Goettingen Journal of International Law 9 (2019) 3, 395-424

Reconciling the Irreconcilable? – The Extraterritorial Application of the ECHR and its Interaction With IHL

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* This article has been written during my employment as research assistant at the Chair of Prof. Dr. iur., h.c. Helen Keller, Professor of Constitutional and International Law at the University of Zurich and Justice at the European Court of Human Rights. Prof. Keller has provided guidance from the very beginning, throughout the drafting process, and has read and commented on the entire article in its final form. My special thanks thus goes to her. The arguments put forward, however, do not necessarily reflect Prof. Keller's views. Any errors that may remain are, of course, my sole responsibility.

doi: 10.3249/1868-1581-9-3-meier

Abstract

This article examines the extraterritorial application of the European Convention on Human Rights (ECHR) during international armed conflict. After a brief discussion of the different historic origins of international human rights law and international humanitarian law (IHL), the article examines the test for establishing jurisdiction under Article 1 of the ECHR. A critical analysis of some contentious legal issues regarding derogations completes the picture of when jurisdiction is established. Subsequently, the article considers the interaction between the ECHR and IHL in international armed conflicts and concludes by arguing that a balance must be found between protecting human rights in international armed conflicts while not interfering unduly with IHL.

A. Introduction

I. Different Origins of IHL and IHRL

While historically international humanitarian law (IHL) and international human rights law (IHRL) have been developed in wholly different contexts, they are increasingly overlapping. This contribution focuses on an important international human rights treaty, the ECHR,[1] and its extraterritorial application in times of international armed conflict. In such situations, questions arise regarding whether the Convention can apply outside the territory of its member States and how the Convention and IHL interact. This paper does not consider the interplay between IHL and the ECHR in internal armed conflicts.[2]

To better understand the challenges that occur when both IHL and IHRL deal with the same factual situations, it is helpful to briefly look at their different origins. While the law of war belongs to the oldest areas of international law, IHRL has only been in existence since the end of the Second World War.[3] Before the Second World War, IHL had developed in isolation. Its modern codification process commenced with the first Geneva Convention of 1864.[4] While the sections of the 1907 Hague Regulations[5] on prisoners of war and occupied territories covered – what would today be called – human rights issues, at the time nobody referred to such terminology or, more generally, to the dignity of human

1 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221.

2 For an overview on how different types of armed conflicts are determined, see O. Hathaway *et al.*, 'Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian and Human Rights Law', 96 *Minnesota Law Review* (2012) 6.

3 H.-P. Gasser, 'The Changing Relationship between International Criminal Law, Human Rights Law and International Humanitarian Law', in J. Doria, H.-P. Gasser & M. Cherif Bassiouni (eds.), *The Legal Regime of the ICC: Essays in Honour of Professor I.P. Blishchenko* (2009), 1111, 1111-1112; T. D. Gill, 'Some Thoughts on the Relationship Between International Humanitarian Law and International Human Rights Law: A Plea for Mutual Respect and a Common-Sense Approach', in Y. Haek *et al.* (eds.), *The Realisation of Human Rights: When Theory Meets Practice: Studies in Honour of Leo Zwaak* (2014), 335.

4 *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*, 22 August 1864, available at https://ihl-databases.icrc.org/ihl/INTRO/120?OpenDocument (last visited 18 November 2019).

5 *Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land*, 18 October 1907, 187 CTS 227; Gasser, *supra* note 3, 1112.

beings.[6] Even in the years after the Second World War, when human rights were codified in various international and regional treaties,[7] the two bodies of law continued to develop independently.[8] None of the human rights treaties adopted after World War II directly dealt with questions concerning armed conflicts.[9] At the same time, the 1949 Geneva Convention did not explicitly refer to human rights despite containing rules on the protection of civilians in the hand of the enemy,[10] as well as basic rules for non-international armed conflicts[11] – domains that States usually consider to be internal affairs.[12]

Kolb noted that in the period after the Second World War

> "[...] the United Nations, the guarantor of international human rights, wanted nothing to do with the law of war, while the [International Committee of the Red Cross], the guarantor of the law of war, did not want to move any closer to an essentially political organization or to human rights law which was supposed to be its expression."[13]

6 Gasser, *supra* note 3, 1111-1112.

7 *Universal Declaration of Human Rights*, 10 December 1948, 217 A(III); ECHR, *supra* note 1; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171; *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966; 993 UNTS 3.

8 R. Kolb, 'The Relationship Between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions', 324 *International Review of the Red Cross* (1998), 409; the separate development of the two bodies of law has, however, been relativized by a recent historical study. See B. van Dijk, 'Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions', 112 *American Journal of International Law* (2018), 553.

9 Gasser, *supra* note 3, 1112.

10 *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

11 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (First Geneva Convention), 12 August 1949, Art. 3, 75 UNTS 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (Second Geneva Convention), 12 August 1949, 75 UNTS 85; *Geneva Convention Relative to the Treatment of Prisoners of War* (Third Geneva Convention), 12 August 1949, 75 UNTS 135; Fourth Geneva Convention, *supra* note 10; for an overview on the differences between international armed conflicts and non-international armed conflicts, see F. Kalshoven & L. Zegveld, *Constraints on the Waging of War: Introduction to International Humanitarian Law* (2011).

12 Gasser, *supra* note 3, 1113.

13 Kolb, *supra* note 8, 411.

The two bodies of law thus evolved separately. This started to change in 1968 at the United Nations Conference on Human Rights in Teheran, where delegates used the term *Human Rights in Armed Conflict* to refer to IHL.[14] The Additional Protocols to the Geneva Convention that were adopted in 1977 contain several explicit references to human rights.[15] As I will argue below, since the beginning of the 21st century, the case law of the European Court of Human Rights' (ECtHR) has brought IHL and IHRL even closer together.

This increasing interconnection,[16] however, gives rise to complex legal challenges, due in part to the different regulative focus of the two bodies of law. Traditionally, IHL regulated warfare between States. The 1949 Geneva Conventions, with the exception of Common Article 3, apply to situations of "[...] declared war or of any other armed conflict which may arise *between two or more of the High Contracting Parties* [...]".[17] This strict focus on international armed conflicts only changed in 1977, when Protocol II was adopted, which deals with non-international armed conflicts. However, Protocol II contains relatively few rules compared to those treaties that regulate inter-state conflicts. The main focus of IHL thus remains on armed conflicts between States.[18] This

14 Gasser, *supra* note 3, 1114.

15 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Additional Protocol I), 8 June 1977, 1125 UNTS 3; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (Additional Protocol II), 8 June 1977, 1125 UNTS 609; Art. 72 of Additional Protocol I mentions human rights as a subsidiary legal source in armed conflict; Art. 75 of Additional Protocol I codifies basic human rights for persons in armed conflict and holds that they have to be treated humanely in all circumstances. The preamble of Additional Protocol II recalls "[...] that international instruments relating to human rights offer a basic protection of the human person, [...]". The part on "Humane Treatment" in Additional Protocol II strongly resembles the fundamental guarantees regarding detention and penal prosecution of human rights law.

16 It has even been suggested that today the notion of *humanitarian* in IHL "[...] can be understood [...] only with reference to the idea, language, law and policy of human rights as the dominant moral and legal discourse of our times". However, while both branches of law have grown closer, the notion that the two bodies of law are indispensable to the understanding of each other seems exaggerated considering that IHL and IHRL are still separate legal regimes, see G. Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (2015), 340.

17 First Geneva Convention, *supra* note 11, Art. 2 (emphasis added).

18 This is still relevant even though the distinction between international armed conflicts and non-international armed conflicts has become increasingly blurred, see T. Meron, *The Making of International Criminal Justice: The View from the Bench: Selected Speeches* (2011), 220.

is where international human rights law differs. Its focus is on regulating the relationship between States and the individuals under their jurisdiction. This is the reason why international human rights treaties have their roots at the national level unlike IHL which has always been a predominantly international project.[19] While IHRL originates from the democratic revolutions of the late 18th century, IHL is more conservative as it takes armed conflicts as a given and simply tries to make them less cruel.[20] The current debate on how these two bodies of law (should) interact is based on the worry that their differences might be irreconcilable.[21] In this article, I shall argue that IHL and the ECHR can be reconciled to a certain degree.

II. Research Questions and Outline

The present contribution attempts to answer two main questions: 1) What is the test for establishing *jurisdiction* of the member States of the Council of Europe pursuant to Art. 1 of the ECHR? 2) Once jurisdiction is established, how do rights and freedoms of the Convention interact with norms of IHL in situations of international armed conflict? Part II shall give an overview of the recent case law on the extraterritorial application of the ECHR, on derogations and on the interaction between norms of the Convention and IHL. Additionally, some criticisms that have been voiced against these approaches will be presented. Section III will analyse the merits and shortcomings of these criticisms and will propose a way to reconcile the ECHR with IHL to a certain degree.

19 M. Happold, 'International Humanitarian Law and Human Rights Law', in C. Henderson & N. White (eds.), *Research Handbook on International Conflict and Security Law* (2013), 444, 446.

20 B. Bowring, 'Fragmentation, Lex Specialis and the Tensions in the Jurisprudence of the European Court of Human Rights', 14 *Journal of Conflict and Security Law* (2009) 3, 485, 489-490.

21 The concern that these two branches of law are irreconcilable might stem not only from their historical differences but also from a debate that has often been exaggerated on both sides. As Bethlehem notes: "The debate to this point, however, has too often been characterised by a high level of generality, a lack of judicial rigour, a failure by those in government to engage actively in public discussion, overly expansive claims on the part of non-governmental commentators, and anxiety on the part of the military that these developments are hampering the flexibility to act effectively to keep society safe", see D. Bethlehem, 'The Relationship between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict', 2 *Cambridge Journal of International and Comparative Law* (2013) 2, 180, 195.

B. Extraterritoriality, Derogations and the Interplay Between the ECHR and IHL

I. The Extraterritorial Application of the ECHR

Article 1 ECHR demarcates the Convention's scope. Its application *ratione loci* is controversial: does the Convention also apply outside the territory of its member States pursuant to Article 1? This section will give an overview of the ECtHR's case law on the Convention's extraterritorial application. The discussion will only be able to touch upon some of the most important cases and will put the emphasis on more recent case law.

During the negotiation of the Convention, an initial draft of Article 1 was phrased as follows: "Every State a party to this Convention shall guarantee to all persons within its territory the following rights: […]".[22] Although the final formulation used the terms "to everyone in their jurisdiction", this was done in order "[...] to expand [...] the Convention's application to others who may not reside, in a legal sense, but who are, nevertheless, on the territory of the Contracting States".[23] The change from territory to jurisdiction should thus not be over-interpreted as the intention of the drafters to apply the Convention on a large scale to the territories of non-member States. However, the Court's case law over roughly the last two decades has expanded the meaning of Article 1 in such a way that it can also apply extraterritorially.

In the *Banković* decision, the Grand Chamber unanimously held that *jurisdiction* was primarily a territorial notion and that other bases of jurisdiction are exceptional.[24] The exceptions to this territorial notion of jurisdiction that were recognised in the *Banković* decision included the events taking place on board craft and vessels registered in, or flying the flag of, a member State.[25] Additionally, the activities of a State's diplomatic and consular agents abroad would trigger its jurisdiction.[26] Other exceptional grounds are situations in which a State

22 W. A. Schabas, *The European Convention on Human Rights: A Commentary* (2015), 84.

23 Happold, *supra* note 19, 446; *Banković and Others v. Belgium and Others*, ECtHR Application No. 52207/99, Judgment of 12 December 2001, para. 63.

24 *Banković*, *supra* note 23, paras. 59, 61.

25 *Ibid*., para. 73; see also *Hirsi Jamaa and Others v. Italy*, ECtHR Application No. 27765/09, Judgment of 23 February 2012.

26 *Banković*, *supra* note 23, para. 73.

> "[...] through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government [...]".[27]

Moreover, the Court held that once jurisdiction is established, the rights and freedoms of the Convention cannot be "[...] divided and tailored [...]" to the particular circumstances but apply as a whole.[28] Lastly, the *Banković* decision developed the concept of legal space (*espace juridique*), which was used to limit the Convention's jurisdiction to an essentially regional, i.e. European, context.[29] In subsequent cases, however, the Court expanded this notion and has applied the Convention to alleged acts of Turkish agents in Iran[30] and Iraq.[31] In the *Al-Skeini* case, the Court established UK jurisdiction under Art. 1 of the ECHR in the Iraq conflict.

Moreover, the *Al-Skeini* case clarified the principles of extraterritorial jurisdiction pursuant to Article 1 of the ECHR by underlining that what counts is not only the control over a certain *place*, but also the control over *individuals*: "The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question."[32] However, the difference between spatial and personal control should not be exaggerated. *Ohlin* points out that: "[c]ontrol over territory can only mean the capacity to control the individuals who reside on that slice of territory".[33] The shift from spatial to personal control nevertheless comes with an important advantage: in models of spatial control, the difficult question arises of how small a piece of

27 *Ibid.*, para. 71; see also *Loizidou v. Turkey*, ECtHR Application No. 15318/89, Judgment of 18 December 1996; *Cyprus v. Turkey*, ECtHR Application No. 25781/94, Judgement of 10 May 2001.

28 *Banković*, *supra* note 23, para. 75.

29 *Ibid.*, para. 80.

30 *Pad and Others v. Turkey*, ECtHR Application No. 60167/00, Judgment of 28 June 2007.

31 *Issa and Others v. Turkey*, ECtHR Application No. 31821/96, Judgment of 16 November 2004.

32 *Al-Skeini v. the United Kingdom*, ECtHR Application No. 55721/07, Judgment of 7 July 2011, para. 136; this analysis was followed by the High Court of Justice of England and Wales, *Al-Saadoon and Others v. Secretary of State for Defence* [2015] EWHC 715.

33 J. D. Ohlin, 'Acting as a Sovereign versus Acting as a Belligerent', in J. D. Ohlin (ed.), *Theoretical Boundaries of Armed Conflict and Human Rights* (2016), 118, 139.

territory can be in order to give rise to jurisdiction. Is it, for example, enough to have spatial control over a neighbourhood or even a single room? Adopting a model of personal control avoids such difficulties.[34] It is important to note that the Court in *Al-Skeini* applied a personal conception of jurisdiction to the killing of the applicants' relatives only exceptionally, given that the UK exercised public powers at the relevant time in Iraq.[35] Had the UK not exercised such public powers, the personal conception of jurisdiction would have been inapplicable. This means that firing missiles from an aircraft or drone will not trigger jurisdiction if the State does not simultaneously exercise public powers. Isolated targeted killings by drones would thus not fall under the jurisdiction of the State Parties.[36]

Just like the spatial model of jurisdiction, the personal conception also gives rise to complications. *Milanovic*, for instance, asks how to non-arbitrarily limit this model. Why, *Milanovic* wonders, can jurisdiction based on *physical power and control over a person* be established in cases of physical custody if it is not also triggered by the killing of a person through a gun or a drone?[37] After all, as noted by Mr Justice Leggatt of the High Court of Justice of England and Wales in *Al-Saadoon and Others*: "I find it impossible to say that shooting someone dead does not involve the exercise of physical power and control over that person."[38] These complications will be further discussed below.

34 *Ibid*.

35 *Al-Skeini*, *supra* note 32, para. 149 reads as follows: "It can be seen, therefore, that following the removal from power of the Ba'ath regime and until the accession of the Interim Government, the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention."

36 M. Milanovic, '*Al-Skeini* and *Al-Jedda* in Strasbourg', 23 *European Journal of International Law* (2012) 1, 121, 130; recall that the paper at hand only deals with international armed conflicts. For an analysis of targeted killings in other contexts, see A. Bodnar & I. Pacho, 'Targeted Killings (Drone Strikes) and the European Convention on Human Rights', 32 *Polish Yearbook of International Law* (2013), 189.

37 Milanovic, *supra* note 36, 129.

38 *Al-Saadoon*, *supra* note 32, para. 95; suffice it to say here that this challenge will be examined in the next main section as it has to be understood in the context of the interplay between the ECHR and IHL

A last point on *Al-Skeini* is necessary. The Court held:

> "It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be *divided and tailored*".

Once jurisdiction is established based on personal conception – *authority and control* over an individual – the Convention does not apply in its entirety. Instead, the rights and freedoms that are *relevant* to the situation of the individual apply. It has been suggested that this includes Articles 2, 3, 5 and in certain circumstances Article 8.[39] However, rights and freedoms can only be divided and tailored to the context if State agents exercise *authority and control* over individuals, i.e. when jurisdiction is established based on the personal conception. If jurisdiction is based on the spatial model – effective control over territory – the entire range of substantive rights of the Convention applies.[40] This is meaningful, given that certain rights and freedoms are less relevant when it comes to *authority and control* over a few individuals. For example, it would be doubtful whether the right to form trade unions, which is codified in Article 11 ECHR, is relevant to a handful of individuals at a checkpoint. In the case of effective control over a piece of territory, this right can, however, be relevant and it is thus the obligation of the member State in control to guarantee it.

The *Hassan v. the United Kingdom* Grand Chamber judgment mainly deals with the arrest and detention of Tarek Hassan, an Iraqi national, by British forces in a British-controlled section of the U.S. operated Camp Bucca in Iraq.[41] *Hassan* is so far the most important case on the interaction between the Convention and IHL. Following Tarek Hassan's capture by British troops, the Court held that he was "[...] within the physical power and control [...]" of the UK and thus under UK jurisdiction.[42] Even though some operational aspects relating to Mr. Hassan's detention were transferred to the United States forces,

39 B. Rainey, E. Wicks & C. Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights*, 2017, 94.

40 *Banković*, *supra* note 23, para. 75; Rainey, Wicks & Ovey, *supra* note 39, 94 .

41 *Hassan v. the United Kingdom*, ECtHR Application No. 29750/09, Judgment of 16 September 2014, para. 14.

42 *Ibid*., para. 76.

the UK "[...] retained authority and control over all aspects of the detention relevant to the applicant's complaints under Article 5 [...]".[43] In *Jaloud v. the Netherlands*, the Court continued to focus on the *authority and control* test to establish jurisdiction pursuant to Article 1.[44]

II. Article 15 ECHR: Derogations

Before examining how the Convention and IHL interact, the focus will be put on Article 15 of the ECHR, which deals with derogations. The ECHR only applies extraterritorially in times of international armed conflict if, first, *jurisdiction* pursuant to Article 1 is triggered and, second, no valid derogation has been lodged. Article 15(1) reads: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law." Without going into any detail, it may be sufficient to state that what constitutes a "[...] war or other public emergency threatening the life of the nation [...]" raises interesting questions as to the margin of appreciation doctrine.[45]

Even in such emergency situations, however, not all rights can be derogated from. Article 2, 3, 4 (paragraph 1) and 7, i.e. the right to life, the prohibition of torture, the prohibition of slavery and forced labour as well as the prohibition of punishment without law are non-derogable. An important exception is that Article 2, the right to life, can be derogated from "[...] in respect of deaths resulting from lawful acts of war [...]".[46] How this exception is understood influences

43 *Ibid*., para. 78.

44 *Jaloud v. the Netherlands*, ECtHR Application No. 47708/08, Judgment of 20 November 2014, para. 152.

45 In the recent *Mehmet Hasan Altan v. Turkey* judgment, the Court reiterated that the Contracting State has a large margin of appreciation regarding the determination of such situations of emergency and of the measures they require, given that the national authorities are in more direct contact with the pressing needs of the moment. Nevertheless, the Court emphasized "[...] that States do not enjoy an unlimited discretion in this respect. The domestic margin of appreciation is accompanied by European supervision." In that case, the Court held that the military coup attempt in Turkey in 2016 constituted a "[...] public emergency threatening the life of the nation [...]", see *Mehmet Hasan Altan v. Turkey*, ECtHR Application No. 13237/17, Judgment of 20 March (10 September) 2018, paras. 91-93; see also *Şahin Alpay v. Turkey*, ECtHR Application No. 16538/17, Judgment of 20 March (20 June) 2018, paras. 75-77.

46 Art. 15(2) ECHR *supra* note 1.

how the Convention interacts with IHL regarding situations of targeting. Unfortunately, the question raised by this provision, namely how lawful acts of war are to be distinguished from unlawful ones, has not been discussed in the Court's case law so far and nothing in the drafting history of the ECHR assists in its interpretation.[47] In the Commentary on the ECHR, Schabas states that it is possible to understand the provision as referring to the *ius in bello* (IHL) or the *ius ad bellum* (the completely distinct body of international law regulating the recourse to the use of force in international relations).[48] In my view, the words *in respect to lawful acts of war* should be understood as referring to the *ius in bello*, to IHL. If these words referred to the *ius ad bellum*, it would mean that a derogation from the right to life in the context of an armed conflict not in line with the UN Charter[49] and other instruments regulating the recourse to force would be invalid.[50] This would come close to mixing the question of when a State can go to war and what it can do once it finds itself in war. If human rights law has any application in armed conflicts, it operates at the level of what is allowed in and surrounding hostilities. In this sense, it operates on the same level as the *ius in bello*. Given that modern international law has moved away from just war theories and adopted a clear distinction between the *ius ad bellum* and the *ius in bello*, I argue that the exception to the non-derogability of Article 2 should be understood to refer to the *ius in bello*.[51]

47 Schabas, *supra* note 22, 601; Rainey, Wicks & Ovey, *supra* note 39, 116; K. Oellers-Frahm, 'Menschenrechte und humanitäres Völkerrecht: Umfang und Grenzen der Zuständigkeit des Europäischen Gerichtshofs für Menschenrechte', in: G. Jochum, W. Frizenmeyer & M. Kau (eds.), *Grenzüberschreitendes Recht – Crossing Frontiers: Festschrift für Kay Hailbronner*, (2013), 491, 495 [Oellers-Frahm, Menschenrechte und humanitäres Völkerrecht].

48 Schabas, *supra* note 22, 602; Bodnar and Pacho also argue that *lawful acts of war* pursuant to Article 15 § 2 ECHR have to be determined by reference to UN Security Council resolutions, i.e. the *ius ad bellum*, see Bodnar & Pacho, *supra* note 36, 206.

49 Art. 2(4), Chapter VII of the Charter of the United Nations, 26 June 1945, 1 UNTS XVI.

50 Schabas, *supra* note 22, 602.

51 This is also the approach taken by D. Bethlehem, 'The Right to Life under Article 2 of the European Convention on Human Rights: Twenty Years of Development since McCann vs. the United Kingdom', in L. Early & A. Austin (eds.), *The Right to Life under Article 2 of the European Convention on Human Rights: Essays in Honour of Michael O'Boyle* (2016), 237; the defended opinion is shared by C. Johann, 'Article 15', in U. Karpenstein & F. C. Mayer (eds.), *EMRK: Konvention zum Schutz der Menschenrechte und Grundfreiheiten – Kommentar* (2015), 488, 493; the opposite position is taken by R. Alleweldt, 'Recht auf Leben', in O. Dörr, R. Grote & T. Marauhn (eds.), *EMRK/GG Konkordanzkommentar*,

The *Hassan* case answered important questions regarding derogations in international armed conflicts. In its judgment, the Grand Chamber held that the "[...] lack of a formal derogation under Article 15 does not prevent the Court from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5 in this case [...]".[52] The Strasbourg Court's reasoning was that no derogations from international human rights treaties are made in practice by States that detain prisoners in international armed conflicts.[53] This State practice of not formally derogating was seen by the Court, pursuant to Article 31 § 3(b) of the Vienna Convention on the Law of Treaties (VCLT), to constitute a consistent practice establishing an agreement regarding the Convention's interpretation.[54] The dissenting judges in *Hassan* argue that State practice can only modify the rights enshrined in the Convention "[...] towards a more *expansive or generous understanding of their scope than originally envisaged* [...]" but not towards a more limited or restricted interpretation.[55] It would indeed be preferable if States developed the Convention rights in a more expansive and generous way through subsequent State practice, but it seems doubtful why they should not be able to also limit these rights. First, nothing in the text of the VCLT suggests that State practice can only lead to an expansive development of a treaty text.[56] Second, if States have the power to change the treaty provisions in their written form in both directions, why should it be different for the subsequent development through State practice? The point is that the dissenting judges in *Hassan* present no convincing reasons as to why it should theoretically not be possible to modify the rights enshrined in the Convention in a non-generous way through State practice. Third, even if it were correct that subsequent practice can only establish a more *generous* way of interpreting the Convention rights, it is far from self-evident what such an interpretation would look like. Would, for instance, a shift in the Court's case law towards greater freedom of expression in the context of religious matters be

para. 79; contrary to the position defended here, see also H. Krieger, 'Notstand', in: Dörr, Grote & Marauhn (eds.), *EMRK/GG Konkordanzkommentar*, para 36.

52 *Hassan*, *supra* note 41, para. 103.

53 *Ibid.*, para. 101 .

54 *Ibid*.

55 Partly dissenting opinion of Judge Spano joined by Judges Nicolaou, Bianku and Kalaydjieva, *Hassan*, *supra* note 41, para. 13.

56 Art. 31 § 3(b) VCLT reads: "There shall be taken into account, together with the context: Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

a *generous* interpretation of Article 10 or would it be a restrictive interpretation of religious rights? Therefore, it seems difficult to claim that the ECtHR can only interpret the Convention in a *generous* way. It thus cannot be excluded on these grounds that subsequent State practice establishes an agreement of not formally derogating from human rights treaties in international armed conflicts. Therefore, the reasoning of the majority in *Hassan* on this matter seems to be defensible. By taking State practice into account, the *Hassan* judgment gives effect to the normative force of the factual, which is inherent in the methods of interpretation[57] in international law. *Hassan* recognized that Article 15 ECHR has been modified by State practice to not require a formal derogation in international armed conflicts anymore.[58] This does not mean, however, that subsequent State practice could not reverse this development. A step in this direction could be the derogation lodged by Ukraine in June 2015.[59]

While the Court in *Hassan* held that it is not necessary that a formal derogation be lodged, Article 5 ECHR will only be interpreted in the context of IHL where this is specifically pleaded by the respondent State. The reason stated by the Court for this finding is that: "It is not for the Court to assume that a State intends to modify the commitments which it has undertaken by ratifying the Convention in the absence of a clear indication to that effect."[60] However, neither is it for the Court to assume that a State does not consider itself bound by IHL in situations of armed conflict. That a State is bound by all its international legal obligations should be self-evident and does not have to be stated explicitly in every single instance. Following the above-mentioned argumentation of the Court, it could be inversed: Only when the State clearly indicates that it is

57 *Ibid*.

58 Fachathaler even states that "[i]n fact, applied to scenarios like in *Hassan*, the novel approach of the Court would lead to Article 15 effectively becoming obsolete", see T. Fachathaler, '*Hassan v. United Kingdom and the Interplay Between International Humanitarian Law and Human Rights Law in the Jurisprudence of the European Court of Human Rights*', 16 *European Yearbook on Human Rights* (2016), 345, 356.

59 ECtHR Fact Sheet, Derogation in Time of Emergency, available at https://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf (last visited 18 November 2019).

60 *Hassan*, *supra* note 41, 54, para. 107; Oellers-Frahm partly welcomes this new approach given that "the Court has at least acknowledged that it cannot consider whether acts of states are consistent with IHL without some sort of consent of the state concerned". K. Oellers-Frahm, 'A Regional Perspective on the Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations: The European Court of Human Rights', in E. de Wet & J. Kleffner (eds.), *Convergence and Conflicts: Of Human Rights and International Humanitarian Law in Military Operations* (2014), 333, 356.

also bound by human rights law are its commitments which it has undertaken by ratifying the Geneva Convention modified. Both arguments have the same structure and are equally questionable.[61] Instead, it should be assumed that a State considers itself bound by both IHL and the Convention whenever they apply.[62] The question of applicability of either branch of law cannot be made dependent on the State's clear indication to that effect.

III. The Interaction Between IHRL and IHL

It seems clear that the ECHR applies extraterritorially to situations of armed conflict. But how does the Convention interact with IHL? To answer this question, a brief overview of the International Court of Justice's (ICJ) case law on how IHRL generally interacts with the law of armed conflict will be given to then shed light on the Strasbourg Court's recent judgments on the role of the Convention in international armed conflicts.

In the *Nuclear Weapons* advisory opinion, the ICJ held that IHRL – in this case the International Covenant on Civil and Political Rights – continues to apply in times of war, except for the provisions that have been derogated from. While human rights norms apply, their exact meaning is determined by

61 Fachathaler makes the point that "[b]y stressing the importance of the United Kingdom's explicit referral to international humanitarian law in order to have it considered and, thus, have a less strict standard applied, it effectively invites all states involved in armed conflicts to switch human rights on and off, just as they please." T. Fachathaler, *supra* note 58, 345, 356.

62 A further reason why the view should be rejected that Art. 5 ECHR will only be interpreted in the context of IHL where this is specifically pleaded is that the Court has emphasized that the Convention does not apply in a vacuum. In the *Al-Dulimi* judgment, the Grand Chamber held that "[...] the provisions of the Convention cannot be interpreted and applied in a vacuum. Despite its specific character as a human rights instrument, the Convention is an international treaty to be interpreted in accordance with the relevant norms and principles of public international law, and, in particular, in the light of the Vienna Convention on the Law of Treaties of 23 May 1969. Thus the Court has never considered the provisions of the Convention to be the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties (…)". *Al-Dulimi and Montana Management Inc. v. Switzerland*, ECtHR Application No. 5809/08, Judgment of 21 June 2016, 65, para. 134.

the applicable *lex specialis*, namely IHL.[63] In the *Construction of a Wall* advisory opinion the ICJ adopted the view that three possible solutions exist:

> "[S]ome rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as lex specialis, international humanitarian law."[64]

This was confirmed in the ICJ's *Armed Activities on the Territory of the Congo* judgment.[65] The two branches of international law, the ICJ held, must thus be considered in tandem.

That both branches should be considered together is also the approach taken by the ECtHR. On the merits in *Al-Skeini*, the Court had to decide whether the UK complied with the procedural obligation to investigate the killings pursuant to Article 2. While the Court held that this procedural obligation continues to apply in situations of armed conflict, it also acknowledged that in such situations constraints may lead to delays or compel the use of less effective measures of investigation.[66] Therefore, the Court held that the obligation to conduct an effective investigation is not an obligation of result but of means.[67] Through its holding in this case the Court showed awareness that in the difficult context of an armed conflict the procedural obligation under Article 2 cannot be applied in the same way as it would in peacetime in Europe.

In the 2014 Grand Chamber judgment of *Jaloud v. the Netherlands*, the Court made similar allowances for the challenging conditions under which the investigators had to work.[68] Despite the Court's willingness in *Al-Skeini* to

63 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 240, para. 25; in this regard, Gill noted that: "The ICJ neither said that IHL will always take precedence in every situation and with regard to any issue, nor did it say that the entire relationship between IHL and IHRL is governed by it." Gill, *supra* note 3, 257.

64 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, 178, para. 106.

65 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, Judgment, ICJ Reports 2005, 168, 242, para. 216.

66 *Al-Skeini*, *supra* note 32, 68-69, para. 164.

67 *Al-Skeini*, *supra* note 32, 68-69, para. 164.

68 *Jaloud*, *supra* note 44, para. 226.

take the difficult situations arising in armed conflicts into consideration, the finding that the ECHR did apply extraterritorially to the Iraq conflict was seen as a regrettable watershed.[69] It was argued that extending the applicability of the Convention destabilises the delicate balance between military necessity and humanitarian considerations inherent in IHL. There was a fear that simultaneously applying the ECHR and IHL would lead to absurd results and would threaten to undermine both branches of law.[70]

In *Hassan v. the United Kingdom*, the Court further clarified how the Convention interacts with IHL. In deciding whether the right to liberty and security pursuant to Article 5 ECHR had been violated, it held that

> "[b]y reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of that provision should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions. As with the grounds of permitted detention already set out in those subparagraphs, deprivation of liberty pursuant to powers under international humanitarian law must be 'lawful' to preclude a violation of Article 5 § 1. This means that the detention must comply with the rules of international humanitarian law and, most importantly, that it should be in keeping with the fundamental purpose of Article 5 § 1, which is to protect the individual from arbitrariness […]".[71]

Several points are noteworthy in this crucial text passage: first, the Convention and IHL do co-exist. Second, Article 5 § 1 ECHR *should be accommodated, as far as possible* with the norms of the Geneva Conventions. Lastly, the detention must (fully) comply with IHL while it suffices that it be in line with the *fundamental purpose* of Article 5 § 1, namely the protection of

69 J. Morgan, R. Ekins & G. Verdirame, 'Derogation from the European Convention on Human Rights in Armed Conflict: Submission to the Joint Committee on Human Rights' (2017), available at http://judicialpowerproject.org.uk/wp-content/uploads/2017/04/JPP-JCHR-submission-on-ECHR-derogation.pdf (last visited 18 November 2019), paras. 8-9.

70 *Ibid.*, paras. 5, 7; these criticisms will only be mentioned here in order to deal with them in greater detail in Section III.

71 *Hassan*, *supra* note 41, 53-54, paras. 104-105.

arbitrariness. The dissenting judges argued that there is no scope to *accommodate* Article 5 § 1 ECHR with the powers of internment under IHL, given that they clearly contradict each other.[72] Instead of attempting to "[...] reconcile the irreconcilable [...]",[73] they contended that the Strasbourg Court must give priority to the ECHR.[74]

C. Reconciling the ECHR and IHL

I. Criticism Regarding *Jurisdiction* Pursuant to Article 1 ECHR

It has been argued that the application of the ECHR should not be extended to military action outside the territory of Member States.[75] The criticism has two components: First, the application of the Convention in times of armed conflict and, second, its extraterritoriality pursuant to Article 1. The ECHR clearly applies to international armed conflicts (at least to those taking place on the territory of member States) as it would otherwise be meaningless to allow for derogations to be lodged in such situations.[76] Moreover, the argument that a simultaneous application of the ECHR together with IHL would lead to unclear legal obligations cannot *per se* preclude the Convention from applying in international armed conflicts, given that at the time of the Convention's negotiation in 1950 the four Geneva Conventions had already been agreed upon. It was thus clear from the beginning that the non-derogable rights and freedoms enshrined in the ECHR can apply, simultaneously with IHL, to armed conflicts in Europe. The core of the criticism thus has to be the extraterritorial application of the Convention, given that one cannot meaningfully argue that the non-derogable parts of the Convention do not apply to armed conflicts taking place on the territory of Council of Europe Member States. As has already been discussed above, it was not the intention of the drafters to apply the ECHR outside of the territory of its member States,[77] the Court's jurisprudence over roughly the last two decades has developed the meaning of Article 1 to also cover certain extraterritorial situations.

72 *Hassan*, *supra* note 41, 64-65, paras. 16-17.
73 *Hassan*, *supra* note 41, 66, para. 19.
74 *Hassan*, *supra* note 41, 66, para. 19.
75 Morgan, Ekins & Verdirame, *supra* note 69, para. 2.
76 M. Sassòli, 'Die EMRK in Krisenzeiten', in: S. Breitenmoser & B. Ehrenzeller (eds.), *Wirkungen der Europäischen Menschenrechtskonvention (EMRK) – heute und morgen: Kolloquium zu Ehren des 80. Geburtstages von Luzius Wildhaber* (2018), 23, 33.
77 Happold, *supra* note 19, 446-447; *Banković*, *supra* note 23, 17, para. 63.

It could be argued that this extension of jurisdiction has been done incorrectly. *Milanovic*'s point raised above is that the personal conception of jurisdiction cannot be limited non-arbitrarily. Why should an isolated killing by a drone not trigger jurisdiction while physical custody does?[78] This distinction is, however, not arbitrary as it takes the interplay between the Convention and IHL into consideration. In the situation of a drone strike, the many detailed targeting rules of IHL are sufficient to determine whether a target can be attacked or not. In situations of physical custody, however, the level of control over an individual is higher than in the case of a drone strike. The detained individual cannot *only* be killed or wounded, as it is in the case of the drone strike, but can be forced to take certain actions – actions that could not be ordered by a drone flying over the house of an individual, for example. Because the control over an individual held in custody is greater than the control exercised by a drone, it indeed makes sense to establish jurisdiction in the former situation but not in the latter. Moreover, the rights of the Convention, interpreted by accounting for the context of an international armed conflict, can be applied to such situations without unduly interfering with IHL. The way the Strasbourg Court established jurisdiction is thus non-arbitrary as it is based on relevant differences in control and considerations regarding the interplay between the Convention and IHL. Therefore, the Court is well advised to stick to the strict criteria of jurisdiction. Establishing jurisdiction in situations other than those that have been mentioned above would not be beneficial to the ECHR nor for IHL. Applying the Convention to isolated targeted killings would, for instance, severely destabilise the balance between the two legal regimes.

If the criticism that the Convention should not apply to military action outside the territory of member States is justified, it is so not because Article 1 of the Convention cannot be interpreted in the way it has been by the Court but because the consequences of such an extension would be adverse. In other words, the criticism would need to focus on the unfavourable consequences of the interplay between the ECHR and IHL.

78 Milanovic, *supra* note 36, 129.

II. Criticism Regarding the Interplay Between the ECHR and IHL

1. Absurd Results?

A central argument against the extraterritorial application of the Convention pursuant to Article 1 ECHR and its interaction with IHL is that the application of the Convention would produce absurd results when applied to armed conflicts. For example, the right to life codified in Article 2 ECHR could be interpreted to prohibit targeting enemy combatants with lethal force unless strictly necessary for the protection of life. The right to liberty and security enshrined in Article 5 ECHR could also be read as fully precluding taking prisoners of war, given that this is not listed as one of the exceptions within Article 5.[79] Such criticism has to be taken very seriously, given that unrealistic results stemming from the applicability of the ECHR in times of armed conflict would undermine the respect for the Convention and at the same time weaken IHL. However, it is also important that these criticisms are not exaggerated.

First, it should be recalled in what situations *jurisdiction* pursuant to Article 1 ECHR is established, namely when a State exercises effective control over a territory or its agents have authority and control over individuals.[80] In both scenarios, we are not dealing with chaotic circumstances of war where nobody really is in control of the situation. Instead, jurisdiction is established in cases of military occupation, at checkpoints, in prisons etc., where states clearly exercise control. For that reason, as has already been discussed, isolated targeted killings by drones or fighter jets would not trigger jurisdiction.[81] The Convention thus only applies when a member State has a certain amount of control over the situation, i.e. either effective control over a piece of territory or authority and control over individuals. It can hardly be argued that the conditions in a military prison are so chaotic that it is absurd to ask from the State which controls the detention centre to at least respect the core human rights obligations.

Second, as to the right to life codified in Article 2 of the Convention, States can, subject to the conditions spelled out in Article 15, lodge derogations "[...] in respect of deaths resulting from lawful acts of war [...]". As has been noted above, the lawfulness is determined by the *ius in bello*, i.e. IHL. If a derogation is lodged and is valid, an application of Article 2 ECHR to situations

79 Morgan, Ekins & Verdirame, *supra* note 69, para. 5.
80 See Section B. I above.
81 Milanovic, *supra* note 36, 121, 130.

of international armed conflict would not produce the manifestly absurd results that the above-mentioned critics fear. Third, other than Articles 2 and 5 of the Convention, the obligations under the ECHR and the rules of IHL can be interpreted to lead to the same results. This is, for example, the case regarding the prohibition of torture and degrading treatment, as well as for the right to a fair trial.[82] *Sassòli* argues that the right to respect for private and family life can also be interpreted as not interfering with the provisions of IHL. Other freedoms, such as the freedom of expression and the freedom of assembly and association are not contained in IHL and hence no direct tensions can occur.[83] Article 2 (right to life) and Article 5 (right to liberty and security) are thus clearly the most important fields of potential conflicts.[84]

Even though the above-mentioned criticisms should be relativized, certain problematic issues remain. What if no valid derogation from Article 2 "[...] in respect of deaths resulting from lawful acts of war [...]" has been lodged? How can Article 5, which does not list taking prisoners of war as an exception to the deprivation of liberty, be brought in line with IHL? A strict interpretation of Articles 2 and 5 would be at odds with the realities of war, as well as with the rules of IHL. It would be impossible to engage in an international armed conflict without constantly violating these two ECHR provisions if they were not interpreted less strictly than in peacetime. Such an outcome would, of course, weaken the Convention. The aim of alleviating the suffering of people in situations of armed conflict would thus be missed by adopting a strict interpretation of Articles 2 and 5. Hence the core question is how these two ECHR provisions should be interpreted in times of international armed conflict once jurisdiction is established.

The procedural obligations to independently and effectively investigate the deprivation of life must also be assessed along with the substantive side of Article 2. The substantive component of Article 2 shall be discussed first. As stated above, the ICJ in the *Nuclear Weapons* advisory opinion has decided that the IHL rules referring to lethal uses of force in international armed conflicts constitute the *lex specialis* to the right to life.[85] Moreover, the ICJ held that while human rights norms apply, their exact meaning is determined by the applicable *lex specialis*, namely IHL.[86] Article 15 § 2 ECHR, which allows derogations from

82 Sassòli, *supra* note 76, 35-36.
83 Sassòli, *supra* note 76, 36.
84 Sassòli, *supra* note 76, 35.
85 Legality of the Threat or Use of Nuclear Weapons, *supra* note 63, 240, para. 25.
86 *Ibid*.

the right to life only "[...] in respect of deaths resulting from lawful acts of war [...]", strongly suggests that the drafters of the Convention would have agreed with the ICJ's *Nuclear Weapons* advisory opinion on the relation between IHL and the right to life in international armed conflicts. As noted in *Hassan*, the Strasbourg Court does not require a formal derogation under Article 15 ECHR to be lodged.[87] In light of these cases, it seems that the substantive component of Article 2, while it still applies to international armed conflicts, is interpreted through the lens of IHL even when no valid derogation has been lodged.[88] Leaving the conceptual differences between the *lex specialis* and the *Hassan* approach aside, the point is that the ECHR continues to apply to situations of international armed conflict but is interpreted by taking IHL into account.

The procedural component of Article 2, namely the obligation to independently and effectively investigate deprivations of life, is another potential area of tension between the ECHR and IHL. The Strasbourg Court has on several occasions demanded an investigation in situations of armed conflict where a person has been killed intentionally.[89] IHL only demands an investigation in cases in which a prisoner of war[90] or an internee[91] has been killed and when someone is accused of a grave breach of IHL.[92] Given that IHL only requires investigations in these cases and does not prescribe any further details, the procedural component of Article 2 ECHR has been described as *lex specialis*.[93] If

87 *Hassan*, *supra* note 41, 53, para. 103.

88 Recall that the Court required in Hassan that Article 5 ECHR only be interpreted in the context of IHL where this is specifically pleaded by the respondent State. As mentioned above, however, I argue that compliance by the State with all its applicable international legal obligations should be presumed.

89 *Güleç v. Turkey*, ECtHR Application No. 21593/93, Judgment of 27 July 1998, 37, para. 81; *Kaya v. Turkey*, ECtHR Application No. 22729/93, Judgment of 19 February 1998, unreported, 25, 26, para. 86; *Ergi v. Turkey*, ECtHR Application No. 23818/94, Judgment of 28 July 1998, unreported, 27, para. 85; *Isayeva and Others. v. Russia*, Applications Nos. 57947/00-57949/00, Judgment of 24 February 2005, unreported, 43 - 45, paras. 209-213; *Al-Skeini*, *supra* note 32, 63 - 70, paras. 151-167; *Jaloud*, *supra* note 44, 65-76, paras. 157-228.

90 Art. 121 of the Third Geneva Convention, *supra* note 11.

91 Art. 131 of the Fourth Geneva Convention, *supra* note 10.

92 Common Article 49, 50, 129 respectively 146 of the four Geneva Conventions, *supra* notes 10, 11.

93 G. Gaggioli, *L'influence mutuelle entre les droits de l'homme et le droit international humanitaire à la lumière du droit à la vie* (2013), 474-514; Sicilianos has pointed out that due to the ambiguity of the *lex specialis* approach, the Court has so far not referred to it but preferred to apply IHL and the ECHR simultaneously. L.-A. Sicilianos, 'L'Articulation entre droit international humanitaire et droits de l'homme dans la jurisprudence de la

such an approach were taken, however, the ECtHR would need to refrain from requiring an investigation in cases of lethal force used against combatants, given that IHL – which is *lex specialis* on the matter of killing combatants – clearly does not prohibit such conduct.[94] Even though the death of civilians can be legal under IHL, it could be argued that an investigation is necessary in order to shed light on whether the conditions of lawfully killing civilians have been fulfilled in the specific case.[95] The Strasbourg Court does not require the same standards of investigation in situations of armed conflict as it would in a peaceful context.[96] This ensures that the obligation to investigate under Article 2 does not lead to an unrealistic burden for the parties to the conflict.

Regarding Article 5 of the Convention, the Strasbourg Court's approach concerning the interplay between the ECHR and IHL adopted in *Hassan* appears to be a workable route. As has been seen, the Grand Chamber held that the ground of permitted deprivation of liberty set out in Article 5 § 1 ECHR should be "[...] accommodated, as far as possible [...]" with the provision regarding detention under IHL.[97] While the rules of IHL have to be fully complied with, it suffices that the fundamental purpose of Article 5 § 1, which is the protection from arbitrary detention, be respected. This interpretation of Article 5 does not interfere unduly with the delicate balance between humanitarian considerations and military necessity that is at the heart of IHL.[98] One might even argue that merely requiring respect for the fundamental purpose of Article 5 adds very little, if anything at all, to the provisions of IHL, given that the detention of enemy combatants and civilians is regulated by the Geneva Conventions and can thus hardly be described as arbitrary. However, the main advantage of the

Court européenne des droits de l'homme', *Swiss Review of International and European Law* (2017) 1, 3, 16.

94 Sassòli, *supra* note 76, 44.

95 *Ibid*.

96 *Al-Skeini*, *supra* note 32, 68-69, para. 164; *Jaloud*, *supra* note 44, 75, para. 226.

97 *Hassan*, *supra* note 41, 53, para. 104.

98 Hampson mentions that: "Lawyers with certain armed forces shy away from anything to do with human rights law and, by extension, with human rights more generally, perhaps at least in part owing to fear of the unknown." At the same time, she highlights that "[o]n condition that human rights law is interpreted in the light of relevant rules of the law of armed conflict, armed forces should not fear the extraterritorial applicability of the former." F. J. Hampson, 'Is Human Rights Law of Any Relevant to Military Operations in Afghanistan?', 85 *International Law Studies* (2009), 485, 486, 511[Hampson, Military Operations in Afghanistan]; it is hoped that the *Hassan* judgment contributes to establishing a considerate balance between IHL and the ECHR and that therefore military lawyers will less often shy away from human rights law.

Hassan approach is that it allows the Strasbourg Court, whose competence is limited to applying the Convention, to pronounce itself on situations where an individual is detained in the context of an international armed conflict. Due to the weak enforcement mechanisms of IHL, this advantage of the *Hassan* approach is not to be underestimated.[99]

2. Policy and Procedural Concerns

There are several policy and procedural concerns regarding the application of the Convention to times of armed conflict. For one, the ECtHR is already overburdened by its current workload, which is quite substantial. Regarding this criticism, it is indeed true that the Strasbourg Court is tasked with deciding too many cases when compared with its few resources. However, this is a problem of a lack of resources, not of too many cases. It would be a wrong reaction to turn a blind eye on those situations where the gravest human rights violations often occur, namely armed conflicts, simply because of a lack of resources. Rather, this problem needs to be solved by acquiring more funds. A further concern is that it would be difficult to properly decide cases without being able to get reliable factual evidence from the ground. The ECtHR cannot engage in fact finding on the spot and is thus dependent on the, often scarce, information at its disposal. This is especially a challenge in situations of armed conflicts where it is even more difficult for the Court to get accurate documentation. Insufficient factual evidence forces the Court to leave certain legal questions unanswered. This,

[99] Due to IHL's weak enforcement mechanisms, Oellers-Frahm welcomes that human rights courts take IHL into consideration. At the same time, she cautions against an undue extension of the ECtHR's competence *ratione materiae* in order not to weaken its own implementation and excessively interfere with IHL. Oellers-Frahm, *Menschenrechte und humanitäres Völkerrecht*, *supra* note 47, 504. I argue that the *Hassan* case achieves exactly this balance; it is to be noted that the relationship between IHL and IHRL needs to be clarified in any case, whether this is done by a human rights court or by a body mainly applying IHL. As remarked by Hampson, in the case of the establishment of a new IHL court "[a] new problem would (…) emerge, namely the extent to which the new IHL body could take account of human rights law in determining whether there had been a breach of IHL. Rather than creating new problems, it might be preferable to attempt to solve the difficulties that arise for existing institutions." F. J. Hampson, 'The Relationship Between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body', 90 *International Review of the Red Cross* (2008) 871, 549, 572 [Hampson, The Relationship Between International Humanitarian Law and Human Rights Law].

however, does not mean that it cannot pronounce itself on situations where the facts are sufficiently established.

Another question relating to the factual basis of the ECtHR's decisions concerns the prima facie evidence required for the establishment of an administrative practice in inter-state cases. To substantiate an application by providing evidence has to be distinguished from the burden of persuading the Court. The substantiation of an application requires the concerned State to adduce evidence which is sufficient to allow a reasonable person to decide in favour of that party.[100] In contrast, the party that bears the *persuasive* burden of proof will lose on the relevant point if its factual contentions are not in the end proved to the appropriate standard.[101] For present purposes, I only refer to the substantiation of an application by adducing evidence. Providing substantial evidence to prove an administrative practice is usually treated in the admissibility phase while the *persuasive* burden of proof is dealt with on the merits. However, in the *Georgia v. Russia (II)* admissibility decision, the Chamber decided to join the question of providing substantial evidence to prove an administrative practice to the merits.[102] In terms of procedural economy, it would be advisable not to blur the distinction between these two steps.[103] The requirement of the exhaustion of domestic remedies applies to individual as well as inter-state cases. This requirement, however, may differ in inter-state proceedings. To the extent that "[...] the applicant State complains of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask the Court to give a decision on each of the cases put forward as proof or illustrations of that practice" the requirement of the exhaustion of domestic remedies not does apply.[104] Such

100 T. Thienel, 'The Burden and Standard of Proof in the ECtHR', 50 *German Yearbook of International Law* (2007) 543, 545; usually the term *burden of producing evidence* is distinguished from the *persuasive burden of proof*. The ECtHR, however, refers to *substantiating an application* by providing evidence instead of using the term *burden of producing evidence*.

101 *Ibid.*, 548; J. Auburn, 'Burden and Standard of Proof', in H. M. Malek & M. N. Howard & S. L. Phipson (eds.), *Phipson on Evidence* (2005), para. 6-01, para. 6-02.

102 *Georgia v. Russia II*, ECtHR Application No. 38263/08, Decision of 13 December 2011, unreported, 33, para. 93-94.

103 In the Grand Chamber case of *Cyprus v. Turkey* the Court confirmed the Commission's view of limiting the scope of admissibility, which was in the interest of procedural economy. *Cyprus v. Turkey*, ECtHR Application No. 25781/94, Judgment of 10 May 2001, 81, para. 335.

104 *Ireland v. the United Kingdom*, ECtHR Application No. 5310/71, Judgment of 18 January 1978, 56-57, para. 159; *Georgia v. Russia II*, *supra* note 102, 31, para. 85; W. A. Schabas, *supra* note 22, 728.

an administrative practice consists of the repetition of acts and their official tolerance.[105] An applicant State trying to prove an administrative practice must provide substantial evidence. However, this should not be understood to mean that the applicant State has to fully prove the existence of an administrative practice, given that:

> "[...] whether the existence of an administrative practice is established or not can only be determined after an examination of the merits. At the stage of admissibility prima facie evidence, while required, must also be considered as sufficient... There is prima facie evidence of an alleged administrative practice where the allegations concerning individual cases are sufficiently substantiated, *considered as a whole and in the light of the submissions of both the applicant and the respondent Party*. It is in this sense that the term 'substantial evidence' is to be understood."[106]

The ECtHR will thus "[...] study all the material before it, from whatever source it originates [...]".[107]

In practice this flexible approach may lead to uncertainty. Firstly, the States involved in inter-state proceedings currently have no clear guidance on which Party is under the obligation to adduce the required evidence. While it is understandable why the Court considers the evidence "[...] as a whole and in light of the submissions of both the applicant and the respondent Party [...]",[108] further clarifications would be welcomed. If the applicant government knew more precisely which party has to adduce what kind of evidence, it could better foresee the likelihood of succeeding in Court. This is particularly important regarding sensitive information, such as military intelligence. Better

105 *Georgia v. Russia II*, *supra* note 102, 31, para. 85; *France, Norway, Denmark, Sweden, and the Netherlands v. Turkey*, ECtHR Application Nos. 9940/82-9944/82, Commission decision of 6 December 1983, unreported, 163, para. 19.

106 *Georgia v. Russia II*, *supra* note 102, 31, para. 86; *France, Norway, Denmark, Sweden, Netherlands v. Turkey*, *supra* note 105, 164, paras. 21-22; emphasis added; international humanitarian law is not only relevant for the inter-state case as such but also for the numerous individual applications that can be examined as evidence of an administrative practice. *Georgia v. Russia I*, ECtHR Application No. 13255/07, Judgment of 3 July 2014, 37, para. 128; see also *Ireland v. the United Kingdom*, *supra* note 104, 55, para. 157.

107 *Georgia v. Russia I*, *supra* note 106, 28, para. 95; see also *Cyprus v. Turkey*, *supra* note 103, 31, para. 113; *Ireland v. the United Kingdom*, *supra* note 104, 57, para. 160.

108 *Georgia v. Russia II*, *supra* note 102, 31, para. 86. *France, Norway, Denmark, Sweden, Netherlands v. Turkey*, *supra* note 105, 164-165, paras. 22.

foreseeability of the rules of evidence would enable the applicant State Party to assess the trade-off between successfully making its case at the ECtHR and revealing sensitive information. As inter-state cases are often based on heavily contested facts, clearer evidentiary rules would prevent the ECtHR from being slowed down by numerous such cases. This, in turn, would free resources to be allocated to individual cases. Lastly, elucidating the evidentiary procedures of the establishment of an administrative practice would enable the Strasbourg judges to ensure a coherent case-law regarding this crucial matter in inter-state proceedings. Hence clarifying the rules regarding the substantiation of a *prima facie* case would be to the benefit of State-Parties, the Court and the many individual applicants that are waiting for a judgment in their case.

Moreover, it has been argued that the staff of the ECtHR will either have to be further trained in IHL or rely on IHL specialists.[109] While this is true, it should be noted that the Court has to deal with many different legal branches and it is thus necessary that its staff consists of generalists with the support of a few experts. The same could be argued regarding the ICJ's expertise in IHL. Therefore, while it would be appreciated if member States further supported the ECtHR, e.g. by seconding IHL lawyers, a Court with such a wide material scope like the ECtHR relies on jurists that have a wide knowledge of different aspects of international and domestic law without being overly specialised.

Critique against the majority's findings in *Hassan* has been voiced by four partly dissenting judges. Referring to the clash between the provisions on detention contained in the ECHR and in the Geneva Conventions, the judges argue that

> "[t]he Court does not have any legitimate tools at its disposal, as a court of law, to remedy this clash of norms. It must therefore give priority to the Convention, as its role is limited under Article 19 to '[ensuring] the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto'."[110]

Is the Strasbourg Court indeed not legitimized to remedy the clash between the ECHR and IHL? Yes, it is true that the Court is tasked to apply

[109] Hampson, *The Relationship Between International Humanitarian Law and Human Rights Law*, *supra* note 99, 571.

[110] *Hassan*, *supra* note 41, 66, para. 19.

solely the ECHR.[111] However, this does not bar it from interpreting the rights enshrined in the Convention in their context, even if these contextual factors are also governed by another branch of international law. In the *Hassan* judgment, the Grand Chamber pronounced itself on the scope of Article 5 of the ECHR, not on norms of IHL.[112] If the Court were unable to take other fields of law into consideration when interpreting the Convention, the outcome would often be disconnected and unrealistic.[113] Had the majority in *Hassan* blindly given "[...] priority to the Convention [...]" without taking IHL into consideration, its application would have given rise to the unrealistic result that, during an international armed conflict, prisoners of war cannot be lawfully detained.[114] The argument made here is, however, not mainly a consequentialist one. The point is that the ECtHR did not exceed its competence as a court of law by referring to another branch of law when interpreting the Convention. To the contrary, it is the task of the Strasbourg Court to apply the rights and freedoms enshrined in the Convention in light of their context – a context that includes both domestic law and other branches of international law.[115]

111 Oellers-Frahm points out that pursuant to Article 15 § 2 ECHR, the Court's competence *ratione materiae* is extended to also include an examination of whether deaths resulted from *lawful acts of war* – i.e. an examination of IHL. Oellers-Frahm, *Menschenrechte und humanitäres Völkerrecht*, *supra* note 47, 494.

112 Lippold noted that „[...] the European Court did not engage in a mere balancing which could have blurred both regimes and raised legitimacy concerns, and instead adopted a restrained interpretation of the Convention which the court is mandated to interpret.", M. Lippold, 'Between Humanization and Humanitarization? Detention in Armed Conflicts and the European Convention on Human Rights', 76 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2016), 53, 88.

113 The Court often takes other areas of law into consideration, e.g. the Hague Convention (*Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, 1343 UNTS 89). See, for instance, *X v. Latvia*, ECtHR Application No. 27853/09, Judgment of 26 November 2013.

114 Lippold furthermore argued that if the Court in the *Hassan* case had applied Art. 5 ECHR without any qualification it would have risked the non-implementation by member States. Moreover, he commends "[...] that the judgment does not emphasize one [branch of international law] at the expense of the other. The UK won the Hassan case, and the European Court applied the Convention, but not to the detriment of international humanitarian law." Lippold, *supra* note 112, 88.

115 The Court held in the *Al-Dulimi* case that the Convention cannot be applied in a vacuum, *supra* note 62.

D. Concluding Remarks

The tests for establishing jurisdiction extraterritorially pursuant to Article 1 are meaningful and the ECHR and IHL can be reconciled. The Court would be well advised to stick to the strict criteria of jurisdiction. Extending the application of the Convention to situations of isolated drone strikes would, for example, unnecessarily interfere with the sole domain of IHL. While numerous challenges arise from the interplay between the ECHR and IHL, it would be exaggerated to conclude that either only IHL applies or that the Strasbourg Court should blindly give priority to the Convention when applying it to extraterritorial situations of international armed conflict. Instead, a middle way must be found. It is crucial that the rights and freedoms of the Convention do not interfere unduly with the delicate balance between humanitarian considerations and military necessity which is inherent in IHL. This is especially true for the two provisions that might give rise to the greatest tensions, namely Article 2 (the right to life) and Article 5 (the right to liberty and security) of the Convention. The argument was made that there are ways to apply the ECHR without imposing unrealistic obligations on the parties to the conflict. Such a considerate application of the Convention leads, however, to a lower standard of protection in international armed conflicts as compared to normal peacetime situations. Given that the application of human rights never takes place in a contextual vacuum, it is legitimate to account for the difficult context in international armed conflicts. Were the Convention applied in exactly the same way as during peacetime, unrealistic and harmful consequences would result.

Going forward, it is hoped that the Strasbourg Court continues to develop a prudential balance between not unduly interfering with IHL while continuing to protect individuals in international armed conflict from human rights violations.[116] No doubt this is a difficult task since the two branches of international law have different historical origins and ways of functioning.

[116] Gioia also calls for a prudential balance between the two branches of law: "[...] some commentators already interpret the Court's case-law relating to the right to life as being 'at odds' with IHL and, indeed, hail this as the beginning of a 'new approach' whereby combat operations will be treated in the same way as law-enforcement operations. This attitude is often based on the perception that the protection provided to individuals by IHL is less than that afforded under IHRL. In my opinion, however, this perception is largely mistaken, much as the view that IHRL should apply in times of armed conflict in exactly the same way as it applies in times of peace and without any adaptations is unrealistic and thus, ultimately, dangerous: IHRL extremists tend to forget that international law is the product of a society where sovereign states still play the leading role." A. Gioia, 'The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian

However, both IHL and IHRL share a common goal, namely alleviating human suffering. To come closer to this purpose, they should be reconciled, even though this might appear at first to be attempting to *reconcile the irreconcilable*.

Law in Armed Conflicts', in O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (2011), 201, 248-249.