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War as a Human Rights Matter: the European Court of Human Rights' Approach to Armed Conflicts in the light of the Inter-State Application *Ukraine v. Russia (X)*

Author: Marie Brousek
Supervisor: Chritina Binder

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Abstract

This thesis explores the role of the European Court of Human Rights (ECtHR) in addressing human rights violations during armed conflicts, with a particular focus on the case of Ukraine v. Russia (X), initiated following Russia's large-scale invasion of Ukraine in February 2022.

The study offers a comprehensive analysis of the ECtHR's procedural and conceptual approaches in handling cases related to armed conflicts. It examines the procedural framework of the ECtHR, including the revival of inter-state applications, the granting of interim measures in conflict contexts, and the significance of third-party interventions. Conceptually, the research explores the extraterritorial application of the European Convention on Human Rights and its interaction with principles of Jus ad Bellum and Jus in Bello.

Furthermore, the thesis evaluates the potential approach of the ECtHR in addressing human rights violations in the Ukraine v. Russia (X) case, identifying specific procedural and conceptual challenges and providing recommendations. It also considers the implications of Russia's exclusion from the Council of Europe on the ECtHR's decisions.

The findings demonstrate that, despite its original focus on peacetime, the ECtHR plays a pivotal role in ensuring accountability for human rights abuses during armed conflicts. The case of Ukraine v. Russia (X) will set a precedent for how the European Convention should apply in future cases beyond Ukraine's conflict.

Abbreviations

A.I. – Amnesty International

ACHR – American Convention on Human Rights

CAHDI - Committee of Legal Advisers on Public International Law

CDDH - Steering Committee for human rights

CEDAW - Committee on the Elimination of All Forms of Discrimination Against Women

CHPR - African Charter on Human and Peoples' Rights

CoE - Council of Europe

CPPCG - Convention on the Prevention and Punishment of the Crime of Genocide

ECCHR - European Center for Constitutional and Human Rights

ECHR - European Convention on Human Rights

ECtHR - European Court of Human Rights

GC – General Comment

HCJ – High Court of Justice of Israel

HRC - Human Rights Committee

HRW – Human Rights Watch

IAComHR - Inter-American Commission on Human Rights

IACtHR - Inter-American Court of Human Rights

ICCPR - International Covenant on Civil and Political Rights

ICERD - International Convention on the Elimination of All Forms of Racial Discrimination

ICJ – International Court of Justice

ICRC - International Committee of the Red Cross

IHL - International Humanitarian Law

IHRL - International Human Rights Law

U.C. - University of California

UCD - University College Dublin

UN GA - United Nations General Assembly

UN OHRC - United Nations Office of the High Commissioner for Human Rights

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A. Introduction

I. Conceptualising

'In times of war, the law falls silent'. Fortunately, Cicero's notion 'Silent inter arma enim leges'[1] no longer holds true today. International law, including humanitarian law, human rights law and international criminal law strive to maintain justice and accountability even amidst severe turmoil. However, ongoing situations of crisis and armed conflicts are challenging the collective system of security and peace.

Since 2014, Ukraine has faced an ongoing conflict in its eastern regions, marked by the annexation of Crimea, the de facto occupation of Donetsk and Luhansk, and the downing of Flight MH17. The international armed conflict in Ukraine reached full scale with Russia's invasion on 22 February 2022, clearly violating the prohibition of the use of force under Article 2(4) of the UN Charter. The international community's response options are limited, as Russia is a permanent member of the UN Security Council with veto power. Against this background, it is important to consider how the conflict, which not only violates fundamental rules of international law but also international humanitarian law and has unleashed widespread human rights violations, should be assessed from a human rights perspective, specifically that of the European Court of Human Rights (ECtHR). Is war a human rights matter?

Even though the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[2] was adopted 1950 in the aftermath of World War II, it was primarily designed to apply in times of peace.[3] The ECtHR, as an organ of the ECHR, initially serves as a safeguard for human rights under the Convention; not as an international Court dealing with armed conflicts. However, in practice, state-parties have increasingly turned to the Court to seek recourse and justice in armed conflicts. This had led to a notable increase of inter-state applications.[4] Cases concerning the Turkish occupation in Cyprus, the Georgia v. Russia cases, Iraqi cases or the applications concerning Armenia and Azerbaijan are examples of

[1] Marcus T. Cicero, *Pro Milone* (n.d) 10.
[2] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 1953).
[3] Cedric De Koker, 'The European Court of Human Rights' Approach to Armed Conflict and Humanitarian Law: Ivory Tower or Pas de Deux?' in Paul De Hert, Stefaan Smis, and Mathias Holvoet (eds), *Convergences and Divergences Between International Human Rights, International Humanitarian and International Criminal Law* (1st, Intersentia 2018) 195.
[4] Kanstantsin Dzehtsiarou and Vassilis P Tzevelekos, 'The Aggression Against Ukraine and the Effectiveness of Inter-state Cases in Case of War' (2022) 3(2) European Convention on Human Rights Law Review 165, 168.

Strasbourg's increasing engagement with situations of armed conflicts.[5] Ukraine has lodged in total ten applications against Russia since 2014.[6] In the latest one *Ukraine v. Russia (X),*[7] concerning the large-scale invasion in February 2022, Ukraine referred to 'massive human rights violations committed by the Russian troops in the course of the military aggression against the sovereign territory of Ukraine', leading to Strasbourg's decision to grant 'urgent interim measures'.[8] Additionally, the Court authorised twenty-six member states to intervene as third parties.[9]

Both Ukraine and Russia were parties to the ECHR, but Russia's expulsion from the Council of Europe (CoE) led to its cessation as a party to the ECHR on 16 September 2022.[10] Despite this, the Court remains obligated to decide on cases prior to Russia's expulsion.[11]

II. Purpose and Scope of the Thesis

The primary purpose of this thesis is to reassess the ECtHR's approach to armed conflicts, with a particular focus on the legal issues arising in the context of the application *Ukraine v. Russia (X)*. It seeks to determine whether the ECtHR is a suitable forum for addressing human rights violations during crises and conflicts, thereby considering war as a human rights matter.

The approach is multi-faced, emphasising a human rights perspective:

Firstly, the analysis examines whether the ECtHR possesses adequate procedural infrastructure to address cases arising from armed conflicts, including inter-state applications, interim measures, and third-party interventions. All these procedural tools have been employed in *Ukraine v. Russia (X)*.

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[5] See, ECtHR, 'Factsheet – Armed conflicts' (January 2023) <www.echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf> accessed 24 April 2024.
[6] See, ECtHR, 'Inter-State applications' <www.echr.coe.int/en/inter-state-applications#> accessed 01 June 2024.
[7] *Ukraine v. Russia (X),* App no 11055/22.
[8] See, Isabella Risini, 'Strasbourg Has No Chance and Uses It: Interim Measures by the European Court of Human Rights in re Ukraine v Russia no. 10' *(Verfassungsblog,* 3 March 2022) <https://verfassungsblog.de/strasbourg-has-no-chance-and-uses-it/> accessed 26 March 2024.
[9] ECtHR, Press Release, 'Update on the third-party intervention request granted in Inter-State case Ukraine and the Netherlands v. Russia' (17 March 2023) ECHR 082(2023) <https://hudoc.echr.coe.int/eng-press?i=003-7598878-10452070> accessed 26 April 2024.
[10] Council of Europe, 'Russia ceases to be party to the European Convention on Human Rights' (16 September 2022) <www.coe.int/en/web/portal/-/russia-ceases-to-be-party-to-the-european-convention-on-human-rights> accessed 30 April 2024.
[11] ECtHR, Resolution on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights (22 March 2022).

Secondly, the thesis addresses the Court's conceptual approach to armed conflicts through three key legal issues:

- Considering that many violations in *Ukraine v. Russia (X)* were committed outside Russia's territory, the thesis explores whether the extraterritorial application of the Convention can be extended to such violations.

- The thesis investigates whether an act of aggression - which is clearly given in the specific case - can establish jurisdiction under Article 1 of the ECHR and/or constitute a violation of the right to life under Article 2 of the ECHR.

- The thesis analyses the interaction between the ECHR and international humanitarian law (IHL) in the context of international armed conflicts, such as the one in Ukraine. This includes evaluating how the ECtHR integrates IHL into its interpretation and application of the Convention and identifying potential normative conflicts.

The final section of the thesis will scrutinise the specific challenges faced by the ECtHR in the case of *Ukraine v. Russia (X)*, highlighting both procedural and conceptual aspects.

The importance of clarifying theses legal questions is far from being limited to the case *Ukraine v Russia (X)*. In anticipation of further conflict situations the ECtHR might play a crucial role in holding states accountable for human rights violation. By identifying important legal issues, this study aims to contribute to the advancement of human rights protection within the Council of Europe framework.

III. Case Overview: *Ukraine v. Russia (X)*

The case *Ukraine v Russia (X)* concerns the Ukrainian Government's allegation of mass and gross human rights violations committed by the Russian Federation in its military operation on the territory of Ukraine since 22 February 2022.

Additionally, the case *Ukraine and the Netherlands v. Russia* (application nos. 8019/16, 43800/14 and 28525/20) includes complaints related to the conflict in eastern Ukraine from 2014 involving pro-Russian separatists and the downing of Malaysia Airlines flight MH17,

resulting in the deaths of 298 people, among them 196 Dutch nationals. This case was already pending before *Ukraine v. Russia (X)* and was declared partially admissible.[12]

On 17 February 2023, the ECtHR decided to join these two cases, referring to *Ukraine and the Netherlands v. Russia (nos. 8019/16, 43800/14, 28525/20 and 11055/22)*.[13] The case deals now with three different incidents: firstly, with hostilities in Eastern Ukraine in 2014; secondly, with the downing of the MH17; and lastly, with hostilities in Ukraine from 24 February to 16 September 2022, when Russia ceased to be a contracting party to the Convention.

The Court will examine the admissibility and merits of *Ukraine v. Russia (X)* jointly and at the same time as the merits of the proceedings in the existing *Ukraine and the Netherlands v. Russia* case.[14]

The thesis will focus on the case Ukraine *v. Russia (X)*, but will consider the admissibility decision in *Ukraine and the Netherlands v. Russia* as well. However, the key aspects remain the same for all the incidents addressed within these cases, including the ECtHR's procedural tools, jurisdictional issues, and the interplay between the ECHR and jus ad bellum and jus in bello.

A factual background regarding Ukraine's application and the alleged human rights violations will be provided in Section E.

B. The ECtHR's Procedural Infrastructure to Deal with Armed Conflict: Inter-state Applications, Interim Measures, and Third-Party Interventions

This section assesses the Court's preparedness and mechanisms for handling cases related to armed conflicts, focusing on its procedural framework.

[12] *Ukraine and the Netherlands v. Russia*, App nos 8019/16, 43800/14 and 28525/20 (ECtHR, 30 November 2022) [GC].
[13] ECtHR, Press Release, 'European Court joins inter-State case concerning Russian military operations in Ukraine to inter-State case concerning eastern Ukraine and downing of flight MH17' (20 February 2023) ECHR 055(2023) <https://hudoc.echr.coe.int/eng-press?i=003-7575325-10413252> accessed 26 April 2024.
[14] Ibid.

I. Inter-state Applications in the Context of Armed Conflicts

The analysis begins with an examination of the increasing prevalence and key features of inter-state applications during armed conflicts.

1. The Revival of Inter-State Applications

The ECtHR has two different mechanisms to receive applications. First, according to Article 33 ECHR the Court can receive applications from contracting parties against other contracting parties for any alleged breaches of the Convention. Second, the Court can receive applications from individuals who claim to be victims of human rights violation by a contracting party under Article 34 ECHR. Initially, the right to individual petition was only optional, while the interstate application was mandatory in the sense that the right to start an interstate litigation was the automatic result of the Convention's membership.[15] The right to individual petition - as we know it today - came into effect only in 1998.[16] Both mechanisms are designed to complement each other.[17]

However, the number of inter-state applications remains relatively low. Since the ECHR entered into force in 1953, the Court has received in total 36 inter-state applications,[18] compared to 34,650 individual applications in 2023[19] alone. This disparity can be attributed to inter-state applications being perceived as 'unfriendly acts' or 'the most drastic and confrontational measures available to states'[20]. Additionally, they are resource-intensive for the applicant-state in terms of time, money, and work.[21] Over the years, individuals have emerged as key actors in protecting their human rights.[22]

[15] Giorgi Nakashidze, 'The European Court of Human Rights in a new Reality: Does it Have Sufficient Infrastructure to Deal with Armed Conflicts?' (2020) 2 Journal of Constitutional Law 47, 52.
[16] Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, (Strasbourg, 11 May 1994) Article 34.
[17] Isabella Risini, *The Inter-State Application under the European Convention on Human Rights* (1st, Brill 2018) 64.
[18] See, ECtHR, 'Inter-State applications' (n 6).
[19] See, ECtHR, 'General Statistics 2023' (January 2024), <www.echr.coe.int/documents/d/echr/stats-analysis-2023-eng> accessed 1 April 2024.
[20] Scott Leckie, 'The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?' (1988) 10(2) Human Rights Quarterly 249, 254.
[21] Helen Küchler, *Die Renaissance der Staatenbeschwerde* (1st, Nomos 2020) 36.
[22] *Mamatkulov and Abdurasulovic v. Turkey,* App nos 46827/99 and 46951/99 (ECtHR, 6 February 2003) [GC] para 122.

However, Helen Küchler notes a 'renaissance' of inter-state applications, although the procedure has not yet become the Convention's enforcement 'centrepiece'.[23] Particularly since 2008, there has been a notable rise in inter-state applications due to the increase of armed conflicts.[24] Between 1953 and 2008, a total of 12 inter-state applications were lodged before the ECtHR.[25] In the following 16-year period (2008-2024), the Court received 21 state cases, with nine involving Russia as the respondent state.[26] Most pending inter-state applications relate to armed conflicts, with 11 out of 13 cases addressing such conflicts.[27] Among them four pertain to the Russia-Ukraine conflict.[28] Further growth can be anticipated considering the increasing number and duration of conflicts.

2. Purpose of Inter-State Applications

Inter-state applications have a dual role: collectively enforcing human rights standards and serving the individual political interests of member states.[29] This classification focuses on two main strands.[30]

The first category aims to uphold human rights standards for the broader collective interest of 'the public order of the free democracies of Europe',[31] aligning with the Convention system's purpose and the Council of Europe's goals, particularly articulated in the ECHR's preamble.[32] A typical example is the case of *Denmark, Norway, Sweden and the Netherlands v. Greece (II),*[33] arising in the aftermath of the 1967 Greek coup, where the military junta suspended key Convention guarantees, prompting states to intervene despite no personal or political ties to Greece.

[23] Küchler (n 21) 668.
[24] Dzehtsiarou and Tzevelekos (n 4) 149, 150.
[25] See, ECtHR, 'Inter-State applications' (n 6).
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] Dzehtsiarou and Tzevelekos (n 4) 168, 169; Søren C. Prebensen, 'Inter-state complaints under treaty provisions – The Experience under the European Convention on Human Rights' in Gudmundur Alfredsson et al. (eds), *International Monitoring Mechanisms* (2nd, Brill 2009) 449.
[30] See, e.g., three categories proposed by Küchler (n 21) 155-301; or five by Philip Leach, 'On Inter-State Litigation and Armed Conflict Cases in Strasbourg' (2021) 2(1) European Convention on Human Rights Law Review 2-5.
[31] *Austria v. Italy,* App no 788/60 (Commission Decision, 11 January 1961) 18; *Cyprus v. Turkey* App no 25781/94 (Commission Decision, 12 May 2014) para 44.
[32] See, Preamble of the ECHR.
[33] *Denmark, Norway, Sweden and the Netherlands v. Greece (II),* App no 4448/70 (Commission Decision, 16 July 1970).

In contrast, the second category concern cases raised by states pursuing a national-political individual interest, often within bilateral disputes.[34] Examples includes complaints related to the Northern Ireland conflict, [35] the first three Cyprus complaints,[36] or the case *Ukraine v. Russia (re Crimea),*[37] addressing Russia's administrative practices in Crimea. A sub-category within this includes cases where states act due to their citizens being injured by the human rights violations of another party.[38] This can be characterised as 'a form of subrogation',[39] resembling the Convention's individual protection mechanism. The case *Ukraine v. Russia (II),*[40] concerning the abduction of orphaned children by armed separatist groups in Eastern Ukraine to Russian territory, falls into this category, driven by Ukraine's duty to protect its citizens' rights.

A closer examination of pending cases before the ECtHR in armed conflict contexts reveals that states have been hesitant to use inter-state applications for collective enforcement. Instead, they primarily use them to shield themselves and their citizens from human rights abuses linked to armed conflicts.

3. Low Admissibility Requirements

Inter-state applications, designed as collective enforcement mechanism, have intentionally lower admissibility requirements.[41] They do not need to satisfy the particularly high criteria for individual applications outlined in Article 35(1) – (4) of the ECHR), but they are still required to meet the six-month rule and exhaust all domestic remedies (Article 35(1) of the ECHR). However, the Court may dismiss inter-state cases based on territorial, subject-matter, personal and temporal jurisdiction.[42] Remarkably, no state complaint has ever failed to meet the admissibility requirements, whereas approximately 98% of individual applications are declared inadmissible.[43] Unlike individual applications, the applicant state does not need to be a direct victim of the alleged human rights violation, reflecting the idea of erga omnes parte –

[34] Walter Kälin and Jörg Künzli, *Universeller Menschenrechtsschutz – Der Schutz des Individums auf globaler und regionaler Ebene* (4th, Nomos 2013) para 686.
[35] *Ireland v. the United Kingdom,* App no 5310/71; *Ireland v. United Kingdom (II),* App no 5451/72.
[36] *Cyprus v. Turkey (I)* and *(II),* App nos 6780/74 and 6950/75; *Cyprus v. Turkey (III),* App no 8007/77.
[37] *Ukraine v. Russia (re Crimea),* App nos 20958/14 and 38334/18 (ECtHR, 16 December 2020) [GC].
[38] Prebensen (n 29) 451; Küchler, (n 21) 158.
[39] Dean Spielmann, President of the ECtHR 'The European Court of Human Rights as guarantor of a peaceful public order in Europe' (Gray's Inn, London 7 November 2014) <www.echr.coe.int/documents/d/echr/Speech_20141107_Spielmann_GraysInn> accessed 14 April 2024.
[40] *Ukraine v. Russia (II),* App no 43800/14.
[41] Prebensen (n 29) 446.
[42] Nakashidze (n 15) 53.
[43] Küchler (n 21) 33.

obligations that each state party owes to all others.[44] Inter-state applications are admissible due to their general interest in upholding Convention provisions.[45]

4. Fact-finding

Fact-finding is 'one of the greatest challenges' for the ECtHR, as acknowledged by its Working Methods Committee. [46] It involves examining extensive evidence, witnesses, and claims, as seen in the *Georgia v. Russia (II)* case with over 30,000 pages of files.[47] The Court is not designed for such extensive fact-findings missions and often act as a court of first instance, without relying on domestic court findings.[48] This complexity is amplified in armed conflicts, dealing with politically sensitive aspects and logistical limitations. In *Georgia v. Russia (II)*, the Court declined jurisdiction due to its inability to handle the case's scope and gravity, underscoring the overwhelming nature of such cases.[49]

5. Duty to Cooperate

Under Article 38 of the Convention, states have a duty to cooperate, mandating them to provide 'all necessary facilities' for case examination and investigations. Despite this, respondent states often refuse to cooperate in armed conflicts.[50] For instance, in *Cyprus v. Turkey*, delivery of the just satisfactory judgment was delayed for twenty years due to Turkish authorities' non-cooperation.[51] Similarly, in *Georgia v. Russia (I)*, Russia breached Article 38 by withholding crucial evidence[52] - a violation underscored in the judgment's first operative paragraph. This

[44] *Ireland v. the United Kingdom*, App no 5310/71 (ECtHR, 18 January 1978) paras 239, 240.
[45] William A. Schabas, *The European Convention on Human Rights: A Commentary* (1st, Oxford University Press (2015) 726.
[46] ECtHR, Committee on Working Methods, 'Proposals for More Efficient Processing of Inter-state Cases - a redacted version of a report adopted by the plenary of the Court on 18 June 2018' (5 June 2019) paras 20-21 <https://rm.coe.int/steering-committee-for-human-rights-cddh-proposals-for-a-more-efficien/168094e6e1> accessed 14 April 2024.
[47] Leach, 'On Inter-State Litigation' (n 30) 24.
[48] Philipp Leach, 'Enhancing fact-finding – a critical role for the European Court of Human Rights', (Proceedings of the Conference 'European convention on human rights experiences and challenges' (Berlin, 12 – 13 April 2021) 76 <https://rm.coe.int/interstate-cases-under-the-echr/1680a5e82c> accessed 14.04.2024; ECtHR, Jurisconsult, 'International and national courts confronting large-scale violations of human rights - Genocide, Crimes against Humanity and War crimes' (Background Paper for Seminar Opening of the Judicial Year January 2016) 20 <www.echr.coe.int/Documents/Seminar_background_paper_2016_part_1_ENG.pdf> accessed 14 April 2024.
[49] *Georgia v Russia (II)*, App no 38263/08 (ECtHR, 21 January 2021) [GC] para 141.
[50] Nakashidze (n 15) 58.
[51] *Cyprus v. Turkey*, App no 25781/94 (ECtHR, 12 May 2014) [GC].
[52] *Georgia v. Russia (I)*, App no 13255/07 (ECtHR, 3 July 2014) [GC] para 2.

trend persists in other cases related to Chechnya, where Russia repeatedly refused to provide essential documents. [53]

6. Interrelated Individual Applications

Inter-state proceedings in the context of armed conflicts are often accompanied by a multitude of overlapping individual applications.[54] Given the Court's general 'backlog'[55], the examination of these sometimes thousands of interrelated claims presents an immense task.

To address repetitive cases, the Court introduced the pilot judgment procedure; [56] however, it often proves inadequate for armed conflict situations, where issues arise from military operations rather than structural deficiencies.[57]

In 2018, the Copenhagen Declaration acknowledged the challenges encountered by the Convention system 'in the context of situation of conflict and crisis in Europe' and proposed considering judgments in interstate cases as leading decision for individual applications. [58] This approach was exemplified by the ECtHR's decision regarding individual applications related to Eastern Ukraine, pending a Grand Chamber judgment in the *Ukraine v Russia (re Eastern Ukraine)* case.[59] The Court adjourned all individual applications until clarifying the 'key issue' of jurisdiction under Article 1 of the Convention in the inter-state application.[60] Thus, the ECtHR has developed a mechanism to handle overlapping individual claims more effectively.

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[53] See, *Imakayeva v. Russia*, App no 7615/02 (ECtHR, 9 November 2006) para 124; *Tangiyeva v. Russia*, App no 57935/00 (ECtHR, 29 November 2007) paras 81-83; Ole Solvang 'Russia and the European Court of Human Rights: The Price of Non-Cooperation' (2008) 15(2) Human Rights Brief 15 et seq.

[54] Isabellea Risini, 'Proceedings of the Conference 'European convention on human rights experiences and challenges' (Berlin, 12 – 13 April 2021) 103 <https://rm.coe.int/interstate-cases-under-the-echr/1680a5e82c> accessed 14 April 2024; Robert Spano, President of the ECtHR, 'Meeting of the Committee of Legal Advisers on Public International Law (CAHDI)' (Strasbourg, 25 March 2021) 2 <www.echr.coe.int/documents/d/echr/Speech_20210325_Spano_Meeting_CAHDI_ENG> accessed 14 April 2024; CDDH, 'Report on the longer term future of the system of the European Convention on Human Rights'(11December 2015) para 79 <https://rm.coe.int/the-longer-term-future-of-the-system-of-the-european-convention-on-hum/1680695ad4> accessed 16 April 2024.

[55] CDDH Report (n 53) paras 76, 195.

[56] Rule 61 (1) of the Rules of Court (inserted on 21 February 2022).

[57] Nakashidze (n 15) 64.

[58] Council of Europe Committee of Ministers, Copenhagen Declaration on the Reform of the European Convention (adopted on 13 April 2018) para 45.

[59] ECtHR, Press Release 'ECtHR to adjourn some individual applications on Eastern Ukraine pending Grand Chamber judgment in related inter-State case' (17 December 2018) ECHR 432(2018) <https://hudoc.echr.coe.int/engpress#{%22itemid%22:[%22003-6282063-8189102%22]}> accessed 20 April 2024.

[60] Ibid.

7. Implementation and Effectiveness

The effectiveness of international courts depends on the compliance with their judgments.[61] However, implementing ECtHR judgements has consistently proven problematic.[62] Inter-state cases pose even greater difficulties because their resolution may often demand more innovative solutions beyond monetary compensation.[63]

Nonetheless, even monetary compensation remains sometimes difficult to enforce. For instance, payments in cases like *Cyprus v. Turkey (IV)*[64] from 2014; or *Georgia v. Russia (I)*[65] from 2007 remain outstanding.[66] However, this concerns compensation awarded in favor of individuals within the framework of inter-state complaints.

Overall, while it could be tempting to interpret implementation shortcomings to a lack of political will, thereby questioning the effectiveness of inter-state applications, Helen Küchler's analysis provides a more nuanced perspective. She highlights that 75% of the inter-state case decisions have positively impacted the democratic and human rights structures within the applicant-state.[67]

II. Interim Measures in the Context of Armed Conflicts

The next section explores the role of interim measures during armed conflicts, emphasising their scope, the ECtHR's evolving approach, and their general use in inter-state cases. It highlights the importance of maintaining realistic expectations regarding the Court's ability to grant interim measures in inter-state conflicts.

[61] Kanstantsin Dzehtsiarou, 'Can the European Court of Human Rights prevent war? Interim measures in inter-state cases' (2016) 2 Public Law 254, 267.
[62] CDHH Report (n 54) para 34.
[63] Council of Europe Parliamentary Assembly, Resolution 2494 (2023) on the implementation of judgments of the European Court of Human Rights (26 April 2023) para 6. See also Leach 'On Inter-State Litigation' (n 30) 30.
[64] *Cyprus v. Turkey (IV)*, App no 25781/94 (ECtHR, 12 May 2014) [GC] paras 40-46.
[65] *Georgia v. Russia (I)*, App no 13255/07 <https://hudoc.exec.coe.int/ENG#{%22execidentifier%22:[%22004-14138%3E.%22]}> accessed 20 April 2024.
[66] See, Ezgi Yildriz, *Between forbearance and audacity: the European Court of Human Rights and the norm against torture* (1st, Cambridge University Press 2024) 175.
[67] Küchler (n 21) 494 et seq.

1. Scope of Interim Measures

Although interim measures are not explicitly mentioned in the text of the Convention, Rule 39 of the Court's Rules of Court, introduced in 1982, serves as the relevant provision.[68] It builds upon a previous rule established in 1974 by the Commission to codify existing informal practice of interim measures.[69]

The Court applies interim measures in limited cases only, typically when there is an immanent risk or irreparable harm to a Convention right.[70] These measures may require the parties to refrain from certain actions or undertake specific measures. [71] The Court generally responds swiftly to requests, often issuing interim measures within one or a few days. [72]

Interim measures can be issued within both individual and inter-state complaint procedures.[73] However, their binding legal nature has been established in relation to individual applications.[74] Consequently, failure to comply with interim measures violates the right of individual application guaranteed by Article 34 ECHR.[75]

Most frequently, interim measures involve cases of expulsion and extradition engaging Articles 2 (the right to life) and 3 (the prohibition of torture or inhuman or degrading treatment) of the ECHR.[76] During armed conflicts, these measures notably protect the right to life and personal integrity of alleged victims and their relatives. [77]

[68] Risini, *The Inter-State Application under the ECHR* (n 17) 201.
[69] Eva Rieter, *Preventing Irreparable Harm, Provisional Measures in Human Rights Adjuction* (1st, Intersentia, 2010) 173, 174.
[70] ECtHR, 'Factsheet - Interim Measures' (March 2024) <www.echr.coe.int/documents/d/echr/fs_interim_measures_eng> accessed 22.04.2024.
[71] Practice Direction, 'Requests for interim measures (Rule 39 of the Rules of Court)' (issued by the President of the Court, 5 March 2003, revised on 28 March 2024) para 5 <www.echr.coe.int/documents/d/echr/PD_interim_measures_ENG> accessed 23 April 2024.
[72] Yves Haeck and Clara Burbano Herrera, 'The use of interim measures issued by the European Court of Human Rights in times of war or international conflict' in Antoine Buyse (ed), *Margins of conflict: the ECHR and transitions to and from armed conflict* (1st, Intersentia, 2011) 85.
[73] Ibid, 78.
[74] *Mamatkulov and Askarov v. Turkey*, App nos 46827/99 and 46951/99 (ECtHR, 4 February 2005) [GC] paras 128-129; *Paladi v. Moldova*, App no 39806/05 (ECtHR, 10 March 2009) [GC] paras 84-106 and *K.I. v. France* App no. 5560/19 (ECtHR15 April 2021) para 115.
[75] Practice Direction, 'Requests for interim measures' (n 71) para 2.
[76] ECtHR, 'Factsheet - Interim measures' (n 70) 1; Rieter (n 69) 170.
[77] Haeck and Burbano Herrera (n 72) 124.

Interim measures represent one of the Court's very few instruments capable of influencing ongoing or developing situations.[78] They can proactively prevent states from breaching Convention's rights.[79]

2. Evolution of Interim Measures

The ECtHR has expanded its approach to interim measures over time in three significant ways:

Firstly, the Court now applies interim measures beyond Articles 2 and 3 of the Convention to protect rights which previously deemed unsuitable for such protection.[80] For instance, measures have been granted to safeguard the right to family (Article 8 ECHR)[81] or freedom of expression (Article 10 ECHR)[82]. However, in cases related to armed conflicts, the focus remains primarily on Articles 2 and 3 of the Convention.[83] For example, the Court does not grant interim measures in cases involving protection of property in conflict zones under imminent risk of destruction (Article 1 Protocol No. 1 to the ECHR).[84]

Secondly, the scope of obligations of the Contracting Parties has broadened. For example, in the Case of Aleksey Navalnyy, the ECtHR requested his transfer from Russia to Germany for medical treatment.[85] Additionally, in the case *Oliynichenko v. Russia*, the Court extended interim measures to cover any requests made on behalf of Ukrainian prisoners of war in Russian custody if there was sufficient evidence provided of serious and imminent risk of irreparable harm to their physical integrity and/or right to life.[86] Initially, the Court would only require

[78] Kanstantsin Dzehtsiarou, 'The Effectiveness of the European Court of Human Rights in Cases of War', (*ECCHRBLOG*, March 2014) <www.echrblog.com/2014/03/ukraine-russia-inter-state-application.html> accessed 28 April 2024.
[79] Dzehtsiarou, 'Can the ECtHR prevent war?' (n 61) 255.
[80] Kanstantsin Dzehtsiarou, and Vassilis Tzevelekos, 'Interim Measures: Are Some Opportunities Worth Missing?' (2021) 2 European Convention on Human Rights Law Review 1, 3.
[81] See, *Amrollahi v. Denmark*, App no 56811/00 (ECtHR, 11 July 2002); *Evans v. UK*, App no 6339/05 (ECtHR, 10 April 2007) [GC].
[82] See, ECtHR, Press Release, 'European Court applies urgent interim measure in the case of the Russian daily newspaper *Novaya Gazeta*' (10.03.2022) ECHR 084(2022) <https://hudoc.echr.coe.int/eng-press?i=003-7282927-9922567> accessed 24 April 2024.
[83] Haeck and Burbano Herrera (n 72) 126.
[84] ECtHR, Press Release, 'ECHR refuses urgent measures in cases concerning Ukrainian Orthodox Church in Crimea' (01.09.2020) ECHR 241(2020) <https://hudoc.echr.coe.int/eng?i=003-6777466-9056249> accessed 24 April 2024. See also, Haeck and Burbano Herrera (n 72) 86, 126.
[85] ECtHR, Press Release, 'The Court grants an interim measure in favour of Aleksey Navalnyy' (21 August 2020) ECHR 235(2020) <http://hudoc.echr.coe.int/eng-press?i=003-6770533-9044388> accessed: 24 April 2024.
[86] ECtHR, Press Release, 'Interim measures concerning Ukrainian prisoners of war' (01.07.2022) ECHR 227 (2022) <https://hudoc.echr.coe.int/eng-press?i=003-7375654-10081123> accessed 28 April 2024.

states to provide medical treatment or assistance, including in specialized hospitals, to individual prisoners pending examination of their cases.[87]

The most significant development pertains to inter-state cases during armed conflicts. Previously, interim measures in inter-state cases were limited to specific individuals.[88] For instance, in the case *Greece v UK* (1956),[89] measures were requested for specific known individuals, or in *Denmark, Norway, Sweden and the Netherlands v. Greece* (1967),[90] for a specific group of individuals. In more recent conflicts such as those between Georgia and Russia, Ukraine and Russia or in the Nagorno-Karabakh-region, the Court issued interim measures of a more 'general' nature, protecting an indeterminate number of people with abstract obligations.[91] This development warrants closer examination.

3. General Interim Measures in Inter-States Cases

The ECtHR has applied general interim measures in several inter-state cases, including *Georgia v. Russia (II),*[92] *Ukraine v. Russia (re-Crimea),* [93] and cases related to the Nagorno-Karabakh conflict: *Armenia v. Azerbaijan*[94] and *Armenia v. Turkey*[95] ; as well as *Ukraine v. Russia (X)*[96] (the latter being separately analysed under Section E). These measures possess specific characteristics.

[87] See, *Aleksanyan v. Russia,* App no 46468/06 (ECtHR, 22 December 2008) [GC]; *Paladi v. Moldova,* App no 39806/05 (ECtHR, 10 March 2009) [GC].
[88] Risini, *The Inter-State Application under the ECHR* (n 17), 202; Dzehtsiarou, 'Can the ECtHR prevent war?' (n 61) 10.
[89] *Greece v. UK*, App no 176/56 (Commission Decision, 2 June 1956).
[90] *Denmark, Norway, Sweden and the Netherlands v. Greece (II), App no 4448/70.*
[91] See, Dzehtsiarou, and Tzevelekos, 'Interim Measures' (n 80); Ezgi Özlü, 'A few, but very necessary, minutes to devote to interim measures': Further transparency as a resilience strategy?' (*Strasbourgobservers,* 15 March 2024) <https://strasbourgobservers.com/2024/03/15/a-few-but-very-necessary-minutes-to-devote-to-interim-measures-further-transparency-as-a-resilience-strategy-1/> accessed 28 April 2024.
[92] *Georgia v. Russia (II),* App no 38263/08 (ECtHR, 21 January 2021) [GC] para 5.
[93] *Ukraine v. Russia (re-Crimea),* App nos 20958/14 and 38334/18 (ECtHR, 16 December 2020) [GC] para 5.
[94] *Armenia v Azerbaijan*, App no 42521/20; *Azerbaijan v. Armenia* App no 47319/20.
[95] *Armenia v. Turkey*, App no 43517/20.
[96] ECtHR, Press Release, 'Decision of the Court on requests for interim measures in individual applications concerning Russian military operations on Ukrainian territory' (4 March 2022) ECHR 073(2022) <https://hudoc.echr.coe.int/eng-press?i=003-7277548-9913621> accessed 20 April 2024.

a) Recipients

In all mentioned cases, interim measures address both parties of the conflict: the respondent state and the applicant. Notably, in *Armenia v. Turkey* the Court extended its direction to 'all States directly or indirectly involved in the conflict, including Turkey'.[97]

b) Legal Obligations

General interim measures lack a specific list of acts to be performed but entail abstract obligations open to interpretation. For instance, parties are directed to 'refrain from taking any measures, in particular military action'[98] or 'refrain from actions that contribute to breaches of the Convention.'[99]

It remains unclear whether these measures introduce new obligations or merely emphasise existing commitments under the Convention. For example, in *Georgia v. Russia (II),* measures were issued 'to honour their commitments under the Convention, particularly in respect of Articles 2 and 3'.[100] Similarly, in *Ukraine v. Russia (re Crimea),* parties should refrain from actions that could violate the civilian population's rights, notably under Articles 2 and 3.[101]

This ambiguity extends to the legal foundation of interim measures in inter-state cases. The binding nature of interim measures in individual applications under Article 34 ECHR does not directly apply to inter-state applications.[102] One approach could be drawing an analogy to not hinder the exercise of the state's right to petition implicit in Article 33 of the ECHR.[103] Alternatively, finding a violation of Article 46 of the ECHR could offer a solution.[104] The ECtHR has yet to definitively address this issue, necessitating further clarification.

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[97] ECtHR, Press Release, 'The Court's decision on the request for an interim measure lodged by Armenia against Turkey' (6 October 2020) ECHR 276(2020) <https://hudoc.echr.coe.int/eng-press?i=003-6816855-9120472> accessed 20 April 2024.
[98] ECtHR, Press Release 'The Court Grants an Interim Measure in the Case of Armenia v. Azerbaijan' (30 September 2020) ECHR 265(2020) <http://hudoc.echr.coe.int/eng-press?i=003-6809725-9108584> accessed 28 April 2024.
[99] ECtHR, Press Release 'ECHR 276(2020) (n 97).
[100] *Georgia v Russia (II),* para 5.
[101] *Ukraine v. Russia (re-Crimea),* para 5.
[102] Risini, *The Inter-State Application under the ECHR* (n 17) 139.
[103] Andrea Sacucci, 'Interim Measures at the European Court of Human Rights: Current Practice and Future Challenges', in Fulvio Maria Palombino, Roberto Virzo and Giovanni Zarra (eds), *Provisional Measures Issued by International Courts and Tribunals* (1st, Springer, 2021) 215, 247.
[104] Vassilis P Tzevelekos, 'On the Value of Interim Measures by the ECtHR on Inter-State Disputes' (*Strasbourgobservers*, 3 February 2021) <https://strasbourgobservers.com/2021/02/03/on-the-value-of-interim-measures-by-the-ecthr-on-inter-sate-disputes/> accessed 23 April 2024.

However, the general formulation of obligations allows for a broader range of acts concerning potential human rights abuses to be encompassed. [105] Abstract wording permits subsequent concretisation and clarifying existing legal obligations enables states to identify their relevant duties effectively. Thus, general interim measures serve as a 'useful reminder'[106] for conflict parties and reflect a pragmatic approach by the Court, allowing states to determine how best to address these obligations.[107]

c) Protected Persons

During ongoing hostilities with a significant risk to life on a large scale, interim measures can serve as a protective umbrella for a large or potentially unlimited number of individuals.[108] For example, in *Armenia v. Turkey* and *Armenia v. Azerbaijan* reference is made to 'civilian population'.[109] While initially intended to produce individual effects, these measures now focus on providing protection to all potential or actual victims.

d) Compliance and Effectiveness

At the opening of the Judicial Year 2024, ECtHR President O'Leary expressed deep concern over widespread disregard for interim measures, underscoring their crucial role in safeguarding democracy.[110] Moreover, compliance rate of interim measures in individual cases is high (99%) due to their precise instructions.[111] Conversely, the imprecise wording of general interim measures can potentially lead to non-compliance.[112] Instances such as Russia's violation of interim measures in Crimea[113] and the persistence of the Nagorno-Karabakh conflict[114] despite provisional measures highlight their limited effectiveness. Interim measures are heavily

[105] Aurélie Van Baelen, 'Interim measures by the European Court of Human Rights in the Ukrainian Conflict: United against the Russian aggression' (*Strasbourgobservers*, 22 March 2022) <https://strasbourgobservers.com/2022/03/22/interim-measures-by-the-european-court-of-human-rights-in-the-ukrainian-conflict-united-against-the-russian-aggression/> accessed 25 April 2024.
[106] Tzevelekos (n 104).
[107] Ibid.
[108] Van Baelen (n 105).
[109] ECtHR, Press Release ECHR 276(2020) (n 97); ECtHR, Press Release ECHR 265(2020) (n 98).
[110] Síofra O'Leary, President of the ECtHR, 'Solemn Hearing Opening of the Judicial Year 2024' (Strasbourg, 26 January 2024) <www.echr.coe.int/documents/d/echr/speech-20240126-oleary-jy-eng> accessed 28 April 2024.
[111] Haeck and Burbano Herrera (n 72) 380; Dzehtsiarou, 'Can the ECtHR prevent war?' (n 61) 9
[112] Dzehtsiarou 'Can the ECtHR prevent war?' (n 61) 8.
[113] Julia Koch, 'The Efficacy and Impact of Interim Measures: Ukraine's Inter-State Application Against Russia' (2016) 39(1) Boston College International and Comparative Law Review 163, 183.
[114] Dzehtsiarou, and Tzevelekos, 'Interim Measures' (n 80) 7.

influenced by the 'political realities on the ground'[115] and are prone to being ignored, affecting compliance and potentially undermining their efficacy.

e) Realistic Expectations

Recognising the limitations of interim measures in conflict situations is crucial. However, it is important to remember that interim measures are provisional per nature and do not halt violence or prevent war. They draw attention to conflicts, contribute to discourse, and facilitate finding solutions within the international community. Even minor impacts, such as serving as reminders, are valuable in armed conflicts.

Matei Alexianu's example of 'Provisional Countermeasures' in the ICJ case *South Africa v. Israel* underscores this.[116] Doubts persist about whether Israel's actions in Gaza amount to genocide, but evidence indicates non-compliance with provisional measures ensuring humanitarian aid delivery into Gaza.[117] Alexianu points out that emphasising obligations through interim measures can catalyse actions within the international community. It empowers affected parties and third-party states to enforce compliance with international law through means such as diplomatic pressure or sanctions.

III. Third-Party Interventions by Member States

Third parties can intervene under Article 36(2) of the ECHR in both individual and inter-state applications. The Court permits three types of interventions: by contacting parties; by 'amici curiae' (friends of the court), and by 'interested third parties'.[118] This procedural tool is further detailed in Rule 44 of the Rules of the Court, addressing aspects like time constraints and the format of intervention requests.

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[115] Kanstantsin Dzehtsiarou, 'The Interim Measures of the European Court of Human Rights in the Conflict between Armenia and Azerbaijan' (*Strasbourgobservers*, 9 October 2020) <https://strasbourgobservers.com/2020/10/09/catch-22-the-interim-measures-of-the-european-court-of-human-rights-in-the-conflict-between-armenia-and-azerbaijan/> accessed 28 April 2024.

[116] Matei Alexianu, 'Third-Party "Provisional Countermeasures": A Proposal to Give Teeth to Provisional Measures', (*EJIL:Talk!*, 20 March 2024) <https://www.ejiltalk.org/third-party-provisional-countermeasures-a-proposal-to-give-teeth-to-provisional-measures/> accessed 26 April 2024.

[117] Ibid.

[118] Practice Direction 'Third-party intervention under Article 36 § 2 of the Convention or under Article 3, second sentence, of Protocol No. 16' (issued by the President of the Court, 13 March 2023) para 5 <www.echr.coe.int/docuemnts/d/echr/pd_third_party_intervention_eng-pdf?download=true> accessed 23.04.2024; Nicole Bürli, *Third-Party Intervention before the European Court of Human* Rights (1st, Intersentia, 2017) 5.

Intervening as a third-party is not a right, but a procedural tool subject to the Court's discretion, contingent upon whether it serves 'the interest of the proper administration of justice'.[119] A third-party is not required to have a direct legal interest.[120] However, the criteria for intervention remain somewhat unclear, with the Court generally reluctant to decline such requests.[121] Intervening parties occupy a distinct status - they do not attain full procedural rights akin to litigants.[122] Typically, third-parties contribute through written submissions, although they may exceptionally participate orally in proceedings.[123]

The objectives of third-party interventions are twofold: firstly, to acquaint the Court with the views of the third parties. [124] This reflects the Copenhagen Declaration in 2008, which calls on member states to engage with the Court in a 'dialogue' through this procedural tool.[125] Secondly, intervening parties should provide impartial and objective information and arguments that have not already been put forward, adding valuable input to the proceedings.[126]

Reasons why member states intervene as third parties echo those evident in inter-state applications. They intervene to express their general support for human rights, aligning with the collective enforcement idea outlined in the Convention's preamble.[127] However, the predominant motivation lies in self-interest concerning the case's outcome, including the desire to provide relevant information on domestic law and practices or seek clarification on existing case law.[128] Notably, states often intervene due to the strong de facto erga omnes effect of the ECtHR's case law.[129] This effect compels member states to reassess their legislation and practices, despite the judgment being formally binding only on the respondent state.[130]

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[119] Practice Direction, 'Third-party intervention' (n 118) 1-2.
[120] Ibid., 2.
[121] Isabella Risini and Justine Batura, 'Of Parties, Third Parties, and Treaty Interpretation: Ukraine v. Russia before the European Court of Human Rights: Völkerrechtliche Tagesthemen: Spotlight (Episode 34), (*Völkerrechtsblog*, 15.02.2023) <https://voelkerrechtsblog.org/of-parties-third-parties-and-treaty-interpretation-ukraine-v-russia-before-the-european-court-of-human-rights/> accessed 27 April 2024.
[122] Ibid.
[123] Practice Direction 'Third-party intervention' (n 118) para 19.
[124] Ibid., para 2.
[125] Copenhagen Declaration (n 58), para 34.
[126] Justine Batura, 'The Objective Friends of the Court – New Insights into the Role of Third Parties before the European Court of Human Rights' (*EJIL:TALK!,* 19 April 2023) <www.ejiltalk.org/the-objective-friends-of-the-court-new-insights-into-the-role-of-third-parties-before-the-european-court-of-human-rights/> accessed 27 April 2024.
[127] Risini and Batura (n 121).
[128] Kanstantsin Dzehtsiarou, 'Conversations with friends: 'friends of the Court' interventions of the state parties to the European Convention on Human Rights' (2023) 43 Legal Studies 381, 393.
[129] Bürli (n 117) 135.
[130] Practice Direction 'Third-party intervention' (n 118) para 8.

Interventions of states pursuant to Article 36(2) ECHR are infrequent, occurring in slightly over 11% of all cases heard by the Grand Chamber between 1998 and 2000.[131] According to Kanstantsin Dzehtsiarou, these interventions do not seem to significantly alter the Court's decision-making pattern or influence its reasoning. [132] However, the true impact of third-party interventions before the ECtHR warrants further investigation.

IV. Conclusion - The ECtHR's Procedural Infrastructure

In conclusion, the ECtHR, originally designed to operate in peacetime, has demonstrated remarkable flexibility in adapting its procedural tools to the complexities of armed conflicts. The Court is increasingly confronted with the challenges of extensive fact-finding, state cooperation and interrelated individual applications in inter-state proceedings. However, inter-state applications have become powerful tools for states to pursue a form of 'parity in weaponry' in procedural terms during armed conflicts, and the Court has developed mechanisms to manage the high volume of interrelated individual cases.

Moreover, the Court underscores its procedural readiness with its general interim measures, providing swift protection in complex and uncertain situations of armed conflicts for a large number of people. Additionally, the Court has shown procedural openness to input from third-party interventions, further enhancing its adaptability and effectiveness.

C. The ECtHR's Conceptual Approach to Armed Conflicts: Extraterritorial Jurisdiction, Jus ad Bellum and Jus in Bello

This section examines the ECtHR's conceptual approach to armed conflicts. It focusses on extraterritorial jurisdiction under Article 1 of the ECHR, explores the relationship between the Convention and Jus ad Bellum, specifically whether acts of aggression can establish jurisdiction or violate the right to life and the interplay with Jus in Bello, including potential normative conflicts.

[131] Dzehtsiarou, 'Conversations with friends' (n 128) 387.
[132] Ibid., 397 et seq.

I. The Extraterritorial Application of the Convention in Armed Conflicts

Article 1 of the ECHR stipulates that obligations under the Convention apply only if the situation falls within the state's jurisdiction. However, applying the Convention outside the state's own territory – thus, extraterritorially – is often debated, especially in the context of armed conflicts. This section explores the Court's approach to establishing extraterritorial jurisdiction during such conflicts, examining aspects like the use of kinetic force outside national borders, the concept of effective control during 'active hostilities', and the scope of the Convention's legal space. The critical question of whether the unlawful use of force can establish jurisdiction under Article 1 of the ECHR will be further addressed in Section C, which deals with jus ad bellum.

1. Extraterritoriality under Article 1 of the ECHR

The ECtHR's case-law emphasises that jurisdiction under Article 1 is a threshold criterion, necessary to hold the contracting party responsible for alleged violations of Convention rights.[133] Whether an applicant's complaint falls within the respondent state's jurisdiction and if the respondent state bears responsibility for those actions are distinct inquiries, the latter pertains to the merits of the case.[134] Thus, jurisdiction under Article 1 is about whether the ECHR applies.[135] The principle is primarily territorial.[136] Acts occurring outside the Contracting state's territory can be within the meaning of Article 1 only in 'exceptional circumstances', determined by specific facts. [137] The Court has outlined criteria for such application:

Under the spatial model, extraterritorial application can be based on whether a contracting state exercises control over foreign territory (*ratione loci*),[138] either directly through military presence[139] or indirectly through economic and political support for a local administration[140].

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[133] *Ilasçu and Others v. Moldova and Russia*, App no 48787/99 (ECtHR, 08 July 2004) [GC] para 311; *Georgia v. Russia (II)*, para 81; *Al-Skeini and Others v. the United Kingdom*, App no. 55721/07 (ECtHR, 7 July 2011) [GC] para 130. See also, Schabas (n 45) 92.
[134] ECtHR, 'Guide on Article 1 of the European Convention' (updated 31 August 2022) para 6 <www.echr.coe.int/documents/d/echr/guide_art_1_en > accessed 28 April 2024.
[135] Marco Milanovic, 'Jurisdiction and Responsibility: Trend in the Jurisprudence of the Strasbourg Court' in Anne van Aaken and Lulia Motoc (eds), *The European Convention on Human Right and General International Law* (1st, Oxford University Press 2018) 103.
[136] *M.N and Others v. Belgium*, App no 3599/18 (ECtHR, 5 May 2020) [GC] para 98; ECtHR, 'Guide on Article 1' (n 134) para 13.
[137] *Georgia v. Russia (II)*, para 128, *M.N and Others v. Belgium*, para 101-102.
[138] ECtHR, 'Guide on Article 1' (n 134) para 44b.
[139] *Georgia v. Russia (II)*, paras 194 -196.
[140] *Ilasçu and Others v. Moldova and Russia*, paras 388-394.

Consequently, the area is treated indistinguishable from the state's own territory, with the controlling state responsible for securing all Convention's rights.[141]

Under the personal model, extraterritoriality is established based on the exercise of power or control over individuals (*ratione personae*).[142] This may arise in diplomatic contexts, where state agent exercise power or control over the victim or the property[143], or through the exercises of another state's sovereign authority with its agreement,[144] and sometimes due to the use of force[145]. Consequently, the state with jurisdiction must secure relevant Convention's rights for the individual, which can be therefore 'tailored and divided'.[146] Another more recently developed criterion is the jurisdictional link between the respondent state and the victim's relatives concerning the procedural obligation to carry out an effective investigation under Article 2 of the ECHR.[147]

However, these criteria are not exhaustive and only reflect the Court's prior jurisprudence.[148]

2. Extraterritorial Use of Kinetic Force

The question arises whether actions like artillery strikes, shelling, missile attacks, or aerial bombing might bring individuals under the control of the State's authorities and thus under Article 1 jurisdiction.

The ECtHR has taken a cautious approach to the extraterritorial use of kinetic forces - in contrast to other legal bodies.[149] For instance, the Inter-American Commission on Human Rights considers this as part of personal jurisdiction, as evidenced by a ruling where a Cuban military aircraft shot down a civilian craft in international airspace.[150] Likewise, the Human

[141] *Ukraine and the Netherlands v. Russia*, para 561.
[142] ECtHR, 'Guide on Article 1' (n 134) para 44a.
[143] *M.N and Others v. Belgium*, paras 105 et seq; *Ukraine and the Netherlands v. Russia*, paras 568-569.
[144] ECtHR, 'Guide on Article 1' (n 134) para 58.
[145] *Al-Skeini and Others v. UK*, para 136.
[146] *Al-Skeini and Others v. UK*, para 137; *Ukraine and the Netherlands v. Russia*, para 571. See also, ECtHR, 'Guide on Article 1' (n 134) para 69.
[147] See *Güzelyurtlu and Others v. Cyprus and Turkey*, App no. 36925/07 (ECtHR, 29 January 2019) [GC] paras. 188-190; *Georgia v. Russia (II)*, paras. 330-332; *Hanan v. Germany*, App no. 4871/16 (ECtHR, 16 February 2021) [GC] paras. 134-145.
[148] Marco Longobardo and Stuart Wallace, 'The 2021 ECtHR's Decision on Georgia v Russia (II) Case and the Application of Human Rights Law to Extraterritorial Hostilities' (2022) 55(2) Israel Law Review, 147, 153.
[149] See, Marko Milanovic and Sangeeta Shah, 'Ukraine and the Netherlands v. Russia', (Amicus Curiae Brief Submitted on behalf of the Human Rights Law Centre of the University of Nottingham, 24 April 2023) para 8.
[150] IAComHR, *Alejandre Jr and Others v Cuba*, Case no 11.589, Report no 86/99 (29 September 1999) para 25.

Rights Committee stresses that state parties must uphold the right to life for all individuals under their power or effective control, even those outside territories directly governed by the State, if their lives are impacted by its military or other activities in a direct and reasonably foreseeable manner. [151]

Conversely, in the *Banković* case, where the applicants complained about a NATO bombing of Serbian radio and television premises in Belgrade in 1999, the Court ruled that the concept of jurisdiction under Article 1 does not imply a 'cause-and-effect' notion.[152] Consequently, the use of lethal force from the air did not establish a jurisdictional link.

In *Al-Skeini*, concerning the killing of six individuals during British military security operations in Iraq, the Court applied the personal model of jurisdiction, albeit exceptionally, due to the UK exercising public powers at the time. [153] Contrastingly, in *Issa*[154], *Pad*[155], and *Isaak*[156], the Court indicated that killing, including bombing from a helicopter, can constitutes an exercise of authority and control over an individual, even without public powers.[157] Accountability stems from the fact that Article 1 cannot allow a state party to violate the Convention on the territory of another state which it could not perpetrate on its own.[158]

However, in *Georgia v. Russia (II)*, the Court maintains a restrictive stance, suggesting that the personal model applies only to 'isolated and specific acts of violence involving an element of proximity'.[159] The ECtHR does not explain at any point its understanding of 'isolated', 'specific' and 'proximity'. Moreover, the Court considers that military operations such as armed attack, bombing or shelling carried out during armed conflict are generally not an exercise of 'effective control'.[160] Thus, the Court contrasts acts such as fire aimed by the armed forces or police of the states - which can be covered by the personal model - with the use of kinetic forces which are excluded from extraterritorial jurisdiction.[161]

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[151] Ibid.
[152] *Banković and Others v. Belgium and Others*, App no 52207/99 (ECtHR, 12 December 2001) [GC] para 65.
[153] *Al-Skeini and Others v. UK*, para 149.
[154] *Issa and Others v. Turkey*, App no 31821/96 (ECtHR, 16 November 2004).
[155] *Pad and Others v. Turkey*, App no 60167/00 (ECtHR, 28 June 2007).
[156] *Isaak v. Turkey*, App no 44587/98 (ECtHR, 24 June 2006).
[157] See, Petra Stojnić, 'Gentlemen at home, hoodlums elsewhere': The Extraterritorial Application of the European Convention on Human Rights' (2021) 10 Oxford University Undergraduate Law Journal 137, 152.
[158] *Issa and Others v. Turkey*, para 71.
[159] *Georgia v. Russia (II)*, para 132.
[160] Ibid., 126.
[161] ECtHR, 'Guide on Article 1' (n 134) para 48.

In *Carter v. Russia,* the targeted killing of a Russian defector in the UK with poison was covered by the Convention due to that element of 'proximity', highlighting that the failure to establish jurisdiction would undermine the effectiveness of the Convention in guarding human rights and maintaining peace.[162] Although the ECtHR, for the first time, explicitly applied the ECHR to extraterritorial assassinations and adopted an approach similar to the UN Human Rights Committee,[163] it still adhered to the concept of 'proximity'.

More recently, the admissibility decision in *Ukraine and the Netherlands v. Russia* decided to leave the question if the administrative practice of shelling establishes personal jurisdiction under Article 1 of the ECHR to the merits.[164]
The Court's handling of extraterritorial kinetic forces remains ambiguous, yet it is evidently a question of admissibility. However, the Court tends to distinguish between killings from near and far, making the means of lethality a criterion for extraterritorial jurisdiction.

3. Exclusion of Extraterritorial Application during 'Active Hostilities'?

Extraterritorial jurisdiction typically extends to international armed conflict without the need of distinct criteria. The ECtHR's jurisprudence, seen in cases like *Cyprus v. Tukey, Al-Skeini and Others, Georgia v. Russia,* or the admissibility decision in *Ukraine, and the Netherlands v. Russia,* upholds extraterritorial jurisdiction under the spatial or personal model during such conflicts.[165] Additionally, allowing derogations under Article 15 of the ECHR during armed conflicts would otherwise be meaningless.[166]

However, in *Georgia v. Russia (II)* the Court introduced a distinction between 'military operations carried out during an active phase of hostilities' and a period following them (in that specific case, after a ceasefire agreement).[167] The concept of 'active hostilities' remains undefined,[168] but the Court held that a 'context of chaos' stemming from 'armed confrontation and fighting between enemy forces seeking to establish control over an area' would prevent

[162] *Carter v. Russia,* App no 20914/07 (ECtHR, 21 September 2021) paras 128, 130.
[163] Francesco Romani and Gloria Gaggioli, '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)' (2023) paras 14-15.
[164] *Ukraine and the Netherlands v. Russia,* para 700.
[165] See, *Ukraine and the Netherlands v. Russia,* paras 556, 696.
[166] Severin Meier, 'Reconciling the Irreconcilable? – The Extraterritorial Application of the ECHR and its Interaction With IHL' (2019) 9(3) Goettingen Journal of International Law 395, 403.
[167] *Georgia v. Russia (II),* para 113; ECtHR, 'Factsheet – Armed conflicts' (n 5) 16.
[168] Longobardo and Wallace (n 148) 168, 169.

effective control, thus precluding spatial and personal jurisdiction.[169] It is uncertain whether all dynamics of war are excluded from jurisdiction, but it likely applies to exceptional situations where attribution and jurisdiction are nearly impossible to determine, such as in frontline areas during intense hostilities, where control is fiercely contested.[170]

Ukraine and the Netherlands v. Russia upheld the previous decision in the sense that military operations during active hostilities may influence jurisdiction but did not entirely exclude a specific temporal phase of an armed conflict from a state's jurisdiction.[171] The Court emphasised that the mere presence of armed conflicts and military operations does not automatically lead to a 'context of chaos' and the exclusion of extraterritorial jurisdiction; rather, it depends on the specifics of each case.[172] While an active phase of hostilities may have a presumptive effect, it does not set a normative precedent.[173] Instead, when complaints do not pertain to active phases of hostilities, the Court applies general principles of extraterritorial jurisdiction first and then assesses whether certain complaints or actions are excluded based on the newly established exception.[174] Further clarification of this notion's factual meaning and legal consequences is needed.[175]

4. Espace Juridique

The extraterritorial application of the Convention poses a fundamental question: should the same standard be applied to armed conflicts occurring within the territory of a state party to the Convention as in the territory of a non-party?

In the landmark *Banković* case, concerning NATO bombings in the former Federal Republic of Yugoslavia, the Court limited the Convention's jurisdiction to 'an essentially regional context' and developed the notion of 'legal space (espace juridique) of the Contracting States'.[176] However, some scholars advocate for a dynamic understanding of legal space in line with

[169] Ibid., para 137.
[170] Milanovic and Shah (n 149) para 4.
[171] *Ukraine and the Netherlands v. Russia*, paras 558, 576, 577.
[172] Ibid.
[173] Romani and Gaggioli (n 163) para 3.
[174] *Ukraine and the Netherlands v. Russia*, para 577.
[175] See, Romani and Gaggioli (n 163) para 3.
[176] *Banković and Others v. Belgium and Others*, para 80. See, Yves Haeck, Clara Burbano-Herrera and Hannah Ghulam Farag in Mark Gibney et al. (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (1st, Routledge 2022) 132.

Convention's evolving nature as a 'living instrument' and not as a strict legal space limitation.[177]

Subsequent cases, such as *Pad* and *Issa*, concerning acts of Turkish agents in Iran and Iraq and *Al-Skeini*, concerning the UK's jurisdiction in Iraq, have indeed challenged this strict interpretation.[178] The Court recognised jurisdiction under Article 1 of the ECHR when individuals are under a contracting state's control or authority, regardless of location. [179]

In *Al-Skeini*, the Court first denied jurisdiction beyond CoE states' territory, referring to a potential 'vacuum' of protection within the 'Convention's legal space', but later clarified that this does not imply, *a contrario*, that jurisdiction under Article 1 can never exist outside the territory covered by the CoE member States. [180]

The admissibility decision in *Ukraine and the Netherlands v. Russia* underscores that effective control over an area does not require its location within the CoE member states' borders.[181] However, the Court acknowledges that it has never established extraterritorial jurisdiction over an area outside the CoE borders solely based on ratione loci jurisdiction, but has consistently relied on ratione personae jurisdiction.[182] Nonetheless, the Court recognised the importance of addressing human rights violations in regions beyond Europe and outside the territorial boundaries of CoE member states.

5. Conclusion - The Extraterritorial Application of the Convention

The extraterritorial application of the ECHR is well established in the ECtHR's case law, supported primarily by the spatial and personal models, and extends even beyond the 'espace juridique' of the Convention. However, uncertainties remain, particularly regarding the use of kinetic force in areas not under the relevant state's control and the application of the notion of 'context of chaos' in situations of armed conflict. This underscores the need for further clarity and consistent application to ensure justice and accountability in such complex circumstances.

[177] See, Ralph Wilde, 'The "Legal Space" or "Espace Juridique" of the European Convention on Human Rights: Is It Relevant to Extraterritorial State Action?' (2005) 2 European Rights Law Review 117, 123.
[178] *Pad and Others v. Turkey*, para 53; *Issa and Others v. Turkey*, para 71; *Al-Skeini and Others v. UK*, para 142.
[179] Ibid.
[180] *Al-Skeini and Others v. UK*, para 142.
[181] *Ukraine and the Netherlands v. Russia*, para 562.
[182] Ibid., paras 563, 572.

II. A Human Rights Approach to Jus ad Bellum and Jus in Bello: Interplay with the ECHR during Armed Conflicts

Under international law, the analysis of warfare involves two key dimensions: jus ad bellum, which pertains to the justification for engaging in war, and jus in bello, which concerns the conduct of hostilities. Additionally, human rights, particularly as enshrined in instruments like the ECHR, apply universally, including during armed conflict. This section explores the potential intersections and interactions between Jus ad Bellum and Jus in Bello with human rights law with a particular focus on the ECtHR's approach.

1. Defining the Legal Concepts during Armed Conflicts

The analysis begins with a concise overview of International Human Rights Law (IHRL), Jus ad Bellum, and Jus in Bello, highlighting their core principles, key treaties, and the relationships they govern.

a) Application of International Human Rights Law

International Human Rights Law (IHRL) consists of international rules established by treaty or custom designed to protect and promote the human rights of all persons.[183] These rights are inherent to all human beings and include civil, political, economic, social, and cultural rights.[184]

IHRL emerged in the aftermath of World War II under the auspices of the United Nations, initially articulated in the Universal Declaration of Human Rights (UDHR)[185] and further developed through international treaties, such as the International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social, and Cultural Rights (ICESCR), the Convention on the Prevention and Punishment of the Crime of Genocide, and regionally, for example, through the European Convention on Human Rights (ECHR).[186]

[183] UN OHCHR, 'International Legal Protection of Human Rights in Armed Conflict' (2011, HR/PUB/11/01) 5 <www.ohchr.org/sites/default/files/Documents/Publications/HRin_armed_conflict.pdf> accessed 23 May 2024.
[184] See, ICRC, 'International Humanitarian Law and International Human Rights Law: Similarities and Differences' (2021) <www.icrc.org/en/document/international-humanitarian-law-and-international-human-rights-law-similarities-and> accessed 24 May 2024.
[185] Universal Declaration of Human Rights (adopted 10 December 1948).
[186] See, ICRC, 'International Humanitarian Law and International Human Rights Law' (n 183).

IHRL is applicable at all times, in both peacetime and armed conflict.[187] It explicitly governs the relationship between a state and individuals within its territory and/or under its jurisdiction, characterized by a 'vertical' relationship, laying out the obligations of States towards individuals. [188] Certain rights may be derogated in extreme situations, [189] but non-derogable core provisions, such as the prohibition of torture, remain binding under all circumstances.[190] While international law sets the standards for human rights, they are predominatly enforced by national laws, reflecting individuals' rights against their state.[191]

b) Application of Jus ad Bellum

Jus ad bellum refers to the set of criteria that must be met for a state to legally engage in war or armed conflict[192] and guides 'external' interstate relations[193]. The primary sources of jus ad bellum are the UN Charter, particularly Article 2(4) which prohibit the use of force amongst states and its exceptions to it, notably the right to self-defense (Article 51 of the UN Charter) and the UN SC authorisation (under Chapter VII of the UN Charter).

Key principles of jus ad bellum include just cause, legitimate authority, right intention, last resort, reasonable prospects, and proportionality.[194] These principles ensure that states engage in armed conflict only for reasons that are justifiable under international law.

Thus, *jus ad bellum* has evolved into *jus contra bellum* (i.e. the law prohibiting war).[195]

[187] ICRC, 'What is the difference between IHL and human rights law?' (2015) <www.icrc.org/en/document/what-difference-between-ihl-and-human-rights-law > accessed 24 May 2024.
[188] Ibid.
[189] ICRC, 'IHL and human rights' (n.d.) <https://casebook.icrc.org/law/ihl-and-human-rights> accessed 24 May 2024.
[190] See, ECHR, Articles 3, 15(2); ICCPR, Article 4(2), 7; ACHR, Articles 5(2), 27(2).
[191] Rhona K. M. Smith, *International Human Rights Law* (10th, Oxford University Press 2021) 63-65.
[192] Mary E. O'Conell, 'Historical Development and Legal Basis' in Dieter Fleck (ed) *The Handbook of International Humanitarian Law* (4th, Oxford University Press 2021) 13.
[193] See, Eliav Lieblich, 'Internal Jus ad Bellum' (2016) 67(3) Hastings Law Journal.
[194] James Pattison, 'In Defence of *Jus Ad Bellum* Criteria' (2023) 51 Philosophia 2307, 2307.
[195] ICRC, 'The same IHL applies to all warring parties: differentiating between jus contra bellum (law prohibiting use of interstate force) and jus in bello (law limiting effects of warfare)' <https://casebook.icrc.org/highlight/same-ihl-applies-all-warring-parties-differentiating-between-jus-contra-bellum-law> accessed 24 May 2024.

c) Application of International Humanitarian Law

Jus in bello, also known as international humanitarian law (IHL), avoids questions of legitimacy because it primary goal is to grant protection during an armed conflict - *durante* bello.[196] Its scope is strictly limited *ratione materiae* to situations of armed conflict.[197]

As one of the oldest bodies of international law, IHL was initially codified in the latter half of the 19th century under the influence of Henry Dunant, the founding figure of the International Committee of the Red Cross. [198] The Geneva Conventions and their Additional Protocols form the core instruments of IHL, complemented by treaties such as the Hague Conventions and various weapons agreements.[199]

The fundamental purpose of IHL is to balance the military necessity to prosecute the armed conflict and the humanitarian imperative to protect individuals who are not or no longer participating in hostilities, while also regulating the means and methods of warfare.[200] IHL applies equally to all parties involved in an armed conflict, establishing an equality of rights and obligations - an essentially 'horizontal' relationship'.[201]

The key principles of jus in bello include distinction (differentiating between combatants and non-combatants), proportionality (avoiding excessive force in relation to the military advantage gained), and necessity (using force only to achieve legitimate military objectives).[202]

2. A Human Rights Approach to Jus ad Bellum

Jus ad bellum and human rights law are two distinct regimes of international law that have not been often considered together – contrary to IHL and IHRL. Jus ad bellum prohibits the use of force under Article 2(4) of the United Nations Charter,[203] with any serious violation of the prohibition on the use of force amounting to aggression.[204] From a human rights perspective

[196] Emily Crawford and Alison Pert, *International Humanitarian Law* (2nd, Cambridge University Press, 2020) 30-33.
[197] Jann K. Kleffner, 'Scope of Application of International Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (4th, Oxford University Press, 2021).
[198] Ibid., 4 - 28.
[199] O'Connell (n 192) 15-34.
[200] Crawford and Pert (n 196) 30.
[201] ICRC, 'What is the difference between IHL and human rights law?' (n 187).
[202] O'Connell (n 192) 34-38.
[203] Article 2(4) of the Charter of the United Nations.
[204] Mary E. O'Connell and Mirakmal Niyazmatov, 'What is Aggression? Comparing the Jus ad Bellum and the ICC Statute' (2012) 10 Journal of International Criminal Justice 189, 192 et seq.

this raises two questions: First, can an act of aggression against another state establish extraterritorial jurisdiction under Article 1 of the ECHR? Second, does the violation of the use of force inherently constitute a violation of the right to life as enshrined in Article 2 of the ECHR?

a) Establishing Jurisdiction under Article 1 of the ECHR Based on Aggression

Establishing jurisdiction based on an act of aggression suggests that the unlawful use of force, due to its gravity, could create a situation sui generis allowing for expanded jurisdiction by integrating principles of jus ad bellum. This could imply that a state committing aggression against another might automatically exercise extraterritorial jurisdiction under Article 1 over the aggressed territory or individuals. This approach would simplify jurisdictional determinations by circumventing the need to establish 'effective control' under the spatial and personal model, which is particularly challenging during ongoing hostilities.

Traditionally, however, the ECtHR has not considered jus ad bellum relevant to extraterritorial jurisdiction. Since *Loizidou*, the ECtHR has held that military operations, typically leading to the establishment of effective control and consequently extraterritorial jurisdiction, can be 'lawful or unlawful'. [205] With few exceptions (e.g., Ilascu,[206] Catan[207]), the same principle applies to personal jurisdiction. Cases like *Issa* and *Pad* illustrate that the legality of a state's agents' actions in another state's territory is not determinative; what matters is whether these operations place individuals under the state's authority and control.[208]

Nevertheless, the admissibility decision in *Ukraine v. Russia (re Crimea)* appears to challenge this approach. The Court initially emphasised its inability to directly decide on the legality of Russia's purported 'invasion' and 'occupation' of Crimea,[209] but then referenced UNGA resolutions and other documents affirming Ukraine's sovereignty over Crimea, saying that

[205] *Loizidou v. Turkey*, App no 15318/89 (ECtHR, 10 December 1996) [GC] para 62; *Ukraine and the Netherlands v. Russia*, para 560.
[206] *Ilaşcu and Others v. Moldova and Russia*, paras 322 et seq.
[207] *Catan and Others v. the Republic of Moldova and Russia*, App nos 43370/04, 8252/05 and 18454/06 (ECtHR, 19 October 2012) [GC] paras 83 et seq.
[208] *Issa and Others v. Turkey*, paras 71 and 76; *Pad and Others v. Turkey*, para 53.
[209] *Ukraine v. Russia (re Crimea)*, para 244.

'these acts cannot be disregarded'[210] – and thus, considers them indirectly to determine the nature of Russia's jurisdiction.[211]

Similarly, in *Carter*, the Court recognised the need of maintaining peace and stability in Europe as a basis for asserting jurisdiction in cases of extraterritorial targeted human rights violations, thereby allowing for jus ad bellum considerations.[212]

However, the Court's longstanding jurisdictional practice is rooted in the factual exercise of state power over territory or individuals, regardless of legality. [213] Determining whether an action constitutes aggression and violates jus ad bellum requires legal analysis. Relying on aggression to establish or expand extraterritorial jurisdiction conflates a legal determination (compliance with jus ad bellum) with a factual one (the relationship between an individual right-holder and a duty-bearing State).[214] Nonetheless, this does not imply that uses of forces in the ad bellum sense cannot violate human rights.

b) Aggression as a Violation of the Right to Life under Article 2 of the ECHR

While jus ad bellum may not seem suitable for establishing jurisdiction under the ECHR, an act of aggression can inherently violate Article 2 of the ECHR. This perspective suggests that killings, even if fully in accordance with IHL, still stem from an unjust cause – an act in contrary to jus ad bellum – and inherently breach the right to life.

aa) Challenging the Traditional Understanding of Jus ad Bellum: HRC General Comment No. 36

The mere resort to the use of force falls under jus ad bellum and is typically regarded as matters between states.[215] Under this view, as long as the conduct of war conforms to IHL, human rights issues do not arise; only breaches of IHL trigger the relevance of Human rights law. Thus, a

[210] Ibid., para 348.
[211] Marko Milanovic, 'ECtHR Grand Chamber Declares Admissible the Case of Ukraine v. Russia re Crimea' (*EJIL:Talk!,* 15 January 2021) <www.ejiltalk.org/ecthr-grand-chamber-declares-admissible-the-case-of-ukraine-v-russia-re-crimea/> accessed 12 May 2024.
[212] *Carter v. Russia*, para 128. See also, Romani and Gaggioli (n 163) para 19.
[213] Marko Milanović and Tatjana Papić, 'The Applicability of the ECHR in Contested Territories' (2018) 67(4) International and Comparative Law Quarterly 779, 795.
[214] Romani and Gaggioli (n 163) para 20.
[215] See ICRC, 'The same IHL applies to all warring parties' (n 195).

state can be deemed an aggressor, but as long as the killings comply with IHL, they are not considered human rights violations.[216]

However, the Human Rights Committee (HRC) General Comment No. 36 (GC 36), adopted in 2018, challenges to this 'non-relationship' by asserting that certain jus ad bellum violations also constitute a violation of the right to life under Article 6 of the ICCPR.[217] GC 36 states 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.'[218] Thus, killings, that are compliant with IHL inherently breach the right to life. This is particularly pertinent in cases involving the killing of combatants who are not hors de combat and the killing of civilians as proportional incidental harm.[219]

Legal scholar Eliav Lieblich terms this concept as the 'The Humanization of Jus ad Bellum' to capture the idea of subjecting decisions to resort to force to human rights law. [220]

Although views from UN human rights treaty bodies are not legally binding, states are obliged to consider them in good faith, which lends significant weight to General Comments.[221] Despite awaiting acceptance and application by member states, this development essentially links jus ad bellum and human rights, breaking with a longstanding tradition.

bb) Doctrinal Perspective

In doctrinal terms, General Comment 36 challenges the idea that killings during armed conflicts should be evaluated solely under IHL. Instead, killings by an aggressor state are viewed as violations of the right to life from a human rights perspective. Thus, the framework governing the use of force should be evaluated against the yardstick of IHRL.[222]

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[216] JIB/JAB – The Laws of War Podcast, 'Episode 10: Eliav Lieblich on the Humanization of Jus ad Bellum' (25 October 2020) <https://jibjabpodcast.com/episode-10-eliav-lieblich-on-the-humanization-of-jus-ad-bellum/> accessed 23 May 2024.
[217] UN HRC, 'General Comment No. 36, Article 6: Right to Life' CCPR/C/GC/36 (3 September 2019) para 70.
[218] Ibid.
[219] Miles Jackson and Dapo Akande, 'The Right to Life and the Jus ad Bellum: Belligerent Equality and the Duty to Prosecute Acts of Aggression' (2022) 71 International and Comparative Law Quarterly 453, 456.
[220] See, Eliav Lieblich, 'The Humanization of Jus ad Bellum: Prospects and Perils' (2021) 32(2) European Journal of International Law 579–612.
[221] Nikolaos Sitaropoulos, 'States are Bound to Consider the UN Human Rights Committee's Views in Good Faith' (*Oxford Human Rights Hub*, 11 March 2015) <https://ohrh.law.ox.ac.uk/states-are-bound-to-consider-the-un-human-rights-committees-views-in-good-faith/> accessed 22 May 2024.
[222] Fréderic Mégret, 'What might a human-rights harmonious international regime on the use of force look like' (2023) 14(2) Transnational Legal Theory, 211, 211, 212, 215.

Jackson and Akande present a variation of this argument, arguing that IHRL necessitates the prosecution not of those who kill in compliance with IHL, but of those who, by launching an aggressive war and by their ability to control and direct state policy, render those killings arbitrary under IHRL.[223]

This perspective is part of a broader discourse on how we think about aggression and war. Traditionally, war has been viewed as an exceptional state-to-state affair, making it difficult to perceive soldiers as victims from a human rights law perspective.[224] They are seen as equal participants in conflict with no individual accountability for the cause and conduct of war.[225] While this contrasts with the individualisation of jus ad bellum, it corresponds to the predominant notion over the last decade that jus ad bellum and IHRL occupy distinct spheres.[226]

Revisionist just war theory challenges this view, asserting that there is no fundamental moral difference between armed confrontations between states and situations of violence between individuals.[227] Relations in war are just relations and states exist every day. War should be judged based on morality, treating soldiers as innocent individuals. This perspective is reflected in GC 36, suggesting that claims by soldiers under a human rights framework are justifiable.

This view also aligns with a newer understanding of aggression as not only a crime against sovereignty but also a crime against human rights. [228] Frédéric Mégret argues that aggression is best conceived as a crime against human rights, inter alia, of those that can be lawfully killed under jus in bello.[229] The wrongfulness of aggression lies in harm inflicted on individuals and not on states.[230] Human rights law uniquely places individuals at the heart of the normative case against war and aggression.[231]

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[223] Jackson and Akande (n 219) 461- 462.
[224] Lieblich 'The Humanization of Jus ad Bellum' (n 220) 583, 584; Seth Lazar, 'Just War Theory: Revisionists versus Traditionalists' (2017) 20 Annual Review of Political Science 37, 40.
[225] Henrik Syse, 'The Moral Equality of Combatants' in James Turner Johnson and Eric D. Patterson (eds), *The Ashgate Research Companion to Military Ethics* (1st, Routledge, 2015). See also, Michael Walzer, 'It's No Crime to Be a Russian Soldier in Ukraine' (*Foreign Policy Magazine*, 4 December 2022) <https://foreignpolicy.com/2022/12/04/russian-army-conscription-just-war-theory/> accessed 24.05.2024.
[226] JIB/JAB – The Laws of War Podcast (n 216).
[227] See, Jeff McMahan, *Killing in War* (2nd, Oxford University Press 2011).
[228] Frédéric Mégret and Chiara Redaelli, 'The crime of aggression as a violation of the rights of one's own population' (2022) 9(1) Journal on the Use of Force and International Law 99, 105 et seq; Tom Dannenbaum 'Why Have We Criminalized Aggressive War?'(2017)126(5) Yale Law Journal 1242-1318; Frédéric Mégret, 'What is the Specific Evil of Aggression?' in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression – A Commentary* (1st, Cambridge University Press 2016) 1444-1445.
[229] Mégret, 'What is the Specific Evil of Aggression?' (n 228) 1445.
[230] Lieblich 'The Humanization of Jus ad Bellum' (n 220) 584.
[231] Mégret, 'What is the Specific Evil of Aggression?' (n 228) 1432.

cc) Critical Perspective

From a critical perspective, it is essential to acknowledge potential risks and dangers associated with applying human rights law to jus ad bellum, while avoiding overemphasizing them. The focus should be on how human rights can contribute to conflict resolution rather than exacerbate it.

One significant risk of the 'humanization' of jus ad bellum is the potential for human rights to become securitised and depoliticised.[232] This means that human rights could be used to legitimise state power rather than restrain it. The War on Terror illustrates this concern, where human rights language was used to justify extensive security measures.[233] A human rights approach to jus ad bellum might lead states to argue that resorting to force is a human rights obligation rather than a political decision, thereby misusing human rights to endorse military actions. [234]

Another critical concern is the sidelining of IHL in favor of a human rights approach to the resort to force. This could undermine IHL's role in regulating violence during wartime by balancing military necessity with humanitarian concerns.[235] This is problematic given IHL's fundamental principle to apply rules equally to all conflict parties.[236] Moreover, if states disregard IHL restrictions because they believe they are accountable under human rights law, conflicts could escalate significantly.[237]

Expanding the scope of application and the range of potential victims raises questions about the efficacy of this approach. Broadening the definition of who qualifies as a victim risks diluting the concept, potentially hindering effective human rights protection and burdening human rights bodies with increased caseloads.[238]

[232] Lieblich, 'The Humanization of Jus ad Bellum' (n 220) 585.
[233] Ibid.
[234] JIB/JAB – The Laws of War Podcast (n 216).
[235] Romani and Gaggioli (n 163) para 31.
[236] Ibid, para 26.
[237] Pavle Kilibarda, 'Turkey, Aggression, and the Right to Life Under the ECHR: A Reaction to Professor Haque's Post' (*EJIL:TALK!*, 22 October 2019) <https://www.ejiltalk.org/turkey-aggression-and-the-right-to-life-under-the-echr-a-reaction-to-professor-haques-post/> accessed 23 May 2024.
[238] Romani and Gaggioli (n 163) para 32.

dd) The ECtHR's Perspective

The foundational principle guiding the potential application of the approach advocated by the HRC GC 36, is Article 2 (the right to life) of the ECHR, which states that 'no one shall be deprived of his life intentionally' except when absolutely necessary to defend a person from unlawful violence; to effect a lawful arrest or prevent the escape of a person lawfully detained; or to quell a riot or insurrection.[239] Applying the principles outlined in GC 36 reveals that States parties to the Convention, engaging in acts of aggression as defined in international law resulting in intentional deprivation of life, ipso facto violate Article 2 of the Convention. [240]

Article 15 of the ECHR allows no derogation from the right to life except in respect of death resulting from lawful acts. It has been argued that lawful acts of war under Article 15 encompass not only IHL but also jus ad bellum.[241] Therefore, a state waging a war of aggression commits solely unlawful acts and cannot derogate from its obligations under the Convention.

Despite opportunities where the ECtHR could have addressed violations of jus ad bellum (e.g., in *Al Skeini v. UK*) findings of UN Charter violations have been absent.[242] However, Judge Keller's concurring opinion in *Georgia v. Russia (II)* suggests a potential shift. Keller proposed that if the Court had established jurisdiction in this case, it should have examined the deaths 'in terms of, inter alia, Article 2 § 4 of the [UN] Charter'.[243] She further urged the Court to apply the norms governing the use of force in future cases where the 'threshold criterion' of 'jurisdiction' under Article 1 is satisfied.[244]

Thus, the Court could adopt normative changes in its jurisprudence. However, it must clarify its authority to address jus ad bellum violations. The absence of exclusive competence by the UN Security Council over jus ad bellum matters, as demonstrated by the International Criminal Court dealing with aggression, supports the ECtHR's potential involvement.[245] Nonetheless, Article 32 of the ECHR mentions only interpretation and application, not explicitly covering jus ad bellum.

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[239] ECHR, Article 2(1) and 2(2).
[240] Adil Ahmad Haque, 'Turkey, Aggression, and the Right to Life Under the ECHR' (*EJIL:TALK!*, 21 October 2019 <https://www.ejiltalk.org/turkey-aggression-and-the-right-to-life-under-the-echr/> accessed 23 May 2024.
[241] Haque (n 240); Milanovic and Shah (n 149) para 28.
[242] Kilibarda (n 237); Romani and Gaggioli (n 163) para 33.
[243] Concurring opinion Judge Keller *Georgia v. Russia (II)*, paras 16, 27.
[244] Ibid., paras 30-31.
[245] JIB/JAB – The Laws of War Podcast (n 216).

Alternatively, the Court could rely on jus ad bellum determinations made by political organs, but this approach could be problematic given the ECtHR's judicial nature and may lead to political controversies.[246] It is worth noting that some scholars who reject a straightforward violation of Article 2 in the context of jus ad bellum argue for a violation of Article 1 of the ECHR vis-à-vis CoE states, highlighting the need to consider jus ad bellum from a human rights perspective, albeit on an exclusive horizontal level. [247]

c) Conclusion – A Human Rights Approach to Jus Ad Bellum

In conclusion, while jus ad bellum may be insufficient to establish jurisdiction under the ECHR, an act of aggression can potentially violate Article 2 of the ECHR. The Human Rights Committee's General Comment No. 36 challenges traditional views by asserting that acts of aggression violate the right to life, even if the killings conform to IHL. This approach faces challenges and risks, such as potentially undermining IHL and politicising human rights. However, it emphasises that even lawful killings under IHL can be wrongful under a human rights perspective, meaning that all individuals deserve recourse and remedy under human rights law.[248] As Andrew Clapham succinctly puts it, 'The right to life trumps the right to fight.'[249]

The ECtHR has not yet followed this approach, but this does not preclude it from doing so in the future. The Court has already shown some openness to this perspective, albeit from a single voice within the Court.

3. A Human Rights Approach to Jus In Bello: Interplay between the ECHR and IHL

Considerable debate surrounds the relationship between International Human Rights Law and International Humanitarian Law.[250] While the distinction of IHRL governing peacetime and IHL regulating armed conflicts might be too simplistic, the question arises how to conceptualize their relationship within the framework of the ECHR. How does the ECtHR consider IHL in

[246] Milanovic and Shah (n 149) para 28; Romani and Gaggioli (n 163) para 35.
[247] Romani and Gaggioli (n 163) para 37; Kilibarda (n 237).
[248] JIB/JAB – The Laws of War Podcast (n 216).
[249] Andrew Clapham, 'Ukraine Can Change the Future of Prosecuting Crimes of Aggression' (*Foreign Policy Magazine*, 24 February 2023,) <https://foreignpolicy.com/2023/02/24/ukraine-russia-war-crimes-trial-putin-military/> accessed 24 May 2024.
[250] See, Marco Milanović, 'Norm Conflicts, International Humanitarian Law and Human Rights Law' in Orna Ben-Naftali (ed) *HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW, Collected Courses of the Academy of European Law, Vol. XIX/1* (1st, Oxford University Press 2010) 1.

interpreting and applying the Convention? And what are possible normative conflicts, particularly concerning Articles 2 and 5 of the ECHR?

a) The Interplay between IHRL and IHL

Fundamentally, IHL and IHRL pursue different purposes. The convergence of these legal regimes finds its basis in the logic of jus in bello to ensure adequate protection for individuals in vulnerable situations - specifically during armed conflicts.[251] It is justifiable to translate this into a circumstantial protection of human beings and, therefore, to relate it to Human Rights Law.[252] Both regimes share the core principle of humanity, aiming to protect human dignity and integrity,[253] but linking them is complex. Historically, IHL developed independently and prior to IHRL.[254] Theoretically, their orientations diverge: IHRL addresses the relationship between states and individuals, granting universal rights, while IHL balances necessity and humanity, governing the parties' conduct in armed conflict.[255] This divergence has led to doctrinal divisions.

Traditionally, both regimes were perceived as distinct or even diametrically opposed,[256] which can be described as a separatist approach.[257] Armed conflicts were regulated by the 'law of armed conflicts', while human rights law predominantly focused on peacetime matters with minimal overlap.[258]

[251] Fanny Martin, 'Le Droit International Humanitaire Devant les Organes de Contrôle des Droits de l'Homme' (2001) 1 Droits Fondamentaux 119, 119.
[252] Ibid.
[253] Daniel I. Odon, 'The interplay between international humanitarian law and human rights law' in Daniel I. Odon (ed), *Armed Conflict and Human Rights Law: protecting civilians and international humanitarian law* (1st, Routledge 2022) 1.
[254] See, Louise Doswald-Beck and Sylvain Vité, 'International Humanitarian Law and Human Rights Law' in Robert McCorquodale (ed), *Human Rights* (1st, Routledge 2003) 105 et seq.
[255] Odon (n 253) 1.
[256] See, G.I.A.C. Draper, 'Humanitarian Law and Human Rights' in Michael Meyer and Hilaire McCoubrey (eds), *Reflections on Law and Armed Conflicts: The Selected Works on the Laws of War by the late Professor Colonel G.I.A.C. Draper, OBE* (Martinus Nijhoff 1998) 145, 149.
[257] Damien Scalia and Marie-Laurence Hebert-Dolbec, 'The Intricate Relationship between International Human Rights Law and International Humanitarian Law in the European Court for Human Rights Case Law: An Analysis of the Specific Case of Detention in Non-International Armed Conflicts' in Dražan Djukić and Niccolò Pons (eds), *The Companion to International Humanitarian Law* (1st, Brill 2018) 115, 116.
[258] Gloria Gaggioli, 'A Response to 'Which Rights to enforce in Time of Public Emergency?'' (*Völkerrechtsblog*, 8 June 2016) < https://voelkerrechtsblog.org/a-response-to-which-rights-to-enforce-in-time-of-public-emergency/> accessed 6 July 2024.

The 1968 Tehran Conference marked a turning point, initiating the 'Humanization of IHL'.[259] This led to resolutions like 'Human Rights in Armed Conflict,'[260] emphasising that 'peace is the underlying condition for the full observance of human rights and war is their negation,'[261] and the UN Resolution 'Respect for Human Rights in Armed Conflict.'[262]. The expanding understanding of the role of human rights in armed conflict paved the way for the 1977 Additional Protocols to the Geneva Conventions, the first treaties to explicitly acknowledge the applicability of IHRL during armed conflicts alongside IHL.[263]

Today, international practice follows the complementarist approach, advocating for the intrinsic value of each body of law and their simultaneous application for maximum protection of individuals.[264] Various bodies, including the Human Rights Committee, [265] other UN treaty bodies, [266] the ECtHR, [267] the Inter-American Court on Human Rights[268], the Inter-American Commission on Human Rights,[269] the African Commission on Human and Peoples' Rights, [270] and the International Court of Justice[271] frequently incorporate this approach.

This raises the question how these regimes can be applied simultaneously when they conflict. This issue is significant as it poses a dilemma: for example, the right to life might be evaluated under IHL to determine if a killing was lawful (necessary and proportionate) or from a human rights perspective, highlighting the potential arbitrariness of depriving life.[272]

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[259] See, Marko Milanović, 'The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law' in Jeans D. Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (1st, Cambridge University Press 2016) 78, 93.
[260] Human Rights in Armed Conflicts, Resolution XXIII (adopted by the International Conference on Human Rights, Teheran, 12 May 1968).
[261] Ibid., 18.
[262] UN GA, 'Respect for human rights in armed conflicts' A/RES/2676 (9 December 1970).
[263] See, Additional Protocol I (1977) to the Geneva Conventions, Article 71; Additional Protocol II (1977) to the Geneva Conventions, Preamble.
[264] Katharine Fortin, 'The relationship between human rights law and international humanitarian law: Taking stock at the end of 2022?' (2022) 40(4) Netherlands Quarterly of Human Rights, 343, 345.
[265] UN HRC, 'General Comment No. 31 [80], The 42 Nature of the General Legal Obligation Imposed on States Parties to the Covenant', CCPR/C/21/Rev.1/Add 13 (26 May 2004) para 11; UN HRC, 'GC 36' (n 216) para 64.
[266] UN CEDAW, 'General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations' CEDAW/C/GC/30 (18 October 2013).
[267] *Hassan v. UK*, App no 29750/09 (ECtHR, 16 September 2014) [GC] para 104.
[268] IACtHR, *The Ituango Massacres v. Colombia*, Series C no 148 (Judgement, 1 July 2006) para 179.
[269] IACHR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 (22 October 2002) para 61.
[270] CHPR, Communication 227/99, 'Democratic Republic of Congo/Burundi, Rwanda, Uganda' (29 May 2003) para 87 <www.achpr.org/sessions/descions?id=138> accessed: 20 June 2024.
[271] ICJ, Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion, 1996) para 25; ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion, 2004) para 106; ICJ, Armed Activities on the Territory of Congo (*Democratic Republic of the Congo v. Uganda)* (Judgment, 19 December 2005) para 243.
[272] Mégret, 'What might a human-rights harmonious international regime on the use of force look like' (n 222) 217.

When resolving conflicts between IHRL and IHL, the lex specialis doctrine, introduced by the ICJ in its advisory opinion on nuclear weapons, traditionally prevailed.[273] It suggests that IHL, as the more specialised law, takes precedence over IHRL.[274] However, this view has been increasingly challenged for implying a competitive rather than complementary relationship[275] or failing to recognize IHRL's potential as lex specialis. [276]

In its advisory opinion on the wall in the occupied Palestinian territory, the ICJ outlined a complementary principle that applies alongside the lex specialis test with three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; and others may be matters of both these branches of international law.[277] The analysis is made rule by rule and context by context, rather than broadly applying a single body of law.[278] In In the Congo case, the ICJ reaffirmed this approach, but dropped the term 'lex specialis'.[279]

Today, there is increasing recourse to the principle of systematic integration found in Article 31 of the Vienna Convention on the Law of Treaties,[280] supporting a non-hierarchically incorporation of IHL and IHRL to facilitate their complementary application.[281] For instance, the HRC stresses that 'both spheres of law are complementary, not mutually exclusive,' while acknowledging the mutual interrelationship within the norms of both legal regimes[282]. Similarly, the International Committee of the Red Cross (ICRC) employs IHRL norms to interpret IHL law concepts such as 'torture' or 'degrading treatment'.[283] Conversely, criminal

[273] ICJ, Legality of the Threat or Use of Nuclear Weapons (n 271) 25.
[274] Ibid.
[275] Fortin 'The relationship between human rights law and international humanitarian law' (n 264) 347.
[276] Marco Longobardo, *The Use of Armed Force in Occupied Terri*tory (1st, Cambridge University Press 2018) 78; Brandon Perkins, 'Reconciling Human Rights with International Humanitarian Law: Human Rights as Lex Specialis in Armed Conflict' (2022) 22 UCD Law Review 31.
[277] ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (n 271) para 106.
[278] Odon (n 253) 3.
[279] ICJ, *Democratic Republic of the Congo v. Uganda* (n 271) para 216.
[280] Fortin 'The relationship between human rights law and international humanitarian law' (n 264) 348.
[281] Ibid. See also, UN GA, 'Fragmentation of international law: Difficulties arising from the diversification and expansion of international law' International Law Commission A/CN.4/L.702 (18 July 2006).
[282] UN HRC 'GC 36' (n 217) para 64.
[283] See, ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2nd, Cambridge University Press 2016) 9-10, 232-4, 215-221, 229.

tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and Rwanda have used human rights interpretations to delineate definitions within IHL. [284]

b) Towards A Human Rights Approach of IHL

From a human rights perspective, it can be argued that we a currently witnessing a 'Humanitarisation of IHRL', as an opposed idea to the humanisation of IHL. [285] The ongoing debate about war is embedded in discussion on IHL.[286] Karima Bennoune, a former legal advisor from Amnesty International, criticizes human rights organisations for increasingly adopting IHL as their primary framework for analysing armed conflicts.[287] Human Rights Watch, for example, incorporates humanitarian law in numerous reports.[288] It is worth noting that even though IHL might seem more functionally suited for armed conflict, IHRL does not exclude its application in times of war.[289] One may also argue that the language of human rights has become militarised, with humanitarians using the same terms as those planning and conducting wars.[290]

Despite sharing some rights such as due process and detainee rights, the merging of human rights and humanitarian law might weaken the philosophical underpinnings of human rights principles.[291] From a purist human rights perspective, based as it is on respect on human life and well-being, the use of force is inherently a violation of human rights.[292] As Audrey Benison points out, 'Humanitarian law contemplates a starting point of death, violence, and destruction that is repugnant to the essence of human rights law.'[293] On one hand, the absolutism of human

[284] Fortin 'The relationship between human rights law and international humanitarian law' (n 264) 348.
[285] See, Vera Gowland-Debbas, 'The Right To Life And The Relationship Between Human Rights And Humanitarian Law' in Christian Tomuschat, Evelyne Lagrange and Stefan Oeter (eds), *The Right to Life* (Martinus Nijhoff Publishers 2010) 128.
[286] See, Thomas Smith, 'Can Human Rights Build a Better War?' (2010) 9(1) Journal of Human Rights 24, 26-27.
[287] Karima Bennoune, 'Toward a human rights approach to armed conflict: Iraq 2003' (2004) 11 U.C. Davis Journal of International Law & Policy 171–228.
[288] HRW and A.I., '"We Will Erase You from This Land": Crimes Against Humanity and Ethnic Cleansing in Ethiopia's Western Tigray Zone' (Report, HRW 2022); HRW, 'Needles deaths in the Golf War: civilian casualties during the air campaign and violations of the laws of war' (A Middle East Watch Report, HRW 1991).
[289] Mégret, 'What might a human-rights harmonious international regime on the use of force look like' (n 222) 216.
[290] David Kennedy, 'Reassessing international humanitarianism: The dark sides' in Anne Orford (ed), *International Law and its Others* (1st, Cambridge University Press 2006) 132.
[291] Smith (n 286) 27.
[292] Doswald-Beck and Vité (n 254) 105.
[293] Audrey I. Benison, 'War Crimes: A Human Rights Approach to a Humanitarian Law Problem at the International Criminal Court' (1999) 88 Georgetown Law Journal 141, 152.

rights dictates that human rights apply 'always and everywhere' without distinction.[294] On the other hand, jus in bello utilises utilitarian considerations and addresses military necessity during armed conflicts to design legitimate targets of violence.[295]

These value judgements are not adequately addressed by the principle of lex specialis or systematic integration, which are solely formal tools.[296] Only a few scholars engage in theoretical frameworks with alternative tools for a human rights approach to jus in bello. Marco Sassòli sticks to lex specialis doctrine but adds another factor: the extent to which the solution conforms to the systematic objectives of the law, as the systematic order of international law is a normative postulate founded upon value judgments. [297] Raphaël van Steenberghe calls for a coherency approach, combining formal and substantive consideration to ensure that IHL is interpreted in light of IHRL and that both are applied together in conflicts, limited by the specific context. [298] Frédéric Mégret goes further and argues that 'IHRL, IHL, and the jus ad bellum must be understood fully according to [their] normative specificity,' aiming at a 'human right harmonious international regime of on the use of force' in both the ad bellum and in bello sense.[299]

There is a need to formulate and expand a clear human rights approach to IHL, which preserves the specific characteristics of both regimes. However, currently, the discourse is more focused on recognising the simultaneous application of IHRL and IHL as an opportunity rather than as a difficulty. [300]

c) The ECtHR's approach towards IHL

Given the explanations above, it is pertinent to examine the ECtHR's current approach to jus in bello.

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[294] René Provost, *International Human Rights Law and Humanitarian Law* (1st, Cambridge University Press 2002) 19.
[295] Smith (n 286) 25.
[296] Raphaël van Steenberghe, 'The impacts of human rights law on the regulation of armed conflict: A coherency-based approach to dealing with both the "interpretation" and "application" processes' (2022) 104(919) International Review of the Red Cross 50.
[297] Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions* (2nd, Edward Elgar Publishing 2019) 439.
[298] Van Steeneberghe (n 296) 49.
[299] Mégret, 'What might a human-rights harmonious international regime on the use of force look like' (n 222) 240.
[300] See, Emma Lush, 'The view through a Different Lens - Increasing Respect for International Humanitarian Law through the Use of the International Human Rights Law Framework' (2023) 14 Journal of International Humanitarian legal Studies, 95, 105.

In its earlier rulings, the ECtHR referenced principles such as distinction[301] and proportionality[302] and employed humanitarian law terms, like 'incidental loss of civilian life',[303] 'legitimate targets'[304] 'disproportionality in the weapon used'[305]. While this suggests an implicit reliance on IHL,[306] the mere use of vocabulary familiar to humanitarian law does not prove the Court's engagement with the legal regime.[307] In fact, the Court often refrained from clarifying the relationship between IHL and IHRL, even in cases involving armed conflict or occupation,[308] despite already asserting in *Loizidou* that the Convention must not be interpreted in 'vacuum', but 'in light of the rules set out in the Vienna Convention […] on the Law of Treaties.' [309]

In the *Varnava and Others* case, the ECtHR explicitly considered IHL, stating that Article 2 of the ECHR must be interpreted as much as possible in light of general principles of international law, including those of IHL.[310] Similarly in *Al-Jedda*, concerning UK activities in Iraq, the Court referenced Articles 42 and 43 of the Hague Regulations and the Fourth Geneva Convention to recognise the responsibilities of occupying powers under IHL.[311]

A significant development occurred with the judgement in *Hassan v. UK*, where the Court examined the lawfulness of Tarek Hassan's deprivation of liberty by British forces during hostilities in Iraq. [312] The Court applied IHL to interpret and apply Article 5 of the ECHR, allowing for the lawful detention of combatants and civilians posing a security threat - a scenario not contemplated by the ECHR drafters. [313] This marked the first time the Court applied IHL together with the Convention law, giving the former precedence in this specific case.[314]

[301] *Ergi v. Turkey*, App no 23818/94 (ECtHR, 28 July 1998) para 81.
[302] *Güleç v. Turkey*, App no 21593/93 (ECtHR, 27 July 1998) para 71.
[303] *Ergi v. Turkey*, para 79; *Isayeva v. Russia* App No 57950/00 (ECtHR, 24 February 2005).
[304] *Isayeva, Yusupova and Bazayeva v. Russia*, App Nos 57947–49/00 (ECtHR, 24 February 2005) para 175.
[305] Ibid., para 19.
[306] Sergio Salinas Alcega, 'The Invasion of Ukraine from the Point of View of the European Court of Human Rights: Extraterritorial Responsibility of Russia and (Un)Control of International Humanitarian Law' (2023) Revue Québécoise de Droit International 293, 305.
[307] William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16(4) European Journal of International Law 741, 746.
[308] Christine Byron, 'A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies' (2007) 47 Virginia Journal of International Law 839, 851.
[309] *Loizidou v. Turkey*, para 43.
[310] *Varnava and Others v. Turkey*, App no 16064/90 (ECtHR, 18 September 2009) [GC] para 185.
[311] *Al-Jedda v. UK*, App no 27021/08 (ECtHR, 7 July 2011) paras 78, 104, 107.
[312] *Hassan v. UK*, App no 29750/09 (ECtHR, 16 September 2014) [GC].
[313] *Ibid*, paras 102, 107. See also, Fortin 'The relationship between human rights law and international humanitarian law' (n 264) 349.
[314] Cilem Simsek, 'Which Rights to enforce in Time of Public Emergency? The European Court of Human Right's approach towards International Humanitarian Law' (*Völkerrechtsblog*, 6 June 2016) <https://voelkerrechtsblog.org/which-rights-to-enforce-in-time-of-public-emergency/> accessed 6 July 2024.

However, the Court did not present its finding as an application of the lex specialis maxim but rather as a result of systematic integration. [315]

Another turning point came with *Georgia v. Russia (II),* where the court recognised the possible conflict of Article 5 of the ECHR and IHL provisions but did not resolve it as the situation was regulated mainly by norms other than the ECHR.[316] The concept of a 'context of chaos' established in this case suggests a departure from the approach seen in *Hassan,* indicating a separation between jus in bello and human rights law in armed conflicts. [317]

In *Ukraine and the Netherlands v. Russia* (before joining), the Court reaffirmed that IHL and Human Right can apply simultaneously and acknowledges that IHL rules on proportionality might not be 'entirely consistent' with substantive limbs of Article 2 of the ECHR but left the question to the merits.[318] In these two recent cases, the Court outlined its methodology regarding the interplay of IHL and the ECHR: initially determining if there is a normative conflict, and if not, examining cases only with regard to the Convention's provisions.[319] If there is a conflict, the Court will interpret the ECHR provisions with regard to IHL.[320] This suggests that harmonisation between the two regimes is secondary, with IHL entering only if there is a normative conflict; otherwise, it does not impact human rights rules.[321] This approach is human rights centered.

d) Possible Normative conflicts between the Convention and IHL

The following section will address two rights that traditionally raise issues between IHL and the Convention: the use of force under Article 2 and detention under Article 5 of the ECHR.[322]

[315] Cedric De Koker, 'Hassan v United Kingdom: The Interaction of Human Rights Law and International Humanitarian Law with regard to the Deprivation of Liberty in Armed Conflicts' (2015) 31(81) Utrecht Journal of International and European Law 90, 94; Vito Todeschini, 'The Impact of International Humanitarian Law on the Principle of Systematic Integration' (2018) 23(3) Journal of Conflict and Security Law 359, 367.
[316] *Georgia v. Russia (II),* paras 141, 236-237.
[317] See Salinas Alcega (n 306) 308; Fortin 'The relationship between human rights law and international humanitarian law' (n 264) 351.
[318] *Ukraine and the Netherlands v. Ukraine,* para 720.
[319] Ibid, para 719 quoting *Georgia v. Russia (II)* paras 194-222, 234-256, 266-281, 290-30, 310-14, 323-327.
[320] *Ukraine and the Netherlands v. Ukraine,* para 720.
[321] Romani and Gaggioli (n 163) para 40.
[322] See, Meier (n 166) 415.

aa) Normative Conflicts between Article 2 of the ECHR and IHL

Understanding the normative conflicts between IHL and the right to life under the ECHR requires recognising the distinct paradigms these regimes operate under during armed conflicts. According to the International Committee of the Red Cross (ICRC), IHL emphasises the conduct-of-hostilities paradigm, which is based on the principle that the use of force is inherent to waging war.[323] Thus, the Hague Law and the Geneva Conventions mainly address the methods and means employed by states in conflict.

In contrast, human rights law shapes the law enforcement paradigm, wherein lethal force may be used only as a last resort to protect life when other means are ineffective or unlikely to achieve the intended result.[324] This paradigm prioritises the outcomes of state actions rather than the tactics used.[325] However, both IHL and European human rights law share the principles of necessity, proportionality, and precaution, albeit with different interpretations and applications.[326]

(1) The Necessity and Proportionality of the Use of Lethal Force

The use of lethal force during armed conflict is highly relevant to Article 2 of the ECHR, which protects the right to life. Article 2 stipulates that life shall not be intentionally deprived, allowing only three exceptions typically designed for peacetime.[327] However, Article 15(2) of the ECHR permits derogation from the right to life for 'deaths resulting from lawful acts of war', thereby incorporating elements of IHL. [328] Despite this provision, states have not utilised this derogation clause during armed conflicts.[329]

Generally, any killing that contradicts IHL - such as those that are intentional, disproportionate, indiscriminate, or targeting individuals hors de combat - violates the right to life under Article 2 of the ECHR. [330] It should be highlighted that many scenarios do not present conflicts but

[323] Gloria Gaggioli, 'Use of Force in Armed Conflicts – Interplay between the Conduct of Hostilities and Law Enforcement Paradigms' (Report on the Expert Meeting, November 2013) 6.
[324] Ibid., 7.
[325] Smith (n 286) 31.
[326] ICRC, 'International Humanitarian Law and the challenges' (ICRC Report, October 2011) 14.
[327] Romani and Gaggioli (n 163) para 49.
[328] Meier (n 166) 405.
[329] Louise Doswald-Beck, 'The right to life in armed conflict: does international humanitarian law provide all the answers?' (2006) 88(864) International Review of the Red Cross 881, 883.
[330] Romani and Gaggioli (n 163) para 51.

rather demonstrate an overlap between the regimes.[331] However, there may be some instances where use of lethal force constituting 'lawful acts of war' under IHL nonetheless violates Article 2 of the ECHR.

A significant potential conflict arises regarding the ECHR's requirement that any use of force must be 'absolutely necessary', which marks a notable difference from IHL. IHL permits broadly speaking any attack as long as it is directed to a military target or proportional collateral damage.[332] For example, consider a group of soldiers sleeping and surrounded by their adversaries in an armed conflict.[333] Instead of killing them, the adversaries could capture the soldiers using non-lethal means. Under the ECHR, states must attempt to capture individuals where possible instead of using lethal force.[334] IHL, however, does not mandate a capture-before-kill approach.[335]

The *McCann* case highlights the ECtHR's approach of minimising the use of violence. In this case, involving the killing of three unarmed members of the Irish Republican Army by British soldiers during a stakeout in Gibraltar, a divided ECHR held that the operation violated the right to life under Article 2 of the Convention.[336] The Court accepted that the soldiers believed it was 'absolutely necessary' to use deadly force to safeguard innocent lives.[337] However, the majority opinion noted that the soldiers' decision to shoot lacked the necessary caution expected from law enforcement personnel in a democratic society. [338] This approach is equally relevant in armed conflict situations.[339]

Similarly, in a case before the Israel supreme court concerning Israeli Government's policy of 'targeted killings,' employed against members of Palestinian terrorist organisations in the Gaza Strip and the West Bank, the Court referred to *McCann* and imposed additional conditions beyond the IHL proportionality test, emphasising that terrorists may not be targeted if less

[331] Milanović, 'Norm Conflicts, International Humanitarian Law and Human Rights Law' (n 250) 35. See also *Geogia v. Russia (II)*, paras 194-222, 234-256.
[332] Stuart Wallace, 'Norm Conflict' in *The Application of the European Convention on Human Rights to Military Operations* (1st, Cambridge University Press 2019) 75.
[333] See, Milanovic and Shah (n 149) para 41.
[334] Marco Sassòli, 'Die EMRK in Krisenzeiten' in Bernhard Ehrenzeller and Stephan Breitenmoser (eds), *Wirkungen der Europäischen Menschenrechtskonvention (EMRK) – heute und morgen, Kolloquium zu Ehren des 80. Geburtstags von Luzius Wildhaber* (1st, Dike/Nomos 2017) 36.
[335] Milanovic and Shah (n 149) para 41.
[336] *McCann and Others v. UK* App no 18984/91 (ECtHR, 27 September 1995) [GC] para 214; p. 55.
[337] Ibid., para 40.
[338] Ibid., paras 200, 212.
[339] Milanovic and Shah (n 149) para 35.

harmful means can be employed. [340] This approach reflects clearly a human rights perspective in the context of the use of lethal force influenced by the ECtHR.

However, it is crucial to recognise that the same standards cannot be applied uniformly during ongoing hostilities.[341] While in individual situations, such as occupations scenarios, the law enforcement paradigm might be more applicable, during active combat, it is unrealistic to expect non-lethal alternatives to always be employed.[342] Nonetheless, states' obligations to reduce the use of force to a minimum tends to align with the IHL principle to take precautions in the choice and means of warfare.[343]

Another potential conflict arises regarding collateral damage. The issue was addressed in the admissibility decision on *Ukraine and the Netherlands v. Russia*, concerning the incidental killing of civilians. [344] Under Article 2 of the ECHR, no distinction is made between combatants and civilians, suggesting that every incidental death could constitute a violation of the right to life.

This stance contradicts the IHL principle of proportionality, which focuses on incidental harm to civilians. Under IHL, members of the armed forces of a conflict party are combatants who may be targeted at any time unless they are hors de combat.[345] Civilians may also be targeted if they directly participate in hostilities.[346] The proportionality principle and the obligation to take precautions to protect human life applies only to the civilian population affected by an attack on a legitimate target, not to those who may be lawfully targeted.[347] Thus, IHL provides a less protective regime compared to Article 2 of the ECHR under a strict interpretation.[348]

[340] HCJ, *The Public Committee against Torture in Israel et al v. The Government of Israel et al*, No 769/02 (11 December 2006) para 89.
[341] Andrea Gioia, 'The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict', in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (1st, Oxford University Press, 2011) 226.
[342] Milanovic and Shah (n 149) para 40.
[343] Gioia (n 341) 223.
[344] *Ukraine and the Netherlands v. Russia*, para 720.
[345] Additional Protocol I (1977) to the Geneva Conventions, Articles 43(2), 41(1).
[346] Additional Protocol I (1977) to the Geneva Conventions, Article 51(3).
[347] Sassòli, 'Die EMRK in Krisenzeiten' (n 334) 36.
[348] Noelle Quenivet, 'Guest Lecture: Dr Jane Rooney: Article 2 of the European Convention on Human Rights in Armed Conflict' (*Bristol Law School blog*, 26 April 2018) <https://blogs.uwe.ac.uk/bristol-law-school/guest-lecture-dr-jane-rooney-article-2-of-the-european-convention-on-human-rights-in-armed-conflict/> accessed 14 June 2024.

However, the *Finogenov* decision by the ECtHR provides insight into how incidental deaths are treated under Article 2 of the ECHR.[349] In this case, a hostage-rescue operation in Moscow using anesthetic gas resulted in over 100 hostage deaths. The Court did not find a violation based on the incidental deaths or the gas use itself but did find a violation due to the poorly planned medical response afterwards.[350] This decision shows that the ECtHR considers the broader context and specific circumstances surrounding the use of force when determining compliance with Article 2 and the Court could do so in situation of armed conflicts as well.

Overall, it is argued that the standard of 'absolute necessity' under Article 2 of the ECHR should be interpreted more liberally in the context of armed conflicts to ensure the effectiveness of military actions. [351] Realistic requirements must be applied to Article 2 within armed conflicts, suggesting that an attack complying with IHL principles should be deemed prima facie lawful under Article 2 of the ECHR.[352] This perspective aligns with the Human Rights Committee's view that 'the use of lethal force consistent with international humanitarian law and other applicable international law norms is, in general, not arbitrary'.[353] However, following this approach would also mean not adopting a strict human rights' specific approach.

(2) The Necessity of Investigation

The procedural component of Article 2 of the ECHR, which mandates independent and effective investigations into deprivations of life, presents potential tension with IHL. The ECtHR frequently requires investigations in armed conflict situations where a person has been intentionally killed,[354] while IHL mandates such investigations only in specific cases, such as the death of prisoners of war[355], internees[356], or accusations of grave breaches[357]. This would mean that if the ECtHR for example requires an investigation in cases of lethal force used against combatants this conflicts with IHL which clearly does not prohibit such conduct.

[349] *Finogenov v. Russia*, App nos 18299/03 and 27311/03 (ECtHR, 20 December 2011).
[350] Ibid., paras 227-266.
[351] Wallace (n 332) 76, 77.
[352] Romani and Gaggioli (n 163) para 52.
[353] UN HRC, 'GC 36' (n 217) para 64.
[354] *Güleç v. Turkey*, paras 6, 81; *Ergi v. Turkey*, para 85; *Isayeva and Others. v. Russia*, paras 209-213; *Al-Skeini,v. UK* paras 151-167; *Jaloud v. the Netherlands*, App no 47708/08 (ECtHR, 20 November 2014) paras 157-228; *Kaya v. Turkey*, App no 22729/93 (ECtHR 19 February 1998) para 86.
[355] Geneva Convention III, Article 121.
[356] Geneva Convention IV, Article 131.
[357] Geneva Convention IV, Article 146; Geneva Conventions, Common Article 49, 50, 129.

Moreover, the ECtHR has shown limited flexibility in adapting its peacetime investigative standards to the realities of armed conflict.[358] In cases involving Turkey and Russia, but also in Iraq, the Court has consistently demanded investigations with high standards whenever a person was intentionally killed, focusing on the obligation to conduct effective and independent inquiries.[359] However, most cases where the ECtHR found violations of the right to life involved civilian victims, often with doubts about their participation in hostilities. Nonetheless, the requirement for investigations exceeds IHL's mandates.

bb) Normative Conflicts between Article 5 of the ECHR and IHL

The most relevant normative conflict between European Human Rights Law and IHL often arises in the context of deprivation of liberty, particularly in relation to internment. Internment refers to the non-criminal detention of a person based on the serious threat their activity poses to the security of the detaining authority during an armed conflict.[360]

Article 5 of the ECHR guarantees the right to liberty (in the sense of physical liberty of a person) and security.[361] The provision provides – similar to Article 2 of the ECHR - a number of limitations in Article 5(1) (a) - (f), permitting detention after conviction, for non-compliance with a court order or legal obligation, on remand, of minors for educational supervision, for medical or social reasons and in immigration contexts. This list is generally considered exhaustive. [362] Moreover, Article 5(4) of the ECHR secures the right of detained persons to have the lawfulness of their detention decided 'speedily' by a court.

Article 5 of the ECHR differs from other human rights treaties because it does not contain an explicit prohibition against 'arbitrariness',[363] which can be an entry point for IHL. [364] Thus, derogation under Article 15 from Article 5 is generally required for IHL to apply. [365]

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[358] Sassòli, 'Die EMRK in Krisenzeiten' (n 334) 38.
[359] *Güleç v. Turkey*, para 81; *Isayeva and Others. v. Russia*, paras 211-212; *Al-Skeini,v. UK* para 164.
[360] ICRC, 'Internment in Armed Conflict: Basic Rules and Challenges' (Opinion Paper, November 2014) 3.
[361] ECtHR, 'Guide on Article 5 of the European Convention on Human Rights' (updated on 29 February 2024) para 1 <https://rm.coe.int/1680700ab0> accessed 14 June 2024.
[362] Ibid., para 26. See also, Claire Landais and Lea Bass, 'Reconciling the Rules of International Humanitarian Law with the Rules of European Human Rights Law' (2015) 97(900) 1295, 1308.
[363] See, ACHR, Article 7(3); ICCPR, Article 9(1).
[364] Matthias Lippold, 'Between Humanization and Humanitarization? Detention in Armed Conflicts and the European Convention on Human Rights' (2016) 76 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 53, 81.
[365] Wallace (n 332) 142.

In contrast, IHL permits the internment of prisoners of war and, under certain conditions, of civilians in international armed conflict.[366] Both the Third and Fourth Geneva Conventions provide rules on the procedure, conditions and length of interment.[367] Under the Fourth Geneva Convention, civilians may challenge and subsequently review their lawfulness of their detention.[368] However, prisoners of war cannot review the lawfulness of their detention as long as hostilities are ongoing because they are considered a security threat ipso facto.[369]

While the ECHR generally does not foresee security detention, IHL provides a detailed framework. The procedural rules concerning detention diverge under both legal regimes.

This conflict was addressed by ECtHR in the *Hassan* case, as already mentioned above. The Court decided that the grounds for permitted deprivation of liberty in Article 5(1) ECHR should be […] accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians […] under the Third and Fourth Geneva Conventions'.[370] While the rules of IHL have to be fully complied with, it suffices that the fundamental purpose of Article 5(1), which is the protection from arbitrary detention, be respected.[371] The Court acknowledged that during an ongoing conflict, it is 'not practicable' to require judicial review according to Article 5(4).[372] It modified the obligations under Article 5(4) such that the competent body reviewing detention should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness, and it should review the legality of the detention shortly after a person is detained.

The Court also emphasised that the lack of a formal derogation under Article 15 of the ECHR does not prevent the consideration of IHL, but only when specifically pleaded by the respondent state.[373]

The harmonious interpretation of the Convention in light of IHL has led to widespread criticism. The partially dissenting opinion in the judgement described the 'symbiotic' approach as 'reconciling the irreconcilable', arguing that priority should be given to the Convention when

[366] Geneva Convention III, Article 21, Geneva Convention IV, Articles 41-42.
[367] Geneva Convention III, Articles 21, 22, 25, 108, 118, 126; Geneva Convention IV, Article 42-43, 78, 79-135.
[368] Geneva Convention IV, Articles 43 and 78.
[369] ICRC, 'Internment in Armed Conflict' (n 360) 4. See Geneva Convention III, Article 21.
[370] *Hassan v. UK*, para 104.
[371] Ibid., para 105.
[372] Ibid., para 106.
[373] Ibid., paras 103, 107.

it does not automatically assimilate IHL provisions.[374] Some critics labeled this approach as 'judicial vandalism,' [375] or suggested that it diluted the meaning of Article 5, making its status as an IHRL norm questionable[376]. Others stated that by accommodating security detention in Article 5 of the ECHR, the Court came very close to rewriting the article and might have gone beyond treaty interpretation.[377] This approach would also undermine the derogation provision of Article 15.[378]

Even if the Court somehow limited the obligation under Article 5 of the ECHR,[379] it still provided very clear guidance on the accommodation of IHL under the Convention and how to resolve the normative conflict regarding Article 5 of the ECHR.

e) Conclusion – A Human Rights Approach to Jus in Bello

The international trend towards the co-application and cross-fertilisation of IHL and IRHL is also evident in the ECtHR's jurisprudence. The ECtHR has been somewhat hesitant to explicitly define the relationship between IHL and IHRL, but moved towards increasingly considering IHL in the interpretation and application of the Convention, reflecting a 'modern advanced version of the complementarist approach',[380] albeit with some limitations.

The ECtHR has demonstrated a clear stance in relation to Article 5 of the ECHR in the *Hassan* Judgment. Whether this approach is entirely appropriate from a human rights perspective is debatable, but it undeniably enhances legal certainty and provides clear guidance how to accommodate IHL in Article 5 of the ECHR. It is necessary and desirable for the Court to also provide comprehensive guidance for future cases regarding normative conflicts involving other provisions of the Convention.

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[374] Partly Dissenting Opinion of Judge Spano, Joined by Judges Nicalaou, Bianku and Kalaydjieva, *Hassan v. UK*, paras 6, 17.
[375] Van Steenberghe (n 296) 17.
[376] Fortin 'The relationship between human rights law and international humanitarian law' (n 264) 350.
[377] De Koker, '*Hassan v United Kingdom*' (n 315) 90, 92, 94.
[378] Wallace (n 332) 160.
[379] Paulo Pinto de Albuquerque, Judge at the ECtHR, 'Is the ECHR facing an existential crisis?' (Mansfield College Oxford, 28 April 2017) 5 <www.law.ox.ac.uk/sites/files/oxlaw/pinto_opening_presentation_2017.pdf> accessed 15 June 2024.
[380] Gaggioli, 'A Response to 'Which Rights to enforce in Time of Public Emergency' (n 258).

Furthermore, it is crucial to acknowledge that some normative conflicts may remain unresolved and do not necessarily need to be resolved if doing so leads to absurd results or undermines the norms of either IHL or IHRL.[381] It is essential not to lose sight of the characteristics and peculiarities of the respective regimes.

D. The Added Value of Human Rights and the ECtHR in Times of Armed Conflicts

To conclude this part of the thesis and before addressing the inter-state application *Ukraine v. Russia (X)*, it is crucial to briefly capture the added value of human rights in times of armed conflict.

Jus in Bello takes the existence of armed conflicts as a given and aims to limit the effects of war within this reality.[382] This approach is pragmatic. Similarly, Jus ad Bellum, which has evolved into jus contra bellum, acknowledges the reality of war, even as it seeks to prevent it. In contrast to this pragmatic acceptance, human rights law stands out with its aspirational character. Human rights law not only defines the rights inherent to all individuals but also establishes institutional standards for ensuring these rights are realised.[383] War, as an absolute violation of human rights,[384] must be considered within the human rights framework. Only human rights law 'brings the long-term and cumulative impacts of war into focus […] highlighting the terrorization of populations even by lawful attacks, pressing for accountability for war policies and raising basic questions about societies and economics'.[385] This is particularly relevant when the international security system fails to offer solutions, IHL lacks judicial enforcement at regional and international levels and international criminal law targets individuals, rather than regimes or governments as such.

Against this background, the ECtHR has become a forum for victims seeking redress for violations during armed conflicts, as there is no equivalent body especially ensuring state's accountability in those circumstances. The Court, originally designed for peacetime, adapted

[381] Milanović, 'Norm Conflicts, International Humanitarian Law and Human Rights Law' (n 250) 36.
[382] Katharine Fortin, 'Added Value of Application of International Human Rights Law to Armed Groups' in Katharine Fortin *The Accountability of Armed Group under Human Rights Law* (1st, Oxford University Press 2017) 31.
[383] Ibid., 32.
[384] Jessica Almqvist cited in Ellen Albertsdóttir, '"War is the ultimate violation of human rights"' (*Lund University*, 6 March 2023) <www.lunduniversity.lu.se/article/war-ultimate-violation-human-rights> accessed 28 June 2024.
[385] Smith (n 286) 29.

remarkably well to the new realities of armed conflicts both in terms of procedural tools and conceptual approaches. The ECtHR's procedural tools transform unenforceable IHL rights into enforceable rights under the Convention.[386] Conceptually, the Court aspires to effectively address the realities of war. This brings the ECtHR closer to the normative understanding of international courts as 'judicial peacemakers' proposed by the scholar Hans Kelsen.[387]

Despite facing challenges and criticism, the ECtHR, fundamentally a human rights mechanism, cannot be strictly evaluated as a special tribunal for armed conflict situations. The Court's readiness and flexibility remain vital assets in its pursuit of justice in armed conflicts, making it indispensable human rights mechanism in such situations.

E. *Ukraine v. Russia (X)*

The legal issues previously discussed will be examined in the context of the inter-State case *Ukraine v. Russia (X)*, which concerns the Ukrainian Government's allegations of mass and gross human rights violations committed by Russia during its military operations on Ukrainian territory since 24 February 2022.

I. Factual Background of Ukraine's Application

Before delving into the analysis, it is essential to understand the specific allegations forming the basis of Ukraine's application. As the details of Ukraine's application are not publicly available, the information provided is sourced from the press release 'Inter-State case Ukraine v. Russia (X): receipt of completed application form and notification to respondent State' issued by the ECtHR.[388] The full application has been received by the Court on 23 June 2022.

Ukraine accuses Russia of illegally invading and occupying its territory, conducting deliberate, indiscriminate, and disproportionate attacks on civilians and property and thereby violating international legal norms. These attacks are purportedly carried out by Russian military forces or allied paramilitary groups under Russian command and have resulted in significant casualties, widespread displacement, and extensive damage to property and businesses. Ukraine

[386] Nakashidze (n 15) 68.
[387] Hans Kelsen, *Peace through Law* (1st, The University of North Carolina Press, 1944).
[388] ECtHR, Press release 'Inter-State case Ukraine v. Russia (X): receipt of completed application form and notification to respondent State' (28.06.2022) ECHR 220(2022) <http://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-7372751-10076076%22]}> accessed 17 June 2024.

asserts Russia failed to investigate these incidents adequately, implicating high-level Russian government officials, including the President. Ukraine claims numerous violations of the European Convention on Human Rights: Articles 2 (right to life), 3 (prohibition of torture and inhuman or degrading treatment), 4 (prohibition of slavery and forced labour), 5 (right to liberty and security), 8 (right to respect for private life), 9 (freedom of religion), 10 (freedom of expression), 11 (freedom of assembly and association), 13 (right to an effective remedy), 14 (prohibition of discrimination), as well as under various protocols to the Convention protecting property, education, freedom of movement, and prohibiting expulsion of nationals.

All in all, it is a very complex case.

II. Infrastructural Aspects

The following section explores the advantages of the case being pursued as an inter-state application, the interim measures issued and the substantial number of third-party interventions.

1. Inter-State Application

Ukraine has lodged in total 10 interstate applications against Russia since 2014 before the ECtHR, using human rights as its defense mechanism against Russia.[389] Russia has lodged one application against Ukraine.[390]

In *Ukraine v. Russia (X)*, Ukraine seeks to demonstrate to Russia the limits imposed by human rights in the ongoing conflict. The application aims to comprehensively assess the human rights situation and is employed as a measure of last resort. As a comparison, being unable to seek recourse at the ICJ due to Israel's non-submission to its jurisdiction, Palestine resorted to an inter-state application on a universal level in the *Palestine v. Israel* case, invoking Article 11 of the CERD to argued that Israel's policies in the occupied Palestinian territories constitute apartheid.[391] Ukraine's case illustrates a similar pursuit of effective legal mechanisms amidst the ongoing conflict in order to hold Russia accountable. Although Ukraine did not suffer a complete defeat legally, the ICJ's judgments in 2024 have been described as a 'huge loss' for

[389] See, ECtHR 'Inter-State applications' (n 6).
[390] *Russia v. Ukraine*, App no 36958/21.
[391] Palestine's Inter-State Communication '*Interstate Complaint under Articles 11-13 of the ICERD: State of Palestine versus Israel*' (23 April 2018) para 660 B <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fISC%2f9325&Lang=en> accessed 21 April 2024.

Ukraine and ‘major disappointment in its ‘lawfare’ efforts against Russia’. [392] Ukraine turned to the Genocide Convention to address the February 2022 invasion, given the lack of international jurisdiction over Russia's UN Charter violation.[393] However, the ICJ decided that uses of force do not fall within the scope of the CPPCG and thus lies outside the Court’s jurisdiction.[394] The International Court of Justice’s measures, such as the arrest warrants against President Putin and Maria Lvova-Belova, the Commissioner for Children’s Rights have also been ineffective.[395] Consequently, the inter-state application *Ukraine v. Russia (X)* before the ECtHR serves as a final recourse to ensure accountability within the framework of human rights.

The inter-state application *Ukraine v. Russia (X)* is primarily driven by Ukraine's political self-interest, yet it still upholds the notion of 'public order of the free democracies of Europe'. It spotlights those, such as Russia, who not only fail to uphold a democratic and human rights-based system but also present a tangible threat to it and underlines the commitment of Ukraine to align with democratic principles and human rights, exemplified by its swift application for EU accession following Russia's invasion, and its subsequent grant of EU candidate status in June 2022. [396] This brings the complaint closer to the original purpose of inter-state applications as a collective enforcement mechanism.

One of the greatest advantages of the inter-state complaint lies in facilitating the handling of overlapping individual cases. With 7,400 interconnected individual cases related to the Ukraine-Russian conflict since 2014,[397] the case as a leading judgment will expedite justice for victims and relieve the Court.

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[392] Marko Milanovic, ‘ICJ Delivers Preliminary Objections Judgment in the Ukraine v. Russia Genocide Case, Ukraine Loses on the Most Important Aspects’, (*EJIL:Talk!,* 2 February 2024) <www.ejiltalk.org/icj-delivers-preliminary-objections-judgment-in-the-ukraine-v-russia-genocide-case-ukraine-loses-on-the-most-important-aspects/> accessed 21 April 2024.

[393] Oona A. Hathaway, ‘Taking Stock of ICJ Decisions in the ‘Ukraine v. Russia’ Cases - And implications for South Africa’s case against Israel’ (*Just Security*, 5 February 2024) <www.justsecurity.org/91781/taking-stock-of-icj-decisions-in-ukraine-v-russia-cases-and-implications-for-south-africas-case-against-israel/> accessed 21 April 2024.

[394] ICJ, ‘Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (*Ukraine v. Russian Federation*), (Press Release 2024/10, 2 February 2024) 1 <www.icj-cij.org/sites/default/files/case-related/182/182-20240202-pre-01-00-en.pdf> accessed 21 April 2024.

[395] ICC, ‘Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova’ (Press Release, 17 March 2023) < https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> accessed 21 June 2024.

[396] European Council, ‘EU enlargement policy – Ukraine’ (23 March 2024) <www.consilium.europa.eu/en/policies/enlargement/ukraine/> accessed 21 April 2024.

[397] ECtHR, Press Release ‘Grand Chamber hearing on inter-State case Ukraine v. Russia (re Crimea)’. (13 December 2023) ECHR 352 (2023) <www.coe.int/en/web/portal/-/european-court-of-human-rights-hears-ukraine-v.-russia-case> accessed 1 April 2024.

2. Interim Measures

The ECtHR indicated general interim measures in the context of *Ukraine v. Russia (X)* on 1 March 2022, responding promptly to a request from Ukraine regarding the 'massive human rights violations […] committed by the Russian troops in the course of the military aggression against the sovereign territory of Ukraine'.[398]

The Court urged Russia to abstain from 'military attacks against civilians and civilian objects'.[399] While the terms 'military action' and 'military attack' can be used interchangeably, their connotations carry subtle nuances. The former, frequently employed by the Court within the context of armed conflicts, may convey a sense of neutrality, whereas the latter might denote more aggressive and violent acts.[400]

The Court recalled the interim measures previously indicated in *Ukraine v. Russia (re Crimea)*, which remain in force in context of the case *Ukraine and the Netherlands v. Russia*. Unlike the prior measures, the interim measures in *Ukraine v Russia (X)* are exclusively directed at one party of the conflict: the Russian Government. This new targeted approach may signify the Court's resolute condemnation of Russia's full scale-invasion in February 2022.
The interim measures highlight the real risk posed by Russia's military actions for the Convention's rights of civilians, particularly those outlined in Articles 2, 3, and 8 of the ECHR.[401] Notably, Article 8 (the right to respect for private and family life) has been newly invoked in the context of interim measures during armed conflicts, reflecting the Court's judgement in *Georgia v. Russia (II)*, where it deemed the destruction of civilian homes a violation of Article 8 of the ECHR. [402]

By expressly prohibiting attacks on civilian objects such as residential premises, medical facilities and schools, the ECtHR reaffirmed customary international humanitarian law

[398] ECtHR, Press Release 'The European Court grants urgent interim measures in application concerning Russian military operations on Ukrainian territory' (1 March 2022) ECHR 068(2022) <https://hudoc.echr.coe.int/eng-press?i=003-7272764-9905947> accessed 20 June 2024.
[399] Ibid.
[400] See, for example definition of attack of Additional Protocol I to the Geneva Conventions, Article 49 as 'acts of violence against the adversary, whether in offence or in defence'.
[401] ECtHR, Press Release ECHR 068(2022) (n 398).
[402] Mariana Ferolla, 'There and Back Again: Ukraine vs. Russia at the European Court of Human Rights and Interim Measures' (*International Law Agendas*, 3 May 2022) < http://ila-brasil.org.br/blog/there-and-back-again-ukraine-vs-russia-at-the-european-court-of-human-rights-and-interim-measures/> accessed 29 April 2024.

principles including the principle of distinction between civilian objects and military objectives,[403] and the obligation to respect safety zones[404].

In response to numerous requests for interim measures amid Russia's invasion, the Court expanded the scope of its initial interim measures in a subsequent decision.[405] As a result, the interim measures now include provisional protection for civilians seeking refuge from the conflict and requiring humanitarian aid and safe evacuation.[406]

In essence, these interim measures serve as reminders of Russia's obligations under the Convention and international humanitarian law. Nevertheless, incidents such as the bombing of a children's and maternity hospital in Mariupol shortly after the Court's decision on interim measures and the ongoing hostilities raise questions about the effectiveness of these measures.[407]

3. Third-party Interventions

The Court permitted a total of 26 member states to join as third parties the case *Ukraine v. Russia (X)*: Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.[408] Due to the fact that the Court joint the case *Ukraine v Russia (X)* and *Ukraine, the Netherlands v. Russia*, the Netherlands is both a third party concerning the invasion in February 2022 and a party to the entire case.

The member states have presented their arguments and information collectively through a joint brief consisting of 47 paragraphs.[409] Most states submitted it separately with only difference in prefatory or concluding remarks, covering letter and signature.[410]

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[403] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, ICRC (1st, Cambridge University Press 2005) rule 7.
[404] Ibid., rule 35.
[405] ECtHR, Press Release ECHR 073(2020) (n 96).
[406] Ibid.
[407] See, 'Ukraine war: Three dead as maternity hospital hit by Russian air strike', (*BBC*, 10 March 2022) <https://www.bbc.com/news/world-europe-60675599> accessed 29 April 2024.
[408] ECtHR, Press Release, ECHR 082(2023) (n 9).
[409] All of them are available for download under <www.ejiltalk.org/wp-content/uploads/2024/01/Ukraine-v-Russia-State-Interventions.zip>.
[410] Marko Milanović, 'The Mariupol Test: Analysing the Briefs of Third States Intervening in Ukraine and the Netherlands v. Russia" (*EJIL:Talk!*, 9 January 2024), <www.ejiltalk.org/the-mariupol-test-analysing-the-briefs-of-third-states-intervening-in-ukraine-and-the-netherlands-v-russia/> accessed 26 March 2024.

The *ratione* of the third-party interventions in *Ukraine v. Russia (X)* are multifaced.

Firstly, they underscore the role of the member states as the 'guardians' of the convention, reflecting the idea of collective enforcement of human rights against Russia. [411] This function might be secondary.

Another dimension of the third-party intervention is to provide legitimacy to the later judgement of the Court. Russia as a respondent state is unlikely to cooperate or participate in the proceeding. Therefore, the submissions of more than half of all ECHR member states carry considerable weight. They cannot replace the opposing submission of Russia, nonetheless they contribute significantly to legitimising the final judgment, an essential step in holding Russia accountable for its actions.[412]

Moreover, the third-party interventions serve as a dialogue about treaty interpretation. Member states focus their submissions on two main aspects: 'jurisdiction for the purpose of article 1 of the convention' and the 'Application of the convention during armed conflict and its relationship with IHL'.[413] Member states aim to express their views on these complex issues and to ensure that the Court does not bear the burden alone. This engagement also seeks to avoid undesired outcomes, such as the criticised decision regarding jurisdiction in *Georgia v Russia (II)*.[414]

Ultimately, third-party intervention serves as a symbolic expression of solidarity through legal means. All member states stated their intervention to support Ukraine.[415] However, it is worth noting that according to the Practice Directive, 'third parties are not entitled to express support directly for one or the other party.'[416] Member states could have expressed solidarity through procedural means by joining Ukraine on equal footing through an inter-state application, which does not require direct victimhood and could have been joined with Ukraine's application. But member states choose to take the 'passenger seat'; rather than the 'driver's one'.[417] A choice

[411] Risini and Batura (n 121).
[412] Ibid.
[413] See, The Czech Republic, 'Observations of the Government under Article 36 § 2 of the Convention on certain issues raised by the Inter-state application Ukraine v Russia (x) (no. 11055/22)'; Additional Observation of the Government of the United Kingdom 'Third-party intervention of the United Kingdom in *Ukraine and the Netherlands v. Russia*' (ECtHR, 28 June 2023).
[414] Risini and Batura (n 121).
[415] Milanović, 'The Mariupol Test' (n 410).
[416] Practice Direction 'Third-party intervention' (n 118) para 78.
[417] See, Batura, (n 126).

that may reflect the perception of an inter-state application as a hostile act against Russia and the desire to opt for a more conciliatory and diplomatic approach.

III. Conceptual Aspects

The conceptual aspects of the case encompass extraterritorial jurisdiction, as well as considerations of jus ad bellum and jus in bello.

1. Extraterritorial Jurisdiction

The next section examines the (potential) extraterritorial application of the ECHR in the case *Ukraine v. Russia (X).* Key questions include whether the extraterritorial application of the Convention can be extended to the events since February 2022 in terms of spatial and personal jurisdiction, and whether the notion of a 'context of chaos' precludes jurisdiction.

a) Spatial Model

Under the spatial model extraterritorial jurisdiction will cover all events, where Russia exercised directly and indirectly control over Ukrainian territories. This means that at a minimum all acts occurring during the Russian occupation are within the respondent's jurisdiction.[418]

There is abundant evidence of human rights violations (killings, torture, sexual violence, enforced disappearances, arbitrary detention, and suppression of Ukrainian culture and identity) during the occupation.[419] Moreover, the Institute for the Study of War provides detailed insight into the dynamic frontlines of the conflict via a daily updated interactive map and a time-lapse archive.[420] The captured territories include Donetsk, Kharkiv, Kherson, Luhansk, Mykolaiv, and Zaporizhzhia regions of Ukraine.[421] However, the fact that Russia unlawfully annexed

[418] See, *Georgia v. Russia (II),* paras 194-196.
[419] UN OHCHR, 'Report on the Human Rights Situation in Ukraine: 1 December 2023 – 29 February 2024' (26 March 2024) < https://ukraine.un.org/sites/default/files/2024-04/report-human-rights-situation-ukraine-1-dec-2023-29-feb-2024.pdf> accessed 15 May 2024; UN OHCRC, 'Human Rights Situation during the Russian Occupation of Territory of Ukraine and its aftermath' (20 March 2024) <www.ohchr.org/sites/default/files/documents/countries/ukraine/2023/2024-03-20-OHCHR-Report-Occupation-Aftermath-en.pdf> accessed 15 May 2024.
[420] Institute for the Study of War 'Ukraine Conflict Updates' <www.understandingwar.org/backgrounder/ukraine-conflict-updates> accessed 24 May 2024.
[421] See, UN OHCHR, 'Human Rights Situation during the Russian Occupation' (n 419) para 31.

Donetsk, Luhansk, Kherson, and Zaporizhzhia on 30 September 2022,[422] falls outside the case's scope.

Despite fluctuations in Russia's control, such as the withdrawal of Russian forces from the vicinity of Kyiv in April 2022,[423] definitive determinations of Russia's effective territorial and temporal control are feasible due to the enormous amount of evidence available. Within this framework, Russia is obligated to ensure the protection of all Convention rights within the Ukrainian territories.

b) Personal Model

In accordance with the ECtHR's jurisprudence certain scenarios undeniably fall under the personal model of jurisdiction. This includes violations concerning detained combatants or civilians, individuals in buildings controlled by Russian soldiers and those abused or summarily executed by Russian soldiers in close proximity.[424]

Establishing jurisdiction becomes more challenging in scenarios involving the use of kinetic forces from Russian-controlled territory into Ukrainian territory or killings in areas not under Russian occupation, such as Kyiv or highly contested regions like Bahkmut or Mariupol during the battle.

While the Court's approach is difficult to anticipate, it would be preferable for it to adopt a straightforward approach to extraterritorial jurisdiction under the personal model, aligning with HRC's General Comment 36. [425] The Court could also follow the notion of jurisdiction established in Carter as 'physical power and control over […] life'[426], emphasising that killing alone constitutes an exercise of authority and control over an individual by totally removing their autonomy.[427] Or, as Mr. Justice Leggatt stated that killing establishes jurisdiction under the personal model as 'using force to kill is the ultimate exercise of physical control'.[428] Against this background, Milanović introduced the so-called 'Mariupol test': any use of force by a state

[422] Ibid., para 33.
[423] Milanovic and Shah (n 149) para 5.
[424] See, Additional Observation of the Government of the United Kingdom 'Third-party intervention of the United Kingdom in *Ukraine and the Netherlands v. Russia*' (ECtHR, 28 June 2023) para 20.
[425] Milanovic and Shah (n 149) paras 15, 16.
[426] *Carter v. Russia,* para 161.
[427] Stojnić (n 157) 152.
[428] England and Wales High Court, *Al-Saadoon & Others v. Secretary of State for Defence* EWHC 715 (17 March 2015) para 95.

agent on an individual constitutes an exercise of authority, regardless of proximity.[429] This approach aims to resolve factual difficulties in armed conflicts through burden and standard of proof principles, rather than exempting certain killings from human rights law.

However, if the ECtHR maintains its approach of proximity and does not pass the Mariupol test in this sense, it must consider that even bombing, shelling, and artillery fire may be isolated and specific in terms of time, location, and target. [430]

Ultimately, there is no moral or legal justification for why the killing of one person with a knife or poison in a prison establishes jurisdiction under the personal model, while the killing of thousands with a bomb does not. It remains a question of human rights law, particularly in situations where cities like Mariupol or Bahkmut are destroyed and thousands are killed. In this context, it would be desirable for the ECtHR to encompass all killings by Russian armed forces under the personal model, regardless of means or proximity. Lethal force can be exerted from near or far, and Russia must ensure that the relevant rights under the Convention are upheld in both scenarios.

c) Does the Notion ‚Context of Chaos' Preclude Jurisdiction?

There Court faces three potential approaches in addressing the notion of a 'context of chaos' as established in *Georgia v. Russia (II):*

Firstly, it could strictly follow the restrictive approach of *Georgia v. Russia (II*), which would mean, that vast majority of individual acts of hostilities committed in Ukraine would be excluded from the purview of the Convention.[431] As there has been no peace agreement between the two countries and hostilities were ongoing at the time of application (and continue to be so), this situation could be considered a 'context of chaos'.

Alternatively, and more probable, the Court may follow the approach taken in the admissibility decision of *Ukraine and the Netherlands v. Russia*, which emphasises that the occurrence of an armed conflict and military operations do not automatically constitute a 'context of chaos' that precludes jurisdiction, but must be evaluated based on the specific facts of the case .[432] This

[429] Milanovic, 'The Mariupol Test' (n 410).
[430] Romani and Gaggioli (n 163) para 7.
[431] See, Milanovic and Shah (n 149) para 10.
[432] *Ukraine and the Netherlands v. Russia,* paras 558, 556, 557.

would involve a case-by-case examination of the events in *Ukraine v. Russia (X)*, potentially excluding certain regions where control was highly contested during active hostilities. For instance, in Bakmuth, Russia's private Wagner group claimed control of the city in May 2022, handing it over to Russian regular forces, while Ukraine disputed this and said fighting continued.[433] It appears appropriate to identify that during intense street fights, neither Russia nor Ukraine effectively maintained control. This was also evident in the battle for Mariupol, where a small number of Ukrainian fighters defended the city against Russian forces for over eighty days from February to May 2022.[434] Another consideration is to focus on the general modus operandi, examining factors like the intensive pre-planning of military actions or the targeting of civilian objects with explosive weapons (e.g.: the targeting of maternity ward in Mariupol)[435] which are too deliberate and planned to be considered chaotic.[436] Overall, there are extensive investigations by national and international institutions, or the Joint Investigations Team, gathering evidence capable to 'pierce the fog of war'.

Thirdly, albeit less likely, the Court could overrule its own decision in *Georgia v. Russia (II)*, as it did previously with the *Banković* decision, [437] and disregard the newly established exception completely. This approach would allow for the unrestricted application of extraterritorial jurisdiction in armed conflicts, even in intense and potentially chaotic situations and ensure a strict application of the notion of 'effective control', as established in previous jurisprudence.

2. Jus Ad Bellum Considerations

In the present case, Ukraine relies on military aggression to establish Russia's jurisdiction under Article 1 of the Convention.[438]

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[433] Donbas.Realities, Svitlana Kuzmenko and Carl Schreck, 'The Ukrainian Cities Obliterated In Russia's Self-Proclaimed 'Liberation' (*RadioFreeEurope/RadioLi*berty, 11 June 2023) <www.rferl.org/a/ukraine-destroyed-cities-russia-war/32454453.html#> accessed 16 May 2024.
[434] John Spencer, 'Inside the Fight for Mariupol' (*Modern War Institute*, 1 May 2024) <https://mwi.westpoint.edu/inside-the-fight-for-mariupol/> accessed 16 May 2024.
[435] 'Ukraine war: Three dead as maternity hospital hit by Russian air strike', (*BBC*, 10 March 2022) (n 407)
[436] See, The Czech Republic, 'Observations of the Government under Article 36 § 2 of the Convention on certain issues raised by the Inter-state application Ukraine v Russia (x) (no. 11055/22)' (28 June 2023) 52.
[437] *Ukraine and the Netherlands v. Russia*, para 571.
[438] Ukraine application file, paras 91 (b), 92, 101, 110, 121 cited in Romani and Gaggioli (n 163) para 17; *Ukraine v Russia (x)*, App no 11055/22, paras 93 (b), 113-116 cited in 'Additional Observation of the Government of the United Kingdom 'Third-party intervention of the United Kingdom in *Ukraine and the Netherlands v. Russia*' (n 424) para 62.

However, according to the Court's jurisprudence, jus ad bellum considerations are irrelevant for determining extraterritorial jurisdiction. Military actions aimed to conquer territory cannot be equated with the exercise of effective power in the understanding of the Convention's threshold criterion.[439] Nonetheless, this does not preclude jurisdiction arising later in a different phase of the armed conflict, nor does it imply that jus ad bellum considerations should be entirely disregarded by the ECtHR.

Regarding Article 2 of the ECHR, it is indeed a valid consideration that all deaths in the conflict stem from Russia's aggression against Ukraine. Should the Court choose to align its jurisprudence with GC 36 the consequences could be immense: It would mean that the killing of Ukrainian soldiers in hostilities, in accordance with IHL, would be viewed a violation of the right to life akin to as the internationally killing of a child on a playground. This would certainly add to the workload of the Court, despite its backlog.

However, the Court also faces a jurisdictional challenge concerning its authority to decide on jus ad bellum violations.[440] It could rely on the determinations made by the Council of Europe or the United Nations, both of which have recognised a breach of jus ad bellum in this case reaching the threshold of an act of aggression. [441] Nonetheless, it is crucial for the ECtHR, as a judicial body, to avoid politicising human rights. While clear-cut aggression like that committed by Russia in Ukraine is rare, there may be other instances where aggression is less clearly defined, raising highly sensitive political questions. [442]

Nevertheless, the ECtHR should engage in deliberations about a potential human rights approach to jus ad bellum.

[439] Ibid.
[440] See, ECHR, Article 32.
[441] See, Council of Europe Committee of Ministers, 'Situation in Ukraine – Measures to be taken, including under Article 8 of the Statute of the Council of Europe' Decision CM/Del/Dec(2022)1426bis/2.3 (25 February 2022), Council of Europe, Press Release, 'Russia's war of aggression against Ukraine: Council renews economic sanctions for a further 6 months' (29 January 2024) < https://www.consilcoium.europa.eu/en/press/press-releases/2024/01/29/russia-s-war-of-aggression-against-ukraine-council-renews-economic-sanctions-for-a-further-6-months/> accessed 16 May 2024; UN GA, 'Aggression against Ukraine', A/RES/ES-11/1, (2 March 2022) para. 2.
[442] Romani and Gaggioli (n 163) para 35.

3. Jus In Bello Considerations

Despite Russia officially declaring war only in March 2024, previously referring to it as a 'special military operation', it is clear that the situation since February 2022 is an international armed conflict subject to IHL rules.[443] Both Ukraine and Russia frequently invoke IHL rules and concepts, such as prisoners of war and civilians, indicating they acknowledge their involvement in an international armed conflict.[444] In its application, Ukraine referred to breaches of IHL, arguing that Russia has engaged in targeted, indiscriminate and disproportionate attacks against civilians and their property across Ukraine.[445]

International organisations like the UN and OSCE have confirmed the parallel application of IHL and IHRL in the conflict and identified numerous violations of both legal frameworks.[446] The ECtHR, in its jurisprudence, generally supports the parallel application of ECHR and IHL. It is worth noting that while Ukraine derogated from various provision of the Convention (but not from Article 2 of the ECHR), Russia did not. [447]

It is likely that the ECtHR, in this case, will use IHL so far as possible, as a legal framework to interpretate the obligations imposed by the ECHR.[448] However, this does not mean that Russia can avoid findings of Convention breaches merely because of IHL compliance, and this does not mean as well that the ECtHR will monitor IHL compliance. As a judicial human rights body, the ECtHR can only highlight IHL violations and provide redress through IHRL, but not directly controlling IHL by integrating it in its reasoning.[449]

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[443] See, Tarik Solmaz, 'Why Russia has only now declared war on Ukraine' (3 April 2024, *The Lowy Institute*) available at <www.lowyinstitute.org/the-interpreter/why-russia-has-only-now-declared-war-ukraine> accessed 14 June 2024.
[444] Veronika Bílková, 'The Conflict in Ukraine: Implications for *Jus in Bello* and Human Rights Law' (2022) 32 The Italian Yearbook of International Law Online 181, 183.
[445] See ECtHR, Press release ECHR 220(2022) (n 388) 2.
[446] UN HRC, 'Report of the Independent International Commission of Inquiry on Ukraine' HRC/52/62 (15 March 2023) paras. 9, 15, 21 <www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A_HRC_52_62_AUV_EN.pdf> accessed 28 June 2024; Wolfgang Benedek, Veronika Bílková and Marco Sassòli, 'Report on Violations of International Humanitarian And Human Rights Law, War Crimes And Crimes Against Humanity Committed In Ukraine Since 24 February 2022'(OSCE Report I, 13 April 2022), 50-53 <www.osce.org/files/f/documents/f/a/515868.pdf> accessed 28 June 2024; Veronika Bílková, Laura Guercio, Vasilka Sancin, 'Report on Violations of International Humanitarian And Human Rights Law, War Crimes And Crimes Against Humanity Committed In Ukraine (1 April – 25 June 2022)', (OSCE Report II, 11 July 2022) 12. <https://www.osce.org/files/f/documents/3/e/522616_0.pdf> accessed 28 June 2024.
[447] See, Council of Europe, 'Legal Analysis of the derogation made by Ukraine under Article 15 of the European Convention of Human Rights and Article 4 of the International Covenant on Civil and Political Rights' (November 2022) 6 < https://rm.coe.int/legal-analysis-of-the-derogation-made-by-ukraine-under-article-15-of-t/1680aa8e2c> accessed 18 June 2024.
[448] See, *Hassan v. UK*, paras 77, 103; *Georgia v Russia (II)*, para 85.
[449] Salinas Alcega (n 306) 308.

The Court will need to assess any potential conflict between IHL and Article 2 of the ECHR for each complaint alleging a right to life violation. It is possible that in specific cases, incidents may be fully compatible with IHL principles. Moreover, the situation is governed by a conduct-of-hostilities paradigm, making it infeasible to expect Russia (and Ukraine) to exhaust all non-lethal means.

Moreover, Ukraine argues in the context of detention of civilians by the armed forces of the Russian Federation that the ruling in the *Hassan* case, concerning Article 5 of ECHR is mistaken.[450] It contends that the only permissible method for restricting Convention obligations during wartime is through derogation under Article 15 and that Article 5 should be regarded as an exclusive set of rules in this regard.[451] However, it is unlikely the Court will depart from its judgment in Hassan if faced with a similar conflict situation.[452]

All in all, this case presents an opportunity for Strasbourg to adopt a nuanced approach in armed conflicts, recognising the distinct contexts of IHL and human rights law and balancing them. How the ECtHR will achieve this remains to be seen.

IV. Implications on the ECtHR's Decision due to Russia's Expulsion from the CoE

The case *Ukraine v. Russia (X)* will be influenced by CoE's decision to expel the Russian Federation from the Council on 16 March 2022[453] – a first timer in the 70 year of history.[454] While Russia breached CoE's standards and norms before, such as with the annexation of Crimea in 2014, the country did not have to bear any significant consequences.[455] However, the full-scale invasion in February 2022 left no choice but to finally drew a red line - unlawful use of force against another member state is incompatible with the CoE principles.[456]

[450] Ukraine application file, para 221 cited in Romani and Gaggioli (n 163) para 45.
[451] Ibid.
[452] See, *Georgia v. Russia (II),* paras, 236, 237.
[453] Council of Europe Committee of Ministers. Resolution CM/Res (2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe (Adopted by the Committee of Ministers on 16 March 2022 at the 1428ter meeting of the Ministers' Deputies).
[454] Andrew Drzemczewski and Rick Lawson, 'Exclusion of the Russian Federation from the Council of Europe and the ECHR: An Overview' (2024) 21 Baltic Yearbook of International Law 38, 43.
[455] Klaus Brummer, 'The Council of Europe, Russia, and the future of European cooperation: any lessons to be learned from the past?' (2024) 61(2) International Politics 258, 271.
[456] Dzehtsiarou and Tzevelekos (n 4) 166.

As a consequence of the termination of the CoE membership, Russia ceased to be a member of the ECHR on the 16 September 2022.[457] Technically, the Court is still competent to deal with cases which took place before the date on which Russia ceased to be a party to the European Convention.[458] All human rights violations that occur afterwards are no longer being addressed in the framework of the ECHR. At the same time, according to a Resolution of the Committee of Ministers (CoM),[459] it continues to supervise the execution of judgments and the Russian Federation is required to cooperate and implement them.

Nevertheless, executions of judgments have already been problematic during Russia's membership of the CoE.[460] Since March 2022, Russia has stopped communicating with both the ECtHR and the CoM.[461] Moreover, Russia adopted a law[462] on 11 June 2022 which *inter alia* prevents the execution of judgments of the ECtHR issued after 15 March 2022. There is little hope, for the enforcement of any past or future judgements.

Thus, the immediate impact of the judgment in the case *Ukraine v. Russia (X)* itself will be very limited. Nevertheless, Ukraine may use it for justifying the seizure of frozen Russian assets for reparations,[463] or the readmission to the CoE might be made conditional on compliance with judgements.

Moreover, the CoE's decision might pose a problem from an individual rights perspective. It restricts legal protection for Russian citizens, which have been heavily relaying on the human rights protection system,[464] and it may affect those under Russia's 'effective control', such as in parts of Ukraine. This contradicts the fundamental purpose of a human rights system in providing remedies to victims of severe violations.

[457] ECtHR, Resolution on the consequences of the cessation of membership of the Russian Federation (n 11).
[458] Ibid.
[459] Council of Europe Committee of Ministers, Resolution CM/Res(2022)3 on legal and financial consequences of the cessation of membership of the Russian Federation in the Council of Europe (Adopted by the Committee of Ministers on 23 March 2022 at the 1429bis meeting of the Ministers' Deputies).
[460] Brummer (n 455) 265.
[461] Ausra Padskocimaite, 'Execution of the ECtHR's judgments against Russia: Some legal (and political) aspects', (*Strasbourgobservers*, 15 May 2023), <https://strasbourgobservers.com/2023/05/15/execution-of-the-ecthrs-judgments-against-russia-some-legal-and-political-aspects/> accessed 26 March 2024.
[462] Федеральный закон No 183-ФЗ "О внесении изменений в отдельные законодатель- ные акты Российской Федерации и признании утратившими силу отдельных положений законодательных актов Российской Федерации", 11 June 2022, Собра- ние законодательства Российской Федерации, 2022, No 24, ст. 3943, Article 7(1). See also, OSCE Report II (n 446) 11.
[463] Marko Milanovic, 'The Mariupol Test' (n 410).
[464] Brummer (n 455) 272.

V. Main Findings and Recommendations - *Ukraine v. Russia (X)*

The case *Ukraine v. Russia (X)* underscores the procedural strengths of the ECtHR, particularly in utilising inter-state applications as a powerful (last) resort to combat human rights violations. Simultaneously, the multitude of interrelated individual applications allows the Court in taking a lead role on the human rights issues in the conflict. The interim measures, promptly issued and explicitly addressed to Russia, served as a reminder of its obligations under the Convention and IHL. Third parties contributed to the case through their written submissions, although they refrained from becoming applicants.

Regarding conceptual questions raised in the case, it is anticipated that an authoritative statement on the extraterritorial application of the Convention will be made, which is relevant for other pending cases before the ECtHR. In this case, the extraterritorial application of the Convention under the spatial model, especially in cases of occupation, appears straightforward. However, adopting a simple approach that links killing to a state's effective control and power under the personal model is imperative to ensure broad human rights protection. Given the complexities of ongoing hostilities, some events may fall outside the Court's jurisdiction if it adheres strictly to the notion of the ‘context of chaos’. It would be desirable in this context to reconsider this approach. Ultimately, it is crucial that the application of the Convention does not create gaps in protection. An unsatisfactory outcome would be if Russia were allowed to commit violations on Ukrainian territory that it could not commit on its own, while Ukraine remains fully bound by the Convention, thus creating an imbalance that must be avoided.

Additionally, while the ECtHR currently does not address jus ad bellum, its flexibility and adaptability suggests that these considerations could become relevant in the future, potentially influenced by approaches seen in the HRC. An advantage in this regard is that the violation of jus ad bellum is clear-cut in this case.

In *Ukraine v. Russia (X)*, the ECtHR will also face the challenge of balancing Convention rights and International Humanitarian Law. It is advisable for the Court to provide clear guidance on potential norm conflicts and to ensure that human rights interpretations are guided by IHL rather than allowing IHL to overshadow human rights law, thus preventing a mere ‘humanitarisation’ of human rights.

In conclusion, this case raises many pertinent legal questions regarding the ECtHR's approach to armed conflict. Undoubtedly, the Court will face challenges due to the complexity of the case and Russia's position, which is clearly at odds with the ECtHR's system. For the first time, the Court will issue a ruling against a state that is not a member of the CoE and lacks representation by a judge elected in accordance with the ECHR's provisions, akin to a trial in absentia to some extent.[465]

However, the case also presents an opportunity for the Court to clarify and solidify its assessment of human rights in such contexts, reaffirming its legitimacy as a guardian of the Convention during armed conflict. The Court can take a leading role in upholding human rights in the ongoing conflict between Ukraine and Russia, and most importantly, the judgment will set a precedent for how the European Convention should apply in future cases beyond Ukraine's conflict.

F. Final Conclusion and Outlook

The European Court of Human Rights occupies a unique and critical role in the landscape of international law, especially amid armed conflicts. This thesis has demonstrated the Court's potential, showcasing its robust procedural infrastructure and flexibility in adapting to evolving conflict situations. However, it also underscores its limitations, such as its strict approach to extraterritorial jurisdiction and occasional challenges in balancing Convention rights with international humanitarian law.

Russia's war against Ukraine has prompted various international law and human rights institutions into action, all providing legal assessments of the attack and paving the way for accountability for the crimes committed.[466] These include, among others, the UN Human Rights Council, the OSCE Moscow Mechanism, preparations by the ICC for individual accountability, national jurisdictions, and special tribunals. Despite these efforts, the ECtHR plays an indispensable role. Ukraine's application before the ECtHR highlights the necessity of effective

[465] Alla Tymofeyeva, 'A Ray of Light in Dark Times: On the Importance of the Case of Ukraine and the Netherlands v. Russia' (*Liverpool Law School Blog*, 3 June 2024) < www.liverpool.ac.uk/law/blog/the-case-of-ukraine-and-the-netherlands-v-russia/> accessed 26 June 2024.
[466] See, Marika Lerch and Sara Mateos Del Valle, 'Russia's war on Ukraine in international law and human rights bodies: Bringing institutions back in' (8 April 2022) European Parliament Briefing <www.europarl.europa.eu/RegData/etudes/BRIE/2022/639322/EXPO_BRI(2022)639322_EN.pdf> accessed 26 June 2024.

legal mechanisms when other avenues, like the UN system, are unable to prevent or adequately respond, the International Court of Justice faces jurisdictional limitations, or the measures of International Criminal Court prove insufficient.

Thus, the ECtHR stands as a forum of last resort, preserving justice and accountability for serious human rights violations during international conflicts.

The Court not only provides a crucial legal recourse for individuals and states but also plays a pivotal role in shaping international legal standards. As armed conflicts continue to pose significant humanitarian challenges globally, the ECtHR's jurisprudence remains essential for advancing human rights protections and guiding future cases. Moreover, its principles can influence other human rights mechanisms, just as it can be influenced by approaches observed in bodies like the Human Rights Committee.

The implications of the Ukraine case extend beyond its immediate context, holding broader significance. For instance, the application of International Human Rights Law in conflicts like Israel-Hamas exhibits similarities to the Russia-Ukraine situation. Both conflicts involve increased engagement of IHRL bodies and other international legal entities applying IHRL, challenging how the traditional military-humanitarian balance is managed under International Humanitarian Law.[467] Therefore, the insights from the Ukraine case have universal implications, informing how human rights law intersects with and impacts armed conflicts globally.

An intriguing idea to explore further, though beyond the scope of this thesis, is what a comprehensive human rights approach to war would entail. Instead of debating the primacy of different legal regimes and resolving norm conflicts, this approach would focus on how human rights can optimise the effectiveness and protective capabilities of all legal frameworks, thus offering the best possible protection for victims. Would maintaining peace through a human rights-based approach to jus ad bellum and jus in bello be more feasible? Such a perspective prioritises human dignity and protection, potentially offering a more holistic and effective framework for addressing the complexities of armed conflicts.

[467] Yuval Shany, 'In Honor of Yoram Dinstein – Co-Application of IHL and IHRL: Some Takeaways from Ukraine and Gaza Wars (*Lieber Institute*, 29 April 2024) < https://lieber.westpoint.edu/co-application-ihl-ihrl-some-takeaways-ukraine-gaza-wars/> accessed 21 June 2024.

In conclusion, referring to Cicero's notion at the beginning, we are fortunate that in times of war, the law - and especially human rights law - does not fall silent. The ECtHR significantly contributes to upholding this principle, exemplified by cases like *Ukraine v. Russia (X)*, which is set to be a milestone in the history of inter-state proceedings. However, we must also consider regions of the world where basic human rights concepts are not widely accepted or think about situations such as the current in Israel-Gaza, which raises questions about the extent to which international law is being adhered to – and can indeed correspond to what the famous Roman philosopher and lawyer said already in 52 BC.

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