damage caused. *Finogenov and others vs. Russia* §143

⁹⁰ Historical exchange rate, 50,000 Russian roubles in euro, October 2002, available at:

<http://fxtop.com/en/historical-exchange-rates.php?A=50000&C1=RUB&C2=EUR&MA=1&DD1=22&MM1=10&YYYY1=2002&B=1&P=&I=1&DD2=25&MM2=10&YYYY2=2002&btnOK=Go%21> (Consulted on 11 July 2013)

⁹¹ Historical exchange rate, 100,000 Russian roubles in euro, October 2002, available at:

<http://fxtop.com/en/historical-exchange-rates.php?A=100000&C1=RUB&C2=EUR&MA=1&DD1=22&MM1=10&YYYY1=2002&B=1&P=&I=1&DD2=25&MM2=10&YYYY2=2002&btnOK=Go%21> (Consulted on 11 July 2013)

loosing a loved one, sometimes a bread maker. It is pointless to say that considering the extent of the trauma the relatives and the surviving hostages suffered the smallness of the amount received was nowhere close to a proper compensation. However, after recognizing a breach of article 2 of the Convention by the Russian authorities in the evacuation process, the Court clearly condemned Russia to pay much higher compensations as shown in the annex of the case.⁹² Indeed the compensations granted ranged from 8,200 € to 66,000 € which is five to twenty times more important than what Russia granted at the time. The moral of that case may be that the life of a hostage surely has no price, but it has a cost.

Conclusion on the Finogenov case

In order to bring down the curtain on the Finogenov case a few points have to be revisited. For a first case on the matter of hostage takings, the Court was certainly treading on thin ice. Terrorism and counter-terrorism have their own logic, and human rights most certainly are only considered to the extent in which it does not narrow the scope of answers of Counter-terrorist decision makers. It is probably pointless to say that as human rights tend to limit the scope of actions of member states they receive very little consideration in counter terrorism strategies. However, one must wonder if it is the duty of the European Court of Human Rights to acknowledge that reality and give in on certain fields where its will to enforce human rights further will meet a very fierce political or ideological opposition.

It is the strong belief of the author that it is the very nature and essence of the European Court of Human Rights to distance itself from any political consideration when it comes to a question of human dignity. The Court should be all the more proactive on the questions of human dignity as it has been with a certain success on the more consensual questions of privacy or discrimination for instance. It is clear that the status of the Hostage in modern societies poses a real philosophical, legal and even social set of

⁹² European Court of Human Rights, *Finogenov and others vs. Russia*, 20 December 2011, annex

questions. It is also true that those individuals are a tiny minority among the general population and consequently are sometimes considered as unfortunate and unavoidable collateral damages. But the real question is: Is this fair? Is this justice? Is it normal to trade one's life for something else? And pushing it further, is it normal for a human right Court to accept the fact that one's life is at the mercy of States and hostage takers? That they have a real wide margin of appreciation in considering the value of these lives?

Looking at the bigger picture, the Court probably did as best as it could, avoiding the sensitive issues, taking the most consensual middle way by focusing only on the duty to protect rising from the evacuation part of the rescue operation. It allowed the Court to grant the applicants the compensations they should have gotten from the Russian State without interfering with counter terrorism. One can regret however that the Court did not use the opportunity to recall the utmost importance of the value of a hostage life. It could even have set some general principles on how to protect innocents before anything else in the course of a counter-terrorist operation. It had a unique chance, given the lack of cooperation of Russia, to also reverse the burden of proof on counter terrorist situations which would have helped to make full light on the shady decisions taken, the individual responsibilities and granted a far better protection to the victims of the war against terrorism. It seems that the decision taken by the Court is neither marked by political courage nor marked by the same will to protect human dignity and life as it was in 1995 when the judges declared:

*'the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom'*⁹³

The Court always declared that the right to life was the highest of all rights.

*'above all the right to life, the supreme value in the international hierarchy of human rights'*⁹⁴

⁹³ European Court of Human Rights, S.W. vs. United Kingdom 22 November 1995, paragraph 44

And it is regrettable that judges do not linger more on the right to life of the hostage. Facing the counter-terrorism problems of our time, among others hostage takings situations, it is regrettable that the Court gave in so fast by granting a margin of appreciation so wide on the hostage's fate to its respondent State.

What is however important now is for the Court to be more incisive, more protective of the hostage's fate in the case to come, *Tagayeva and others vs. Russia*⁹⁵ (pending), where it will deal with the Beslan crisis with 447 applicants. A crisis in which over 380 hostages met their tragic end in yet another storming of the Russian elite forces after a standoff with the Chechens. It is time for the Governments and the Court to guarantee to the victims of hostage takings, the respect and dignity they deserve as they are perfectly innocent, a lamb who pays for a society. Every citizen of a society, is a potential hostage to be from the hostage takers point of view, everyone could be, one day, the haunting figure we are fast to praise, mourn and regret yet never ready to defend, a hostage.

⁹⁴ European Court of Human Rights, *Streletz, Kessler and Krenz vs. Germany*, 22 March 2001, paragraphs 87 and 94

⁹⁵ European Court of Human Rights, *Tagayeva and others vs. Russia* (pending) available at: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111101#{\"itemid\":\[\"001-111101\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111101#{\) (Consulted on 11 July 2013)

General conclusion

The purpose of this master thesis is to shed a light on a particularly small and weak group of individuals, a group that never received the attention and the care it truly deserves. It has been demonstrated that hostage takings can take several form, last for a short or a longer time, and are motivated by different interest. But all have a same consequence: the negation of one's humanity in order to be able to trade his or her life to serve another's interest, in order to be able to kill or let die that person should it serve to better the cause of the hostage taker or the negotiating authorities.

Even if overall it concerns only a very small portion of the population, when it strikes, a hostage taking brings havoc to communities, because it does not pick random people at random places equally distributed in a country. It strikes a school, a public building, a workplace. Suddenly the relatives who were fortunate enough not to be in the place, now know, not only one, but potentially several people inside. They know each other and if a tragedy occurs it devastates entire communities.⁹⁶

The dramatic consequences behind a hostage crisis is how much it destroys people's lives whether they survive it or not, and how indifferent those people leave us, our societies, our decision takers, our policy makers, and the monitoring bodies supposed to scrutinize their actions. Elie Wiesel, American author and Nobel peace prize, once said *'Because of indifference, one dies before one actually dies'*. This synthesizes the condition of modern hostages and the terrible blinding indifference we treat them with. They could be us, they could be our loved ones, but until they become such we are indifferent, merciless, willing to trade their lives for politics. Needless to say that if one argues that some political reasons should prevail over a bunch of hostages' lives, one would be the first to change his mind should he ever be an hostage or ever happen to love one. One would never willingly offer to trade his own life for a political reason he

⁹⁶ See the Nord-Ost siege, the Beslan case or the Palace of Justice siege.

or she is so eager to trade other hostages for. And ultimately no one is ever responsible when the deal turns sour and the hostages get killed.

The strangest thing with hostages is that they are no strangers, they belong to our communities, they could be anybody, and anybody could be one of them. Yet if people are so eager to demonstrate for certain rights, to do charities and give money for certain causes or tragedies happening in distant lands, most people feel little if anything for unknown innocents taken as hostages. It is common to read in the newspaper in France that the hostages are probably guilty of doing their job as journalist, of living or traveling to distant lands, or even of being at the wrong place at the wrong time. They have to be guilty of something, to be dehumanized, otherwise how could they be sacrificed when the politics or the Nation needs it?

It can be wondered whether or not Hostages in the Finogenov case and all around the world would not have benefited from more protection if placed under International Humanitarian Law. Indeed hostage takings are prohibited both in case of international armed conflict and internal armed conflict under the fourth Geneva Convention and under the Rome Statute of the International Criminal Court. Regarding the Russian case it is widely debated whether or not it is a conflict and the stance of Russia on this question is always ambiguous. However it is not the purpose of this thesis to qualify the tensions in Chechnya as an internal or international conflict, nor is it to discuss the legitimacy of the Russian claims over Chechnya. What is important to note here is that *in abstracto* if human rights law is incapable of protecting the Hostage, possibly International Humanitarian Law could bring an interesting alternative. On one hand Article 397 of the Geneva Convention forbids hostage takings of civilians in times of internal armed conflict and if hostage takers were to be brought to justice they could be prosecuted for war crimes. The Rome Statute forbids the taking of hostages as part of a

⁹⁷ Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 available at: <http://www.icrc.org/applic/ihl/ihl.nsf/ART/380-600006?OpenDocument> (Consulted on 11 July 2013)

war crime under its article 8 (a) (viii).⁹⁸ Article 8 (b) (xviii) also states '*Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices*' is considered a war crime and this could pose serious problems to the Russians if the case was to be judged under International Humanitarian Law. Furthermore article 8 (b) (i) and (iii) states that:

'Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;'

'Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated'

Both those actions constitute a war crime. It can be discussed at lengths whether or not the death of 3 hostages for every hostage taker neutralized in the Moscow Theater Crisis or the death of 12 hostages per hostage taker neutralized in Beslan is not '*clearly excessive in relation to the concrete and direct military advantage anticipated*'. Again, it has to be considered if a stronger International Humanitarian Law could be more profitable to the hostage's cause than the European Convention on Human Rights law.⁹⁹

This thesis raises more questions than it provides answers; the subject of Human rights and hostage takings has never been seriously studied as the absence of any literature on the subject clearly demonstrates. However, the recent cases of the European Court of

⁹⁸ United Nations Treaty Collection, Rome Statute of the International Criminal Court, entry into force on 1 July 2002, article 8 available at:

<http://untreaty.un.org/cod/icc/statute/rome.htm> (Consulted on 11 July 2013)

⁹⁹ It shall be noted though that International Humanitarian Law intends to protect the victims and exercise justice on the perpetrators of war crimes, genocides and crimes against humanity but not to give compensations to victims. Whereas the European Convention on Human Rights does not prosecute individuals but grant victims financial compensations by condemning a State for a breach of the convention. The logics behind both processes are very different.

Human Rights call for a real debate on the status western societies tend to give to hostages, a debate on their counter-terrorism policies and their human right standards. The analysis of the right to Life, as well as the spectrum and the chart provided previously, demonstrates that the hostage as an extraordinary subject of international law highlights several issues about the application of article 2 of the Convention and the interconnections between private and public actors in the protection of Human rights. It also shows that the drift of the hostage from his rightful protection in the duty to respect zone to his current protection in the counter terrorism zone is due to several factors. Among other things, it is due to the fear of terrorism, the militarization of the police and the general indifference required to accept the unacceptable: the lawful sacrifice of innocent individuals by their own society.

There are numerous fields and questions that have never been discussed among human right bodies, scholars and defenders when it comes to hostage takings. Is it normal or even desirable to continue the current policy of executing without trial every hostage taker? Is there a right under the European Convention on Human Rights for the applicants to be reunited with their hostage relatives on the basis of article 8 (Hence a positive obligation for the State)? What are the limits of the freedom of press opposed to the rights of the relatives when it comes to the footage of the beheading of a hostage? What are the merits and demerits of making a hostage case public, of having the press to speak of it? Does it protect the hostage's life but raises the hostage takers' demands or does it unnecessary complicates its liberation? Regarding the value we give to hostage lives in our societies the debate is wide open. There is probably no easy answer, admittedly one's life is priceless, however it has a cost, and it is the firm belief of the author that decision makers never pay that cost, never bear any responsibility in the conduct of the case, in most cases with the blessing of the society and the judicial bodies. This is not normal nor is it fair. It is not right that no one ever answered for the Munich massacre, it is not right that the same happened for every hostage situation which turned bad, Moscow, Beslan, Bogotá, Lima or In Amenas. When will it stop? Are the mistakes made in the past bound to repeat themselves again and again? Or will

someone say ‘enough! Those are no tradable goods! Those are human beings in desperate need for our help.’?

However, it needs to be nuanced. Ben Lopez’s (professional hostage negotiator) concluded his book¹⁰⁰ by saying that *‘trying to stop kidnapping is like trying to stop oxygen. You can be against it but it’s everywhere [...] It manipulates the emotional bond that exists between two people [...] Until human beings stop caring about each other, kidnap will be a part of our lives. But what kind of world would that be? A worse one than we have now, I think.’* The point is not to stop hostage takings, it can be prevented sometimes with counter-intelligence but it is as Lopez says too linked to the essence of humans and their need for ‘emotional bonding’ to disappear one day. The point is: to reinstall the life of the hostage at the very top of the governments’ considerations and at the very core of the Court’s and the Convention’s protection.

¹⁰⁰ Ben Lopez, *The Negotiator, My life at the heart of the hostage trade*, Sphere, 2011 p. 304

Bibliography

Case Law

- European Court of Human Rights, *Ireland vs. United Kingdom* 18 January 1978
- European Court of Human Rights, *McCann and others vs. United Kingdom*, 27 September 1995
- European Court of Human Rights, *S.W. vs. United Kingdom* 22 November 1995
- European Court of Human Rights, *Kaya vs. Turkey*, 19 February 1998
- European Court of Human Rights, *L.C.B vs. United Kingdom*, 9 June 1998
- European Court of Human Rights, *Ergi vs. Turkey*, 28 July 1998
- European Court of Human Rights, *Osman vs. United Kingdom*, 28 October 1998
- European Court of Human Rights, *Pretty vs. United Kingdom*, 29 April 2002
- European Court of Human Rights, *Vo vs. France*, 8 July 2004
- European Court of Human Rights, *Isayeva vs. Russia*, 24 February 2005
- European Court of Human Rights, *Khashiyev and Akaïeva vs. Russia*, 24 February 2005
- European Court of Human Rights, *A. B. and C. vs. Ireland*, 16 December 2010
- European Court of Human Rights, *Finogenov and others vs. Russia*, 20 December 2011
- European Court of Human Rights, *Tagayeva and others vs. Russia* (pending)

Articles

Identified authors

- Adam Dolnik and Richard Pilch ‘The Moscow Theater Hostage Crisis: The Perpetrators, their Tactics, and the Russian Response’ in *International Negotiation* vol. 8, no. 3 (2003) p.579 available at: http://www.academia.edu/1498225/the_moscow_theater_hostage_crisis_their_tactics_and_rusain_response (Consulted on 11 July 2013)
- Irène Herrmann and Daniel Palmieri, ‘A haunting figure: the hostage through the ages’ p. 137 in *International Review of the Red Cross*, March 2005 available at http://www.mkkk.org/eng/assets/files/other/irrc_857_palmieri.pdf (consulted on 11 July 2013)
- Julian Nundy, ‘France honours teacher heroine in nursery siege: Julian Nundy reports from Paris on the dramatic climax to a 46-hour hostage ordeal for schoolchildren as police kill 'human bomb' gunman’ The Independent, 16 May 1993 available at: <http://www.independent.co.uk/news/world/france-honours-teacher-heroine-in-nursery-siege-julian-nundy-reports-from-paris-on-the-dramatic-climax-to-a-46hour-hostage-ordeal-for-schoolchildren-as-police-kill-human-bomb-gunman-2323142.html> (consulted on 11 July 2013)
- Lynn Klotz, Martin Furmanski and Mark Wheelis, *Beware the Siren’s Song: Why “Non-Lethal” Incapacitating Chemical Agents are Lethal* available at: http://www.fas.org/bwc/papers/sirens_song.pdf (Consulted on 11 July 2013)
- Martin Prieto ‘Muerte en el Palacio de Justicia’ EL PAÍS, 17 April 1986 (in Spanish) available at: http://elpais.com/diario/1986/04/17/internacional/514072805_850215.html (Consulted on 11 July 2013)

- Shaun Walker 'Passion, deadly secrets and betrayal in Putin's Russia', The Independent, 21 April 2009, available at: <http://www.independent.co.uk/news/world/europe/passion-deadly-secrets-and-betrayal-in-putins-russia-1671597.html> (Consulted on 11 July 2013)
- Vyacheslav Izmailov "Nord-Ost": Unpublished details about the terror act' Nord-Ost Website, 7 June 2007, available at: http://www.nord-ost.org/today/nord-ost-unpublished-details-about-the-terror-act_en.html (Consulted on 11 July 2013)

Unidentified authors

- 'Colombia hostage Ingrid Betancourt Freed' BBC News, 3 July 2008, available at: <http://news.bbc.co.uk/2/hi/7486552.stm> (consulted on 11 July 2013)
- 'Commando execution of MRTA hostage takers and "take no prisoners" order' Defense Intelligence Agency Information Report, 10 June 1997, paragraphs 2 and 5, available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB237/document1.pdf> (consulted on 11 July 2013)
- 'Gas 'killed Moscow hostages'' BBC News World Edition, 27 October 2002, available at: <http://news.bbc.co.uk/2/hi/europe/2365383.stm> (Consulted on 11 July 2013)
- 'Hostages speak of storming terror' BBC NEWS World Edition, Saturday 26 October 2002, available at: <http://news.bbc.co.uk/2/hi/europe/2363679.stm> (consulted on 11 July 2013)
- 'How special forces ended siege' BBC News World Edition, 29 October 2002, available at: <http://news.bbc.co.uk/2/hi/europe/2363601.stm> (Consulted on 11 July 2013)

- ‘Moscow theater Siege: Questions remain unanswered’ BBC News Europe, 24 October 2002, available at: <http://www.bbc.co.uk/news/world-europe-20067384> (Consulted on 11 July 2013)
- ‘Seven hostages freed in Moscow siege’ BBC 25 October 2002 04:14 GMT available at: <http://news.bbc.co.uk/2/hi/europe/2359491.stm> (consulted on 11 July 2013)

Pieces of legislation:

- Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 available at: <http://www.icrc.org/applic/ihl/ihl.nsf/ART/380-600006?OpenDocument> (Consulted on 11 July 2013)
- French Penal Code, Article 224-1 and 224-4, available in English at: http://www.legifrance.gouv.fr/content/download/1957/13715/version/4/file/Code_33.pdf (consulted on 11 July 2013)
- International Court of Justice’s advisory opinion on the legality of the threat or use of Nuclear weapons, July 8 1996, available at: <http://www.icj-cij.org/docket/files/95/7495.pdf> (Consulted on 11 July 2013)
- United Nations Treaty Collection, Rome Statute of the International Criminal Court, entry into force on 1 July 2002, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (Consulted on 11 July 2013)
- United State Code, Title 18, Part 1, Chapter 55, section 1203, available at: <http://uscode.house.gov/download/pls/18c55.txt> (consulted on 11 July 2013)

Books:

- Frédéric Sudre, *Droit européen et international des droits de l'homme*, Presse Universitaire de France 10ème édition, 2011
- Ben Lopez, *The Negotiator, My life at the heart of the hostage trade*, Sphere, 2011

Internet resources, websites:

- European Court of Human Rights Website, *Tagayeva and others vs. Russia* (pending) available at:
[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111101#{"itemid":\["001-111101"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111101#{) (Consulted on 11 July 2013)
- European Court of Human Rights website, 'Travaux préparatoires' of the convention. <http://www.echr.coe.int/library/COLENTTravauxPrep.html>
- Fxtop website (currency converter) available at:
<http://fxtop.com/en/historical-exchange-rates.php?A=50000&C1=RUB&C2=EUR&MA=1&DD1=22&MM1=10&YYYY1=2002&B=1&P=&I=1&DD2=25&MM2=10&YYYY2=2002&btnOK=Go%21> (Consulted 11 July 2013) and at:
<http://fxtop.com/en/historical-exchange-rates.php?A=100000&C1=RUB&C2=EUR&MA=1&DD1=22&MM1=10&YYYY1=2002&B=1&P=&I=1&DD2=25&MM2=10&YYYY2=2002&btnOK=Go%21> (Consulted 11 July 2013)
- 'Groupement d'Intervention de la Gendarmerie National' (GIGN) website, in French, available at: <http://www.gign.org/groupe-intervention/?p=3572> (consulted on 11 July 2013)
- Institut National de la Statistique et des Etudes Economiques, website in French (National Institute of Statistics and Economical Studies in English)
'Démographie - Nombre de naissances vivantes – France' available at:
<http://www.insee.fr/fr/bases-de->

[donnees/bsweb/serie.asp?idbank=001641601](http://www.insee.fr/fr/bases-de-donnees/bsweb/serie.asp?idbank=001641601) (consulted on 11 July 2013)

‘Démographie - Nombre de décès – France’ available at :

<http://www.insee.fr/fr/bases-de-donnees/bsweb/serie.asp?idbank=001641603> (consulted on 11 July 2013)

- Vidal Website available at:
<http://www.vidal.fr/substances/8896/naloxone/> (consulted on 11 July 2013) and at: <http://corp.vidal.fr/professionals-products/vidal-drug-compendium> (consulted on 11 July 2013)

Multimedia:

- National Geographic, Seconds to disasters, Season 3 Episode 10, ‘The Munich Olympic Massacre’, (annotated by the author) testimony of Heinz Hohensinn at 38:09, images at 38:51 and 39:06, available at http://www.youtube.com/watch?v=Rr_F_r2Fv1I (consulted on 11 July 2013)

To go further, Fictions, Movies and Documentaries of interest regarding hostage takings...

Movies:

- Argo (2012) directed by Ben Affleck
- Proof of Life (2000) directed by Taylor Hackford
- The Assault (2010) directed by Julien Leclercq (French)
- The Taking of Pelham 1 2 3 (2009) directed by Tony Scott

Documentaries:

- 'Chavín de Huantar, Parte 1 - 9 (*Adonde.com*)' (in Spanish)
(http://www.youtube.com/watch?v=w_5AyueWJug)
- 'El Palacio de Justicia' - History Channel
(<http://www.youtube.com/watch?v=uqY9AK3BehQ>)
- 'Jihad: Slaughter of the Innocents - Beslan (Беслан) Part 1 – 4'
<http://www.youtube.com/watch?v=DSE6IEZfgRA>
- 'La prise d'otages du vol Alger – Paris' (in French)
(<http://www.youtube.com/watch?v=ov3v7mWrNrY>)
- 'The Moscow Theatre Siege' – BBC
(http://www.youtube.com/watch?feature=player_embedded&v=zsF7D-C3NSM#at=1909)

Books:

- Hargrove, Thomas R. (2001). Long March To Freedom: Tom Hargrove's Own Story of His Kidnapping by Colombian Narco-Guerrillas. 1st Books Library

Annexes

	Abbreviations used	Hostage taker Hostage Rescue Operation Governmental Armed Forces Killed Captured Free / Freed	HT H RO GAF K C F	Some situations having no official figures provided, or when the official figures are highly contested by external sources, the author took on himself for providing an average estimation (figures in red)																
Crisis Number	Name of the crisis	Continent	Country		City	HT Motives	Starting Date	Ending Date	Length of the crisis in days (approximate)	Length of the crisis in hours (approximate)										
	1 Nord Ost Siege	Europe	Russia		Moscow	Political	23/10/02	26/10/02	4	55										
	2 AirFrance Flight 8969	Africa & Europe	Algeria & Fran		Algiers & Mars Islamism		24/12/94	26/12/94	3	55										
	3 Beslan School	Europe	Russia		Beslan	Political	01/09/04	03/09/04	3	55										
	4 In Amenas	Africa	Algeria		In Amenas	Political	16/01/13	19/01/13	4	79										
	5 Loyada's hostage taking	Africa	Djibouti	Djibouti	Political	03/02/76	04/02/76	2	32											
	6 Munich Massacre	Europe	Germany	Munich	Political	05/09/72	05/09/72	1	20											
	7 Japanese Embassy of Lima	South America	Peru	Lima	Political	17/12/96	22/04/97	126	3024											
	8 Carré d'As IV incident	Africa	Somalia	at bay	Economical	02/09/08	16/09/08	14	336											
	9 My Le Ponant incident	Africa	Somalia	at bay	Economical	04/04/08	12/04/08	8	192											
	10 Iranian Hostage Crisis	Asia	Iran	Tehran	Political	04/11/79	20/01/81	444	10656											
	11 Palace of Justice Siege of Bogota	South America	Colombia	Bogota	Political	06/11/85	07/11/85	2	28											
12 Operation Nimrod	Europe	United Kingdo	London	Political	30/04/80	05/05/80	6	127												

Hostage Takings Statistics, (for research and estimation purpose only) Table 1/3

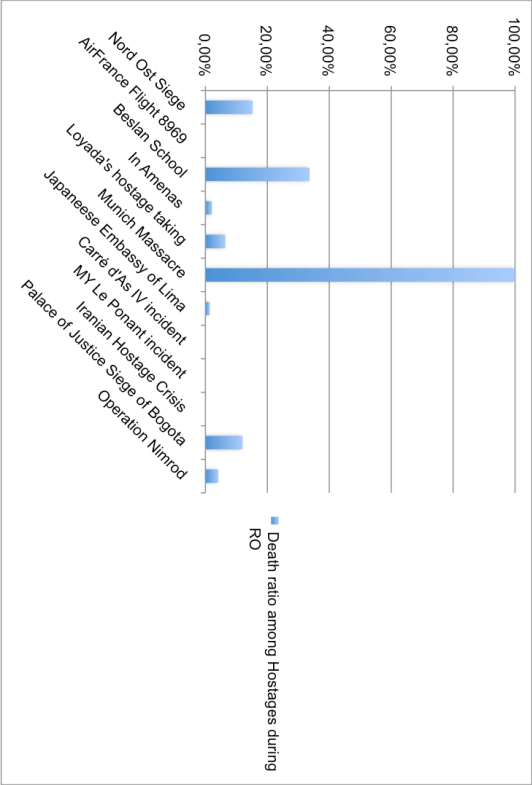


Chart 1, Death ratio among hostages during rescue operations