Chapter 19

How Does the ECHR Provide Protection in wartime?

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Abstract

The article aims to provide an overview of selected case-law of the European Court of Human Rights, covering the interplay between international humanitarian law and international human rights law from several points of view, especially in relation to the protection of the right to life and the right to liberty and security.

Keywords: European Convention for the Protection of Human Rights and Fundamental Freedoms, armed conflicts, international humanitarian law, international human rights law

1. Introduction

Several years ago, it would have been rather easy to answer the question how the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter also referred to as the "Convention") provides protection in wartime, i.e. during armed conflicts. However, the situation has changed dramatically since then primarily because of the cases brought before the European Court of Human Rights after the Russian Federation engaged in armed conflicts with Georgia and later on with Ukraine because of the Crimea.

This article is not about the still ongoing armed conflict between Ukraine and Russia because of the aggression of the Russian Federation and its invasion into the

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territory of Ukraine that started in February 2022. It is not even about any alleged perpetration of war crimes and crimes against humanity.[1] This article aims at covering some of the key issues that have been decided by the European Court of Human Rights (hereinafter also referred to as the "Court") in the *Georgia v. Russia* (II) case, the *Ukraine and the Netherlands v. Russia* case within the admissibility phase and some other cases such as *Varnava and others* and *Hassan*. Since these decisions included the application of several concepts of international human rights law and international humanitarian law at the same time, because of space constraint, focus has been chosen to be given to only three Articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms, namely its Article 1 (principle of extraterritoriality and the relevant issue of jurisdiction of a State party), Article 2 (right to life) and Article 5 (right to liberty and security). Such a strict framework is intended to help in understanding the interplay between international human rights law and international humanitarian law.

The first part of the article will focus on the interplay between international human rights law and international humanitarian law itself, i.e. from a general point of view. The second part will analyse the European Convention on Human Rights as an international treaty. It will also look into the means of interpretation applicable in case of an international treaty. The next part will aim at providing an overview of selected decisions of the European Court of Human Rights to point out particularities of the simultaneous application of international human rights law and international humanitarian law. The fourth part will focus on a decision adopted by the European Court of Human Rights, which became final only as regards the admissibility aspect. The aim of this article is to examine the legal framework that is applicable during armed conflicts and to emphasise that both the factual and the legal context must be taken into account in every single case decided by an international judicial body, including the European Court of Human Rights.

2. International Human Rights Law and International Humanitarian Law in General

Both these areas of international law have the same final *raison d´être*, namely the protection of the inherent dignity of individuals and ensuring their safety and well-being. However, each of these areas use different methods to achieve their goal.

International humanitarian law and international human rights law are two distinct but interconnected sets of legal norms. International humanitarian law

1 For more information see e.g. an investigation carried out by the International Criminal Court, information available at: https://www.icc-cpi.int/situations/ukraine.

primarily focuses on regulating the actions of parties involved in armed conflicts, aiming to mitigate human suffering and to protect non-combatants, prisoners of war and civilians.[2] It thus governs the conduct of parties during armed conflicts, namely methods and means of warfare.[3] International human rights law, on the other hand, is applicable both in peacetime and in times of armed conflicts, setting universal standards for the respect and protection of human rights under all circumstances, although sometimes derogation from these standards is possible.[4] The interplay between international humanitarian law and international human rights law occurs during armed conflicts, where both bodies of law complement and reinforce each other to ensure a comprehensive human rights protection framework. The interplay between international humanitarian law and international human rights law underscores the need for a comprehensive approach to addressing human rights violations during armed conflicts, emphasizing accountability, justice and the principle of humanity.

The International Court of Justice (hereinafter also referred to as "ICJ") and other international tribunals have already considered the relationship between international humanitarian law and international human rights law in their decisions, aiming to uphold the overall framework of human rights during armed conflicts. By the time of the CEA conference in June 2023, the International Court of Justice has specifically approached the relationship between international humanitarian law and international human rights law in two of its advisory opinions, namely in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, adopted in 1996[5] and in its advisory opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, adopted in 2004,[6] and in one judgment, namely in its decision on Armed Activities on the Territory of the Congo.[7]

In the course of those proceedings, some States argued that international human rights treaties were adopted to protect human rights in peacetime and that unlawful loss of life in hostilities was to be governed by the law applicable in times of armed conflicts, i.e. international humanitarian law.[8] The Court rejected this argument and stated that the protection provided by international human rights treaties does not cease in wartime, except upon the application of a derogation clause. But even in that case some rights are not derogable anyway. Even in times of national emergency

2 See e.g. Henckaerts and Doswald-Beck, 2005, p. 3. For more information about the principle of distinction see also Article 48 of Additional Protocol I.

3 Crowe and Weston-Scheurber, 2013, pp. 24–44.

4 See e.g. Article 15 of the Convention.

5 International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996.

6 International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004.

7 International Court of Justice, *Democratic Republic of the Congo v. Uganda*, Judgment, I.C.J. Reports 2005, p. 168, para. 216.

8 International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996 (I), p. 239, para. 24.

and in times of belligerent hostilities, the right to life is protected by the international human rights protection system. It is true that people are deprived of their lives during armed conflicts, however, such a deprivation must undergo determination whether it has been arbitrary or not according to the law applicable in armed conflict which is designed to regulate the conduct of hostilities.

According to the ICJ, the protection provided for by international human rights law does not cease in case of an armed conflict.[9] As for the relationship between international humanitarian law and international human rights law, there are three possible situations presented by the ICJ. First, some rights may be exclusively addressed by international humanitarian law. Second, some rights may be exclusively addressed by international human rights law. Third, there are rights that are of a concern of both these areas of international law. For the third situation, the ICJ originally stated that international humanitarian law is *lex specialis* vis-à-vis international human rights law.[10] Nevertheless, it does not mean that international human rights law is not applicable in such a situation, both these branches of law coexist and are applied within the same framework.

As for the European regional system of human rights protection, there are several possibilities to limit the scope of human rights protection system that was foreseen when the ECHR was drafted and adopted. Not only can a State Party withdraw from the Convention,[11] it can also apply reservations when ratifying it.[12] Finally, a State Party may apply the derogation clause of the Convention. Article 15 of the Convention, the so-called derogation clause, regulates the application of the concept of derogation in exceptional situations in three paragraphs, both materially in a positive and negative way and procedurally without setting a specific time frame. It is not only in wartime but also upon the occurrence of any other public emergency threating the life of the nation when a State Party to the Convention may take measures derogating from its obligations under the 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. The State Party is obliged to keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons thereof and of the time when such measures have ceased to operate and the provisions of the Convention are again being fully executed.[13] It is very important to point out that there are limits to the derogation clause, namely in relation to some rights that are considered to be non-derogable: no derogation from Article 2 (right to life), or from Articles 3 (prohibition of torture), 4 (paragraph 1, prohibition of torture and forced labour) and 7

9 International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004, para. 106.

10 Compare ibid. The Court maintained the same approach in Armed Activities on the Territory of the Congo, para. 216.

11 Article 58 of the Convention.

12 Article 57 of the Convention.

13 See Article 15, paras. 1 and 3 of the Convention.

(*nullum poena sine lege*) is possible in case of war or emergency situation.[14] However, directly within the derogation clause, an exception is a part of a list of non-derogable rights, namely deaths resulting from lawful acts of war.[15]

Especially at the time when the Convention was adopted in 1950, these two areas of international law were as separated and distinct as possible. International human rights law started to emerge, international humanitarian law had been one of the oldest branches of international law.[16] International humanitarian law was the law applicable during wars, i.e. armed conflicts, international human rights law was the other side of the classical division of law in wartime and in peacetime.[17] Nevertheless, as it will be demonstrated, although differences between international human rights law and international humanitarian law keep their reasoning, the interplay between them is more obvious in the current framework of international law. The appropriate example is analysed in the following subchapter, namely an international human rights law treaty, the European Convention on Human Rights, and its interpretation and application in armed conflicts, i.e. when international humanitarian law is applied as well.

3. The European Convention on Human Rights as an International Treaty and its Interpretation in case of Armed Conflicts

According to the general rule of interpretation codified in Article 31 of the Vienna Convention on the Law of Treaties,[18] a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Moreover, the Vienna Convention specifies that the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes, any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty and any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.[19] Furthermore, together with

14 See Article 15, para. 2 of the Convention.
15 Ibid.
16 Cryer *et al.*, p. 267
17 See also the analysis of the development of the relationship between international humanitarian law and international human rights law in Robert Kolb, Human Rights and Humanitarian Law. Max Planck Encyclopedia of Public International Law available at www.mpepil.com. *Johnston and others v. Ireland*, European Court of Human Rights, 18 December 1986, decision No. 9697/82.
18 For more details see e.g. Aust, 2007, p. 234.
19 Article 31 of the Vienna Convention on the Law of Treaties.

the context, there shall be considered any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation and any relevant rules of international law applicable in the relations between the parties.[20] Finally, the Vienna Convention determines also supplementary means of interpretation, including the preparatory work of the treaty[21] and the circumstances of its conclusion, to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.[22]

It is especially Article 31, para. 3, letter (c) of the Vienna Convention that is of relevance in relation to the topic of this contribution. Any relevant rule of international law applicable in the relations between the parties should be taken into account when deciding a case according to the European Convention on Human Rights. Having searched the case-law of the European Court of Human Rights in terms of the possible application of international humanitarian law when deciding the case in front of the Court, there are several approaches of the Court within its jurisprudence and decision competence.

As for the first approach, one might detect cases where no norm of international humanitarian law was mentioned, such as a very well-known case where acts of occupation were analysed. In *Loizidou v. Turkey* the Court declared full existence of the effective overall control by the Turkish armed forces over the disputed territory.[23] However, although occupation as such is an institute of international humanitarian law with its specified rules in e.g. Geneva Conventions from 1949, the Court has not even mentioned it at all. Its reasoning was based solely on the European Convention on Human Rights, the Court declared that the right to enjoy ownership of a Greek Cypriot woman was violated by preventing her from going to her property located in Northern Cyprus. However, in *Loizidou*, the Court pointed out that the Convention must not be interpreted and applied in a vacuum, but rather in light of the rules set out in the Vienna Convention on the Law of Treaties.[24]

Within the second approach, there are situations and cases where, on the contrary, the applicability of the Geneva Conventions from 1949 is expressly mentioned by the Court. The best example is a decision in *Varnava* case in which the applicants were relatives of Cypriot nationals who disappeared during Turkish military operations in Northern Cyprus in July and August 1974. In relation to the selected Articles

20 Ibid.

21 Article 32 of the Vienna Convention on the Law of Treaties. *Travaux préparatoires* were important in *Johnston and others v. Ireland*, European Court of Human Rights, 18 December 1986, decision No. 9697/82, § 52.

22 Article 32 of the Vienna Convention on the Law of Treaties.

23 *Loizidou v. Turkey*, application no. 15318/89, judgment, Grand Chamber, 18 December 1996, para. 56.

24 Ibid., para. 43.

considered in this contribution, namely Articles 1, 2 and 5 of the Convention, it was claimed that the Cypriot nationals had disappeared after being detained by Turkish military forces and that the Turkish authorities had not accounted for them since.[25] Considering its temporal jurisdiction, the Court decided that any complaints by the applicants asserting the responsibility of the Contracting State for factual events in 1974 were outside its temporal jurisdiction. However, since the applicants specified that their claims related only to the situation pertaining after January 1987 (acceptance of the right of individual petition by Turkey), namely the continuing failure to account for the fate and whereabouts of the missing men by providing an effective investigation was at stake.[26] And it was finally this continuing violation of Article 2 (right to life) of the Convention on account of the failure of the authorities to conduct an effective investigation into the fate of the nine men who disappeared in life-threatening circumstances that the Court held upon. Moreover, it was also decided upon a continuous violation of Article 5 (right to liberty and security) of the Convention by virtue of the failure of the authorities to conduct an effective investigation into the fate of the missing men. As for Article 1, the Court only referred to its previous case-law concerning Cyprus, namely to the decision of Grand Chamber in *Cyprus v. Turkey*.[27]

As for the interplay between international human rights law and international humanitarian law, the Grand Chamber concurred with the reasoning of the Chamber in holding that in a zone of international conflict, State Parties are under the obligation to protect the lives of those not, or no longer, engaged in hostilities.[28] This would also extend to the provision of medical assistance to the wounded; where combatants have died, or succumbed to wounds, the need for accountability would necessitate the proper disposal of remains and would require from the authorities to collect and provide information about the identity and fate of those concerned, or to permit bodies such as the International Committee of the Red Cross to do so.[29] The Court pointed out that Article 2 of the Convention must be interpreted, as far as possible, in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflicts.[30] Moreover, the

25 *Varnava and others v. Turkey*, applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90), judgment, Grand Chamber, 18 September 2009, para. 3.

26 Compare *Varnava* case, para. 134.

27 *Cyprus v. Turkey* case, application no. 25781/94, judgment, Grand Chamber, 10 May 2001, paras. 80 to 81.

28 *Varnava* case, para. 185

29 Ibid.

30 Ibid.

Court included all the Geneva Conventions into the footnote to specify the applicable rules.[31]

Finally, the third approach within the case law of the European Court of Human rights in relation to the interplay between international human rights law and international humanitarian law includes not only the applicability of both these branches, but their coexistence as such. The best example of the beginning of this approach is the *Hassan* case.[32] This case concerned the capture of the applicant's brother by British armed forces and his detention at Camp Bucca in Iraq. The applicant alleged in particular that his brother had been arrested and detained by British forces in Iraq and that his dead body, bearing marks of torture and execution, had subsequently been found in unexplained circumstances. He also complained that the British authorities had failed to carry out an investigation into the circumstances of his brother's detention, ill-treatment and death. The case therefore concerned extra-territorial jurisdiction and the application of the Convention in the context of an international armed conflict.[33]

As for more facts, after the British assessment that Tarek Hassan was a civilian who did not pose a security risk, he was determined to be released and placed in the civilian section of the base until the security situation allowed his release. The British Government submitted documents recording his release in the first days of May 2003. During a physical check of detainees carried out in mid-May 2003, Tarek Hassan was demonstrably no longer at the base.[34]

However, Tarek Hassan was never reunited with his family, and they had no information about his fate until 1 September 2003, when they were contacted after Tarek Hassan's body was accidentally found in Northern Iraq. According to the complainant, when Tarek Hassan was found, he had multiple gunshot wounds to the chest caused by a machine gun, his hands were bound with a plastic tape, and in his pocket, there was an identification tag issued by US authorities at Camp Bucca. The death certificate issued by the Iraqi authorities gave the date of death as 1 September 2003, leaving the cause of death undetermined.

As for legal issues, of the first one concerns the exercise of jurisdiction under Article 1 of the Convention outside the territory of a Member State. The Court recalled the principles formulated in the *Al-Skeini* case by application of which, Tarek Hasan fell under the jurisdiction of the United Kingdom because he was in the physical

31 See the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (first adopted in 1864, last revised in 1949); Second Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (first adopted in 1949); Third Geneva Convention relative to the Treatment of Prisoners of War (first adopted in 1929, last revised in 1949); and Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (first adopted in 1949), together with three additional amendment protocols, Protocol I (1977), Protocol II (1977) and Protocol III (2005).

32 *Hassan v. the United Kingdom*, application no. 29750/09, Grand Chamber, judgment, 16 September 2014.

33 See e. g. ibid., para. 86.

34 *Hassan* case, paras. 14 to 28.

power and control of British soldiers, even though this happened during the active fighting phase of an international armed conflict.[35] The Court also supported its conclusion by referring to the jurisprudence of the International Court of Justice and underlined that even in armed conflicts, international humanitarian law and human rights law could be applied at the same time.[36] Moreover, the Court rejected claims that the United States exercised jurisdiction over Tarek Hassan.[37]

The Court noted that detention under the Third and Fourth Geneva Conventions did not fall under any of the permitted exceptions to the prohibition of restrictions on personal freedom under Article 5, paragraph 1 of the Convention. In the absence of another agreement between the States on the interpretation of Article 5 of the Convention in international armed conflicts, the Court proceeded from the rules of interpretation codified in Article 31, paragraph 3, letter (b) of the Vienna Convention on the Law of Treaties, according to which the consistent practice of States following the ratification of the Convention can be understood not only as an expression of their agreement on the interpretation, but also of a change in the text of the Convention.[38] According to the Court, such a relevant practice of States is absent in cases of derogation from their obligations under Article 5 of the Convention if persons are detained under the Third and Fourth Geneva Conventions. Furthermore, it also seemed that the practice of not withdrawing from obligations under Article 15 of the Convention replicated the practice of States in relation to Article 4 of the International Covenant on Civil and Political Rights, which continues to apply even after the International Court of Justice proceeded in the case of the *Democratic Republic of the Congo v. Uganda* and specified its position in its advisory opinions on the Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territory and on the Legality of the Threat or Use of Nuclear Weapons, in which it confirmed that international human rights law was also applicable in international armed conflicts.

With reference to Article 31, paragraph 3, letter (c) of the Vienna Convention on the Law of Treaties, the Court further emphasised that the Convention must be interpreted in accordance with other rules of international law of which it is a part, i.e. also with international humanitarian law. The Geneva Conventions were negotiated concurrently with the Convention and are universally applicable, with the provisions of the Third and Fourth Geneva Conventions formulated to protect captured combatants and civilians posing a security risk. The Court recalled its earlier conclusion that Article 2 of the Convention must, to the maximum extent possible, be interpreted in the light of the general principles of international law, including international humanitarian law, the rules of which play an indispensable role in mitigating the inhumanity of armed conflict.[39] According to the Court, this conclusion

35 Cf. *Al-Skeini v. the United Kingdom*, no. 55721/07, Grand Chamber, judgment, 7 July 2011, paras. 130 to 142.

36 *Hassan* case, para. 24.

37 *Ibid*., para. 78.

38 *Soering v. the United Kingdom*, no. 14038 /88, judgment, 7 July 1989, paras. 102–103.

39 *Varnava* case, para. 185.

also applies in relation to Article 5 of the Convention. Due to the concurrent validity of the guarantees of international human rights law and international humanitarian law in armed conflicts, the Court found it necessary to try to interpret the Convention in a manner consistent with the framework established by the International Court of Justice.

The Court thus accepted the government's argument that the lack of a formal derogation under Article 15 of the Convention, the derogation clause, does not prevent it from taking into account the context and provisions of the norms of international humanitarian law when interpreting Article 5 of the Convention. Although the guarantees arising from the Convention remain in force even during an international armed conflict, there are legal reasons for the restriction of freedom formulated in Article 5 paragraph 1, letters a) to f) of the Convention to adapt the authority to take prisoners of war and to detain civilians posing a security risk under the Third and Fourth Geneva Conventions. However, only in an international armed conflict, where legal norms permit prisoners of war, Article 5 of the Convention can be so broadly interpreted even without derogation under Article 15 of the Convention.[40] In order for a restriction of liberty to be lawful within the meaning of Article 5, paragraph 1 of the Convention, the detention must comply with the rules of international humanitarian law and in particular with the basic purpose of Article 5, paragraph 1 of the Convention, i.e. the protection of individuals against arbitrary decisions. According to the Court, the procedural guarantees contained in Article 5, paragraphs 2 and 4 of the Convention must also be interpreted in a way that considers the context and the relevant rules of international humanitarian law. Furthermore, the Court added that, given that Tarek Hassan was not detained pursuant to Article 5, paragraph 1, letter c), Article 5, paragraph 3 of the Convention was not applicable to the case under discussion.[41]

However, the lack of a formal derogation under Article 15 of the Convention had to be looked into as well, since in case there is no such derogation, it cannot lead the Court automatically to the assumption that a State Party intends to change its obligations under the Convention. In the absence of derogation, the Court has to interpret and apply the provisions of Article 5 of the Convention in the light of the relevant provisions of international humanitarian law only if such an objection is raised.[42]

Considering the above-mentioned principles and the facts of the case (Tarek Hassan was armed at the time of his arrest, other weapons and documents of intelligence importance were found in his house), the Court concluded that the Geneva Conventions were applicable during the relevant period, while the arrest of Tarek Hassan took place in accordance with these Conventions and was not arbitrary.

40 In non-international armed conflicts, the Geneva Convention on Prisoners of War with its detailed legal framework is not applicable (only its Article 3 that is, however, not detailed enough if interpretation of the Convention is done according to Article 31 of the Vienna Convention on the Law of Treaties).

41 *Hassan* case, para. 106.

42 Ibid., para. 107.

Moreover, it only took a few days and the reason for the detention was obvious to the detainee from the questions that were put to him during the interrogations. The Court thus found no violation of Article 5 of the Convention.[43]

As for the alleged violation of Article 2 of the Convention, the Court recalled that the obligation under this Article in conjunction with Article 1 of the Convention imposes on States the duty of effective investigation where an individual has been killed as a result of the use of force by State officials.[44]

However, in the present case, according to the Court, there was no indication that the United Kingdom was responsible for the alleged ill-treatment of Tarek Hassan or for his death, nor that the death occurred in a United Kingdom-controlled territory or while he was in the hands of the British authorities, which could establish an obligation to conduct an effective investigation. The Court declared this part of the complaint inadmissible since it found it manifestly ill-founded.[45]

Although the decision was adopted by a clear majority, a partially dissenting opinion was provided by Co-Judges Nicolaou and Bianku and Judge Kalaydjieva, together with Judge Spano. They emphasised that the majority, in the Court's conclusion of no violation of Article 5 of the Convention, attempted to merge rules of international law that are incompatible.[46] These judges emphasised that the Convention is applied equally in times of peace and war, otherwise the possibility of derogation from obligations under Article 15 of the Convention would be meaningless. Therefore, according to the dissenting judges, if the United Kingdom considered it likely that it would be necessary to detain prisoners of war or civilians posing a security risk within the meaning of the Third and Fourth Geneva Conventions during the Iraq campaign, the only legal recourse was to derogate from its obligations under Article 15 of the Convention, which the United Kingdom failed to do. The position of these dissenting judges points out that the authority to restrict personal liberty under the Third and Fourth Geneva Conventions relied upon by the respondent Government in the *Hassan* case is in direct conflict with Article 5, paragraph 1 of the Convention. According to the dissenting opinion, the Court has no legal instrument to resolve this conflict. It must therefore, in the purpose of the obligations imposed on it by Article 19 of the Convention, give priority to the Convention. In attempting to reconcile the irreconcilables, the majority failed to respect the significance of the scope and content of the fundamental right to liberty under the Convention, as reflected in its purpose and historical origins in the horrors of the Second World War.[47]

43 Ibid., para. 108 to 111.
44 *Al-Skeini and Others* case, para. 163.
45 See Article 35 of the Convention.
46 See the dissenting opinion, para. 17.
47 Ibid., para. 19.

4. Latest Case Law of the European Court of Human Rights Regarding Armed Conflicts

Before considering the last two selected cases, from a jurisdictional point of view it is very important to mention at least basic facts about NATO operation in former Yugoslavia, and the related *Banković* case.[48] A complaint was submitted by six people living in Belgrade, Serbia against 17 NATO Member States which are also State Parties to the Convention. The applicants complained about the bombing by NATO, as part of its campaign of air strikes during the Kosovo conflict, of the Serbian Radio-Television headquarters in Belgrade, which caused damage to the building and several deaths. The Court declared the application inadmissible. It made a distinction between the attributability of the acts of State to that State and its jurisdiction by refusing the argument that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, could be brought within the jurisdiction of that State for the purpose of Article 1 of the Convention.[49] It found that, while international law did not exclude a State's exercise of jurisdiction extra-territorially, jurisdiction was, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States. Other bases of jurisdiction were exceptional and required special justification in the particular circumstances of each case, the Court did not find special justification for airstrikes. It was therefore not persuaded that there was any jurisdictional link between the victims of the airstrike and the respondent States.[50]

A different approach to the so-called effective control to base the jurisdiction under Article 1 of the Convention was taken in the inter-State case concerning the Georgia-Russia conflict.[51] This case concerned allegations by Georgia of administrative practices on the part of Russia that allegedly included various breaches of the Convention, in connection with the armed conflict between Georgia and Russia in August 2008. The *Georgia v. Russia (II)* case was a landmark judgment by the European Court of Human Rights in cases concerning armed conflicts. The alleged violations concerned, *inter alia*, the right to life and the freedom of movement. The Court pointed out that Russia exercised effective control over parts of Georgia's territory during and after the conflict. The Court found that a distinction had to be made between the military operations carried out during the active phase of hostilities and the other events occurring after the cessation of the active phase of hostilities – that is, following the ceasefire agreement of 12 August 2008.

48 *Banković and Others v. Belgium and 16 Other Contracting States*, 19 December 2001, Grand Chamber – decision on admissibility.

49 *Banković* case, para. 75.

50 European Court of Human Rights, Fact Sheet – Armed Conflicts,

51 *Georgia v. Russia (II)*, application no. 38263/08, judgment, Grand Chamber, 21 January 2021.

The Court decided that the events that took place during the active phase of hostilities, i.e. during 5 days from 8 to 12 August 2008, did not fall within the jurisdiction of Russia for the purposes of Article 1 of the Convention to respect human rights and therefore declared this part of the application inadmissible. To consider the approach of the Court in relation to Article 1 of the Convention, let us have a closer look at this Article: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." Having said that, it was found that armed fighting created chaos with no effective control over that area of an international armed conflict and that no form of "State agent authority and control" over individuals could be realised.[52] However, on the other hand, the Court held that the Russia had exercised "effective control" over South Ossetia, Abkhazia and the "buffer zone" during the period from 12 August to 10 October 2008 when the Russian troops officially withdrew from this territory. Even after that period it was found that there had been continued "effective control" realised over South Ossetia and Abkhazia by Russia.[53] Therefore, the Court concluded that the events occurring after the cessation of hostilities, that is after 12 August 2008, fell within the jurisdiction of the Russian Federation for the purposes of application of Article 1 of the Convention.[54]

As far as other selected Articles are concerned, namely Article 2 and Article 5 of the Convention, it is very interesting that the Court held that the Russia had had a procedural obligation under Article 2 of the Convention to carry out an adequate and effective investigation not only into the events which had occurred after the cessation of hostilities, following the ceasefire agreement of 12 August 2008, but also into the events which had occurred during the active phase of hostilities, i.e. during those 5 days from 8 to 12 August 2008 for with the Court found no jurisdiction of Russia related to Article 1 of the Convention. Based on such a conclusion, the Court decided that there had been a violation of Article 2 of the Convention in its procedural aspect. As far as Article 5 of the Convention is concerned, the Court held that there was an administrative practice contrary to the Convention as regards the arbitrary detention of Georgian civilians in August 2008.[55]

This decision is a very important case regarding the relevance of the European Convention on Human Rights in armed conflict situations, and it highlighted the duty of States to uphold human rights even in times of armed conflicts. Such an approach to extraterritoriality emphasized the importance of protecting human rights in various international contexts. The decision has developed the application of the principle of accountability and responsibility of States regarding their actions and their effects on individuals outside their territory.

52 Ibid., paras. 122 to 144.
53 Ibid., para. 174.
54 Ibid., para. 175.
55 Ibid., para. 254.

The case that is currently in the spotlight of the academia and practitioners is a case submitted by *Ukraine and the Netherlands against the Russian Federation*.[56] This article was written in 2023, after the Russian aggression against Ukraine had started in February 2022. However, the applications received within this contribution and still pending before the Grand Chamber include events in Eastern Ukraine that took place in 2014, including the downing of flight MH17, not the 2022 aggression. Nevertheless, there are several issues related to the interplay between international humanitarian law and international human rights law already in this case, however, the focus is only on issues concerning Article 1, Article 2 and Article 5 of the Convention in the thread of this contribution.

The application in the case of *Ukraine v. Russia (II)*, submitted on 13 June 2014 concerns the alleged abduction of three groups of children in eastern Ukraine between June and August 2014 and their temporary transfer to Russia.[57] The application in the case of *The Netherlands v. Russia*, submitted on 10 July 2020 concerns the shooting down on 17 July 2014 of Malaysia Airlines flight MH17 over Eastern Ukraine, killing 298 persons, including 196 Dutch nationals.[58] The Government of the Netherlands allege that Russia was responsible for these deaths, however, it failed to investigate them. From the procedural point of view, the jurisdiction was relinquished in favour of the Grand Chamber and since 27 November 2020 both inter-State applications have been joined. As of mid-October 2023, only the admissibility decision has already been adopted in which the Court confirmed that States must respect the principles of proportionality and necessity also during armed conflicts.

This admissibility decision was a long-awaited decision: although Russia was not a member of the Council of Europe at its adoption anymore, it concerned a situation from an era when it was. Moreover, there is another application lodged by Ukraine that considers the 2022 invasion and the situation afterwards when Russia still was a Party to the Convention.[59]

The *Ukraine and the Netherlands v. Russia* admissibility decision has received much attention from commentators, especially in relation to the interrelation between *ius ad bellum* and *ius in bello* and to the interplay between international humanitarian law and international human rights law. It is true that Ukraine argued that since it was Russia that used force in violation of international law, i.e. it violated the provisions of *ius ad bellum*, also this fact should be considered when applying *ius in bello*, and especially the norms of international human rights protection.[60] However, *ius ad*

56 *Ukraine and the Netherlands v. Russia*, application no. 8019/16, the case is still pending before the Court.

57 *Ukraine v. Russia (II)*, application no. 43800/14, complaints relating to events in Eastern Ukraine were placed under application no. 8019/16 still pending before the Court.

58 *The Netherlands v. Russia*, application no. 28525/20), complaints relating to events in Eastern Ukraine were placed under application no. 8019/16 still pending before the Court.

59 *Ukraine v. Russia (X)*, application no. 11055/22 still pending before the Court.

60 Ukraine, Application file, paras. 91(b), 92, 101, 110, 121.

bellum and *ius in bello* are separated to treat all the belligerents equally.[61] Moreover, international humanitarian law and international human rights law are always applicable even if one of the parties to the conflict does not respect them: in such a case the other side is still obliged to follow its own legal commitments, especially norms of law of armed conflicts.[62]

As for Article 1 of the Convention, this admissibility decision analysed it in relation to attributability and jurisdiction as such. Since this contribution is aimed at the jurisdictional aspect of Article 1 of the Convention, it is important to point out that the Court confirmed that it is well-established that acts of the States Parties performed outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 of the Convention.[63] Moreover, the Court developed criteria for establishing extraterritorial jurisdiction, either so-called spatial, i.e. when effective control over an area is established or personal, i.e. when an individual is under State agent authority and control. Finally, the jurisdictional link might be established also in relation to the procedural obligation of a State under Article 2 of the Convention.[64]

There have been differentiations provided by the Court in relation to active hostilities. According to the Court, in case there are complaints regarding military operations carried out during an active phase of hostilities to establish control over an area in a context of chaos, there is a presumption that extraterritorial jurisdiction is excluded under its both spatial and personal type, on the other hand, jurisdiction in relation to an obligation to investigate deaths that have occurred is established anyway.[65] Therefore, in a particular case of kinetic use of force in a context of hostilities and related chaos, a case-by-case determination is necessary to determine jurisdiction. This case-by-case decision-taking approach is important especially in relation to distinguishing the horizontal and vertical application of the Convention also in the context of chaos and related proximity. Nevertheless, as it was stressed by the Court, Article 1 of the Convention "cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State which it could not perpetrate on its own territory".[66] However, even if jurisdiction within the meaning of Article 1 of the Convention is established, it does not mean that all the aspects of the international legal framework of human rights protection and humanitarian law are applicable entirely, they are applied respectively.

61 Compare e. g. ICRC, 2020 Commentary to Geneva Convention on Prisoners of War, Article 2, online available at https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-2?activeTab=undefined

62 See Article 1 of Geneva Conventions from 1949, see also *ICTY, Prosecutor v. Kupreškić et al.*, IT-95-16-T, Senate judgment, 14 January 2000, paras. 511, 517 and following.

63 *Ukraine and the Netherlands v. Russia*, para. 555.

64 Ibid., paras. 560 to 575.

65 Ibid., para. 576.

66 Ibid., para. 570.

As it has been indicated, there are two Articles that toned to be considered in more detail if the interplay between international humanitarian law and international human rights law are at stake, namely Article 2 and Article 5 of the Convention.

During active hostilities, especially in the context of chaos of armed conflicts, killing combatants is a "natural" part of hostilities. According to Article 2 of the Convention, however, everyone's right to life shall equally, irrespective of the position of a combatant, 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 or in case of defence or to quell a riot or insurrection.[67] Even in these cases the use of force has to be no more than absolutely necessary.[68] Nevertheless, especially this procedural aspect is required to be understood in the context of international humanitarian law, i.e. in the context of armed conflicts. Even if Article 15 of the Convention, the derogation clause, is not applied, use of force during an armed conflict, i.e. war has to be analysed in light of interpretation based on Article 31, paragraph 3, letter (c) of the Vienna Convention on the Law of Treaties. According to the Convention, use of force has to be absolutely necessary. And in case of death, there is a positive obligation of a State Party to investigate it.[69] The principles of distinction, proportionality and precaution are applied according to international humanitarian law. It means, if a decision is taken on a case-by-case approach while interpreting the Convention in accordance with the Vienna Convention on the Law of Treaties, there might be a synthesis possible as it was possible in the *Hassan* case.

Such an approach is possible also in relation to Article 5 of the Convention. As for this Article and its aim at the interplay with international humanitarian law, it is true that no one shall be deprived of his liberty, save in accordance with a procedure prescribed by law in cases enlisted strictly in the Convention.[70] However, internment of prisoners of war is not realised as a punishment or to protect the society but because prisoners of war are considered to be a security threat. Moreover, their internment is not arbitrary in substance neither in time, there is a detailed framework in the Third Geneva Convention on Prisoners of War. There might be even security grounds under which civilians in enemy hands can be exceptionally subjected to the measures of internment and assigned residence.[71] This group of individuals protected by international humanitarian law has a specific legal treatment provided for by the Fourth Geneva Convention. That means that if the Convention is interpreted according to Article 31, paragraph 3, letter (c) of the Vienna Convention of the Law of Treaties, these two international treaties have to be taken into account

67 See Article 2 of the Convention.
68 Ibid.
69 *McCann and Others v. the United Kingdom*, application no.18984/91, judgment, Grand Chamber, para. 161.
70 See Article 5 of the Convention.
71 See e.g. Geneva Convention on Civilians, Article 78.

as well. The result then might be not a contradiction but a possible synthesis of the application of norms of different areas of international law.

5. Conclusions

Originally, both legal areas, international humanitarian law and international human rights law, were separated. First, from the historical point of view, international humanitarian law was the first to get developed since basic rules and principles of so-called law of armed conflicts were created already in ancient times.[72] Origins of international human rights law are dated to the era after WWII that was a milestone concerning legal obligations vis-à-vis individuals as human beings in general not only vis-à-vis foreign nationals. That was a fundamental change in relation to own inhabitants because previously there had been no norm limiting treatment of own nationals since it would have been considered until that time as a possible clash with a principle of no intervention into domestic affairs.[73] Furthermore, from the point of view of the scope of application and institutional background of both considered areas what is especially relevant in case law. International humanitarian law, also well-known as Geneva and Hague law, has become universally legally binding as treaty and customary law in a much bigger range than international human rights law that is universally applicable but in various details in a different legally binding framework when talking about regional human rights law systems. The interpretation of regional legally binding texts by regional judicial bodies (European, Inter-American and African Court) has differentiated several aspects of understanding and application of particular legal concepts. On the other hand, decisions of universal quasi-judicial bodies are not considered legally binding. Unlike international humanitarian law, where there is no special protection provided for by institutional background established and functioning on the international level, there is a well-established institutional background on both universal and regional international level in case of human rights protection. However, after all, it is still a State that is a primary subject of duties within both these areas.

Nowadays, the interrelation between the different areas of international law has been materialised also within the interplay between international humanitarian law and international human rights law. As one could detect it in the decisions of the International Court of Justice where international human rights law was originally considered to be *lex generalis* and later on held to be equally applicable during armed conflicts if not derogated, even the decisions of the European Court of Human Rights have moved from the position of no reference to international humanitarian law

72 Cryer *et al.*, p. 267.
73 Cf. Article 2, paragraph 7 of the UN Charter.

even in cases of armed conflicts to the position of implied preference of application of human rights law and of consideration relevant norms of international humanitarian law at the same time.

There have been some proposals on ignoring the specificities of international humanitarian law when applying the European Convention on Human Rights. However, not only could that lead to unwanted fragmentation of international law and international commitments of individual States, but also the result could not cause any greater humanisation of both areas, quite the contrary, respect for both, international human rights law and international humanitarian law could get reduced. To avoid the fragmentation and to support synthesis of various international legal norms, it is important when deciding upon applications in front of the European Court of Human Rights to take the context into account and to apply Article 31, paragraph 3, letter (c) of the Vienna Convention on the Law of Treaties as foreseen in this international treaty. Obviously, the European Convention for the Protection of Human Rights and Fundamental Freedoms is an international treaty itself. It has established an international judicial body that has to decide individual cases on the basis of a case-by-case approach, not to adopt generally legally binding decisions.

In conclusion, how does the Convention provide protection in wartime? While waiting for a decision in merit in the case of *Ukraine and the Netherlands v. Russia*, it is possible to state that factually speaking, the Convention provides protection of basic rights and fundamental freedoms in war as much as it is possible in a context of chaos of war and legally speaking, to the extent it is possible if taking all other international commitments of State Parties into account.

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