'Hard power 'and the European Convention on Human Rights

Kempees, P.M.

1 Introduction

1.1 The European Convention on Human Rights and 'hard power'

In Article 1 of the European Convention on Human Rights,[1] the High Contracting Parties undertake to 'secure to everyone within their jurisdiction the rights and freedoms' defined in its Articles 2-11 and, by extension, in the Protocols to the Convention. This very phrasing makes it clear that the primary responsibility to protect human rights rests with the High Contracting Parties themselves. The role of the European Court of Human Rights,[2] defined in Article 19 of the Convention, is essentially supervisory.

In ordinary circumstances the Parties to the Convention expect to entrust compliance with human rights standards to a competent administration faithfully applying domestic law. Contentious human-rights issues will nonetheless arise; these will be dealt with the domestic courts, which in so doing will also apply rules of domestic law subject as necessary to rules of international human rights law. At the same time citizens expect the State to protect them against the violence of others. It is for that reason that the State enjoys a monopoly on the use of force[3] – or, to use an expression that we will introduce presently, 'hard power'.[4]

The armed forces of our countries also protect human rights. This they do at the most basic level possible. Individual freedom, political liberty and the rule of law[5] would not survive for long unless defended by the credible threat – and if necessary, the actual use – of military force: put differently, the exercise of 'hard power' on behalf of the State.[6]

In recent years the European Court of Human Rights has been called to pass judgment on the actions of servicemen doing their duty towards the countries they served. In several such cases the Court has had to find breaches of the Convention. Such findings have sometimes met with a frosty reception from respondent governments. The defence minister of one of the Convention's Contracting States, for example, has gone on record stating that 'the cumulative effect of some of Strasbourg's decisions on the freedom to conduct military operations raises serious challenges which need to be

1 Hereafter "the Convention".
2 Hereafter "the Court".
3 *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, § 325, ECHR 2007-II.
4 See 1.2.3 below.
5 Preamble to the Statute of the Council of Europe, third paragraph.
6 See generally Dwight Raymond, "Military Means of Preventing Mass Atrocities", in *Reconstructing Atrocity Prevention* (Sheri P. Rosenberg, Tibi Galis, Alex Zucker, eds.), Cambridge University Press 2016, pp. 295-318.

addressed'.[7] In the same country, a member of parliament (a former soldier) has published an article in the press arguing that the 'imposition' of 'complex human rights law' designed, as he sees it, solely for application in peacetime 'changes the conditions of service and hampers the ability of soldiers to fight, because human rights law does not accept that there is anything unique about a military operation'.[8]

Closer to home, the Court has on occasion had to find fault with use of force lawful in terms of domestic law to eliminate a terrorist threat or put an end to a terrorist attack. The public, and especially some sectors of the press, have sometimes been dismissive of such findings.[9]

It is easy to dismiss statements of politicians as mere politics, and the rants of journalists as facile; but even the most ardent human rights defender must at least make an effort to understand the frustration of governments, not to mention their military forces, at being taken to task for having violated the human rights of an often ruthless enemy. One cannot but sympathise with the bewildered soldier and his or her political superiors. Likewise, the view that it is justified to use lethal force to keep the public safe from terrorism is hardly incomprehensible. Even so, it is submitted that those who argue that the European Convention on Human Rights imposes unreasonable constraints on the meaningful use of 'hard power' are wrong.

The first basic supposition defended in this work is that the Convention itself makes sufficient provision for the legitimate use of 'hard power' in difficult situations. It should not be forgotten that the Convention itself was created only a few short years after the Second World War, the bloodiest conflict in human history so far, and after two colonial empires – British India and the Netherlands East Indies – had wrested themselves free from European overlordship: the first of many.[10] Actual drafting took place even as new conflicts threatened to tear Europe apart. NATO, the

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7 The Rt Hon Sir Michael Fallon MP, Secretary of State for Defence of the United Kingdom, speaking at the Policy Exchange seminar 'Clearing the "Fog of Law"' on 8 December 2014. See also Haijer, F.A. & Ryngaert, C.M.J., "Reflections on *Jaloud v. the Netherlands* – Jurisdictional Consequences and Resonance in Dutch Society", *Journal of International Peacekeeping* 19 (2015), pp. 174-189, p. 185.

8 Tom Tugendhat MP, "Human rights lawyers now present a real threat to British troops at war", *The Telegraph*, 19 September 2016, http://www.telegraph.co.uk/news/2016/09/19/human-rights-lawyers-now-present-a-real-threat-to-british-troops/.

9 For example, "European Court of Killers' Rights; EXCLUSIVE: Third of cases won by terrorists, murderers and lags", *The Sun*, 17 August 2015, updated 5 April 2016, https://www.thesun.co.uk/archives/politics/204465/european-court-of-killers-rights/ (accessed on 24 August 2018). For a discussion of the phenomenon, see Egbert Myjer, "About court jesters: Freedom of expression and duties and responsibilities of journalists", in *Freedom of expression: Essays in honour of Nicolas Bratza*, Wolf Legal Publishers 2012, p. 111.

10 British India gained independence as two new states, Pakistan (14 August 1947) and India (15 August 1947); the independence of the Netherlands East Indies (minus Netherlands New Guinea) as the Republic of Indonesia was recognised by the Netherlands on 27 December 1949 (in 2005 the Netherlands retrospectively accepted the Indonesian declaration of independence of 17 August 1945).

North Atlantic Treaty Organization, was created on 24 August 1949[11] in response to the perception of a new threat to peace from the Soviet Union. European troops were in transit to Korea to fight with the blessing of the newly-created Security Council of the United Nations.[12] The founding fathers of the Convention were no strangers to the reality of their day; they read the newspapers just as other responsible citizens did. We shall see that they strove to accommodate the need for 'hard power', even active war, more effectively than the United Nations did in their later Covenant on Civil and Political Rights.[13]

Of course, even an observer who recognises that the use of 'hard power' may be inescapable even for the most well-intentioned of political leaders is bound to recognise that the protection of democracy, human rights and the rule of law in the name of their citizens, or even in a more abstract sense the protection of the international legal order, is hardly the only motive for States resort to the threat or use of force in their domestic and international relations. Whatever the reasons for which the political decision is taken to resort to military force, for the serviceman ordered into action they are of importance only in so far as they may define his operational goals: otherwise, at his level, they matter little, and in so far as the legality of the use of force concerns him it will be at the level of *ius in bello* rather than *ius ad bellum*. These reasons are however relevant to domestic and international courts in that they may engage the State's responsibility for the actions of its servicemen and in some cases the individual criminal responsibility of political decision-makers.

This takes us to the second basic supposition of this work. Human rights law, including the law of the European Convention on Human Rights, is a subdivision of international law. Other such subdivisions include the law of international organisations, most notably the United Nations Organization or UN, and international humanitarian law, also known as the international law of armed conflict or, more traditionally, the laws of war.[14] It is our position that in terms of *ius ad bellum* the law of the United Nations, and in particular Chapter VII of the Charter of the United Nations, while it does not justify or condone violations of human rights, qualifies the way in which the European Convention on Human Rights applies in situations of armed conflict.[15] International humanitarian law is relevant to the Convention applied as *ius in bello*.[16]

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11 The date of the entry into force of the North Atlantic Treaty ("Washington Treaty"), signed on 4 April 1949.

12 S/Res/83, 27 June 1950, Complaint of aggression upon the Republic of Korea; S/Res/84, 7 July 1950, Complaint of aggression upon the Republic of Korea.

13 See 3.2 below.

14 The expression "international humanitarian law", which has much the same meaning as "laws of war" or "law of armed conflict", has gained currency in recent decades.

15 See 4.3 and 8.4.5.2 below.

16 See 4.9, 4.11 and 6.7 below.

1.2 Understanding of 'hard power' for purposes of this study

Since the purpose of this study is to identify the parameters within which the Convention allows States to exercise 'hard power', we must first define our understanding of that concept.

1.2.1 *Armed conflict*

The classical use of 'hard power' involves the use of military force in an armed conflict.

A Vice-President of the Court, speaking in 2015, has used the expression 'conflict' in noting that the Court has had to address in one way or another all instances of the use of military force that have occurred on the continent, at least since 1990. The examples he mentions include the situations in Northern Cyprus and Transdniestria, the dispute between Armenia and Azerbaijan over Nagorno-Karabakh, the events of 2008 in northern Georgia, the dissolution of the former Socialist Federative Republic of Yugoslavia and its aftermath, and the NATO intervention in Kosovo. He also refers to the involvement of European Contracting States, as members of the American-led force, in events in Iraq.[17] He is right; and we shall come across all of these 'conflicts' below.

The Convention nowhere uses the expression 'conflict'. The word 'war' appears in only one Article of the Convention – namely, in Article 15 (derogation in time of emergency) – and in no other Protocols than Protocols Nos. 6 and 13, which concern the abolition of the death penalty. We will discuss the meaning of the expression 'war' as used in that particular context when we come to derogations from Convention rights.[18]

The Convention was first drawn up in the immediate aftermath of the Second World War. A field of international law intended to rid warfare of the worst excesses of inhumanity existed already then, in the form of a body of treaty law that largely codified the customary 'laws of war' – the best known of the treaties being the Hague Conventions of 1899 and 1907, the Geneva Conventions of 1929 that had served the world as well as they could during the Second World War, and most recently the four Geneva Conventions of 1949. The understanding of 'conflict' that then prevailed was kinetic warfare of the classic kind – 'set-piece'[19] or open-field battles, perhaps guerrilla – between the armed forces of opposing states.[20]

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17 Linos-Alexandre Sicilianos, "The European Court of Human Rights at a time of crisis in Europe", SEDI/ESIL Lecture, European Court of Human Rights, 16 October 2015, p. 10.

18 See 4.3 below.

19 An expression apparently first used by Lieutenant General Sir John Monash in *The Australian Victories in France* (London, Hutchinson & Co., 1920), p. 226: "[An operation or a battle] is a 'set-piece' because the stage is elaborately set, parts are written for all the performers, and carefully rehearsed by many of them. The whole performance is controlled by a time-table, and, so long as all goes according to plan, there is no likelihood of unexpected happenings, or of interesting developments."

20 Marko Milanovic, "Extraterritorial Derogations from Treaties in Armed Conflict", in *The Frontiers of Human Rights: Extraterritoriality and its Challenges, Collected Courses of the Academy of European Law*, vol. XXIV/1, p. 55-88 at p. 66-67.

This understanding of 'conflict' has not lost its relevance; neither have the classic laws of war. However, other forms of violence have arisen that cannot be understood in terms of direct confrontation between the armed forces of two or more States but that do not comfortably fit the paradigm of ordinary law enforcement either. For these, a new legal category has been created: the 'non-international armed conflict'. This new category, although foreshadowed by the common Article 3 of the four Geneva Conventions of 1949, has obtained recognition in the second of two Protocols added to those Conventions in 1977. The classical interstate conflict is now dignified by a category of its own: that of 'international armed conflict'.[21]

Non-international armed conflicts are now much more common than classical international armed conflicts. *The War Report 2017*, a paper published by the Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy),[22] lists six situations in 2017 that could be considered 'international armed conflicts' in the classical sense (some of them short-lived); seventeen cases of 'belligerent occupation'; and no fewer than fifty-five 'non-international armed conflicts' (some unfortunate countries hosted a plurality of such conflicts simultaneously).[23]

States Parties to the Convention are concerned by conflicts in all these categories. For example, the situations identified by the Geneva Academy as arguably active 'international armed conflicts' include Ukraine v. Russia and the international coalition v. Syria – the 'international coalition' being comprised of (in addition to non-European states) European NATO members Belgium, Denmark, France, Germany, Italy, the Netherlands and Turkey. Of the ten 'belligerent occupations' identified by the Geneva Academy, five are to be found on the territory of Convention States: Armenia v. Azerbaijan, Turkey v. Cyprus, Russia v. Georgia, Russia v. Moldova, and Russia v. Ukraine. The Falkland Islands are alleged by Argentina to be under belligerent occupation by the United Kingdom.[24]

Of the thirty-eight 'non-international armed conflicts' identified as such by the Geneva Academy in 2017, two are on the territory of Convention States: that be-

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21 See generally Sten Verhoeven, "International and non-international armed conflicts", in *Armed Conflicts and the Law*, Jan Wouters, Philip De Man, Nele Verlinden (eds.), Intersentia, 2016, pp. 151-185 at pp. 156-17 1.

22 Annysa Bellal, *The War Report* 2017, https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202017.pdf (accessed on 11 August 2018), pp. 29-30 (up from three, ten and thirty-five the previous year: see Annyssa Bellal, *The War Report* 2016, https://armedgroupsinternationallaw.files.wordpress.com/2017/05/the-war-report-2016.pdf (accessed on 27 May 2017).

23 The present study does not take any position on the classification in international law of any of these alleged conflicts.

24 *The War Report 2016*, p. 28. The General Court of the European Union has held the 'actions and policies of the Russian Government destabilising Ukraine' to constitute 'war or serious international tension constituting threat of war' within the meaning of Article 99(1)(d) of the Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, Official Journal of the European Communities L 327, 28 November 1997: see General Court, judgment of 15 June 2017, Case T-262/15, *Kiselev v. Council*, § 33 and *passim*.

tween Ukraine on the one hand and the breakaway 'Donetsk People's Republic' and 'Luhansk People's Republic' on the other (it is not necessary for our purposes to take a position on whether this is one conflict or two), and that between Turkey and the *Partiya Karkerên Kurdistanê* (Workers' Party of Kurdistan, 'PKK'). The others are all to be found outside Europe, mainly in Africa and the Middle East; but Convention States take part in some of them as contributors to United Nations forces (at the time of writing, the United Nations Multidimensional Integrated Stabilization Mission in Mali (*Mission multidimensionnelle intégrée des Nations unies pour la stabilisation au Mali*, MINUSMA) and the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (*Mission de l'Organisation des Nations unies pour la stabilisation en République démocratique du Congo*, MONUSCO)).[25]

No mention is made in the Geneva Academy's report of the strife in the parts of the northern Caucasus that are under Russian sovereignty. This is not generally considered in terms of 'non-international armed conflict'; that expression is not used by the Russian Government to describe it.[26]

Even so, the sheer scale of the separatist violence in that area – and elsewhere in Russia: the separatists have taken it to Moscow itself[27] – has made its mark, including on the case-law of the Court, which draws a distinction between 'routine police operations' and 'situations of large-scale anti-terrorist operations'.[28] It is accordingly of interest to us for purposes of this study.

No Convention State is understood currently to deploy military force in Iraq; but several have in the recent past, and the case-law of the European Court of Human Rights has had to develop accordingly. Similarly, the involvement of Convention States in Bosnia and Herzegovina during the 1992-95 war and its aftermath and in Kosovo during and after the events of 1999 is of interest from our standpoint. So, potentially, is the military operation briefly undertaken by Turkish forces in the Afrin

25 *The War Report 2017*, pp. 30-31.

26 In a judgment of 31 July 1995 the Constitutional Court of the Russian Federation proceeded on the implicit recognition that Additional Protocol II was applicable to the conflict which was at that time being fought in Chechnya (later to be known as the First Chechen War), and that its provisions were "binding on both parties to the armed conflict". Constitutional Court of the Russian Federation, Judgment of 31 July 1995 on the constitutionality of the Presidential Decrees and the Resolutions of the Federal Government concerning the situation in Chechnya (translation by Federal News Service Group, Washington D.C., published by the Venice Commission on 10 January 1996 as CDL-INF (96) 1). See Bowring, Bill (2008) – "How will the European Court of Human Rights deal with the UK in Iraq?: lessons from Turkey and Russia" – p. 9. London: Birkbeck ePrints. Available at: http://eprints.bbk.ac.uk/859. Large-scale fighting between Chechen insurgents and Russian (and Russian-backed) armed forces, often referred to as the "Second Chechen War", occurred between August 1999 and April 2009. A low-level insurgency continues to the present day. The Russian Federation ratified the Convention (and Protocols Nos. 1, 4, 7 and 11) on 5 May 1998.

27 *Finogenov and Others v. Russia*, nos. 18299/03 and 27311/03, ECHR 2011.

28 *Tagayeva and Others v. Russia*, nos. 26562/07, 14755/08, 49339/08, 49380/08, 51313/08, 21294/11 and 37096/11, § 595, 13 April 2017.

district of Syria in January 2018, which we mention in passing since it has yet to give rise to Strasbourg case-law.

An 'armed attack' creating for the State under attack the right to defend itself was once thought to be possible only if occurring at the hand of another State. However, as we shall see below,[29] al-Qaeda's 9/11 attack on New York and Washington was sufficient for the NATO members for the first time in history to activate Article 5 of the Washington Treaty, according to which 'an armed attack against one or more of them in Europe or North America shall be considered an attack against them all', and activate the right to collective self-defence, no less, under Article 51 of the Charter of the United Nations.[30] As is well known, forces of the United States and their allies ran the al-Qaeda leadership to earth in Afghanistan; even today no fewer than thirty-seven Convention States are contributing to the Resolute Support mission in that country.[31]

1.2.2 *Other exercise of 'hard power' relevant to this study*

Armed conflict in the sense of kinetic military action against another political actor does not exhaust the scope of the expression 'hard power' as used for purposes of this study.

The threat of terrorist attack, and indeed actual terrorist attacks, by al-Qaeda and groups with a similar ideological motivation have induced several European NATO members to allow American intelligence services to undertake covert action on their territory. The measures taken against al-Qaeda and its ideological successors do not fit neatly into any category of armed conflict, whether international in character or not. Even so, politicians and journalists have sometimes been led to dignify them by the expression 'war'. Already by reason of their sheer scale, they are of interest to us – even though the expression 'war' by any conventional legal definition is inappropriate.[32]

The same may be said, *a fortiori*, about the suppression of widespread organised crime. The kind of widespread violence committed by criminal armed groups, as seen in some parts of Latin America, is at the present time not to be found in Europe; but piracy, a similar phenomenon, does concern European States. Like terrorism of the al-Qaeda type, neither is conventionally viewed in terms of international or non-inter-

29 See 4.5 below.

30 Helen Duffy, *The 'War on Terror' and the Framework of International Law* (2nd edition 2015), Cambridge University Press, pp. 296-97.

31 Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, the former Yugoslav Republic of Macedonia, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Turkey, Ukraine and the United Kingdom (*The War Report 2016*, fn. 4 on p. 15).

32 Helen Duffy, *The 'War on Terror' and the Framework of International Law* (2nd edition 2015), Cambridge University Press, p. 2, fn. 3 and pp. 296-97; Luc Reydams and Jan Wouters, "A la guerre comme à la guerre", in *Armed Conflicts and the Law*, Jan Wouters, Philip De Man, Nele Verlinden (eds.), Intersentia, 2016, pp. 1-27 at pp. 22-24.

national armed conflict.[33] Nevertheless, combating piracy requires the use of armed force; indeed, it is the traditional preserve of naval forces of the State. Piracy too is therefore worth examining in the present context.

Finally, it is conceivable that States – or rather, Governments – may resort to the covert use of lethal means to further their interests. This study touches briefly on such phenomena, which for present purposes must be treated as relevant though hypothetical.[34]

1.2.3 *Defining 'hard power'*

1.2.3.1 Background to the concept

It is convenient for our purposes to use the expression 'hard power' as a holdall term to cover all instances of the use of force referred to above. The concept is borrowed from the study of international relations.

The definition of 'hard power' used by diplomatists is usually in terms such as

> The coercive use of military or economic means to influence the behaviour or interests of political players[35]

distinguishing it from 'soft power', which is the use of diplomacy, foreign aid and cultural relations to the same end,[36] and 'smart power', which is the judicious use of 'hard' and 'soft' power combined.[37]

The use of economic means of coercion – boycotts, economic sanctions imposed by a state on another political actor – has rarely been the object of a judgment or decision of the Court or a decision or report of the Commission; there have been only a

33 Duffy (2018), p. 21.

34 Hypothetical because there is a case pending before the Court that concerns such an allegation and on which the Court has yet to pronounce. See 6.4.6.3 below.

35 Adviesraad internationale vraagstukken (Advisory Council on International Affairs), *Azië in opmars: Strategische betekenis en gevolgen* (Asia on the rise: Strategic significance and implications), no. 86, December 2013, appendix 3; compare House of Lords, Select Committee on Soft Power and the UK's Influence - First Report: Persuasion and Power in the Modern World (ordered by the House of Lords to be printed on 11 March 2014), Chapter 3, paragraph 40, '... getting what one wants by using coercion or inducement to force other countries to do what one wants – "hard power", which includes the threat or use of military coercion or of economic coercion through sanctions or boycotts ...'

36 Adviesraad Internationale Vraagstukken, *ibid.*; compare House of Lords, Select Committee on Soft Power and the UK's Influence, *ibid.*: '... getting what one wants by influencing other countries (via their governments and publics) to want the same thing, through the forces of attraction, persuasion and co-option ...'.

37 House of Lords, Select Committee on Soft Power and the UK's Influence, *loc. cit.*, § 61. For more extensive discussion of these three concepts, see Ernest J. Wilson, III, "Hard Power, Soft Power, Smart Power" in *The Annals of the American Academy of Political and Social Science* 2008; 616; p. 110-24, *passim*, and Joseph S. Nye, Jr., 'Hard, Soft, and Smart Power', in *The Oxford Handbook of Modern Diplomacy* (Andrew F. Cooper, Jorge Heine, and Ramesh Thakur, eds.), Oxford University Press 2013, pp. 559-574.

few such cases.[38] The coercive use of military means is more frequently found in Strasbourg case-law. States Parties to the Convention have taken part in armed conflicts, in some cases on their own territory, in some cases abroad; they have used military force, either to exercise 'hard power' in the above sense themselves or to resist attempts of other political actors to do so.

However, the opponent against whom coercive force is directed is not necessarily a 'political player' in any conventional sense of the word: pirates, for example, are generally viewed as common criminals. Our understanding of 'hard power' is accordingly wider than that of the student of international diplomacy inasmuch as we must also touch on situations of this nature.

1.2.3.2 'Hard power': a definition

For our purposes, accordingly, 'hard power' means:

- Firstly, the deliberate projection by a Government of coercive force outside the territory of the State, whether the situation concerned constitutes an armed conflict within the meaning of international humanitarian law or not;
- Secondly, the deliberate use (or conscious acceptance) by a Government of coercive force within the State's own borders on a scale necessitating the application either of military force or of non-military force in excess of the requirements of ordinary law enforcement to overcome opposition, whether the situation concerned is admitted by that Government to be an armed conflict within the meaning of international humanitarian law or not;
- Thirdly, the application by a Government of economic sanctions in the international relations of the State.

Such a definition encompasses situations which, from the standpoint of international humanitarian law, would in most cases be seen as law enforcement rather than armed conflict, including counter-insurgency operations, antiterrorist action going beyond ordinary policing, and the suppression of piracy whether in home or international waters.

The above definition is autonomous: it does not depend on any admission or declaration by the Government. Thus, the assumption by the Government of emergency powers is not a part of it.

1.2.4 *Problems of applying the Convention to the use of 'hard power'*

1.2.4.1 Perception of inapplicability of human rights law to armed conflict

No one denies the applicability of human rights law to policing, or law enforcement. In contrast, until recently there was a tendency on the part of decision-makers both military and civilian to pay scant attention to human rights law, Convention law in particular, in relation to 'conflict', whether international or non-international. The

38 See 8.4.5.1 and 8.4.5.2.4 below.

writing had been on the wall since 1996 at the latest,[39] but even so their assumption tended to be that human rights law was meant to govern law enforcement only and had little if any relevance to the conduct of hostilities, that being a matter to consider exclusively in terms of international humanitarian law. This can explain, for example, that the Dutch manual on military law (*Handboek Militair Recht*) mentions the Convention and the International Covenant on Civil and Political Rights only in passing, in one brief paragraph, and in its index refers to them not at all.[40] The discovery that the Convention was not merely relevant but applicable to the actions of the armed forces not merely on home territory but also on foreign soil and even at sea[41] would have come as a rude shock.

Military lawyers who take the trouble to study the interaction between human rights law and the law governing the use of 'hard power' – however defined – take the perspective of the confused serviceman trying to predict what the courts will think of next to complicate his life's work; Pouw's dissertation, which explores the 'outer operational limits' of targeting and detention in a counterinsurgency setting, is an excellent example.[42]

The fact is, however, that international human rights law – for our purposes, the Convention – applies also to the actions of service personnel, even, as we shall see, when they are conducting hostilities. Service personnel are entitled to guidance to help them navigate its tortuous channels.

1.2.4.2 Legal interoperability

In military parlance, 'interoperability' defines

39 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226 at § 25; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 176 at § 106; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, I.C.J. Reports 2005, pp. 242-43 at § 216. The latter judgment is of particular interest in that the International Court of Justice finds Uganda responsible for violations of (*inter alia*) the African Charter on Human and Peoples' Rights, a regional treaty like the Convention, committed on the territory of the Democratic Republic of the Congo (pp. 243-44 at § 217-220). See also D. Murray, *Practitioner's Guide to Human Rights Law in Armed Conflict* (Chatham House/Oxford University Press 2016), pp. v-vi (Foreword by Lord Phillips of Worth Maltravers) and pp. 12-13.

40 *Handboek Militair Recht* (P.J.J. van der Kruit, ed.), published by *Nederlandse Defensie Academie* (Netherlands Defence Academy), 2nd edition 2009, pp. 35-36.

41 See *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, ECHR 2011; *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, ECHR 2011; *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012; *Jaloud v. the Netherlands* [GC], no. 47708/08, ECHR 2014.

42 Eric Pouw, *International Human Rights Law and the Law of Armed Conflict in the Context of Counterinsurgency - With a Particular Focus on Targeting and Operational Detention* (diss. UvA 2013), p. 7.

> The ability of systems, units, or forces to provide services to and accept services from other systems, units, or forces, and to use the services so exchanged to enable them to operate effectively together.[43]

Thus defined, it may refer to the capability of diverse military units – formations of land forces, ships, aircraft – to act to a common purpose in the conduct of hostilities. The concept is however not limited to weapons systems and military personnel: the hardware, communications systems and command structures must be compatible, but so must the rulebooks. This may be referred to as 'legal interoperability'.

A problem perceived by at least one military lawyer, the Canadian Colonel Kirby Abbott from whom we borrow the expression, is a loss of legal interoperability within NATO between on the one hand the European NATO members, all of which are parties to the Convention, and the North American NATO members, the United States and Canada, which are not and cannot be. He notes a growing divergence in legal doctrine between the two groups arising from the case-law of the Court. He sees the former increasingly constrained by the restrictive law enforcement paradigm that governs the Convention, whereas the latter remain bound only by the more permissive standards of international humanitarian law. In his words,

> ... there is a real and currently emerging potential for the transatlantic link of legal interoperability between North American and European NATO Member States to be strained or severed, and for divergence among NATO's European members, due to the influence of litigation arising from the European Court of Human Rights (...). This litigation, in turn, is redefining, and has the potential to further redefine, NATO's use of force doctrine and Rules of Engagement (ROE), targeting and detention frameworks. It also has the potential to impact on how NATO Member States, as a matter of law and policy, view the overall relationship between IHL (i.e. international humanitarian law) and IHRL (i.e. international human rights law).

This perception, which is not Colonel Abbott's alone, has to be taken seriously. The issue is not limited to the interaction between NATO member States. The armed forces of NATO members take part in military operations together with non-NATO States, often but not always in an *ad hoc* framework such as United Nations peacekeeping, and indeed so do the armed forces of European States that are not members of NATO.[44]

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43 Hura, Myron, Gary W. McLeod, Eric V. Larson, James Schneider, Dan Gonzales, Daniel M. Norton, Jody Jacobs, Kevin M. O'Connell, William Little, Richard Mesic, and Lewis Jamison, *Interoperability: A Continuing Challenge in Coalition Air Operations*. Santa Monica, CA: RAND Corporation, 2000, https://www.rand.org/pubs/monograph_reports/MR1235.html (accessed on 22 August 2018).

44 Cordula Droege and Louise Arimatsu, "The European Convention on Human Rights and international humanitarian law: Conference report", *Yearbook of International Humanitarian Law* volume 12 – 2009 – pp. 435-449 at pp. 446-449.

It seems likely that considerations of interoperability in this sense may have had some influence on the position of some Contracting States that the Convention should not apply extraterritorially to military action (and hence on their failure to make use of Article 15 to derogate from their obligations under the Convention in respect of such action).

It is our belief that the Convention was never intended to stand in the way of the effective operation of any military alliance to which its Contracting States might be parties – indeed, such an aim would be inexplicable in the light of the drafting history of the Convention as briefly described above[45] – and that it need not have that effect either.

1.3 Object of this study

1.3.1 *Research question*

Since as we have briefly mentioned in 1.2.4.1 above the Convention can, and does, continue to protect human rights in the direst of circumstances, even in wartime, the question arises whether the Convention leaves Contracting States the latitude needed to deal with situations in which a legitimate need to resort to the use of 'hard power' in the sense corresponding to our definition may arise.

Our assumption is that the latitude available to Contracting States will be sufficient if despite the obligations which they have assumed upon ratifying the Convention States retain access to means enabling them to pursue policy objectives that are legitimate in terms of international law.

1.3.2 *Method and approach*

To answer the above question, this study investigates precisely what latitude Contracting States have to tailor their Convention obligations to the situation in which the need to exercise 'hard power' presents itself to them. To that end, it identifies the limits both of the applicability of the Convention and of attribution of the use of 'hard power' to Contracting States.

It is important to reiterate in this connection that – quite contrary to the suppositions of the domestic politicians cited above[46] and perhaps others – the Convention is not to be applied only in times of peace: it has relevance also to situations of conflict, even international armed conflict. As we will see,[47] this was actually envisaged from the very outset by the drafters of the Convention; the Strasbourg institutions – the European Commission and Court of Human Rights – recognised it in their practice and case-law and strove from a very early date to accommodate the various compet-

45 See 1.1.
46 Notes 7 and 8 above.
47 See 4.3.1 below.

ing interests. More recently the Council of Europe's Steering Committee for Human Rights has recognised the Court's role in this domain as 'pivotal'.[48]

This study is essentially a survey of the relevant case-law of the Court and the Commission with a view to identifying the resulting jurisprudential principles. Our intention is to state the law (as it stands in December 2018) as comprehensively as possible. The Court and Commission case-law cited is all accessible through the Court's own searchable database HUDOC.

The case-law considered relevant is that in which the Court was called upon to determine whether the use of 'hard power' was in breach of the Convention. Additionally, cases are analysed where the Court developed general principles or interpretations with the potential to have a bearing on such cases in the future. It will be attempted to relate this case-law to other fields of international law, international humanitarian law and general international law in particular. This will require us to examine a variety of treaties other than the Convention; judgments and decisions of treaty bodies other than the Court and the Commission; documents from a variety of international bodies; domestic legislation and judicial decisions and other domestic legal documents; and finally, selected writings of learned authors.

The perspective of an individual applicant before the Court is necessarily that of an aggrieved victim who feels entitled to redress. As in all litigation, the terms of the dispute are dictated by the party with whom the initiative lies.

The perspective chosen for this study is the opposite: that of the respondent Contracting State. This is the most obvious choice, since only States (and then only Members of the Council of Europe) are Parties to the Convention[49] and within the legal space of the Convention[50] only they may lawfully resort to the use of force.

The extent to which non-State actors may be bound by human rights law is an interesting one,[51] but from our perspective it is of little relevance since they cannot be respondents before the Court. Moreover, even though they may have the potential to violate human rights on a scale comparable to that of a Contracting State, as many armed groups now do, none have so far committed themselves to abide by Convention standards of human rights. A non-governmental structure (of the Geneva Call

48 Council of Europe, *The longer-term future of the system of the European Convention on Human Rights*, Report of the Steering Committee for Human Rights (CDDH) adopted on 11 December 2015, p. 52; Alice Donald and Philip Leach, "A Wolf in Sheep's Clothing: Why the Draft Copenhagen Declaration Must be Rewritten", *EJIL:Talk!,* 21 February 2018.

49 Article 59 of the Convention. The European Union may accede, but has yet to do so.

50 The space within which Contracting States enjoy territorial and quasi-territorial jurisdiction. See Chapter 5.1-5.4 below.

51 See generally Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, Cambridge University Press 2002, and Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law*, diss. Utrecht 2015.

type)[52] that would make it possible for them to register such a commitment, and perhaps enhance their legitimacy, does not exist at this time.

Nonetheless, the position of applicants cannot and will not be overlooked: it takes two, at least, to litigate, and for applicants (whether Contracting States themselves – in interstate cases –, individuals or groups of individuals, or strategic litigators) it is of interest to study possible defences precisely to overcome them. In the European Court of Human Rights as in any other court, the way in which a case is introduced can decide its fate at the outset.

The method chosen is to identify the basic types of legal argument that a respondent Government may make before the Court when it is faced with complaints under the Convention arising from the use of 'hard power'. Since the perspective chosen is the defensive position of the respondent Contracting State they may also be described as 'defences', if one will:

– Once the facts have been established, the first line of defence is to argue that no violation can be found on the facts of the case; in other words, that there has been no violation of the Convention in the first place. This is the most obvious solution: it amounts to persuading the Court that the Contracting Party has remained in compliance with the obligations which it took upon itself in ratifying the Convention. Much of the relevant case-law has been developed over the years in situations of normality; the principles developed, however, are of general application. Its relevance to situations involving the use of 'hard power' will be the subject of Chapter 2.
– Reliance on a prior derogation under Article 15 of the Convention is a special sub-type of the first type of defence; it depends on a prior choice to recognise publicly that a problem exists that is insuperable as long as ordinary Convention standards are maintained. This will be discussed in Chapter 4. However, since, as is apparent from its very wording, Article 15 is of particular relevance to situations of 'war', an understanding of the interrelation between human rights law – for our purposes, Convention law in particular – and international humanitarian law is necessary before we can enter into the subject of derogation. This will be examined in Chapter 3.
– The second defence is that the matters complained of fall outside the 'jurisdiction' of the Contracting Party within the meaning of Article 1 of the Convention. This will be the object of Chapter 5, which explores the limits of what we will term Article 1 jurisdiction, and Chapter 6, which studies its actual exercise in situations of the use of 'hard power'.

52 https://genevacall.org/. According to its mission statement, 'Geneva Call is a neutral and impartial non-governmental organization dedicated to promoting respect by armed non-State actors (ANSAs) for international humanitarian norms in armed conflict and other situations of violence, in particular those related to the protection of civilians'.

– The third defence is that the matters complained of fall outside the competence of the European Court of Human Rights itself. This will be considered in Chapter 7.
– The fourth defence is that the matters complained of are not attributable to the Contracting Party but to some other State or entity if to anyone at all. This will be the focus of in Chapter 8.

All have been considered by the Commission and the Court at various times. Sometimes they have been argued by a respondent. Sometimes the Commission and Court have applied them of their own motion and declared applications inadmissible *de plano*. In the latter situation it is, strictly speaking, more appropriate to use the expression 'ground of inadmissibility' than 'defence'; but this distinction, which goes to the subtleties of Convention procedure, is not relevant to the purpose of this study.

Some 'defences' have been accepted by the Court in certain conditions; some have not. The interest of this study lies in the supposition that much has been said on these subjects but by no means all; that new problems will arise to which existing case-law may be applied; that the possibilities of presenting new positions have not yet been exhausted; and even, perhaps to the surprise of some, that the Convention itself actually has a role to play in furthering the very aims pursued by Contracting States in their use of 'hard power' – as a help, not a hindrance.