Third-Party Intervention on Behalf of the Geneva Academy of International Humanitarian Law and Human Rights

Ukraine and the Netherlands v. Russia (nos. 8019/16, 43800/14, 28525/20 & 11055/22)

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Compared to the text of the third-party intervention submitted to the European Court of Human Rights, the format used here has been modified to reflect the Geneva Academy standard style.

1. With letter dated 17 March 2023, the President of the Grand Chamber of the European Court of Human Rights (the Court) granted the Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy) leave to intervene as a third party in the joined case *Ukraine and The Netherlands v. Russia*. The letter invited the Geneva Academy to make written submissions insofar as they concern application no. 11055/22, and to refer to any aspects of the remainder of the joined case (i.e., application nos. 8019/16, 43800/14, 28525/20) only insofar as they relate to the issues raised in application no. 11055/22. In line with these indications, the submission by the Geneva Academy will address three main subjects: (I) The extra-territorial application of the ECHR in the active phase of hostilities; (II) The interplay between ECHR and *jus ad bellum*; (III) The interplay between the ECHR and international humanitarian law (IHL). As instructed, the submission will not address the facts or the merits of the case and will be limited to the general principles applicable to its determination.

I. The Extra-Territorial Application of the ECHR in the Active Phase of Hostilities

A. The notion of jurisdiction in the recent jurisprudence of the Court

2. The admissibility decision in the case of *Ukraine and The Netherlands v. Russia*[2] provides the most recent and comprehensive restatement of the Court's case-law following the finding regarding jurisdiction in the case *Georgia v. Russia (II)*.[3] Therein, the Grand Chamber recalled that 'it is well-established case-law that acts of the States Parties performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 of the Convention'.[4] Extraterritorial jurisdiction is explicitly described as an exception to the general principle of territoriality of jurisdiction,[5] and as a rebuttal to the presumption whereby 'a State does not exercise its jurisdiction outside its territory'.[6] Importantly, the Grand Chamber recalled and developed criteria for establishing extraterritorial jurisdiction, namely (i) effective control over an area,[7] (ii) State agent authority and

[1] We thank Dr Erica Harper, Head of Research and Policy Studies, for having managed the project and skilfully edited this submission.
[2] *Ukraine and the Netherlands v. Russia* [GC], nos. 8019/16, 43800/14 and 28525/20, 25 January 2023.
[3] *Georgia v. Russia (II)* [GC], no. 38263/08 (merits), 21 January 2021. On controversies surrounding the judgment in relation to jurisdiction, see Milanovic, 'Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos', in *EJIL: Talk!*, 25 January 2021.
[4] *Ukraine and the Netherlands v. Russia*, para. 555.
[5] *Ibid.*, title of V.B.3.b.iii. See also International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, I.C.J. Reports 2004, p. 136, para. 109.
[6] *Ukraine and the Netherlands v. Russia*, para. 553, quoting *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, 8 July 2004, para. 314.
[7] *Ukraine and the Netherlands v. Russia*, paras. 560-564. It is to be noted however that in previous jurisprudence, the Court also used the term "effective overall control" to establish jurisdiction: see *Loizidou v.*

control,[8] and (iii) the jurisdictional link as regards the procedural obligation under Article 2.[9] Whereas the latter ground has been developed relatively recently,[10] the former two have been the subject of extensive refinement by the Court over the years.[11] The first (also known as spatial jurisdiction) typically occurs where a State exercises effective control of an area outside its national territory as a consequence of military action.[12] The second (also referred to as personal jurisdiction) may arise, *inter alia*, in those circumstances where 'the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction'.[13] This ground includes, in particular, 'the exercise by State agents of physical power and control over the victim or the property in question' (typically custody) and 'isolated and specific acts of violence involving an element of proximity'.[14]

3. The framework developed by the Court in *Ukraine and The Netherlands v. Russia* is unitary, in the sense that it does not call for the elaboration of special criteria on extraterritorial jurisdiction in situations of international armed conflict. This is made explicit in paras. 556-558, which clarify that '[e]xtraterritorial jurisdiction is not excluded in situations of international armed conflict' and that 'a State may have extraterritorial jurisdiction in respect of complaints concerning events which occurred while active hostilities were taking place'.[15] The Court's ruling in *Georgia v. Russia (II)* is reaffirmed in the sense that the carrying out of military operations during an active phase of hostilities will still have a bearing on whether extraterritorial jurisdiction is actually exercised.[16] Crucially, the Grand Chamber clarified that this does not imply that a specific temporal phase of an international armed conflict can be entirely excluded from a State's jurisdiction under Article 1 ECHR.[17] Therefore, the occurrence of an active phase of hostilities will have a *probative* (even *presumptive*) value, but not a *normative* one.

4. It is to be noted that the admissibility decision in *Ukraine and the Netherlands v. Russia* did not resolve all matters pertaining to jurisdiction in the present case. In particular, the question whether the complaints regarding administrative practices of shelling fall within the jurisdiction of the respondent Government have been joined to the merits.[18] Additionally, the question of jurisdiction regarding military operations during an active phase of hostilities and outside territories controlled directly or indirectly by the respondent Government remains to be addressed. The possible exclusion of kinetic uses of force in situations of armed conflict raises difficult problems, some that have been commented on by the doctrine following *Georgia v. Russia (II)*, and others that have been raised in a novel manner by the Government of Ukraine in its submission. The question whether aggression can impact jurisdiction, as suggested by the Government of Ukraine, is addressed in section II, while the following paragraphs focus on whether jurisdiction can be excluded in relation to "military operations during an active phase of hostilities" and what would the consequences be in a situation such as the war in Ukraine. This section ends with a concrete proposal to further refine and potentially transcend the criteria devised by the Court.

Turkey [GC] (merits), no. 15318/89, 18 December 1996, para. 56; *Cyprus v. Turkey* [GC], no. 25781/94, 10 May 2001, para. 77.

[8] *Ukraine and the Netherlands v. Russia*, paras. 565-572.

[9] *Ukraine and the Netherlands v. Russia*, paras. 573-575.

[10] See *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, 29 January 2019, paras. 188-190; *Georgia v. Russia (II)*, paras. 330-332; *Hanan v. Germany* [GC], no. 4871/16, 16 February 2021, paras. 134-145.

[11] Previous detailed analysis (with references) of these two criteria can be found in *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, 7 July 2011, paras. 133-140; and *Georgia v. Russia (II)*, paras. 113-124.

[12] See *Loizidou v. Turkey*, no. 15318/89 (preliminary objections), 23 February 1995, para. 62; *Ukraine and the Netherlands v. Russia*, para. 560.

[13] See especially, *Al-Skeini*, para. 136; *Georgia v. Russia (II)*, paras. 117-24 and 130-136; *Carter v. Russia*, no. 20914/07, 21 September 2021, paras. 126-130; *Ukraine and the Netherlands v. Russia*, paras. 568-570.

[14] *Ibid*.

[15] *Ukraine and the Netherlands v. Russia*, paras. 556 and 558.

[16] See *ibid*, paras. 576-577 and discussion below.

[17] *Ukraine and the Netherlands v. Russia*, para. 558.

[18] See *ibid.*, para. 700.

B. Meaning of "military operations during an active phase of hostilities" and its impact on jurisdiction

5. In its admissibility decision in *Ukraine and the Netherlands v. Russia*, the Court strives to provide a coherent framework when applying to the facts of the case the general principles on jurisdiction as a threshold criterion. The cornerstone of its analysis lies in the *nature of the complaints*. In case they do concern "military operations carried out during an active phase of hostilities", the Court interprets *Georgia v. Russia (II)* as providing a kind of *presumption* that extraterritorial jurisdiction is excluded under both the spatial and the personal model, while safeguarding a duty to investigate deaths that have occurred.[19] When the complaints *do not* concern "military operations carried out during an active phase of hostilities" (as in the case it was considering), the general principles on extraterritorial jurisdiction will be applied first. Only after that initial determination, the Court will assess 'whether certain complaints or aspects of them might be said to be excluded from any jurisdiction established, on the basis that they occurred outside any area of effective control or concerned "military operations carried out during an active phase of hostilities"'.[20] It would then seem that, depending on the nature of the complaints, the carrying out of military operations during an active phase of hostilities works as a presumption against extraterritorial jurisdiction in the former case, and as a cross-check on its establishment in the latter. By focusing on the subject matter of the allegations, this approach strives to attribute relevance to military operations in the active phase of hostilities without insulating from scrutiny a whole temporal phase of international armed conflict.[21] This nuanced approach is commendable. However, the factual meaning and legal consequences (if any) of the notion remain to be clarified.

6. Regarding the factual meaning of the phrase of "military operations carried out during an active phase of hostilities", the jurisprudence of the Court does not yet allow the setting of clear boundaries around the notion, which leaves space for the Court to reduce its realm.[22] Importantly, the Court considers that this phrase should be understood in the sense of "armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos"[23]. Based on the jurisprudence of the Court, two sets of limitations or boundaries of the phrase can be identified. In our view, these two limitations should be understood as cumulative.

7. First, the phrase is limited to "military operations" such as "bombing, shelling, artillery fire".[24] As the decision in *Georgia v. Russia (II)* acknowledges, cases concerning kinetic use of force had already been taken by the Court to represent a form of State agent authority and control relevant for extraterritorial jurisdiction.[25] In that case, however, the conducts under scrutiny were distinguished from the previous jurisprudence, notably on the ground that they were part of a large scale campaign rather than 'isolated and specific' and did not involve an element of 'proximity'.[26] It should be noted however that even bombing, shelling, artillery fire may be *isolated and specific* – temporally, geographically or regarding their actual target. Additionally, nothing precludes a large-scale campaign expanding over months from being broken into separate conducts, each (or at least some) of which could integrate a form of control establishing extraterritorial jurisdiction. The intensive pre-planning of such military operations also comports important elements of control that the Court should take into account in its analysis. If procedural obligations under the right to life can be considered as detached for the purpose of establishing jurisdiction, a similar approach can be

[19] *Ukraine and the Netherlands v. Russia*, para. 576.
[20] *Ibid.*, para. 577.
[21] Compare *Georgia v. Russia (II)*, paras. 125-138 with *Ukraine and the Netherlands v. Russia*, para. 558.
[22] *Georgia v. Russia (II)*, para. 83.
[23] *Ukraine and the Netherlands v. Russia*, para. 576.
[24] *Georgia v. Russia (II)*, paras. 51 and *Ukraine and the Netherlands v. Russia*, para. 558. For a tiny variation, see *Georgia v. Russia (II)*, para. 113: 'armed attacks, bombing, shelling'.
[25] *Georgia v. Russia (II)*, para. 131. See e.g. *Al-Skeini*, §136 etc.
[26] *Georgia v. Russia (II)*, para. 132-133.

adopted regarding *ex ante* obligations of planning and control of military operations.[27] Regarding *proximity*, questions arise regarding its interpretation. We believe that jurisdiction is not a matter of physical distance, but of exercise of control (or capacity thereof). In the *Carter* case, the Court rightly interpreted this notion in the sense of control over the life of the victim.[28] Force can be discharged with equally lethal results from near and far. In *Pad,* concerning helicopter fire, the Court aptly considered that jurisdiction was established.[29] The same should be true of e.g. a drone strike or targeted killings, which can be described as isolated and specific. Similarly, a situation of siege or encirclement involves State agent authority and control over the lives of persons who are confined to an area with 'very limited freedom of movement or action'.[30] In *Jaloud,* the Court already found jurisdiction established in a checkpoint scenario, which is not materially different, except for the scope of the use of kinetic force.[31] Sieges (referred to as 'settlements […] encircled to force a surrender' and 'choking of […] cities' in the Application file)[32] and checkpoints scenarios could additionally be seen as involving control over an area. This does not necessarily mean that 'the entire range of substantive rights set out in the Convention'[33] must be secured as in the context of an occupation. Here too – and as for the criterion of state agent authority and control – Convention rights can be 'divided and tailored'.[34] It follows that, under the terms of the decision in *Georgia v. Russia (II)*, nothing prevents in principle some of those military operations from representing a form of State agent authority and control – or even territorial control – capable of establishing extraterritorial jurisdiction.

8. Second, the phrase only includes the "active phase of hostilities" involving situations of "armed confrontation and fighting". As the Court held implicitly in *Georgia v. Russia (II)* and explicitly in *Ukraine and The Netherlands v. Russia*, the occurrence of hostilities is not *per se* determinative of the exclusion of extraterritorial jurisdiction.[35] What is material is that with regard to particular facts, there is not simply a unilateral use of force, but a proper confrontation and "context of chaos", whereby it becomes factually near impossible to determine the exact set of circumstances that would allow making determinations regarding attribution and consequently jurisdiction. This interpretation is further supported by the need for enemy military forces to "seek to establish control over an area in a context of chaos".[36] In other words, control over an area is at stake; the lives of enemy soldiers are at risk; confusion reigns. As for the "fog of war" usually noted in relation to IHL, the "context of chaos" should be seen for what it is, i.e. a "context". It is a context against which the exercise of control must be assessed – not a legal exception to jurisdiction. In a particular case of kinetic use of force in a context of hostilities, a case-by-case determination is therefore needed to determine jurisdiction.

9. In terms of legal consequences, the phrase "military operations carried out during an active phase of hostilities" or the "context of chaos" should not be seen as implying a legal presumption for

[27] See *McCann and Others v. the United Kingdom* [GC], no. 18984/91, 27 September 1995, para. 194, highlighting how the compatibility of the use of deadly force with Article 2 ECHR involves two considerations: whether such use was 'strictly proportionate to the aim of protecting persons against unlawful violence', but also whether it was 'planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force'.
[28] See further below.
[29] *Pad and Others v. Turkey*, no. 60167/00 (dec.), 28 June 2007, paras. 52-53.
[30] On the relevance of freedom of movement, see *Ukraine and the Netherlands v. Russia*, para. 569; *Medvedyev and Others v. France* [GC], no. 3394/03, 29 March 2010, para. 67.
[31] *Jaloud v. the Netherlands* [GC], no. 47708/08, 20 November 2014, para. 152.
[32] Ukraine, Application file, paras. 42 and 229 respectively.
[33] *Ukraine and the Netherlands v. Russia*, para. 561.
[34] *Ibid.*, para. 571.
[35] See, once more, *ibid.*, para. 558.
[36] *Georgia v. Russia (II)*, paras. 126 and 137; *Ukraine and the Netherlands v. Russia*, para. 576. The "context of chaos" that might accompany hostilities has also been referred to as 'the level of disarray unavoidably reigning during such large-scale international armed conflicts'. See *Bekoyeva and Others v. Georgia*, no. 48347/08, 5 October 2021, para. 37.

either the attacking State or the territorial State.[37] It should be noted that not even a hard reading of the decision in *Georgia v. Russia (II)* might warrant such a conclusion. The Court qualified its negative finding on the spatial model of extraterritorial jurisdiction by saying that 'in the event of military operations – including, for example, armed attacks, bombing or shelling – carried out during an international armed conflict, one cannot *generally* speak of "effective control" over an area'.[38] In *Bekoyeva*, the Court complemented a careful (and specular) application of *Georgia v. Russia (II)* with a detailed analysis of the factual evidence excluding (territorial) jurisdiction.[39]

10. In sum, while not every kinetic use of force in an international armed conflict can be considered as falling within the jurisdiction of a belligerent State[40] (otherwise the jurisdictional limitation in the ECHR would have no *effet utile*[41]), to consider that all (or most) acts of hostilities fall *outside* the jurisdiction of all the belligerent parties[42] would be extremely problematic from a victim and legal/technical perspective. The Ukraine context illustrates the illogic of such an interpretation, insofar as it would deprive thousands of civilians of Article 2 protection – and more broadly the ECHR – for potentially years. Such an interpretation would also not take into account the complexity of contemporary military operations and the diversity of situations involving kinetic use of force, which can entail a vast amount of control over areas, individuals and/or their right to life. As such, **we respectfully submit that the occurrence of military operations during the active phase of hostilities should not give rise (either *ex ante* as a presumption, or *ex post* as a cross-check) to an automatic exclusion of extraterritorial jurisdiction**. This is necessary to avoid the 'regrettable vacuum in the system of human-rights protection' criticized since the judgment in *Cyprus v. Turkey*.[43] Lastly, interpretations of the notion of jurisdiction by the Court shall not have the unintended effect of incentivizing the resort to large-scale combat operations by States. As highlighted 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'.[44]

C. Towards a functional understanding of extraterritorial jurisdiction

11. Beyond the question of the interpretation of the criteria devised by the Court around effective control over an area or State agent authority and control, a wider question is whether these criteria *should* be the governing standards. The Court's attempt at '[d]emarcat[ing] the precise scope of extraterritorial application [of the ECHR] through allusion to degrees of control over individuals or

[37] This is an eventuality that has already materialized in the case of *Bekoyeva*, with the result that neither belligerent State has been found to have jurisdiction (either territorial or extraterritorial) in relation to military operations during the active phase of hostility. See *ibid.*, para. 38.
[38] *Ibid*., para. 126 (emphasis added).
[39] *Ibid.*, para. 13.
[40] See in this sense, *Banković and Others v. Belgium and Others* [GC], no. 52207/99 (dec.), 12 December 2001, para. 75.
[41] Compare with IHL, which does not contain such a limitation but on the contrary applies "in all circumstances" based on the principle of effectivity. See Common Article 1, Geneva Conventions, 12 August 1949 (Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I); Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II); Convention III relative to the Treatment of Prisoners of War (GC III); Convention IV relative to the Protection of Civilian Persons in Time of War (GC IV)); Article 1(1), 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (AP I). See also Article 49(2), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (APII). It is to be noted however that the principle of effectivity has already influenced the interpretation of the notion of jurisdiction by human rights bodies. See Gaggioli, *L'influence mutuelle entre les droits de l'homme et le droit international humanitaire à la lumière du droit à la vie,* Pedone (2013), at 142-143.
[42] See a combined reading of *Georgia v. Russia II* and *Bekoyeva.*
[43] *Cyprus vs. Turkey*, para. 78.
[44] *Ukraine and the Netherlands v. Russia*, para. 570.

areas',[45] entrenched in *Al Skeini* and developed thereafter, has been criticized on the basis of two, largely overlapping arguments.

12. First, there have been calls from both within and outside the bench for a more principled and systematic approach to extraterritorial jurisdiction, on the basis that the advantages of flexibility are outweighed by the lack of predictability that this entails.[46] To counter the casuistic approach developed since *Al Skeini*, some scholars have proposed to devise a more coherent vision of extraterritoriality, grounded in a *functional* understanding of jurisdiction.[47] Such an understanding is animated by a concern for universality[48] and by an acknowledgement of the increased risks of protection posed by globalization and new technologies.[49] The exact contours of this notion vary depending on the proponents: broad readings of the principle (whereby a State would have jurisdiction '*whenever the observance or the breach of any of these functions is within its authority and control*')[50] are at times circumscribed by qualifications and limitations (such as the 'combined capacity-based and legitimate expectations threshold' advanced by Shany).[51] All these variants, however, share the fundamental position that 'states particularly well-situated to incur IHRL obligations should do so'.[52]

13. Second, commentators have noted how the approach to extraterritorial jurisdiction espoused by the Court is becoming increasingly distant from that propounded by other human rights bodies.[53] Admittedly, as the case of *Al Skeini* in relation of *Bankovic* suggests, the trajectory of this phenomenon is neither linear nor irreversible. Still, the recent practice is widening this gap. On one hand, in separate contributions Giuffré[54] and Shany[55] have highlighted that the Human Rights Committee's test of "direct and reasonably foreseeable impact"[56] is reflected in different forms by a variety of actors, including the Committee on Economic, Social and Cultural Rights,[57] the Committee on the Elimination of Discrimination against Women,[58] the Committee on the Rights of the Child,[59]

[45] Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law', 7 *Law & Ethics of Human Rights* (2013), pp. 47-71, at 71.
[46] See concurring opinion of Judge Bonello in *Al-Skeini*, paras. 5 and 8; Shany, 'The Extraterritorial Application of International Human Rights Law' in *Collected Courses of the Hague Academy of International Law* (Volume 409), Brill (2019), p. 76. See also Milanovic and Shah, *amicus curiae* brief in *Ukraine and the Netherlands v. Russia*, which highlights that the Court should avoid 'any arbitrary line-drawing' (para. 18). For a recent academic appraisal gathering different voices, see Questions of International Law, 'Litigating jurisdiction before the ECtHR: Between patterns of change and acts of resistance', including the articles by Giuffré ('A functional-impact model of jurisdiction: Extraterritoriality before the European Court of Human Rights'), Mallory ('A second coming of extraterritorial jurisdiction at the European Court of Human Rights?) and Raible ('Extraterritoriality between a rock and hard place'), all dated 30th June 2021.
[47] See Shany, 'Taking Universality'; 'The Extraterritorial Application'.
[48] Manifested in ECHR, Preamble, paras. 1-2 and 5.
[49] Shany, 'The Extraterritorial Application', at 28 and 138-139.
[50] Bonello, concurring opinion in *Al-Skeini*, para. 11.
[51] Shany, 'The Extraterritorial Application', at 151; see also 'Taking Universality Seriously', at 71.
[52] Shany, 'Taking Universality Seriously', at 70.
[53] For a comprehensive overview, see Giuffré, 'A functional-impact model', *passim*.
[54] Giuffré, 'A functional-impact model', *passim*.
[55] Shany, 'The Extraterritorial Application', at 93-100.
[56] Human Rights Committee, *General comment No. 36: Article 6 (Right to Life)*, 3 September 2019, UN Doc. CCPR/C/GC/35, para. 63.
[57] Committee on Economic, Social and Cultural Rights, *General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, 10 August 2017, UN Doc. E/C.12/GC/24, para. 28.
[58] Committee on the Elimination of Discrimination against Women, *General Recommendation No. 32: Gender-Related Dimensions of Refugee Statute, Asylum, Nationality and Statelessness of Women*, 14 November 2014, UN Doc. CEDAW/C/GC/32, para. 22.
[59] Committee on the Rights of the Child, *General Comment 16: State Obligations regarding the Impact of the Business Sector on Children's Rights*, 17 April 2013, UN Doc. CRC/C/GC/16, para. 43.

the African Commission on Human and Peoples' Rights,[60] and the Inter-American Court of Human Rights.[61] On the other hand, Raible has emphasised that even the more expansive model of jurisdiction based on the simple capacity to influence a situation, has been applied by the UN Special Rapporteurs on Counter-Terrorism (Fionnuala Ní Aoláin) and on Extrajudicial, Summary or Arbitrary Executions (Agnès Callamard),[62] and by the Committee on the Rights of the Child.[63]

14. As recently as *Georgia v. Russia (II)*,[64] the Court has reiterated the *Bankovic* holding whereby 'Article 1 did not admit of a "cause and effect" notion of "jurisdiction"',[65] thereby rejecting an expansive reading of functional jurisdiction. However, that notion is not explicitly excluded in the decision regarding *Ukraine and The Netherlands v. Russia*. Moreover, the scholarship has pointed to other instances where the ECtHR *itself* has appeared to embrace a more functional approach to jurisdiction. Shany has remarked how the "decisive influence" test used by the Court in *Ilaşcu* (an influence exercised by the respondent State over the separatist entity), as well as the indirect exercise of control "through a subordinate local administration" mentioned in *Al Skeini*, have diluted the requirement for effective control over an area under the spatial model of extraterritorial jurisdiction.[66] With regard to the personal model of extraterritorial jurisdiction, Milanovic has rightly stressed that the holding in *Carter* – whereby the exercise of 'physical power and control over [one's] life' may be sufficient to extraterritorial jurisdiction – recalls the functional reading of jurisdiction as 'control over *rights* espoused most prominently by the UN Human Rights Committee in its General Comment No. 36'.[67]

15. These openings would result in the establishment of extraterritorial jurisdiction for several conducts related to (international) armed conflict. As mentioned above, such openings would lead to an application of the ECHR to allegations of human rights violations committed in the context of such methods of warfare as sieges and blockades.[68] Turning to *Carter*'s conclusions in relation to State agent authority and control, the fact that the conduct lamented of (i) occurred during peace-time, (ii) in a "situation of proximate targeting" cannot logically (nor should policy-wise) prevent *Carter*'s findings from being applied to kinetic uses of force in a situation of armed conflict (including "military operations during the active phase of hostilities"). Beyond the above-mentioned notion of control over rights, the very reference in *Carter* to the 'proximate' nature of the conducts confirms that the decisive criterion rests in the direct and foreseeable consequences flowing from the State's conduct, irrespective of the geographical location, the context of war and peace, or the rights affected. This conclusion would bring the Court's case-law into line with the position outlined by the HRC in its General Comment 36, whereby jurisdiction is established also *vis-à-vis* 'persons located outside any territory effectively controlled by the State whose right […] is nonetheless affected by its *military* or other activities *in a direct and reasonably foreseeable manner*'.[69] Moreover, it would place

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[60] African Commission on Human and Peoples' Rights, *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)*, 18 November 2015, para. 14; see also generally Pascale, 'Extraterritorial Applicability of the African Charter on Human and Peoples' Rights,' 8 *DUDI* (2014).
[61] Inter-American Court of Human Rights, *The Environment and Human Rights*, Advisory Opinion OC-23/17, 15 November 2017, para. 101.
[62] UN Special Rapporteurs on Counter-Terrorism (Fionnuala Ní Aoláin) and on Extrajudicial, Summary or Arbitrary Executions (Agnès Callamard), 'Extra-territorial Jurisdiction of States over Children and Their Guardians in Camps, Prisons, or Elsewhere in the Northern Syrian Arab Republic', para. 45.
[63] Committee on the Rights of the Child, 'Decision Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communications No 79/2019 and No 109/2019', 2 November 2020, UN Doc CRC/C/85/D/79/2019–CRC/C/85/D/109/2019, para 9.7.
[64] *Georgia v, Russia (II)*, para. 124.
[65] See *Bankovic*, para. 75; *Medvedyev and Others*, para. 64.
[66] Shany, 'Extraterritorial Application', at 71-72 (quoting *Ilascu*, para. 392); Shany, 'Taking Universality', at 59 (quoting *Al-Skeini*, para. 138).
[67] Milanovic, 'European Court Finds Russia Assassinated Alexander Litvinenko', in *EJIL:Talk!*, 23 September 2021 (quoting *Carter*, paras. 161 and 170).
[68] *Carter*, para. 161.
[69] HRC, GC 36, para. 63 (emphasis added).

the victim's perspective at the centre of the Court's activity, and ensure that legal criteria are not interpreted and applied in ways that exclude from the jurisdiction of States massive killings and destructions for a long period of time in Europe, and dilute to a considerable extent the protections offered by the ECHR in times of armed conflict.

16. **It is therefore submitted that the best approach for the Court given the current state of the law is not to reject its long-standing criteria of control, but rather to further refine the meanings of control, taking into account the practice of other human rights bodies around functionality, the need to avoid creating legal gaps**. Anticipated complexities in addressing the interplay between IHL and the ECHR – an issue that pertains to the "merits" of the case – shall have no bearing on interpretations of jurisdiction, which is an admissibility issue.[70] Similarly, the difficulty in establishing relevant circumstances – especially if it is owed to the refusal to disclose crucial documents to the Court – should not have a bearing on the notion of jurisdiction. On the contrary, the Court can draw inferences based on the absence of cooperation of one of the parties.[71]

II. The Interplay between ECHR and *Jus ad Bellum*

A. Relevance of the debate in relation to the case under scrutiny

17. The second subject addressed in this brief concerns the relationship between the ECHR and international legal norms regulating recourse to armed force between States (*ius ad bellum*). On multiple occasions in its application file, Ukraine invokes the unlawful resort to force to substantiate the claim that the Russian Federation violated rights protected by the ECHR. For instance, Ukraine relies on military aggression to infer jurisdiction under Article 1 ECHR.[72] It also submits that the unlawfulness of the military operation launched by Russia, as well as the violation of its sovereignty and territorial integrity, prevents the interference with the rights protected by Articles 8, 9 ECHR and by Article 1 of Protocol No. 1 thereto from being in accordance with the law and, therefore, justified.[73] In this section II, we analyse the legal consequences (if any) that breaches of the *ius ad bellum* regime have on the legal system created by the ECHR.

B. Irrelevance of *ius ad bellum* considerations on the establishment of extraterritorial jurisdiction

18. A first question is whether an act of aggression has a bearing on the establishment of extraterritorial jurisdiction under Article 1 ECHR.[74] In other words, can the existence of a recognized aggression in the middle of Europe create a *sui generis* situation that modifies the scope of the notion of jurisdiction? In assessing whether a given conduct establishes extraterritorial jurisdiction under Article 1 ECHR, the long-standing practice of the Court has been to *not* attribute relevance to issues pertaining to *ius ad bellum*. With regard to spatial jurisdiction, since *Loizidou* the ECtHR has held that the military action that usually results in effective control of an area outside a State's national territory (and therefore in the establishment of extraterritorial jurisdiction) can be 'lawful or unlawful'.[75]

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[70] See *Georgia v. Russia (II)*: '[h]aving regard in particular to the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances and the fact that such situations are predominantly regulated by legal norms other than those of the Convention (specifically, international humanitarian law or the law of armed conflict), the Court considers that it is not in a position to develop its case-law beyond the understanding of the notion of "jurisdiction" as established to date. (…) Having regard to all those factors, the Court concludes that the events which occurred during the active phase of the hostilities (8-12 August 2008) did not fall within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention' (paras. 141-144).
[71] See e.g. *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009, para. 184.
[72] Ukraine, Application file, paras. 91(b), 92, 101, 110, 121.
[73] *Ibid*., paras. 249 (re Article 8 ECHR), 268 (re Article 9 ECHR), 315 (re Article 1 Protocol 1 ECHR).
[74] See Ukraine, Application file, para. 110.
[75] *Loizidou* (preliminary objections), para. 62, reaffirmed in *Ukraine and the Netherlands v. Russia*, para. 560.

The same holds true for personal jurisdiction (despite some possible early indications to the contrary in *Ilaşcu*).[76] In assessing Article 1 jurisdiction in both *Issa* and *Pad*, it did not matter whether a State's agents were operating lawfully in another State's territory, but only if such operations caused persons who were in the territory of the latter to come under the former's authority and control.[77]

19. However, the Court's most recent case-law could challenge the irrelevance of the legality of the use of force for the purpose of extraterritorial jurisdiction. As regards spatial jurisdiction, Milanovic has noted how, in the admissibility decision in *Ukraine v. Russia (re Crimea)*, consideration as to the legality and effects of annexation of territory is first excluded from the purview of analysis, then carried out for the purposes of determining the nature of the respondent's jurisdiction.[78] With respect to personal jurisdiction, the Court in *Carter* identified the need to guarantee peace and stability in Europe as one of the reasons for the recognition of jurisdiction in case of targeted violations of the human rights of an individual by one contracting State in the territory of another contracting State, thereby opening the door to considerations based on *ius ad bellum*.[79] Finally, unlawfulness of recourse to force could potentially constitute one of the "special features" mentioned (but not defined *in abstracto*) by the ECHR as a residual category for establishing jurisdiction in relation to the procedural limb of Article 2.[80]

20. Despite the gravity associated with acts of aggression, caution should be exercised before using it as a tool to loosen the grounds for extraterritorial jurisdiction. As Milanovic and Papić have argued in a different context, jurisdiction in the sense of Article 1 cannot be at once the *right* to exercise a power, and the *actual exercise* of that power.[81] In their view, opting for the former alternative would not only be at odds with the Court's long-standing preference for a factual notion of jurisdiction – it could expose the Court to political backlash.[82] **We therefore submit that relying on aggression to establish or expand the grounds for (extraterritorial) jurisdiction would mix a legal determination (compliance with *ius ad bellum*) with a chiefly factual one (the existence of a certain relationship between an individual right-holder and a duty-bearing State)**.[83]

C. The interaction between *ius ad bellum* and IHRL in the case-law of the Court and other human rights bodies

21. The previous paragraph has concluded that the commission of an act of aggression should remain irrelevant for the purposes of inferring extraterritorial jurisdiction. However, such an act could still have a bearing on the determination of compliance with the substantive rights protected by the ECHR. In the case-law of the Court, this argument has been recently advanced by Judge Keller in her concurring opinion in *Georgia v. Russia (II)*. She maintained that, had the Court held that the Russian Federation exercised jurisdiction over those killed by its forces in the active phase of the

[76] *Ilaşcu and Others*, paras. 332-339: insofar as residual positive obligations are linked to a State's sovereignty, the door is open to considerations pertaining to title over territory and, possibly, to questions pertaining to legality of the use of armed force. See Milanovic and Papić, 'The Applicability of the ECHR in Contested Territories', 67 *ICLQ* (2018), pp. 779-800, at 794-797.
[77] *Issa and Others v. Turkey*, no. 31821/96, 16 November 2004, paras. 71 and 76; *Pad*, para. 53. On the notion of *espace juridique* in relation to the spatial model of extraterritorial jurisdiction: *Ukraine and the Netherlands v. Russia*, para. 572.
[78] Milanovic, 'ECtHR Grand Chamber Declares Admissible the Case of Ukraine v. Russia re Crimea', in *EJIL: Talk!*, 15 January 2021, quoting *Ukraine v. Russia (*re *Crimea)* [GC], nos. 20958/14 and 38334/18, 16 December 2020, paras. 244 and 348-349.
[79] *Carter*, para. 128, also quoted by *Ukraine and the Netherlands v. Russia*, para. 570.
[80] See *Güzelyurtlu and Others*, para. 190; *Georgia v. Russia (II)*, paras. 329-332; *Hanan*, para. 136.
[81] Milanovic and Papić, 'The Applicability of the ECHR', at 795.
[82] *Ibidem*. See also Milanovic, 'Does the European Court of Human Rights Have to Decide'.
[83] On this, see Besson's 'distinction between the international lawfulness of state jurisdiction and the existence of state jurisdiction based on domestic law' (Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to', 25 *LJIL* (2012), pp. 857-884, at 868-870). This is so irrespective of whether we conceive of aggression as a crime against sovereignty or against human rights, on which see below.

hostilities, it should have examined those deaths 'in terms of, *inter alia*, Article 2 § 4 of the [UN] Charter'.[84] In her conclusion, she also called on the Court to apply the norms regulating use of force 'in a future case in which the "threshold criterion" of "jurisdiction" under Article 1 is satisfied'.[85]

22. In reaching these findings, Judge Keller joined an innovative stream of practice and scholarship advocating a closer interaction between *ius ad bellum* and IHRL.[86] In particular, she referenced General Comment No. 36 on the right to life (GC 36), adopted by the Human Rights Committee (HRC) in October 2018. In its paragraph 70, GC 36 presents several ways in which resort to armed force affects the right to life.[87] Most notably, the HRC holds the view that 'States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate *ipso facto* article 6 of the Covenant'.[88] Besides arousing a great deal of commentary in the legal scholarship,[89] this sentence in a non-binding general comment has had an immediate influence on the work of other human rights bodies.[90]

23. At face value, the increased interaction between *ius ad bellum* and IHRL would streamline the finding of human rights violations in cases of acts of aggression. However, it remains unclear what its implications would be on the legal regime primarily designed to govern armed conflict, i.e., IHL. More specifically, it must be assessed if the increased interaction between *ius ad bellum* and IHRL could jeopardize any prospect of restraint in war by bringing into question two IHL principles: (i) the separation between *ius ad bellum* and IHL, and (ii) its corollary of belligerent equality. To assess this risk, a few notations impose themselves on the history and significance of these two principles.

D. Possible consequences on the distinction between *ius ad bellum* and IHL and on belligerent equality

24. *Ius ad bellum* and IHL share a fundamental objective to restrain force and violence in international law, albeit at different levels. As Kolb has demonstrated, the evolution of these two bodies of law over the centuries is strictly intertwined, with either body of norms developing in response to the other.[91] As the two regimes achieved equal footing by the time of the League of Nations, the need arose to determine a "division of labour" between them. To govern their relationship, the principle setting forth the separation of *ius ad bellum* and IHL has gained recognition, to the point of reaching the status of a 'cardinal' rule with 'orthodox' status under contemporary international law.[92] Pursuant to this principle, *ius ad bellum* answers the question of *whether* and *when* States can use force against

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[84] Concurring opinion of Judge Keller, *Georgia v. Russia (II)*, para. 27.
[85] *Ibid*., para. 31.
[86] This approach originates from critical thinking in moral philosophy: see Rodin and Shue (eds.), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, OUP (2008); McMahan, *Killing in War*, OUP (2009). In a recently published paper, Lieblich has coined the expression 'humanization of *ius ad bellum*' to capture 'the possible intersection of the individualization of war, IHRL and the law on the resort to interstate force': see Lieblich, 'The Humanization of Jus ad Bellum: Prospects and Perils', 32(2) *EJIL* (2021), pp. 579-612, at 580.
[87] Interestingly, in individual communications the HRC has not yet found violations of the right to life to have occurred on the basis of an act of aggression.
[88] HRC, GC 36, para. 70. It should be noted that Judge Keller expanded the scope of para. 70 GC 36 in at least two respects: 1) by including violations of *ius ad bellum* other than aggression; 2) by expanding to potential violations of the ECHR beyond Article 2: Concurring opinion of Judge Keller, *Georgia v. Russia (II)*, paras. 27 and 31.
[89] Besides the contribution by Lieblich quoted above, see also Darcy, 'Accident and Design: Recognising Victims of Aggression in International Law', 70(1) *ICLQ* (2021), pp. 103-132; Akande and Jackson, 'The Right to Life and the Jus ad Bellum: Belligerent Equality and the Duty to Prosecute Acts of Aggression', 71(2) *ICLQ* (2022), pp. 453-463.
[90] See e.g. A/HRC/44/38, Annex, para. 80-81 (on the unlawful character of the killing of General Soleimani in 2020).
[91] Kolb, 'Origin of the twin terms *jus ad bellum/jus in bello*', 320 *IRRC* (1997), pp. 553 - 562, at 553-558.
[92] Akande and Jackson, 'The Right to Life and the Jus ad Bellum', at 454. For a more qualified view whereby the separation between *ius ad bellum* and IHL is not absolute, see Roberts, 'The equal application of the laws of war: a principle under pressure', 90 (2008), pp. 931-962, at 948.

each other. On its part, IHL clarifies *how* fighting parties (be they a State or a non-State actor) must behave during an armed conflict.

25. An important corollary of the separation between *ius ad bellum* and IHL is the principle of belligerent equality. This means that IHL applies equally to both sides fighting an armed conflict, irrespective of the legality in initiating or continuing the use of force.[93] The scholarship has long considered the principle an 'absolute dogma' in relation to international armed conflicts.[94] Belligerent equality not only underlies several legal texts governing IHL (including the Geneva Conventions and the 1977 Additional Protocols thereto)[95] – it is also deeply entrenched in treaties and documents addressing *ius ad bellum* (under both the League of Nations and the UN Charter).[96] Whereas the earlier formulations of belligerent equality date back to the writings of classical international lawyers,[97] the principle has been continuously upheld in the case-law,[98] State practice[99] and the work of the ICRC.[100] Rebuking attempts at challenging its continued validity, Bugnion has stressed that the principle corresponds to the requirements of humanity and civilization,[101] while Sassòli has stressed that it continues to satisfy logic, teleological, humanitarian and practical needs.[102]

26. Yet, if we combine this overwhelming support for a strict separation of *ius ad bellum* from IHL,[103] with the growing interaction of *ius ad bellum* and IHRL mentioned above, fault lines appear. Under the former, IHL rules apply *equally* to each party to an armed conflict, no matter the legality of the recourse to force. But if we insert IHRL into the equation and link it with *ius ad bellum*, even attacks that are directed at permissible targets and are therefore *prima facie* lawful under IHL, would nonetheless amount to a violation of the right to life if carried out by the belligerent that has committed an act of aggression. This would be particularly important for two categories of conduct that are *not* prohibited under IHL: the killing of combatants who are not *hors de combat*, and the killing of civilians as incidental casualties of attacks on military targets that complies with the IHL principle of proportionality.[104] In relation to these conducts, it would seem to be immaterial to assess under IHL *who* is deprived of life, or *how* those lives are taken – the legal assessment revolves exclusively around the illegality of the use of force and its impact on IHRL.[105] Therefore, the weaving together

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[93] Sassòli, '*Ius ad Bellum* and *Ius in Bello* – The Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?', in Schmitt and Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultlines*, Brill (2007), pp. 241-264, at 246-247; Roberts, 'The equal application', at 932.

[94] Doswald-Beck, 'International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons', 321 *IRRC* (1997), pp. 35-55, at 53. For the most comprehensive analysis of the principle, see Meyrovitz, *Le principe de l'égalité des belligérants devant le droit de la guerre*, Pedone (1970).

[95] In the GCs, see common Articles 1 and 2; in API, see para. 5 of the Preamble. For non-international armed conflicts, see common Article 3 GCs, whereby '*each Party to the conflict* shall be bound to apply, as a minimum', the provisions contained therein (emphasis added).

[96] For the former, see Report of the Committee Appointed by the Council on January 15th, 1920, 'Amendment of the Covenant of the League of Nations in Order to Bring it into Harmony with the Pact of Paris' (in 11 *League of Nations Official Journal* (1930), pp. 353-383, at 354-355). For the latter, see comments by Bugnion, 'Just wars, wars of aggression and international humanitarian law', 84 *IRRC* (2002), pp. 523-546, at 19.

[97] For an overview of the sources (including Vattel, Rousseau and Kant), see Bugnion, 'The equal application', at 938-939.

[98] For a detailed discussion of post-WWII case-law, see Sassòli, '*Ius ad Bellum* and *Ius in Bello*', at 244, footnote 10, as well as Orakelashvili, 'Overlap and Convergence: The Interaction Between *Jus ad Bellum* and *Jus in Bello*', 12 *Journal of Conflict & Security Law* (2007), pp. 157-196, at 167-170.

[99] See Bugnion, 'The equal application', at 22-24 (in relation to UN-mandated operations).

[100] See ICRC, 2020 Commentary to GC III, paras. 248-249; ICRC, *International humanitarian law and the challenges of contemporary armed conflicts*, 32IC/15/11, Geneva (2015), pp. 18-19.

[101] Bugnion, 'The equal application', at 18-19.

[102] Sassòli, '*Ius ad Bellum* and *Ius in Bello*', at 244-246.

[103] Thus ICRC, 2020 Commentary to GC III, Article 2, footnote 43.

[104] See Lieblich, 'The Humanization of Jus ad Bellum', at 584; Akande and Jackson, 'The Right to Life', at 456.

[105] Kilibarda, 'Turkey, Aggression and the Right to Life Under the ECHR: A Reaction to Professor Haque's Post', in *EJIL : Talk!,* 22 October 2019.

of *ius ad bellum* and IHRL would seem to imply the concomitant unravelling of the underlying principles governing IHL.

E. Contrasting views on the implications for IHL of increased interaction between *ius ad bellum* and IHRL

27. Against the prospect of this friction, various approaches can be detected. A first avenue has been that of *exacerbating* the tension. Scholars such as Dannenbaum and Mégret have highlighted how the separation between *ius ad bellum* and IHL has the effect of 'sanitizing', even 'laundering' violence committed during a war of aggression.[106] In their view, far from being an issue of concern, threats to the separation of *ius ad bellum* from IHL should actually be welcomed as a positive step toward the 'marginalisation of the laws of war as a fundamentally anomalous regime' and the parallel re-conceptualization of aggression as a crime against human rights.[107] On the other hand, several commentators of GC 36 have tried to *minimize* the tension. Lieblich has maintained that responsibility for violating the right to life as a result of aggression rests with the State, whereas 'individual combatants may still enjoy immunity from prosecution if they fight in accordance with *jus in bello*'.[108] A variation of this line of thought is advanced by Akande and Jackson, for whom IHRL requires the prosecution, not of those who kill in compliance with IHL, but rather of those who, by launching an aggressive war by reason of their ability to control and direct State policy, make those killings arbitrary under IHRL.[109] Striking middle grounds, Clapham has argued that '[a]n aggressive war forces us to evaluate some of our assumptions', including '[i]deas about belligerent equality'.[110]

28. In our view, the Court should assess the impact on IHL of the growing interaction between *ius ad bellum* and IHRL to the extent that is needed to appraise the allegations of human rights violations brought to its attention. To this end, we highlight some of the consequences that would follow from integrating *ius ad bellum* considerations in the human rights analysis.

F. Practical implications of finding human rights violations because of *ius ad bellum* violations

29. From the viewpoint of a judge tasked with verifying allegations of human rights violations committed during armed conflict, deriving such violations because of the breach of *ius ad bellum* may offer advantages. At the practical level, it removes to a large extent the need for detailed fact-finding, which is often problematic in relation to violations in the conduct of hostilities because of difficulties in accessing the terrain and/or in obtaining information about the targeting process. It also reduces difficulties associated with the interpretation of IHL norms, taken in themselves as well as in their interplay with IHRL.[111] In the case at hand, this operation would offer an effective remedy not only to victims of behaviours long proscribed by IHL, but also to civilians and combatants, of potentially *both sides* to the conflict, affected by the unlawful recourse to force. Moreover, in the present case both the UN General Assembly and the Council of Europe have already recognized that a breach of *ius ad bellum* reaching the threshold of an act of aggression has occurred.[112] Taken

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[106] See Dannembaum, 'A Special Tribunal for the Crime of Aggression?', 20 *JICJ* (2002), pp. 859-873, at 863-864; Mégret, 'What is the Specific Evil of Aggression?', in Kress and Barriga (eds.), *The Crime of Aggression,* CUP (2017), pp. 1398-1453, at 1420-1424.
[107] Mégret, 'What is the Specific Evil of Aggression?', at 1445-1446.
[108] Lieblich, 'The Humanization of Jus ad Bellum', at 598.
[109] Akande and Jackson, 'The Right to Life', at 461-462.
[110] Clapham, 'On war', in *Articles of War*, 5 March 2022. For a comprehensive consideration of the topic, see Clapham, *War*, OUP (2021). In a recent news article, Clapham further expanded his argument in the realm of international criminal law by holding that all soldiers involved in a war of aggression should be held liable for the crime of aggression (irrespective of the IHL privilege of combatant): 'Ukraine Can Change the Future of Prosecuting Crimes of Aggression', *Foreign Policy*, 24 February 2023.
[111] On this, see below Section 3.
[112] UN General Assembly, Resolution A/RES/ES-11/1, 2 March 2022, para. 2; see also UN General Assembly, Resolution A/RES/ES-11/2, 24 March 2022, as well as Resolution A/RES/ES-11/6, 23 February 2023. For the Council of Europe, see Committee of Ministers, Decision CM/Del/Dec(2022)1426bis/2.3, 24 February 2022, 2.3, para. 1, as well as Secretary-

together, these considerations could be seen as both facilitating and expanding the protection of fundamental human rights.

30. At the same time, assessing allegations of human rights violations on the basis of *ius ad bellum* appraisals, with no consideration for the bearing of IHL norms, would require careful reflection. The issue cannot be reduced to practical considerations. It has often been discussed whether such an approach would provide a disincentive for respecting IHL both at the State and individual level.[113] Whether this is true remains an unresolved empirical question, but since incentives for compliance with IHL are few, taking such a risk should not be approached lightly. In assessing the opportunity of a growing bearing of *ius ad bellum* on IHRL findings, one must also consider implications on systemic integration, victim's rights, and judicial consistency and policy.

31. First, side-lining IHL in the interpretation of wartime conduct in favour of a 'full-blown human rights analysis'[114] overlooks the fact that IHL seeks to limit violence in warfare while balancing the principles of military necessity and humanity. Irrespective of whether IHL confers rights or imposes duties on belligerents,[115] it is uncontested that IHL also enables initiatives and offers guarantees of a strictly humanitarian nature (such as the ICRC's right to access persons deprived of liberty).[116] Whereas some IHL rules can be criticized for lack of determinacy and constraining power, others offer a very detailed and incisive framework of protection (see the rules on prisoners of war). Most importantly, IHL offers a "lexicon" of a wide (if not universal) application, whose core "terms" (i.e., its underlying principles) precede modern codification efforts and are shared across virtually all legal traditions.[117] If doing away with IHL is to become an accepted form of "collateral damage" for the increased interaction between *ius ad bellum* and IHRL, it would be necessary for IHRL to reach a similar degree of practicability and acceptance – all the more so to the extent that human rights instruments can exert their effects outside of the legal space of States that have adopted them.

32. Second, an increased interaction between *ius ad bellum* and IHRL would also require counterweights with regard to victims' rights and economy of proceedings. It might be pondered to what extent broadening the range of potential victims of human rights violations in cases of acts of aggression would ultimately result in an excessive dilution of that notion. Concretely, the extreme result is that the killing of a Ukrainian soldier in hostilities (not contrary to IHL) would amount to a violation of the right to life in the same manner as the intentional killing of a child playing in a school-yard (a serious violation of IHL). Potentially, even the next-of-kin of a Russian soldier legally constrained under domestic law to take part in hostilities and killed in this context could claim to be the victim of a war of aggression.[118] This levelling down of the notion of victim does not lead to an effective protection of human rights and the ultimate rise in claimants could correspond to a significant increase in the backlog of the Court.

33. As to the issue of consistency with previous practice, there is little doubt that deriving violations of the ECHR from non-compliance with *ius ad bellum* would represent a marked development in the case-law of the Court. Whenever the latter has been confronted with allegations of human rights violations in situations of international armed conflicts, it has never deemed it necessary to premise its analysis on a finding that an act of aggression had occurred[119] – notwithstanding the fact that (at least) one party to the conflict must have necessarily violated the

General of the Council of Europe, 'Speech addressing the extraordinary session of the Parliamentary Assembly of the Council of Europe', 14 March 2022.

[113] Akande and Jackson, 'The Right to Life', at 457-461; Kilibarda, 'Turkey, Aggression and the Right to Life'.

[114] This expression is taken from Mégret, 'What is the Specific Evil of Aggression?', at 1447.

[115] See Bugnion, 'The equal application', at footnote 17.

[116] See ICRC, *Customary IHL Study*, Rule 124.

[117] See ICRC, *IHL Treaties Database*.

[118] The question whether the human rights of the soldiers and the civilian population of the aggressor State could also be affected by a breach of *ius ad bellum* is a matter of discussion: Lieblich, 'The Humanization of Jus ad Bellum', at 606-607. See also Dannenbaum, 'The Criminalization of Aggression and Soldiers' Rights', 29 *EJIL* (2018), pp. 859–886.

[119] See also in this sense Kilibarda, 'Turkey, Aggression and the Right to Life'.

norms on the use of force.[120] Admittedly, developing the jurisprudence to take into account normative changes in contemporary practice would not be a problem in itself. On the other hand, this would require the Court to address two considerations.

34. First, the Court would have to determine whether it is competent to decide on issues of compliance with *ius ad bellum*. This is debatable since Article 32 ECHR gives competence to the Court only in relation to the interpretation and application of the ECHR and the Protocols thereto. However, Judge Keller in her concurring opinion has maintained that this would not be in contrast with the ECHR insofar as the case before it would have concerned a dispute over what constitutes a "lawful act of war" and "other obligations under international law" under Article 15 of the ECHR (in an international armed conflict, that would – in her view – entail an acceptable tacit derogation with reference to the *Hassan* case).[121]

35. Second, the Court would have to weigh the feasibility and longer-term implications of this approach. Relying on *ius ad bellum* determinations by political organs (whether internal or external to the Council of Europe) might not be always an option – and even if it were, it could result in double standards that would ultimately weaken the value of judicial determinations. The risk of politicization in matters pertaining to *ius ad bellum* in often unclear situations is high. Clearcut aggressions like the one committed by Russia on Ukraine remain the exception rather than the rule. On the other hand, drawing this topic within the *ratione materiae* jurisdiction of the Court could conflict with States' willingness to have *ius ad bellum* matters decided by a judicial organ and, ultimately, to be or remain part of the ECHR system.

G. Aggression as a violation of Article 1 ECHR

36. The need to navigate the tension when these legal regimes interact cautions against embracing maximalist readings. At the same time, the Court must interpret the ECHR in light of all other applicable legal regimes and harmonize them to the maximum extent feasible: solutions that are meaningful in theory and practice must be crafted to this effect.

37. **We submit that the Court can take into account *ius ad bellum* considerations without side-lining IHL nor diluting the concept of victims. A viable route, which would draw consequences on IHRL from the breach of *ius ad bellum* without sacrificing IHL, could be broached on the basis of textual underpinnings. We submit that a State that commits an act of aggression can be *automatically* considered as responsible for a breach of the obligation to respect human rights under Article 1 of the Convention *vis-à-vis* all the other States partaking in the same human rights regime. But as for responsibility *vis-à-vis* individual victims, allegations of human rights violations would still need to be assessed on a case-by-case basis taking into account IHL, not *ius ad bellum*. Therefore, the automatic consequences of a breach of *ius ad bellum* would operate at the horizontal level, i.e. with regard to the obligation that each State owes to other States (and potentially the international community) to secure human rights to all individuals under its jurisdiction. With respect to the vertical relationship that IHRL establishes between a State and individuals under its jurisdiction, its actual contours would still fall to be determined by the interplay of IHRL and IHL, with no bearing on the separation between *ius ad bellum* and IHL or the principle of equality of belligerents before the laws of war**. Within the ECHR system, this argument could find further support in those paragraphs of the ECHR Preamble that stress 'collective enforcement' of human rights.[122] Admittedly, the Court has affirmed that the ECHR 'comprises more than mere reciprocal engagements between contracting States', and that it 'creates, over and above a network of mutual, bilateral undertakings, objective obligations'.[123] However, finding that the breach of *ius ad bellum*

[120] Sassòli, '*Ius ad Bellum* and *Ius in Bello*', at 246.
[121] Concurring opinion of Judge Keller, *Georgia v. Russia (II)*, paras. 25 and 28.
[122] ECHR, Preamble, para. 5.
[123] *Ireland v. United Kingdom*, no. 5310/71, 18 January 1978, para. 239. In this case, the Court also stated that: 'Article 1 (art. 1) [ECHR] is drafted by reference to the provisions contained in Section I and thus comes into operation only

has a bearing on a State's obligation to secure human rights under Article 1 ECHR would in no way diminish the scope for protection afforded to individuals by specific human rights (under Section I thereof). Quite the contrary, it would allow a further alignment with the IHL regime, insofar as Common Article 1 of the GCs protects collective interests by creating a specific obligation for all States Parties to respect and ensure respect for the provisions contained therein.[124]

38. In brief, this argument would satisfy, at least to an extent, those legitimate calls that strive to reformulate aggression as a crime, not only against sovereignty, but also against human rights.[125] At the same time, by crafting a continuing role for IHL in determining the interpretation and application of the ECHR, it would ensure respect for the imperatives of systemic integration under the Vienna Convention on the Law of Treaties[126] and prevent a further fragmentation of the legal landscape. This solution is workable in both theory and practice. It incentivizes respect for both IHL and *ius ad bellum* and enriches the interpretation and application of the ECHR.[127]

III. The Interplay between the ECHR and IHL

A. Cross-fertilization between the ECHR and IHL beyond conflict of laws

39. In the final section of this intervention, we will look at the actual interplay between the ECHR and IHL in the context of an international armed conflict like the one in Ukraine, which will be addressed by the Court in the present case.[128] In the Court's recent case-law, reference is made to the possible conflict between these two bodies of law. In *Georgia v. Russia (II)*, the Court hinted at a potential conflict between Article 5 ECHR and the IHL provisions on detention of civilians for security reasons, but found that it did not apply to the facts of the case.[129] In *Ukraine and the Netherlands v. Russia* (before joining), the Court found that IHL rules on proportionality might not be 'entirely consistent' with the guarantees afforded by the substantive limb of Article 2 ECHR, but left the question to be addressed at the merits stage.[130] This is also reflected in the submissions of the applicant State.[131] In our opinion, the approach of the Court to the existence and consequences of a conflict with IHL rules outlined in those two decisions does not reflect the full implications of harmonization to which it had earlier subscribed. We believe that the Court should revert to its previous case-law on the interplay between the ECHR and IHL as outlined in *Varnava and Others*

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when taken in conjunction with them; a violation of Article 1 (art. 1) follows automatically from, but adds nothing to, a breach of those provisions' (*ibid*., para. 238). We believe however that an evolutionary interpretation of this provision is required by the demand of human rights as implying reciprocal obligation between States and the need to avoid the fragmentation of international law.

[124] See Boisson de Chazournes and Condorelli, 'Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests', 82 *IRRC* (2000), pp. 67-87.

[125] See Dannenbaum, 'Why Have We Criminalized Aggressive War?', 126 *Yale Law Journal* (2017), pp. 1242-1318; Mégret, 'What is the Specific Evil of Aggression?', at 1444-1445.

[126] On this, see Section 3 below.

[127] See Concurring Opinion of Judge Pinto De Albuquerque, Joined by Judge Vučinić, para. 1, in *Cyprus v. Turkey* [GC], no. 25781/94 (just satisfaction): 'The message to member States of the Council of Europe is clear: those member States that wage war, invade or support foreign armed intervention in other member States must pay for their unlawful actions and the consequences of their actions, and the victims, their families and the States of which they are nationals have a vested and enforceable right to be duly and fully compensated by the responsible warring State. War and its tragic consequences are no longer tolerable in Europe and those member States that do not comply with this principle must be made judicially accountable for their actions, without prejudice to additional political consequences.'

[128] On the classification of the conflict, see RULAC, 'International armed conflict in Ukraine'. See also *Ukraine and the Netherlands v. Russia*, paras. 93, 556-558 and 718. See also Ukraine, Application file, paras. 62-63.

[129] *Georgia v. Russia (II)*, paras. 236-237; see also *Hassan*, paras. 97-98.

[130] *Ukraine and the Netherlands v. Russia*, para. 720.

[131] Ukraine, Application file, paras. 81-83 and 220-222 (on Article 5 ECHR) and paras. 75-77 (in relation to the procedural limb of Article 2 ECHR).

and *Hassan*,[132] and embrace a more nuanced approach to the complementarity of the two regimes.[133]

40. Since *Georgia v. Russia (II)*, the Court has advanced an approach that analyses the potential conflict between the ECHR and IHL 'with regard to each aspect of the case and each Convention Article alleged to have been breached'.[134] As reaffirmed in *Ukraine and the Netherlands v. Russia*, the Court first determines 'in respect of each of the Articles invoked by the applicant State whether there [i]s a conflict between the relevant international humanitarian law provisions and the Convention provisions'.[135] If the answer is negative, the complaints are determined 'by reference to Convention principles only'.[136] If a conflict arises, the Court will determine how to interpret the relevant ECHR provision 'having regard to the content of international humanitarian law'.[137] In this analysis, harmonization appears as a second-order eventuality: IHL enters the picture and has a bearing on the interpretation of ECHR only when there is a conflict of norms – otherwise, it does not affect how human rights rules are construed and applied.

41. Despite this emphasis on conflict with IHL and autonomous interpretation of the ECHR, contemporary international practice highlights the increased co-application and cross-fertilization of these two bodies of law. The International Court of Justice has progressively moved away from its earlier reliance on the terminology of *lex specialis* (which is rather a 'conflict-resolution technique'),[138] stressing the need to take into consideration both IHRL and IHL.[139] Similarly, the HRC in its General Comments has consistently remarked that IHL and IHRL are 'complementary, not mutually exclusive'.[140]

42. Most importantly, even the case-law of the Court indicates that IHL has a bearing on the interpretation and application of the ECHR beyond cases of conflict of laws. Already in *Loizidou*, the Court held 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.[141] Under the principle of systemic integration found in Article 31(3)(c) thereof, treaty interpretation must also take into account 'any relevant rules of international law applicable in the relations between the parties' irrespective of the existence of conflict between norms.[142] Although that particular holding in *Loizidou* did not concern IHL norms,[143] in *Varnava and Others* the Court had the occasion to specify that it also included a reference to the 1949 Geneva Conventions and the three Additional Protocols thereto.[144] Finally, in the *Hassan* judgment the need to interpret the ECHR in harmony with other rules of

[132] *Varnava and Others*, para. 185 and footnote 1 thereof; *Hassan*; para. 102-104. See more in detail the discussion below.
[133] See below for a discussion of the two cases.
[134] *Georgia v. Russia (II)*, para. 95; *Ukraine and the Netherlands v. Russia*, para. 720.
[135] *Ukraine and the Netherlands v. Russia*, para. 720.
[136] *Ibid*., quoting *Georgia v. Russia (II)*, paras. 194-222; 234-256; 266-281; 290-301; 310-14; and 323-327.
[137] *Ukraine and the Netherlands v. Russia*, para. 720.
[138] ILC, 'Report of the Study Group – Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', UN Doc. A/CN.4/L.682 and Add.1, 13 April 2006, para. 57.
[139] Compare the following: ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, at para. 25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, I.C.J. Reports 2004, p. 136, at para. 106; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, at para. 216.
[140] HRC, *General comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 11; *General comment No. 35, Article 9 (Liberty and security of person)*, 16 December 2014, CCPR/C/GC/35, para. 64; *General comment No. 36, Article 6 (Right to Life)*, 3 September 2019, CCPR/C/GC/35, para. 64.
[141] *Loizidou* (merits), para. 43.
[142] Article 31(3)(c) Vienna Convention on the Law of Treaties.
[143] It related instead to UNSC resolutions, as well as decisions by the Committee of Ministers of the CoE, the European Community, and the Commonwealth Heads of Government: see *Loizidou* (merits), para. 42.
[144] *Varnava and Others*, para. 185 and footnote 1 thereof.

international law of which it forms part, including IHL, is premised on the idea that the 'protection' and the 'safeguards' provided under the ECHR and IHL 'co-exist' in situations of armed conflict.[145] This statement has two corollaries. The former hinges on the classification of these regimes as a network of protections and safeguards: these two bodies of law were drafted 'in parallel' (although IHL predates the emergence of HRL) and are, if not exactly coincident, inspired by a similar *ethos* and aiming at analogous results.[146] As a body of law that was specifically made to regulate armed conflicts, IHL must intervene in the interpretation of ECHR rules not only when a conflict of norms arises, but (in the Court own words) much more pervasively as a 'background' against which the ECHR safeguards must be construed.[147]

43. For several substantive rights protected by the ECHR, interplay with IHL offers a necessary tool of interpretation even in the absence of conflict *stricto sensu*.[148] In its Application file, Ukraine rightly identifies several IHL principles of relevance to the alleged violations of the ECHR.[149] For instance, it submits that IHL prohibitions on forcible transfers and deportation from occupied territory,[150] or on pillage and destruction of real or personal property,[151] should be considered in relation to alleged violations of, respectively, Article 8 ECHR and Article 1 of Protocol 1 thereto.[152] The applicant State also submits that the alleged violations of Article 3 ECHR should be interpreted against the background of relevant IHL rules, including Common Article 3 GCs (CA3).[153] In its ongoing project of updating the Commentaries to the Geneva Conventions, the ICRC has referred precisely to the notion of "cruel, inhuman and degrading treatment" in CA3 as one of those 'shared concepts' for the interpretation of which cross-reference between IHL and IHRL is particularly important.[154] IHL could also provide useful guidance for alleged violations concerning matters that (while not forming the object of a specific right) have been addressed by the Court in relation to certain Convention rights. This is particularly the case for those allegations in the Application file that affect the protection of cultural and natural heritage, including the environment.[155] The tight connection between IHL and "cultural" rights has been remarked with ever-increasing urgency by bodies such as the UN Committee on Economic, Social and Cultural Rights, UNESCO, and the former Special Rapporteur in the field of cultural rights, Karima Bennoune.[156] Criteria developed by the Court's case-law in this field[157] could be interpreted in light of IHL rules affording specific

[145] *Hassan*, paras. 102 and 104.
[146] *Hassan*, para. 102; see also *Varnava and Others*, para. 185: 'the rules of international humanitarian law […] play an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflict'.
[147] *Hassan*, para. 104.
[148] In *Georgia v. Russia (II)*, a conflict between IHL provisions and ECHR safeguards was not found to arise in respect of any of the complaints raised: see paras. 194-222; 234-256; 266-281; 290-301; 310-14; and 323-327; see also *Ukraine and the Netherlands v. Russia*, para. 719.
[149] Ukraine, Application file, paras. 64-87.
[150] See GC IV, Article 49; see also ICRC, *Customary IHL Study*, Rules 129 and 131.
[151] See GC IV, Articles 33 and 53; see also ICRC, *Customary IHL Study*, Rules 50-52.
[152] Ukraine, Application file, paras. 84-87, 249-250 and 315.
[153] Ukraine, Application file, paras. 78-80, which also includes a detailed list of relevant IHL provisions.
[154] ICRC, 2020 Commentary to GC III, para. 101. In the absence of a definition of that notion in the GCs and APs, the ICRC looked at '[e]xamples of cruel treatment gleaned from the practice of human rights bodies and standards' and concluded that they would also breach CA3 (*ibid*., paras. 651 and 657). With regard to the notion of "humane treatment", compare ICRC, 2020 Commentary to GC III, para. 103, with *Georgia v. Russia (II)*, paras. 235-252 and Ukraine, Application file, paras. 78-79.
[155] Ukraine, Application file, paras. 257-268 (re Article 9 ECHR) and 335-337 (re Article 1 Protocol 1 ECHR).
[156] Special Rapporteur in the field of cultural rights, *Report on Cultural Rights*, 9 August 2016, UN Doc. A/71/317, para. 78(j); UNESCO, *Protection of Cultural Property – Military Manual*, 2016, paras. 20-22; UN Committee on Economic, Social and Cultural Rights, *General comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21, para. 50(a). See also UNESCO, 'Declaration on the Protection of Cultural Heritage in Ukraine', 18 March 2022, C54/22/2.EXT.COM/3, operative paragraph 1.
[157] ECtHR Research Division, *Cultural rights in the case-law of the European Court of Human Rights*, January 2011; ECtHR, *Guide sur la jurisprudence de la Convention européenne des droits de l'homme*, 31 August 2022.

protection to these objects.[158] Cross-fertilization materializes also in the domain of procedural rights, such as the obligation to investigate.[159] The Court has used customary rules of IHL as one of the "special features" to be considered when establishing jurisdiction in cases of armed conflict.[160] Whereas IHL rules would determine *on which occasions* investigations must be carried out in relation to use of force resulting in death or serious injury in the conduct of hostilities,[161] human rights standards would determine *how* such investigations must be conducted. The interpretation of the criteria for an effective investigation to exist must take into account battlefield realities (e.g. particular difficulties in the collection of forensic evidence).[162] At the same time, evolutionary interpretations of human rights bodies may further influence what can be considered as feasible or not in armed conflict situations. For instance, regarding transparency, the HRC in GC 36 suggests that 'States parties should, in general, disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life, including […] whether less harmful alternatives were considered'.[163] While it may not always be feasible to publicly disclose the planning of military operations in relation to an ongoing armed conflict,[164] a certain degree of transparency is required in the context of criminal investigations: 'over-classification of information in armed conflict, including on national security grounds' must be avoided.[165]

44. **We submit that in the vast majority of cases, IHL will not conflict with the ECHR and nevertheless serve as an essential tool of interpretation that will enrich the reasoning of the Court and ensure the relevance, coherence and acceptability of the Court's decision**. We will now discuss two areas that are traditionally considered as raising issues of conflict between IHL and HRL, i.e. detention and the use of force.

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[158] On cultural property, see 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two (1954 and 1999) Protocols; Articles 53 and 85(4)(d), API; Article 11, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; ICRC, *Customary IHL Study*, Rules 38-41. On the environment, see Article 35, 55-56 and 85(3)(c), API; Article 2(4) of the 1980 Protocol III to the Convention on Certain Conventional Weapons; International Law Commission, *Draft principles on protection of the environment in relation to armed conflicts,* 2022.

[159] Geneva Academy-ICRC, *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice*, September 2019, para. 32. See also *Georgia v. Russia (II)*, para. 325, footnote 42.

[160] See Giuffré, 'A functional-impact model', mentioning *Georgia v. Russia (II)*, para. 324, as well as *Hanan*, para. 137.

[161] Gaggioli, 'A legal approach to investigations of arbitrary deprivations of life in armed conflicts: The need for a dynamic understanding of the interplay between IHL and HRL', in 36 *Questions of International Law* (2017), pp. 27-51, highlighting that the scope of the duty to investigate differs for situations governed by the conduct of hostilities paradigm *versus* situations governed by law enforcement. While every death must be investigated in a law enforcement context, this is not so for deaths occurring in the conduct of hostilities (since the killing of enemy soldiers who are not *hors de combat* and incidental losses of civilian lives in the limits accepted by the principles of proportionality and precautions do not generally violate IHL).

[162] Hampson and Lubell, *Amicus Curiae* Brief in *Georgia v. Russia (II)*, 38263/08 (2014), at para. 40: 'the precise shape of investigations conducted in the context of armed conflict cannot always reasonably be expected to meet the same standards as peace time domestic police investigations. Many aspects of an investigation, from collection of forensic evidence to using experts at the alleged scene of crime might be difficult – if not impossible – to fulfil on the battlefield, and the specificities of the obligation must be interpreted in context' (quoted in *Georgia v. Russia II*, para. 318).

[163] HRC, GC 36, para. 64.

[164] See Sassòli and Cameron, 'The Protection of Civilian Objects – Current State of the Law and Issues *de lege ferenda*', in Ronzitti and Venturini (eds.), *Current Issues in the International Humanitarian*, Eleven (2006), pp. 35-74, at 63: '[i]t is probably unrealistic to expect transparency that would allow third parties to monitor that choice during the conflict. On the other hand, some ex post monitoring would be possible and some preventive effect achieved, if belligerents undertook to keep records of their evaluations and to make them public after a certain period of time after the end of a given conflict'.

[165] Geneva Academy-ICRC, *Guidelines*, para. 153.

B. The interplay between IHL and ECHR in relation to detention

45. In relation to Article 5 ECHR, Ukraine's preliminary assertion is that the majority in *Hassan* was incorrect.[166] It submits that 'the system of derogation under Article 15 is the *sole* approach for limiting Convention obligations in times of war, and Article 5 of the Convention should be construed as an exhaustive list'.[167] The submissions by the applicant State relate exclusively to detention of civilians by the armed forces of the Russian Federation;[168] however, the application file mentions both GC III, and GC IV and API as providing IHL rules relevant for the interpretation and application of Article 5 ECHR.[169] Therefore, our considerations will apply to the interplay between IHL and ECHR in relation to the protection of both prisoners of war and civilians in enemy hands during international armed conflict.

46. In our view, the Court's approach in *Hassan* should be assessed under two, separate respects. On one hand, the Court was correct in holding that the grounds for permitted deprivation of liberty under Article 5 ECHR 'should be accommodated, as far as possible' with IHL rules on internment of prisoners of war and civilians in international armed conflict.[170] The same holds true for the following holding whereby, in case of detention during international armed conflict, the procedural safeguards set forth by the ECHR 'must also be interpreted in a manner which takes into account the context and the applicable rules of international humanitarian law'.[171] However, the 'important differences of context and purpose' between peacetime arrests and internment during conflict mentioned by the Court is just one element to consider.[172] The decisive criterion is that the protections afforded to prisoners of war and civilians in enemy hands by IHL, however 'not […] congruent' with ECHR safeguards,[173] are not necessarily inferior to them.

47. Under IHL, internment represents 'an exceptional, non-punitive measure of control that may be ordered for security reasons'.[174] GC IV clarifies the security grounds under which civilians in enemy hands can be exceptionally subjected to the measures of internment and assigned residence.[175] It also sets forth a number of procedural guarantees to challenge and subsequently review the decision on internment,[176] and provides a thorough regulation for their treatment.[177] Whereas IHL permits internment for prisoners of war without review of its lawfulness,[178] it does so only because 'enemy combatant status denotes that a person is *ipso facto* a security threat',[179] and nonetheless provides in detail for their security and treatment.[180] In case of doubt as to whether a person, who has taken part in hostilities and fallen into the power of an adverse Party, is a prisoner of war, such status must be presumed to exist until such time as his/her status has been determined by a competent tribunal.[181] For both categories of protected persons, IHL also defines the end for

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[166] See Ukraine, Application file, paras. 221.
[167] *Ibid*., para. 221.
[168] *Ibid*., paras. 222-230.
[169] *Ibid*., paras. 81-83.
[170] *Hassan*, para. 104.
[171] *Ibid.*, para. 105.
[172] *Ibid.*, para. 97 (with particular reference to internment of prisoners of war).
[173] *Ibidem*; see also *Georgia v. Russia (II)*, para. 236 (mentioning potential conflict between Article 5 ECHR and certain provisions of GC IV.
[174] 'Internment', in ICRC, *How does law protect in war?*, available at https://casebook.icrc.org/a_to_z/glossary/internment.
[175] GC IV, Articles 41-42, 68 and 78-79.
[176] GC IV, Articles 43 and 78.
[177] GC IV, Section IV, Articles 79-135.
[178] GC III, Article 21.
[179] ICRC, 'Report - International Humanitarian Law and the challenges of contemporary armed conflicts', 31IC/11/5.1.2, October 2011, at 17.
[180] GC III, Articles 23-24.
[181] GC III, Article 5; AP I, Article 45.

the measure of internment.[182] Insofar as IHL provides a detailed and thorough framework for a very specific context and circumstances, reliance on it to interpret and apply ECHR provisions is warranted.[183]

48. The second aspect relates to the Court's findings in relation to the (lack of) derogation under Article 15 ECHR. We agree with the Court's holding 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' the ECHR safeguards.[184] However, this does not mean that the absence of derogation should be deprived of any legal consequences. Such an inference would not only deprive of any *effet utile* Article 15 ECHR in times of international armed conflict, but also overlooks the dawning practice of making derogations.[185] **In *Hassan*, the Court stated that, in the absence of a formal derogation, IHL would be taken into account to interpret and apply the ECHR 'only where this is specifically pleaded by the respondent State'.[186] We believe that this preclusion is too limited a consequence and that a finding more in line with the text of the Convention and the evolving practice should be devised. Nor would we go as far as to say that the non-derogating State should be held responsible for violating a substantive ECHR right without the latter being interpreted and applied in light of relevant IHL. Our more limited suggestion is that the ECHR safeguards would still be construed against the background of IHL; at the same time, a State that has *de facto* derogated should be held responsible under Article 15 paragraph 3 for failing to comply with its obligation of giving notice of such derogation**.

C. The interplay between IHL and ECHR in relation to the use of force in armed conflict

49. The use of (potentially) lethal force in situations of armed conflict is relevant for the substantive limbs of the right to life (Article 2 ECHR).[187] Article 2 ECHR provides for three definite legitimate aims to allow for limitations of the right to life in use of force contexts.[188] These legitimate aims were devised for peacetime policing situations. As a result, they do not fit when analysing conduct of hostilities scenarios. Just as we argued for detention, the Court will be required to "harmonize" Article 2 with IHL in the context of an international armed conflict entailing a tacit derogation (which should be deemed contrary to Article 15 ECHR).[189] The crucial question therefore will be to define what a "lawful act of war" is from an IHL perspective.[190] To do so, a nuanced understanding of the use of force in armed conflicts is needed.

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[182] For civilians, as soon as the reasons which necessitated internment no longer exist (GC IV, Article 132), or as soon as possible after the close of hostilities (GC IV, Article 133). For prisoners of war, without delay after the cessation of active hostilities (GC III, Article 118).
[183] See ICRC, 2020 Commentary to GCIII, paras. 103-104.
[184] *Hassan*, para. 103. For a contrary view, see *Georgia v. Russia (II)*, Joint partially dissenting opinion of Judges Yudkivska, Pinto de Albuquerque and Chanturia, para. 23.
[185] See the derogations notified in 2015 and 2022 by Ukraine, and the announcement by the UK in 2016 and mentioned in Ukraine, Application file, paras. 15 and 128.
[186] *Hassan*, para. 107.
[187] It is questionable whether Article 3 ECHR should come into play in relation to attacks causing injuries to civilians. See allegation in this sense in Ukraine, Application file, para. 200. In our view, such an interpretation should not be welcomed. While Article 3 ECHR prohibits in absolute terms torture, inhuman or degrading treatment or punishment, the prohibition of excessive incidental injuries amongst the civilian population is subject to the principle of proportionality and therefore *not* absolute. See however recent developments in relation to the use of force in extra-custodial settings: Melzer, *Report on Extra-custodial use of force and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/72/178, 20 July 2017.
[188] ECHR, Article 2(2).
[189] See above, Section III.B of the third-party intervention.
[190] On this, see the concurring opinion by Judge Keller in *Georgia v. Russia (II)*, paras. 22-25 (especially the reference to the concurring opinion of Judge Popescu in *Şandru and Others v. Romania* and the analysis of the *travaux préparatoires* of the ECHR).
[190] HRC, General Comment 36, para. 64.

50. As the ICRC has highlighted on several occasions,[191] the interplay between IHL and IHRL is particularly challenging here, insofar as each body of law inspires two distinct paradigms – or set of rules – whose respective application during armed conflict is debated.[192] IHL underlies the conduct-of-hostilities paradigm, which is 'based on the assumption that the use of force is inherent to waging war because the ultimate aim of military operations is to prevail over the enemy's armed forces'.[193] IHRL, on its part, contributes to shaping the law enforcement paradigm, whereby 'lethal force may be used only as last resort in order to protect life, when other available means remain ineffective or without any promise of achieving the intended result'.[194] The principles governing the two paradigms are essentially the same (necessity, proportionality, precaution) but 'have distinct meanings and operate differently'.[195] In relation to the complaints raised in the case before the Court, three situations involving the interplay between IHL and the ECHR in relation to the use of force are of particular relevance for the present case.

51. First, let us consider conducts such as intentional, disproportionate or indiscriminate attacks on civilians or attacks on persons *hors de combat* that would violate IHL.[196] These situations are governed by the conduct of hostilities rules under IHL and no one would contest that they would also entail a violation of the ECHR (most notably, Article 2). In relation to these conducts, the protections and safeguards offered by IHL and IHRL not only co-exist, but overlap.[197] For the Court, defining a disproportionate attack in the context of the conduct of hostilities requires interpreting Article 2 ECHR in light of IHL. In the same vein, the definition of persons *hors de combat* has to be found in IHL and must inform the interpretation of Article 2. The legality of weapons used must also considered to determine whether Article 2 has been violated in this context.[198]

52. A second situation concerns incidental killings of civilians that do *not* violate IHL. The crucial question is whether such killings could nevertheless amount to a violation of Article 2 ECHR. The possibility that such conducts are not entirely consistent with the substantive limb of Article 2 ECHR has been raised by the Court in its admissibility decision in *Ukraine and the Netherlands v. Russia* and left to be discussed at the merits of the case.[199] With regard to these conducts, we have to bear in mind that such attacks are governed by the conduct of hostilities paradigm – and not by the law enforcement paradigm.[200] Clearly, 'the conduct of hostilities paradigm tolerates more incidental loss of life than the law enforcement paradigm'.[201] In such a case, **we submit however that the Court must "accommodate" the substantive limb of Article 2 with the relevant principles on proportionality and precautions under IHL, as it did in the *Hassan* case concerning**

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[191] ICRC, 'International Humanitarian Law and the challenges' (2011), at 18-20; Gaggioli, 'Report on the Expert Meeting "Use of Force in Armed Conflicts – Interplay between the Conduct of Hostilities and Law Enforcement Paradigms"', ICRC; November 2013; ICRC, 'Report – International humanitarian law and the challenges of contemporary armed conflicts', October 2015, at 33-37.
[192] ICRC, 'Report on the Expert Meeting', at 1.
[193] *Ibid.*, at 6.
[194] *Ibid*, at 7. For the view whereby the law enforcement paradigm also flows from certain IHL rules and domestic norms, see *ibid*., at 11-12.
[195] ICRC, 'International humanitarian law and the challenges' (2015), at 34; see also ICRC, 'Report on the Expert Meeting', at 8-9.
[196] In this submission, we are not addressing attacks against objects because of space constraints and as they would not fall under the consideration of Article 2 but rather of the right to property and potentially the right to privacy. It suffices here to say that only military objectives can be the object of attacks as per the basic rule of distinction. However, even civilian objects can be turned into military objectives by their location, purpose or use. Additional special protections are afforded to e.g. medical objects, cultural property and objects containing dangerous forces like nuclear power plants. It is thus crucial to establish the facts in every instance of an attack against an alleged civilian object and to determine its lawfulness from an IHL perspective.
[197] See also *Georgia v. Russia (II)*, paras. 194-222 and 234-256.
[198] See e.g. on the use of cluster munitions, 2008 Convention on Cluster Munitions.
[199] *Ukraine and the Netherlands v. Russia*, para. 720.
[200] For instances governed by the law enforcement paradigm, see further below, paras. 55.
[201] See ICRC, 'Report on the Expert Meeting', at 2, whereby 'the conduct of hostilities paradigm tolerates more incidental loss of life than the law enforcement paradigm'.

detention.[202] In other words, an attack that respects the IHL principles on the conduct of hostilities must be deemed lawful *prima facie* under Article 2 of the ECHR when applied in the context of an acknowledged armed conflict situation, especially an international one like the conflict Ukraine.[203]

53. It is worth highlighting that the principle of proportionality is not alone in regulating such a situation.[204] The principle of precautions in IHL provides for *ex ante* obligations in a comparable way as the planning and control obligations identified by the Court in *McCann* and even more relevantly in *Ergi v. Turkey* or *Isayeva v. Russia.*[205] The IHL principle of precautions provides that 'constant care shall be taken to spare the civilian population, civilians and civilian objects'.[206] It further entails specific obligations regarding e.g. the verification that the target is a military objective, the choice of means and methods of warfare, the issuance of warnings to the civilian population.[207] Accommodating Article 2 ECHR with IHL also aligns with the afore-mentioned finding by the HRC that '[u]se of lethal force consistent with international humanitarian law and other applicable international law norms is, in general, not arbitrary'.[208] As the term "in general" indicates, there may be, in specific instances, additional relevant obligations under ECHR to be taken into account, provided they do not disrupt in essence the delicate IHL equilibrium between the principles of military necessity and humanity.[209]

54. More broadly, the interpretation and application of Article 2 ECHR can evolve in such a way as to provide better and more adequate protections than those foreseen under IHL.[210] A relevant example in this regard concerns sieges.[211] While this method of warfare is not explicitly prohibited by IHL,[212] allowing the incidental starvation of civilians[213] (and the purposeful starvation of encircled combatants) is at odds with the core value of protecting the right to life. Practice shows that this method of warfare is often accompanied by an overly broad understanding of what constitutes a military objective, which leads in reality to indiscriminate attacks. A number of voices have been raised arguing that IHL rules provide for additional protection through the IHL principle of proportionality, the obligation to attempt safe evacuations and the obligation not to arbitrarily deny humanitarian assistance.[214] From a human rights perspective – the right to life can be interpreted in an even more protective fashion and outlaw this method of warfare.

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[202] In the words of *Hassan*, para. 104.
[203] In unacknowledged non-international armed conflicts, the Court has applied Article 2 against a 'normal legal background' (see *Isayeva v. Russia*, no. 57950/00, 24 February 2005, para. 191; see also *Ergi v. Turkey*, 66/1997/850/1057, 28 July 1998). However, it allegedly took implicitly IHL into account. See on this Gaggioli, *L'influence mutuelle*, p. 365, and other references therein. In the present case, the Court will be dealing with an acknowledged international armed conflict and therefore, there should be no hesitation in using explicitly IHL.
[204] *Ukraine and the Netherlands v. Russia*, para. 720 (mentioning only the principle of proportionality).
[205] *McCann*, paras. 202-214; *Ergi*, paras. 79-81; *Isayeva*, paras. 188-201.
[206] AP I, Article 57(1); ICRC, *Customary IHL Study*, Rule 15.
[207] AP I, Articles 57(2)(a)(i)-(ii) and 57(2)(c); ICRC, *Customary IHL Study*, Rules 16-17 and 20.
[208] HRC, General Comment 36, para. 64.
[209] On the potential relevance of these principles in limiting the use of force beyond the strict conduct of hostilities rules, see ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 2009, at 77 ff. It is to be noted however that this Guidance recognizes that 'in classic large-scale confrontations between well-equipped and organized armed forces or groups, the principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by specific provisions of IHL" (*ibid.*, at 80).
[210] This has been the case, for instance, regarding the outlawing of the death penalty in Europe, which applies at all times, despite the fact that IHL does not prohibit it. See *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, 2 March 2010.
[211] See submissions referring to numerous sieges in Ukraine, Application file, paras. 42 and 229.
[212] Gaggioli, 'Are Sieges Prohibited under Contemporary IHL', in *EIJL Talk!* , 30 January 2019.
[213] The notion of starvation should be understood broadly, and not only as deprivation of food but rather as deprivation of the means essential to the survival of the civilian population.
[214] See e.g. Gaggioli, 'Are Sieges Prohibited"; Nijs, 'Humanizing Siege Warfare: Applying the Principle of Proportionality to Sieges', 914 *IRRC* (2021), pp. 683–704.

55. Another situation concerns cases that occur in armed conflicts but that are governed by the law enforcement paradigm.[215] This is typically the case of civilian unrest (e.g. riots),[216] the use of force in detention settings (e.g. escape attempts) or situations where there is doubt as to the status, function or conduct of the person against whom force may be used (e.g. checkpoint scenarios).[217] In the context of the use of force in detention and to maintain law and order in the occupied territories, specific IHL rules are integral to the law enforcement paradigm.[218] In all such cases, the use of force must respect the principles of legality, absolute necessity, strict proportionality, precautions and accountability, as devised in the abundant case-law of the ECtHR.[219]

56. In brief, **we submit that the interplay between IHL and the ECHR regarding the use of force must be approached in a granular fashion. When the use of force pertains to the conduct of hostilities, Article 2 ECHR *must* be interpret in light of IHL and of its principles of distinction, proportionality and precautions. Conversely, when it pertains to law enforcement, the use of force must be the ultimate resort and the applicable standards are the same as those prevailing in peacetime law enforcement, albeit interpreted against a different context**.

[215] ICRC, 'Challenges report (2015), at 35: 'The defining criterion for determining the rules governing the use of force against a particular individual under IHL is whether such a person is a lawful target under its norms on the conduct of hostilities. This could be the case because of a person's status (he or she is a member of regular State armed forces, as generally defined by domestic law), function (he or she is a member of irregular State forces or of a non-State armed group, by virtue of the continuous combat function performed), or conduct (he or she is a civilian directly participating in hostilities)'.
[216] See Ukraine, Application file, paras. 291-292 (excessive use of force in the context of the right to peaceful assembly).
[217] ICRC, 'Report on the Expert Meeting', Case study 5, at 39-42.
[218] GC III, Article 42; 1907 Hague Regulations, Article 43. See also Ferraro, 'Report on the Expert Meeting on "Occupation and Other Forms of Administration of Foreign Territory"', ICRC, March 2012.
[219] ICRC, 'Factsheet – The Use of Force on Law Enforcement Operations', 6 April 2022; Gaggioli, 'The Use of Force in Armed Conflicts: Conduct of Hostilities, Law Enforcement and Self-Defense', in Ford and Williams (eds), *Complex Battlespaces: The Law of Armed Conflict and the Dynamics of Modern Warfare*, OUP (2018), pp. 61-108, at 65-69.