Stuart Wallace: The Application of the European Convention on Human Rights to Military Operations

Cambridge University Press, Cambridge, 2019, 250 pp., £85.00, ISBN: 9781108475181

Liam Halewood¹

Published online: 24 July 2019
© The Author(s) 2019

Recent years have seen developments at the European Court of Human Rights (the Court) which have expanded the application of the European Convention on Human Rights (the Convention) to military operations throughout the world. Consequently, Wallace's book, with the clear aim of examining the practicalities of applying the Convention to military operations (p. 13), is timely. Although the book broadly defines 'military operations' as encompassing all actions involving the armed forces of the State (p. 3), there is a particular focus on operations occurring during armed conflicts. This focus is understandable as the practical challenges of applying human rights law (HRL), developed primarily for peacetime, are exacerbated in conflict situations. Existing scholarship on HRL during armed conflict has concentrated either on the general application of human rights law¹ or the application of specific rights thereof.² By fixating his study specifically on the application of the Convention, Wallace provides a fresh take on this area of law.

Rather than exhaustively examining the application of each individual Convention right, Wallace selectively analyses the application of the rights most likely to be engaged during military operations, notably, the right to life (Article 2) and right to liberty and security (Article 5). This 'selective approach' is practical and facilitates a detailed and analytical examination of the Conventions application in the military context. Drawing on a wide-range of sources, particularly the jurisprudence of the Court, Wallace seeks evidence to support his two-fold hypothesis. Firstly, that HRL could impose standards that are difficult, if not impossible for States to uphold during some military operations. Secondly, the application of HRL to military operations could compromise the integrity and strength of human rights norms (p. 13).

¹ See for example, Murray (2016); Oberleitner (2015).

² See for example, Park (2018); Hill-Cawthorne (2016).

✉ Liam Halewood
L.M.Halewood@2016.ljmu.ac.uk

¹ Liverpool John Moores University, Liverpool, UK

Although this hypothesis is posited in relation to the Convention, it is equally applicable to other human rights instruments, rendering the book relevant beyond the European context.

Although the book's primary focus is the *application* of the Convention, the first two chapters are dedicated to the preliminary issue of the Convention's *applicability* to military operations. Pursuant to Article 1, the Convention is applicable whenever an individual is within the jurisdiction of a State party. In Chapter 1, Wallace examines jurisdiction in the context of domestic military operations before examining extraterritorial jurisdiction in Chapter 2.

In Chapter 1, the author recognises that the jurisdictional competence of Contracting States is 'primarily territorial'.³ Wallace elucidates that jurisdiction under the Convention is contingent on a State having de facto control over people or territory (p. 26). Therefore, the Court's 'primarily territorial' conception of jurisdiction is explained by the presumption that States possess control over their own territory. Subsequently, Wallace considers the effect that a State's loss of de facto territorial control has upon its Convention obligations. With specific attention given to Moldovan, Russian and Georgian cases, Wallace demonstrates the Court's acknowledgment that State continues to exercise jurisdiction in its *de jure* territory, even if it no longer possesses de facto control over it. However, in such circumstances, the Court's jurisprudence is inconsistent on the nature and scope of a State's obligations. The author summarises that the Court's inconsistency leads to confusion about the obligations and standards the State must uphold in territory it no longer controls. Moreover, Wallace posits that in such circumstances, securing obligations will be difficult, if not impossible for States.

In Chapter 2, Wallace undertakes the onerous task of deciphering from the Court's jurisprudence the precise circumstances giving rise to the exercise of extraterritorial jurisdiction. The author conducts an impressively broad but succinct examination of the Court's vast case law, showing the contradictions and uncertainties that plague the jurisprudence on extraterritorial jurisdiction. By identifying the bases for extraterritorial jurisdiction posited by the Court (effective control of an area, personal and personal plus), Wallace conveys the circumstances when the Convention applies to extraterritorial military operations, whilst also providing examples of situations that may not engage the Convention, such as aerial bombardments. Although, recently, the Court has expanded the extraterritorial reach of the Convention, uncertainty remains about the extent of its extraterritorial application. Thus, in some situations, States will be unsure whether they have obligations under the Convention. Additionally, the chapter articulates that extraterritorially, even when the Convention is applicable, the scope of a State's obligations is ambiguous. For example, following the *Al-Skeini*⁴ case, the Court permitted the division and tailoring of Convention rights without clarifying what the consequence of this process would be.

³ *Al Skeini and Others v. United Kingdom*, [GC], No 55721/07, §131; *Soering v. United Kingdom* (1989) 11 EHRR 439, §86; *Bankovic and Others v. Belgium and Others* (2007) 44 EHRR SE5, §59.

⁴ *Al Skeini and Others v. United Kingdom*, §137.

The author concludes the discussion on the preliminary issue of jurisdiction by arguing that the Court could ameliorate the problems identified through consistently interpreting jurisdiction and providing clearer guidance to States on how the Convention will apply to military operations. Despite Wallace's call for consistency and clarity, he does not engage with how the Court should interpret jurisdiction. Although the applicability of the Convention is not the primary focus of the book, it would have been interesting to read how the author believes the Court could best move away from its current haphazard interpretation of jurisdiction to a more coherent and intelligible concept.

With the 'preliminary' issue of jurisdiction set aside, Wallace begins examining the application of the Convention to military operations. In Chapter 3, the substantive application of Article 2 (Right to Life) is assessed, whilst Chapter 4 deals with the procedural aspect of the right to life. Chapter 3 begins with a brief outline of the narrow circumstances whereby the use of 'absolutely necessary' lethal force would not contravene Article 2 (pp. 74–75). Subsequently, Wallace contrasts the restrictive framework of HRL with the more permissive rules of International Humanitarian Law (IHL) before focusing his examination on the Court's approach to reconciling these two bodies of law. The author illustrates clearly the influence of IHL on the Court's jurisprudence. For example, in the case of *Isayeva, Yusupova, Bazayeva v. Russia*,⁵ the Court applied a standard of reasonable necessity rather than absolute necessity. Moreover, in *Ahmet Ozkan and Others v Turkey*,⁶ the Court distinguished between the lives of civilians and combatants, a basic tenet of IHL but an 'anathema to human rights law'.⁷ Yet, the Court has not explicitly addressed IHL, which, Wallace argues, makes the influence of IHL appear arbitrary. Additionally, the influence of IHL on the Court has not been uniform. In some cases, the Court maintains the stringent Convention standards, implicitly rejecting, without explanation, incorporating IHL into its assessment. Consequently, it is uncertain when the Court will be influenced by IHL and the effect that the its concurrent application will have on the right to life. Wallace posits that the Court should openly and transparently engage with IHL and acknowledge when it influences Convention norms (p. 108).

Chapter 4 shines a light on the practical challenges connected with the application of the procedural aspect of Article 2, which are obligations relating to the investigation of deaths or life-threatening injuries. The author exhibits in this chapter how reliant a State is on functioning State institutions in order to fulfil its procedural obligations. In the context of military operations, especially those occurring extraterritorially, the author posits that the lack of institutional support can inhibit a State's ability to investigate deaths or life-threatening injuries to the standard required by the Convention. Moreover, the foreseeable number of investigations during military operations is likely to impose an onerous burden upon States (p. 110), which the Court admits it wishes to avoid. Wallace identifies that the Court has struggled to strike an appropriate balance between avoiding impunity and saddling States with

⁵ *Isayeva, Yusupova, Bazayeva v. Russia* (2005) 41 EHRR 3, §177.

⁶ *Ahmet Ozkan and Others v. Turkey* App no 21689/93 (ECtHR, 6 April 2004) §297.

⁷ Kretzmer (2009, p. 25).

impractical obligations during military operations. To alleviate the Court's struggles, Wallace presents two possible solutions. Firstly, that Article 2 be interpreted in accordance with IHL in armed conflict situations. Secondly, that States utilise derogations during military operations. These options would result in the procedural element of Article 2 only being triggered when an alleged violation of IHL occurs, rather than each case of death or life-threatening injury involving a State.

In Chapter 5, the Court's approach toward the resolution of norm conflicts between the Convention and IHL is examined. Wallace expresses how the Court has been directly confronted with such conflicts in cases involving security detention or internment. Such conduct does not correspond with the finite list of circumstances provided by Article 5(1) allowing for the deprivation of a person's liberty but is permitted by certain provisions of IHL.⁸ When faced with a norm conflict, the Court must seek to resolve it. Of the several available options for resolving norm conflicts, Wallace demonstrates that the Court has favoured a 'harmonious' approach, whereby the Convention is interpreted in light of IHL. The author reiterates that the Court has implicitly, albeit inconsistently, embraced this approach in its jurisprudence relating to the right to life during military operations. Yet, in *Hassan v UK*,⁹ Wallace pinpoints the 'very positive step' (p. 157) taken by the Court in explicitly recognising the influence of IHL when interpreting and applying the Convention. Although Wallace admits that this approach has received criticism, he argues that it is preferable to the inconsistency that pervades the Court's jurisprudence where the Convention and IHL simultaneously apply. Following the Court's explicit reference to IHL in *Hassan*, the author makes a reasonable prediction that the Court will continue to openly engage with IHL in future cases. As a result, Chapter 6 considers how the Court may fare when doing this.

Article 7(1) prohibits the criminalisation of conduct which did not constitute a criminal offence under domestic or international law at the time it was committed. Consequently, Article 7 obliges the Court to consider sources of international law, such as IHL, to establish whether a criminal conviction has a legal basis. Wallace identifies the Court's Article 7 jurisprudence as a 'unique opportunity' to evaluate the Court's institutional capacity to interpret and apply IHL. In Chapter 6, Wallace's examination reveals some shortcomings in the Court's application of IHL, which the author attributes, for the most part, to the Court's apparent lack of expertise in this field. To familiarise itself further with IHL, Wallace recommends that the Court become more transparent in its application of IHL and open to the scrutiny this would entail. As a result, Wallace posits that this would lead to better judgments and better concurrent application of the Convention and IHL (p. 191).

Article 15 permits the utilisation of derogations, which grant States some flexibility to alter their human rights in emergency situations or war. In the final chapter,

⁸ Article 21, Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 and Article 42, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

⁹ *Hassan v. United Kingdom* App no 29750/09 (ECtHR, 16 September 2014), §104.

Wallace promotes the use of derogations by States as a means of alleviating some of practical challenges associated with the Convention's application to military operations. A key benefit of derogation is the mitigation of some of the more onerous burdens imposed on States during armed conflict. For example, Article 15(2) allows derogation from the right to life for 'lawful acts of war'. Consequently, as noted in chapter 4, a derogation would limit the derogating State's procedural obligations within Article 2 to cases where a violation of IHL is suspected. Moreover, derogations compel the Court to explicitly engage with IHL. For example, determining whether a death results from a 'lawful act of war' would require the Court to assess the legality of a killing under IHL. Therefore, derogations provide a 'clear contextual barrier' between the Court's normal jurisprudence and its case law which takes into account the unusual circumstances of military operations (p. 197). Wallace postulates that this 'barrier' could mitigate the risk that the Court's flexible application of the Convention during military operations will 'contaminate' the Court's normal jurisprudence and dilute the standards of human rights protection.

The author acknowledges EL Zeidy's concern, that some of the gravest human rights violations occur in the context of emergencies.¹⁰ However, Wallace emphasises that derogating does not grant States a *carte blanche* to act with impunity because the requisite criteria for a legitimate derogation ensures that the Court retains oversight of derogating measures. So far, no State has issued a derogation in respect to extraterritorial conduct. Yet, the book explains that the absence of State practice is not indicative of States regarding extraterritorial derogations as unavailable. Instead, States have frequently on rejecting the Convention's extraterritorial applicability to military operations, a point that would be conceded by issuing a derogation. Wallace contends that, as the Convention's applicability gradually extends to more extraterritorial situations, States are likely to move on from rejecting the Convention's applicability to adapting its application. Consequently, it is foreseeable that States will be more inclined to utilise derogations in future extraterritorial military campaigns.

Wallace wraps up his examination of the practicalities of applying the Convention to military operations with a range of conclusions. Due to spatial constraints, a selection of these conclusions will be conveyed. Firstly, the application of the Convention to military operations has introduced uncertainty into the law. In particular, there is ambiguity as to the scope and content of a State's obligations during military operations. Secondly, States have been held to, and will continue to be held to, standards that are difficult, if not impossible, to adhere to during military operations. At times, the Court has adapted the application of Convention standards without acknowledging that this is a response to the unique circumstances of military operations. Consequently, Wallace asserts that this approach risks establishing precedents of lower protection, which could be invoked by States outside of the military context. To mitigate the identified issues, the author advises the Court to interpret the Convention more consistently, holistically and transparently, especially when using IHL. Moreover, Wallace proclaims that the Court should acknowledge when its jurisprudence is influenced by IHL to prevent the dilution of the Convention's peacetime norms. With respect to the challenge of adhering to the Convention

¹⁰ El Zeidy (2003, pp. 282–283).

during military operations, the author recommends that States derogate where possible, to modify the Convention standards to a more realistically attainable level.

Throughout this book, Wallace clearly displays the practical challenges that arise from the Convention's application to military operations. Notably, he demonstrates that the Court must apply the Convention in a manner that does not compromise human rights norms but, at the same time, refrain from imposing unrealistic burdens upon States. The author's analysis highlights the Court's inadequate response to this. With reference to the Court's jurisprudence, Wallace provides sufficient evidence to support his two-fold hypothesis, whilst offering reasonable suggestions that could help to alleviate the practical challenges arising from the Conventions application to military operations.

To conclude, this book provides a timely and thorough examination of the application of the Convention to military operations and the practical challenges this brings. The book is well structured, and the author constructs a clear and convincing argument throughout. Without question, Wallace has provided an intriguing contribution to this controversial area of law with a book that is interesting and thought-provoking. For these reasons, the book would definitely be a worthwhile purchase.

Open Access This article is distributed under the terms of the Creative Commons Attribution 4.0 International License (<http://creativecommons.org/licenses/by/4.0/>), which permits unrestricted use, distribution, and reproduction in any medium, provided you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license, and indicate if changes were made.

References

- El Zeidy, Mohamamed M. 2003. The ECHR and States of Emergency: Article 15-A Domestic Power of Derogation from Human Rights Obligations. *San Diego International Law Journal* 4: 277–318.
- Hill-Cawthorne, Lawrence. 2016. *Detention in Non-International Armed Conflict*. Oxford: Oxford University Press.
- Kretzmer, David. 2009. Rethinking the Application of IHL in Non-International Armed Conflicts. *Israel Law Review* 42(1): 8–45.
- Murray, Daragh. 2016. *'Practitioners' Guide to Human Rights Law in Armed Conflict*. Oxford: Oxford University Press.
- Oberleitner, Gerd. 2015. *Human Rights in Armed Conflict: Law, Practice, Policy*. Cambridge: Cambridge University Press.
- Park, Ian. 2018. *The Right to Life in Armed Conflict*. Oxford: Oxford University Press.

Publisher's Note Springer Nature remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.