

## Human Rights vs Humanitarian Law or rights vs obligations: Reflections following the rulings in *Hassan* and *Jaloud*

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### 1. Introduction

In two recent cases, *Hassan v United Kingdom*<sup>1</sup> and *Jaloud v Netherlands*,<sup>2</sup> the European Court of Human Rights (ECtHR) extended the wartime application of International Human Rights Law (IHRL). Although these cases have been celebrated for reducing the horrors of war, this paper shows otherwise.<sup>3</sup> Critical examination of them suggests that applying IHRL to expand the wartime protection of civilians can be counterproductive.

Part 2 presents these recent rulings. Part 3 analyzes them in order to call attention to an unacknowledged problem with reliance on IHRL as a way of regulating wartime scenarios: doing so often results in lower civilian protection than when International Humanitarian Law (IHL) is relied upon. Part 4 uses Robert Cover's seminal work on rights-oriented vs obligations-oriented legal systems to explain why IHL (an obligations-oriented system) is better suited than IHRL to protect civilians during armed-conflicts. Part 5 responds to a counterclaim that may be raised against the present argument whereby practical necessity de-

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<sup>1</sup> App no 29750/09 (ECtHR 16 September 2014).

<sup>2</sup> App no 47708/08 (ECtHR 20 November 2014).

<sup>3</sup> L Hill-Cawthorne, 'The Grand Chamber Judgment in *Hassan v UK*' EJIL:Talk! (16 September 2014) <[www.ejiltalk.org/the-grand-chamber-judgment-in-hassan-v-uk/](http://www.ejiltalk.org/the-grand-chamber-judgment-in-hassan-v-uk/)> ('*Hassan* reflects an extremely important decision'); C DeKoker, 'Extra-territorial Jurisdiction & Flexible Human Rights Obligations: The Case of *Jaloud v the Netherlands*' Strasbourg Observers (8 December 2014) <[www.strasbourgobservers.com/2014/12/08/extra-territorial-jurisdiction-flexible-human-rights-obligations-the-case-of-jaloud-v-the-netherlands/](http://www.strasbourgobservers.com/2014/12/08/extra-territorial-jurisdiction-flexible-human-rights-obligations-the-case-of-jaloud-v-the-netherlands/)> ('the Court... is now slowly but surely moving towards a more expansive approach').



mands extending IHRL to armed-conflicts, since the ECtHR's jurisdiction is limited to IHRL. Israel's experience, among other things, is presented to respond to this counterclaim, demonstrating the potential existence of an IHL-oriented alternative to the ECtHR, in the form of review by domestic courts. In light of this alternative, the dispute over the wartime relations between IHL and IHRL is revealed to be less an expression of disagreements regarding the nature of human rights and more a symptom of the failure of domestic courts to uphold the rule of law in times of war.

## 2. *The Cases*

On April 23, 2003, British forces in Iraq, suspecting Tarek Hassan of being a combatant, arrested him at his home, in the Basra region, and detained him in a joint British-American camp. In September 2003, Hassan's body was found 700 kilometers from the camp, bearing signs of torture. According to British records, Hassan had been released on May 2, 2003, after they concluded that he was a non-combatant. What happened between May and September remains a mystery.<sup>4</sup>

The ECtHR considers it exceptional to require a state to protect the rights of individuals outside of its territory or a territory under its effective control (i.e., under its belligerent occupation).<sup>5</sup> Hassan's case was ruled to be such an exception, as the British, despite not having yet occupied the Basra region, were deemed to have had 'personal jurisdiction' over Hassan because of his detention (irrespective of his custody being shared with the Americans).<sup>6</sup> The UK, however, was not found to have violated Hassan's right to life, because evidence indicated that he was killed after having been released.<sup>7</sup> Regarding *Hassan's* personal liberty, the court applied the doctrine, originating with the International Court of Justice (ICJ), which states that although during hostilities IHRL generally applies alongside IHL, the test for what constitutes a violation of a human right 'falls to be determined by the applicable *lex*

<sup>4</sup> *Hassan* (n 1) paras 10-29.

<sup>5</sup> *Al-Skeini v United Kingdom* App no 55721/07 (ECtHR [GC], 7 July 2011) paras 130-142.

<sup>6</sup> *Hassan* (n 1) paras 70-77.

<sup>7</sup> *ibid* paras 62-63.



*specialis*, namely [IHL].<sup>8</sup> Because Hassan's detention was ostensibly in accordance with IHL, the court ruled that his right to liberty had not been violated.<sup>9</sup>

Shortly after the Hassan ruling, the ECtHR ruled in Jaloud's case, regarding the following events:

'On 21 April 2004, at around 2.12 a.m., an unknown car approached a vehicle checkpoint (VCP) [located on a road in] south-eastern Iraq [and] fired at the personnel guarding the VCP, all of them members of the Iraqi Civil Defence Corps (ICDC). The guards returned fire. No one was hit; the car drove off and disappeared... Called by the checkpoint commander... a patrol of six Netherlands soldiers led by Lieutenant A. arrived on the scene at around 2.30 a.m.... Some fifteen minutes later a Mercedes car approached the VCP at speed. It hit one of several barrels which had been set out in the middle of the road to form the checkpoint, but continued to advance. Shots were fired at the car: Lieutenant A. fired 28 rounds [and] shots may also have been fired by... ICDC personnel... At this point the driver stopped... Mr Azhar Sabah Jaloud, [a] passenger [inside] the car [was] hit [and subsequently] died.'<sup>10</sup>

Dutch authorities investigated the incident and determined that there had been no misconduct on the part of the soldiers.<sup>11</sup> The British were the occupier of that region; the Dutch were only assisting them, even relinquishing 'operational command' (their soldiers received their day-to-day orders from the British). Furthermore, the Dutch forces had not been regularly operating the checkpoint, arriving only 15 minutes earlier to aid the Iraqi forces there. Nevertheless, the ECtHR ruled that sufficient Dutch jurisdiction existed to bind the Netherlands to the duties of IHRL. It concluded that a state does not automatically become divested of its jurisdiction merely by deferring operational control to another state and that this was particularly so in the case at hand (a) because the Dutch retained the power to determine their forces' overall

<sup>8</sup> *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, para 25.

<sup>9</sup> *Hassan* (n 1) paras 96-109. In reaching its conclusion the court did not only rely on the *lex specialis* doctrine but also on art 31 of the Vienna Convention on the Law of Treaties 1969 (*ibid* paras 100-107).

<sup>10</sup> *Jaloud* (n 2) paras 10-13.

<sup>11</sup> *ibid* paras 39-48.



policy and (b) because they assumed sole responsibility for the area.<sup>12</sup> These two elements, however, were insufficient to give rise to Dutch jurisdiction. The determining factor, it seems, was that the checkpoint was manned by personnel under Dutch command and supervision.<sup>13</sup> In other words, it was ruled that the public authority exercised over the small ‘territory’ of the checkpoint was sufficient to deem those passing through to be under Dutch jurisdiction, thereby placing the Netherlands under a duty to protect their rights.<sup>14</sup>

The right to life places a state under a duty to carry out an effective investigation when its agents use deadly force. The ECtHR has determined in its case-law that this duty may arise even during armed conflicts, although its demands are more lax.<sup>15</sup> The Netherlands was found to have violated the victim’s right to life by failing to investigate his death effectively, because (a) key documents were not made available to judicial authorities or to the applicant, (b) the precautions taken to prevent collusion among witnesses and suspects were insufficient, (c) the autopsy was inadequate, and (d) evidence had been misplaced.<sup>16</sup>

### 3. *Have the rulings increased civilians’ protections?*

The rulings in *Hassan* and *Jaloud* serve to broaden the wartime application of IHRL in two ways: *spatially*, to territories beyond those under the state’s control and *temporally*, to periods of intensive fighting (as this is the typical wartime scenario when belligerent occupation has not been attained).<sup>17</sup> The question that arises is whether, aside from giv-

<sup>12</sup> See mainly *ibid* paras 143 and 149.

<sup>13</sup> *ibid* para 152.

<sup>14</sup> The ruling’s discussion of the jurisdictional issue (*ibid* paras 112-153) is not entirely clear, and therefore may be open to interpretations other than the one presented herein.

<sup>15</sup> *Al-Skeini* (n 5) paras 163-167. Other organs have also adopted this position; see eg *Public Commission to Examine the Maritime Incident of 31 May 2010: Second Report* (Israel 2013) 103-106 [Turkel Report].

<sup>16</sup> *Jaloud* (n 2) paras 226-28.

<sup>17</sup> Needless to say, these rulings are but two recent links in a lengthy chain. For prior ‘links’ see eg *Al-Skeini* (n 5); *Al-Jedda v UK* App no 27021/08 (ECHR 2011). Also, for listings of the ECtHR’s previous related rulings see: ECtHR Press Unit, Factsheet – Armed Conflicts (November, 2014) <[www.echr.coe.int/Documents/FS\\_Armed\\_conflicts\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf)>; ECtHR Press Unit, Factsheet – Extra-Territorial



ing the ECtHR jurisdiction, individuals have gained substantive protections as a result of the determinations that IHRL applies alongside IHL.

The answer is negative in both cases, as demonstrated below. Indeed, it has already been generally pointed out that ‘curiously, very few scholars or advocates have put forward... concrete... examples of the substantive, normative contribution of human rights law application.’<sup>18</sup> There was no such contribution in *Hassan*; the ECtHR explicitly ruled there that states need abide only by IHL to fulfill their IHRL duties.<sup>19</sup> Similarly, in *Jaloud*, there was no need to turn to IHRL for a legal basis for the state’s duty to effectively investigate suspected deaths of civilians. Ample basis already exists in IHL.<sup>20</sup> Although IHRL is clearly a source of inspiration when interpreting the term ‘effective investigation’, identical interpretations can be reached through IHL alone, which should be interpreted in a manner that balances humanity with military necessity. Even lacunae in IHL can be remedied without recourse to IHRL. The Martens Clause, an IHL norm, instructs that such lacunae be resolved in accordance with: ‘principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.’<sup>21</sup>

IHL-based solutions are not flawless, but neither is resorting to IHRL, which was not originally designed to regulate wartime actions. Many opine that resorting to IHRL may result in rulings that are overly demanding of armed-forces.<sup>22</sup> A less acknowledged problem is that in-

Jurisdiction of States Parties (November, 2014) <[www.echr.coe.int/Documents/FS\\_Extra-territorial\\_jurisdiction\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Extra-territorial_jurisdiction_ENG.pdf)>.

<sup>18</sup> N Modirzadeh, ‘The Dark Sides of Convergence: A Pro-civilian Critique of the Extraterritorial Application of Human Rights Law in Armed-Conflict’ (2010) 86 Intl L Studies 349, 390. Some might rush to respond that the idea of avoiding any reference to IHRL is paradoxical when applied to rulings by a court that only has jurisdiction when IHRL applies. However, as discussed below, finding a way to allow the ECtHR jurisdiction over extraterritorial wartime occurrences is an insufficient *procedural* motivation for making the *substantive jurisprudential* determination that IHRL applies to combat actions.

<sup>19</sup> *Hassan* (n 1) paras 96-109.

<sup>20</sup> Turkel Report (n 15) 73-82.

<sup>21</sup> Hague Convention (IV), (1907) 36 Stat 2277 preamble.

<sup>22</sup> Eg M Dennis, ‘Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed-Conflict’ (2007) 40 Israel L Rev 453, 473.



dividuals' substantive protections often decrease.<sup>23</sup> This problem is evident in both *Hassan* and *Jaloud*.

IHRL demands that states file formal derogation declarations if they intend to derogate from protecting certain rights (such as personal liberty) in circumstances of emergency.<sup>24</sup> The European Convention explicitly lists 'war' as an emergency that may justify a declaration of derogation.<sup>25</sup> But the UK did not enter a derogation in relation to the detention of individuals during the Iraq War; nor did most other states, when engaging in armed-conflicts. In view of IHL's *lex specialis* status, this state practice led the ECtHR, in *Hassan*, to conclude that IHL absolves states from the requirement to issue a derogation declaration in such circumstances.<sup>26</sup>

This ruling is flawed. States traditionally assumed that human rights treaties did not apply to their extra-territorial actions, and therefore felt exempt from filing derogation declarations. Nearly all wars fought by European states since the signing of the European Human Rights Convention were abroad, prompting the conclusion that the state practice of not issuing derogation declarations is not IHL-related but has to do with the states' interpretation of IHRL. Thus, once IHRL was ruled to be applicable extraterritorially in certain wartime situations, its requirement for a derogation declaration should have also been deemed applicable to these situations.<sup>27</sup> Moreover, the derogation procedure

<sup>23</sup> But see Modirzadeh (n 18) (discussing different protection reductions than those discussed herein).

<sup>24</sup> Eg International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 31 UNTS 269 art 4; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 27.

<sup>25</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 312 UNTS 221 art 15.

<sup>26</sup> *Hassan* (n 1) paras 40-42, 96-111. Stated differently, the court recognized that the member-States implicitly agreed through their subsequent (IHL-related) practice to modify the Convention's derogation demand (see *ibid* para 110).

<sup>27</sup> *Mobammed v MOD* [2014] EWHC 1369 (QB) paras 153-157. See especially para 155: '[its] wording... tends to suggest that Article 15 was not intended to apply to a war overseas which does not threaten the life of the nation. That is no doubt because those who drafted the Convention did not envisage that a state's jurisdiction under Article 1 would extend to acts done outside its territory. Now that the Convention has been interpreted, however, as having such extraterritorial effect, it seems to me that Article 15 must be interpreted in a way which reflects this.'



consists of two elements: (a) the state's decision regarding the extent to which it wishes to derogate from the protections accorded to certain rights (based on the emergency conditions and the limitations set by IHRL); and (b) the derogation declaration itself, which is independently significant, because it requires the state to acknowledge the emergency and the associated harm to human rights it is about to cause in its emergency response. IHL's *lex specialis* status affects the extent to which rights may be harmed (the first element). It need not affect the requirement of a declaration (the second element), as IHL is indifferent to war declarations of any form.<sup>28</sup> The flawed legal reasoning in *Hassan* suggests a possible alternative motive behind the decision to absolve states from the derogation declaration demand: a desire of the ECtHR to reassure states that it does not intend to overly scrutinize their actions, after considerably expending its jurisdiction.

The ruling in *Hassan* can easily be corrected in future rulings, but *Jaloud* attests to a deeper problem, inherent in determining that wartime state duties are rooted in IHRL, not in IHL. Consider the hypothetical scenario of the Dutch forces sent to help the soldiers operating the checkpoint, walking toward the checkpoint as a car speeds past them. Feeling threatened, they shoot at the car, killing a civilian passenger. Clearly, these Dutch soldiers did not exercise sufficient public authority over the road for Dutch 'jurisdiction' to exist. Therefore, if the duty to conduct an effective investigation (without misplacing evidence, preventing collusion between suspects, etc.) is based on IHRL, the Dutch are under no such duty—even though there is no convincing reason to distinguish this case from *Jaloud*. By contrast, if we consider this duty to be based on IHL, it applies as much to this scenario as to *Jaloud*.

This absurd predicament is derived from the historical/jurisprudential connection between 'rights' and 'jurisdiction.' Recognition of universal inalienable rights does not mean, *ipso facto*, that agents of all states are under a duty to protect these rights.<sup>29</sup> As Vattel already pointed out: 'though [each person's human] right[s] [are] necessary and perfect in the general view... we must not forget

<sup>28</sup> *Manual of the Law of Armed-Conflict* 28-29 (UK 2004).

<sup>29</sup> S Besson, 'The Extraterritoriality of the European Convention on Human Rights' (2012) 25 *Leiden J Intl L* 857, 859.



that [they are] but imperfect with respect to each particular country'.<sup>30</sup> Placing state agents under a duty to protect rights with regard to certain individuals was originally justified based on jurisprudence that closely relates to the state's personal and territorial jurisdiction. As Cover noted:

'The jurisprudence of rights... has gained ascendance in the Western world together with the rise of the national state with its almost unique mastery of violence over extensive territories... [I]t has been essential to counterbalance the development of the State with a myth which... establishes the State as legitimate only in so far as it can be derived from the autonomous creatures who trade in their rights for security...'<sup>31</sup>

Cover indicates two realms where imposing a duty on state agents to protect individuals' rights is widely accepted. The first is the relation between citizens and their state, because according to the social contract philosophy, the state was created to ensure its citizens' rights. But states have limited capabilities, and therefore cannot always protect their citizens' rights wherever they are found. The territorial jurisdiction of the state is, therefore, typically regarded as a practical proxy for the state's personal jurisdiction over its citizens.<sup>32</sup> As a result of the reliance on this proxy, a state's duties regarding the protection of its citizen's rights abroad are limited in comparison with the hypothetical scope that would have been set purely on social compact philosophy. On the other hand, the state is considered duty-bound to protect the rights of foreigners found within its territory (although the aforementioned description greatly oversimplifies historical and jurisprudential issues<sup>33</sup>). The

<sup>30</sup> E de Vattel, *The Law of Nations* (Robinson 1797) 108.

<sup>31</sup> R Cover, 'Obligation: A Jewish Jurisprudence of the Social Order' (1987) 5 *JL & Religion* 65, 69.

<sup>32</sup> See Antonio Cassese et al, *Cassese's International Criminal Law* (3rd edn, OUP 2013) 274 (discussing the transition from personal to territorial jurisdiction as the default form of jurisdiction that accompanied the rise of modern states).

<sup>33</sup> Certain legal protections to foreigners (not rooted in IHRL) have existed long before: (1) the rise of modern states; (2) the maturation of Social Contract jurisprudence (and its vast acceptance as the jurisprudential basis for sovereign power (at least in democracies)); or (3) the consolidation of the modern conceptualization of territoriality. Social Contract jurisprudence relies on the existence of a certain kind of a personal connection (a 'contractual' one) as the determining factor for recognizing a special





resulting territorial sovereignty principle, as already stated in the *Island of Palmas* case, ‘serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian’.<sup>34</sup> In fact, even the European Human Rights Convention was drafted with this traditional perspective in mind. ‘[T]hose who drafted the Convention did not envisage that a state’s jurisdiction under Article 1 would extend to acts done outside its territory.’<sup>35</sup> They, accordingly, phrased the Convention’s preamble and Article 1 to state:

‘Considering [that] the Universal Declaration of Human Rights... aims at *securing the universal and effective recognition and observance* of the Rights therein declared;... Being resolved, as the governments of European countries... to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration, Have agreed [that] The High Contracting Parties *shall secure to everyone within their jurisdiction* the rights and freedoms defined in Section I of this Convention.’<sup>36</sup>

This traditional perspective, thus, regards IHRL, and the international organs charged with enforcing it (including the ECtHR), as mechanisms aimed at restraining the state from shirking the human rights-related duties it owes to its citizens and to individuals within its territory.<sup>37</sup>

It is relatively widely accepted that making the duty of states to protect human rights correspond with their territorial sovereignty easily leads to the conclusion that such a duty should also exist in the relations be-

relationship between individuals and a sovereign. But despite that fact, its maturation and the consolidation of the modern conceptualization of territoriality have both occurred roughly at the same time, and both played a pivotal role in the rise of modern states. See Cover (n 31) 69; J Mostov, *Soft Borders* (Palgrave Macmillan 2008) 80; Cassese (ibid). The simultaneous occurrence of these three processes brought about a human rights-oriented, re-conceptualization of the relations between states and foreigners and of the differences between such relations and the relation between each state and its own citizens.

<sup>34</sup> *Island of Palmas* (1928) 2 RIAA 829, 839.

<sup>35</sup> Mohammed (n 27) para 155.

<sup>36</sup> European Convention (n 25) preamble and art 1 (emphasis added).

<sup>37</sup> Besson (n 29) 863-864.



tween a belligerent occupier and the residents of the occupied territory. The occupier, after all, is the ruler of the territory, albeit temporarily.<sup>38</sup>

Are there additional situations in which states are under an obligation to protect individuals' rights? Justifying such obligations in other situations based on the social compact ethos is challenging. To address this difficulty, an array of universalist theories have recently been advanced, offering an alternative 'ethos' in an attempt to place a general duty on all states to protect (or at least not harm) anyone whose life they affect. The motivation behind such attempts is understandable: many state actions negatively affect the lives of non-citizens found abroad, and there is considerable injustice in not demanding that states be concerned with this.<sup>39</sup>

Universalist theories, however, have not garnered full support. On the philosophical level, opponents have argued that such theories fail to grasp the 'true' nature of rights, which presupposes a certain relation between the right-bearers and those placed under a duty to protect them.<sup>40</sup> On the practical level, it has been argued that these theories impose unrealistic demands on states, especially during armed-conflicts.<sup>41</sup>

Many middle-ground approaches have also been offered.<sup>42</sup> The *Has-san* and *Jaloud* rulings may be understood as such for they continue to adhere to a jurisdictional constraint while simultaneously attempting to widely define the concept of 'jurisdiction'.<sup>43</sup> Such middle-ground approaches, however, as is often the case with normative compromises,

<sup>38</sup> Turkel-Report (n 15) 67. But see Y Dinstein, 'The International Law of Belligerent Occupation and Human Rights' (1978) 8 *Israel YB Human Rights* 104, 113-116; Modirzadeh (n 18) 363-367.

<sup>39</sup> See M Saliternik, 'Reducing the Price of Peace: Human Rights Responsibilities of Third-Party Facilitators' (forthcoming) *Vanderbilt J Transnational L* 30-34 <<http://globaltrust.tau.ac.il/wp-content/uploads/2014/11/Michal-Saliternik-WPS-new-version.pdf>> (discussing such approaches). See also E Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 *AJIL* 295.

<sup>40</sup> Modirzadeh (n 18) 371-374.

<sup>41</sup> Dennis (n 22) 473.

<sup>42</sup> Modirzadeh (n 18) 370-373 (discussing such approaches).

<sup>43</sup> Many other middle-ground approaches attempt to 'cherry-pick' international human rights, by applying only some rights in only some wartime situations. See eg M Sassoli, LM Olson, 'The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' (2008) 90 *Intl Rev Red Cross* 599.



are ambiguous and lead to normative incoherence.<sup>44</sup> Admittedly, if forced to choose, I would prefer an ambiguous middle-ground approach over either of the two polar extremes of (a) fully or (b) never applying IHRL to wartime situations. But such a choice is generally unnecessary because there is yet another alternative: applying IHL while properly interpreting and developing it.

#### 4. *The benefits of relying on IHL*

Robert Cover has shown that some legal systems are rooted in the notion of ‘human rights’, while others in the notion of ‘obligations’ and that:

‘There are certain kinds of problems which a jurisprudence of [obligations] manages to solve rather naturally. There are others which present conceptual difficulties of the first order. Similarly, a jurisprudence of rights naturally solves certain problems while stumbling over others... It is not... that particular problems cannot be solved, in one system or the other — only that the solution entails a sort of rhetorical or philosophical strain.’<sup>45</sup>

Each system’s core notions, rights vs obligations, are related to a jurisprudential ‘story’ that helps reveal the problems that the system is likely to solve more effectively. The original ‘story behind the term ‘rights’ is the story of social contract.’<sup>46</sup> By contrast, IHL is an obligations-oriented system, originating in the status-based socio-legal structure of the Middle-Ages, and, according to many, there are still strong

<sup>44</sup> Besson (n 29) 858; Modirzadeh (n 15) 370-373. See also S Benhabib, ‘Another Universalism: On the Unity and Diversity of Human Rights’ (2007) 81(2) *Proceedings & Addresses American Philosophical Association* 7, 9 (‘There is wide-ranging disagreement in contemporary thought about the philosophical justification as well as the content of human rights [which] inevitably lead to... ‘cherry-picking’ among various lists of rights’).

<sup>45</sup> Cover (n 31) 70-71.

<sup>46</sup> *ibid* 66.

moral and practical reasons for it to remain a status-based, obligations-oriented system.<sup>47</sup>

Given its historical and jurisprudential ties to the social contract ethos, rights-oriented jurisprudence functions effectively in the context of actions performed within a state's territory, but not quite as well when applied to extraterritorial actions affecting foreigners. By contrast, IHL, a status-based, obligations-oriented system, is less affected by territorial boundaries as one's duties go wherever one goes.<sup>48</sup> This difference can be demonstrated in readiness of different courts to review extraterritorial air-bombings by states. The Israeli Supreme Court considers itself authorized to review Israeli extraterritorial air-bombings.<sup>49</sup> Its longstanding position is that 'every Israeli soldier carries in his backpack [wherever he goes] the rules of... the law of war' and judicial scrutiny is needed to assure that that is indeed so.<sup>50</sup> By comparison, the ECtHR, whose jurisprudence is rights-based, concluded that it lacks authority to review such air-bombings, as insufficient public authority is exercised by the bombers for state jurisdiction to exist.<sup>51</sup> The decision

<sup>47</sup> Modirzadeh (n 18) 362. The reasons in support of IHL remaining a status-based, obligations-oriented system go beyond the fact that such conceptualization makes it easier to apply IHL extraterritorially. Many opine that the moral/legal precept that one should not harm others — to which self-defense is the most widely accepted moral and legal exception — should be conceived in terms of a moral/legal duty and not be relegated to being a mere manifestation of the right to life. See eg HLA Hart, 'Are There Any Natural Rights?' (1955) 65 *Philosophical Rev* 175, 183-186. The core *jus in bello* duties of soldiers are widely regarded as being rooted in restrictions set by self-defense morality (subsequent to certain adaptations and qualifications). See I Porat, Z Bohrer, 'Preferring One's Own Civilians: May Soldiers Endanger Enemy Civilians More Than They Would Endanger Their State's Civilians?' (2015) 47 *George Washington Intl L Rev* 99. In other words, these restrictions are widely regarded as being rooted in derivatives of the moral/legal *duty* not to harm others.

<sup>48</sup> Modirzadeh (n 18) 352-355.

<sup>49</sup> HCJ 9594/03 *B'tselem v Military Advocate General* (2011). Unlike the two cases below, this petition was rejected on its merits; namely, the court considered itself authorized to review the military action. Moreover, the court pressured the military to change its policy and dismissed the case only after being satisfied that the policy had been properly reformed.

<sup>50</sup> HCJ 393/82 *Jamait-Askan v IDF* (1983) 37(4) PD 785, 810.

<sup>51</sup> *Bankovic v Belgium* App no 52207/99 (ECtHR, 12 December 2001). While supporters of universalist and (some) mid-way approaches strongly hope and believe that the day will soon come when the ECtHR will overturn the *Bankovic* ruling, I seriously doubt that that will ever happen. For to rule that a dropping of a bomb, in and of itself, gives rise to the coming into existence of state jurisdiction is to, de facto, nullify



of the US District Court in *Al-Aulaqi* demonstrates that, if rights-based jurisprudence is applied, substantive judicial review is unlikely even when the enemy target is a citizen of the attacking state. The court declined to review a decision to include Al-Aulaqi (an American al-Qaeda member) in the US 'targeted killing list', irrespective of whether that decision constituted a denial of due process, based on an abuse of rights rationale. It ruled that: 'no US citizen may stimulatingly avail himself of the US judicial system and evade US law enforcement authorities'.<sup>52</sup>

This is not to say that rights-based jurisprudence cannot resolve problems arising from the extraterritorial actions of states. Only that, in Cover's words, doing so entails 'rhetorical [and] philosophical strain[s]'.<sup>53</sup>

Cover also showed that reliance on rights-oriented jurisprudence may prove problematic when 'it is not clear to whom [the right] is address[ed]' because it is likely to result in 'a series of attempts [by state agents] to foist the responsibility off to someone else'.<sup>54</sup> Hence, in cases such as *Jaloud*, when agents of several states control a territory (Americans at the macro-level, British regionally, Dutch locally, and Dutch and Iraqis jointly on the spot), it is more advantageous to deem it to be the *duty* of a military commander to effectively investigate a suspicious death in which his forces were involved, than to grant the deceased (by way of his family) the right to have his death effectively investigated. Otherwise, each state's agents may attempt to foist the responsibility to ensure this right onto someone else, which is likely to result in an inadequate investigation.<sup>55</sup>

the demand for jurisdiction set in the European Convention. Indeed, despite considerable academic criticism, during the decade and a half that has passed since that ruling, the ECtHR has not overturned it. Rather, it merely applied a somewhat wider definition of 'jurisdiction' in (some) subsequent rulings (such as, in *Hassan* and *Jaloud*). See S Hartridge, 'The European Court of Human Rights' Engagement with International Humanitarian Law', in D Jinks et al (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies* (Springer 2014) 257, 267-270.

<sup>52</sup> *Al-Aulaqi v Obama* (DDC 2010) 727 F Supp 2d 1, 18.

<sup>53</sup> Cover (n 31) 71.

<sup>54</sup> *ibid* 71-72.

<sup>55</sup> Wartime criminal investigations are extremely time-consuming and time is a rare commodity for commanders and soldiers during wartime actions. Even more significantly, such investigations are extremely disruptive: impeding the motivation among soldiers to fight, reducing the level of trust between 'brothers-in-arms', et cetera. This is not to say that investigations should not be conducted when suspicions of



Cover further suggested that '[t]he myth of social contract is a myth of coequal autonomous, voluntary acts, [and so, it] posits [active] participation'.<sup>56</sup> Thus, personal problems can be expected to be solved properly in a rights-based system when the individuals are able to actively demand that their rights be protected, which is less likely in the case of disempowered individuals. Cover demonstrates this issue by discussing how each system guarantees that defendants are properly attired for their trial to ensure that the convict's garb or poor man's clothes they may ordinarily wear do not unconsciously affect the judge's/jury's decision. In a rights-based system, this problem is often poorly resolved because courts are likely to rule that if the defendant appears in convict's garb 'in the absence of timely objection by counsel the right [to be dressed properly would be] deemed waived'.<sup>57</sup> By contrast, in an obligations-based system, this problem is generally resolved, because the legal position is likely to be that judges are duty-bound by their responsibility to assure a fair trial to ensure that defendants are properly dressed.<sup>58</sup>

This issue can also be demonstrated regarding the likelihood that each system will successfully ensure the safe return of released wartime detainees to their places of residence. It stands to reason that released detainees are more likely to return home safely if their families are notified of their expected return. The British military orders applicable in *Hassan* further stipulated that safe return is more likely to occur if detainees are released close to their homes 'in daylight hours'.<sup>59</sup> One might ponder whether a rights-oriented jurisprudence should serve as the basis for the regulation of this issue? That is, should family notification and daylight drop-off be defined as rights, and as such their implemen-

wrongdoings arise. It is only stated herein to clarify that even a commander who is not evil nor corrupt, might be tempted to distance himself and his soldiers as much as possible from involvement in the investigation if the opportunity arises. The possible presence of an uncoordinated plurality of responsible persons that is created under an IHRL conceptualization of the issue presents such an opportunity. Hence, in practice, often, a conceptualization of the issue as an obligation of the relevant military commander under IHL, and as a right of the relatives under IHRL, could not co-exist.

<sup>56</sup> Cover (n 31) 73.

<sup>57</sup> *ibid.* 72. Cover further discusses attempts made in such systems to solve this problem. Yet as noted by Cover, such solutions entail rhetorical and philosophical strains.

<sup>58</sup> *ibid.*

<sup>59</sup> *Hassan* (n 1) para 26.



tation should rely on the individuals' demands? If the answer is affirmative, Hassan, upon discovering that he was going to be released at night (according to British records he was dropped off one minute after midnight)<sup>60</sup>, could have been expected to oppose his release and demand to be dropped off the next morning. Similarly, if family notification is considered a right, state agents are permitted to leave to the released detainees the responsibility of notifying their families, when dropping them off in a *warzone*. In other words, irrespective of what happened to Hassan after his release, had the detaining British forces been scrutinized on the basis of an obligations-oriented jurisprudence, they would have been more strongly reprimanded, proving again that developing IHL is often a more appropriate course of action than wartime application of IHRL.

5. *The Israeli experience and the candor of the position herein presented*

Despite the potential harm that may result from reliance on rights-oriented framing of wartime situations, one might argue that doing so is necessary. The ECtHR's jurisdiction is limited to IHRL, and currently no tribunal that is authorized to adjudicate IHL has shown the same readiness as the ECtHR to review states' military actions. Thus, if wartime issues are not framed in IHRL vocabulary, such actions will not be judicially scrutinized.<sup>61</sup> But as the Israeli experience shows, the potential for an IHL-oriented judicial alternative to the ECtHR does exist.

In Israel, most petitions against the government go directly to the Supreme Court, acting as a High Court of Justice (HCJ). Until the 1990s, Israel, like the UK, had no constitutional bill of rights that allowed voiding laws. Judicial scrutiny of the executive branch relied, and still does to some degree, on unwritten administrative law that for historical reasons is strongly rooted in obligations-based jurisprudence.<sup>62</sup> Following Israel's occupation of Gaza and the West Bank, the HCJ decided to allow Palestinians to petition against Israeli military command-

<sup>60</sup> *ibid* para 28.

<sup>61</sup> See Modirzadeh (n 18) 390.

<sup>62</sup> G Davidov, A Reichman, 'Prolonged Armed-Conflict and Diminished Deference to the Military: Lessons from Israel' (2010) 35 L & Social Inquiry 919, 922-926.



ers, despite not having explicit authority to review extraterritorial state actions. It ruled: (a) that the Israeli military must conduct itself in accordance with both customary IHL and Israeli administrative law because every Israeli soldier carries both kinds of norms ‘in his backpack’ wherever he goes and (b) that the jurisprudential basis for its authority to review such extraterritorial actions stems from the HCJ’s role as the organ charged with scrutinizing the legality of governmental actions and its authority to grant relief deemed necessary in the interest of justice.<sup>63</sup> Notice that both elements of the court’s decision rely on obligations-based rationales. Since the 1980s, based on the government’s duty to abide by the rule of law (again, an obligation-based rationale), the HCJ almost entirely did away with the doctrines of ‘justiciability’ and ‘standing’.<sup>64</sup> As a result, even petitions against extraterritorial Israeli military actions not conducted in the context of occupation are examined by the court.<sup>65</sup>

Thus, the Israeli HCJ has become extremely proactive in reviewing conflict-related state actions. It has dealt with a variety of cases, ranging from macro-issues (the security barrier, interrogation techniques) to miniscule ones (tree cutting in a single orchard).<sup>66</sup> Occasionally, it even reviews military actions in real-time, summoning officers from the battlefield to give testimony.<sup>67</sup> The volume of cases is impressive: research from 2010 shows that during 1990-2005, the court examined 410 military-related cases, 207 of them during 2000-2005.<sup>68</sup> The research also examined the full extent to which the court’s scrutiny has led the military to change its decisions; this includes not only petitions that were accepted, but also some petitions that were formally rejected – namely, those whose acceptance became unnecessary because, prior to the court’s ruling, the military, under pressure from the court, was forced to

<sup>63</sup> *Jamait-Askan* (n 18) 810.

<sup>64</sup> Davidov, Reichman (n 62) 926. Formally, the court did not abolish these doctrines. But it left itself almost unlimited discretion to decide when to apply them and, in practice, it rarely does so.

<sup>65</sup> Eg HCJ 9132/07 *Abmed v Prime Minister* (2008) <[http://elyon1.court.gov.il/Files\\_ENG/07/320/091/n25/07091320.n25.pdf](http://elyon1.court.gov.il/Files_ENG/07/320/091/n25/07091320.n25.pdf)>.

<sup>66</sup> Davidov, Reichman (n 62) 919-922.

<sup>67</sup> Eg HCJ 4764/04 *Physicians for Human Rights v IDF* (2004) 58(5) 385; HCJ 201/09 *Physicians for Human Rights v Prime Minister* [2009] Israel LR 1.

<sup>68</sup> Davidov, Reichman (n 62) 939.





change its original decision.<sup>69</sup> The examination revealed that in about 25% of the cases, the military was forced to change its decisions at least partially, rising to 40% during the period of 2000-2005.<sup>70</sup>

The 2000-2005 data is especially important, since during that period, Israel and the Palestinians lived through one of the bloodiest periods of their perpetual conflict, known as the 'Second Intifada'. Despite the intensive fighting, resulting in approximately 1,000 Israeli casualties (70% civilians),<sup>71</sup> judicial scrutiny considerably *increased*, possibly because judges gained greater expertise in military matters owing to the high volume of cases. Such an increase is contrary to the typical tendency, 'in states of emergency, [of] national courts [to] assume a highly deferential attitude when called upon to review governmental actions and decisions.'<sup>72</sup>

While the HCJ did occasionally rely on human rights in these rulings, these were usually common-law rights rooted in Israeli administrative law (namely, in notions regarding the duty of state agents to assure core human rights). It was generally reluctant to apply IHRL,<sup>73</sup> or Israeli Constitutional Rights.<sup>74</sup> Rather, its decisions relied mostly on IHL and Israeli administrative law, i.e., on obligations-based norms.

<sup>69</sup> *ibid* 928.

<sup>70</sup> *ibid* 939-943. One should keep in mind that such judicial pressure could not have been effective without the court's position as to the obligations of soldiers in relation to the laws of war and as regards its own authority to scrutinize the compliance by soldiers with those duties; nor without the occasional rendering by the court of rulings in favor of petitioners on the basis of that position. For an empirical study demonstrating the advantages of the course of action taken by the Israeli HCJ, see M Hofnung, K Weinshall-Margel, 'Judicial Setbacks, Material Gains: Terror Litigation at the Israeli High Court of Justice' (2010) 7 J Empirical LS 664 (examining a sample of 200 cases of the HCJ's 2000-2008 terror-related rulings).

<sup>71</sup> 'Israeli-Palestinian Fatalities Since 2000' (UN-OCHA, 2007) <[www.ochaopt.org/documents/cas\\_aug07.pdf](http://www.ochaopt.org/documents/cas_aug07.pdf)> (approximately 4000 Palestinians were killed). The number of Israeli casualties is in the text (while the number of Palestinian casualties is mentioned in the footnote) only in order, to stress the fact that the HCJ increased its scrutiny despite the serious emergency experienced by the Israeli society.

<sup>72</sup> O Gross, 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?' (2003) 112 Yale L J 1011, 1034.

<sup>73</sup> HCJ 7957/04 *Mara'abe v Prime Minister* (2005) paras 26-27 <[http://elyon1.court.gov.il/Files\\_ENG/04/570/079/A14/04079570.A14.pdf](http://elyon1.court.gov.il/Files_ENG/04/570/079/A14/04079570.A14.pdf)>.

<sup>74</sup> HCJ 8276/05 *Adalah v. MOD* [2006](2) Israel LR 352, 368-372 <[www.hamoked.org/files/2010/8299\\_eng.pdf](http://www.hamoked.org/files/2010/8299_eng.pdf)>.



Of course, any jurist (myself included) may find some cases in which he/she opines that a different course of action should have been taken by the HCJ. But to dismiss the significance of the 'Israeli experience' due to the existence of such individual cases is to miss the forest for the trees; this is especially so in light of the vast amount of cases. Indeed, to the best of my knowledge, the HCJ scrutinizes military actions much more closely than domestic courts in any other state, to an extent that most non-Israelis, in my experience, simply fail to grasp (irrespective of their position regarding the Israeli-Palestinian conflict). Furthermore, the experience of many military legal advisers I know has generally been that high-ranking and mid-level military commanders rarely criticize the Court's activism. Commanders, it seems, have become accustomed to judicial scrutiny as part of the process.

Usually, the actual goal of those who currently oppose the wartime application of IHRL is (presumably) 'saving our armed-forces from defeat by judicial diktat.'<sup>75</sup> Hence, one might intuitively suspect that in this article once again the argument in favor of IHL is only a disguise for the underlying agenda of decreasing the juridical scrutiny of armed-forces' combat actions. However, this is mistaken. One should keep in mind that for many decades the positions were somewhat contradictory to what they are today. When it came to non-international armed conflicts, states often denied that the strife they were embroiled in was indeed an armed conflict, rather considering it as internal disorder; namely, a situation to which IHRL, but not IHL, applies. States attempted to avoid the application of IHL – which forced them reluctantly to accept the applicability of IHRL – in order to shirk their duties according to Common Article 3 of the Geneva Conventions. To clarify, similar duties also exist in IHRL. Yet while the stigma of violating the laws of war was already considered extremely grave at the time, the implications for states of being deemed a violator of IHRL was considerably weaker than today.<sup>76</sup> At the time, those wishing to expend civilians' wartime protections asserted that IHL, and not IHRL, was the relevant law to be

<sup>75</sup> R Ekins, J Morgan, T Tugendhat, *Clearing the Fog of Law: Saving Our Armed-Forces from defeat by judicial diktat* (Policy Exchange, 2015) <[www.policyexchange.org.uk/images/publications/clearing%20the%20fog%20of%20law.pdf](http://www.policyexchange.org.uk/images/publications/clearing%20the%20fog%20of%20law.pdf)>.

<sup>76</sup> J Pictet, *Humanitarian Law and the Protection of War Victims* (AW Sijthoff, 1975) 58.



applied. In fact, in 1975, the Vice-President of the ICRC, Jean Pictet explicitly admitted that, while he believed that '[t]here may be two ways promoting new law to that end: [1] extending... the Geneva Convention or [2] human rights legislation, [traditionally] the ICRC favored the former solution'<sup>77</sup>, for 'the lack of a 'spearhead' for human rights—that is, an operational body—[was] keenly felt.'<sup>78</sup> Only, in the last two decades, subsequent to the ECtHR 'spearheading' the enforcement of international human rights, have the tables (somewhat) turned. In other words, preferring IHL over IHRL is not necessarily motivated by any intention to reduce judicial scrutiny.

Yet contrary to Pictet's position (and to that of most current opponents of the wartime application of IHRL), I do not believe that, in the context of combat actions, the choice between routinely resorting to IHRL and primarily relying on IHL should be guided by attempting to influence the extent of judicial scrutiny. As shown, the option of primarily relying on IHL should be preferred because that body of law is better suited to regulate such actions. Moreover, contrary to the belief of most current opponents of the wartime application of IHRL, relying primarily on IHL can in fact increase judicial scrutiny (and thus lead to an increase of the constraints placed on the armed-forced) in comparison to the current state of affairs whereby juridical scrutiny is mainly IHRL-oriented. The constraints placed on armed forces as a result of such scrutiny will simply be better tailored to the circumstances with which such forces are faced during combat actions.

## 6. Conclusion

Supporters of extensive wartime application of IHRL argue that such application is necessary because IHL alone fails to provide sufficient protection to individuals. The paper shows the inaccuracy of this claim – demonstrating, through the recent cases of *Hassan* and *Jaloud*, that applying IHRL to expand civilians' wartime protection can actually be counterproductive.

<sup>77</sup> *ibid* 58-59

<sup>78</sup> *ibid* 60.

It may be that but for a rights-oriented framing, which facilitates ECtHR jurisdiction, military actions would not be judicially scrutinized, which would in practice diminish civilian protection. If that is the case, what is needed is not to expand the wartime application of IHRL, but to create a tribunal that would proactively scrutinize the military actions of States on the basis of IHL. Domestic courts have the ability to conduct such IHL-based scrutiny and the Israeli HCJ, indeed, has risen to this challenge. Courts in other states have only occasionally shown readiness to conduct such scrutiny, and (to the best of my knowledge) none have reached the HCJ's level of proactivity. The ECtHR appears to feel the need to fill the void left by insufficient domestic judicial action. Due to the limits of its substantive jurisdiction, in order to fill that void, it is forced to develop doctrines that expand IHRL spatially and temporally. The dispute over the relation between IHL and IHRL therefore stems more from domestic courts' failure to rise to the challenges of contemporary warfare, than from any philosophical disagreement over the nature of human rights.