

## ZOOM IN

### *The Question:*

#### **On the relationship between IHL and IHRL ‘where it matters’ once more: Assessing the position of the European Court of Human Rights after *Hassan and Jaloud***

*Introduced by Marco Pertile and Chiara Vitucci*

The relationship between international humanitarian law (IHL) and international human rights law (IHRL) is one of the thorniest issues in the recent literature on those two specialised areas of public international law. It has elicited highly theoretical speculations, but there can be no doubts that it is also fraught with very practical consequences.

As is well known, the International Court of Justice has conceptualized the problem in a relatively formal way. The Court has clarified that IHRL does not cease to apply in times of armed conflict and has made somewhat vague reference to the concept of *lex specialis* to address the inevitable issues of coordination. It can therefore be assumed that in case of conflict between a rule of IHL and a rule of IHRL, IHL should prevail by reason of its more specific character. However, the main weakness in the position of the Court is that it does not offer guidance as to how the possible antinomies between the two bodies of rules should be identified and addressed in practice. This vagueness is perhaps understandable in the light of the inter-state or advisory nature of the jurisdiction of the International Court of Justice, but it is scarcely compatible with the mandate and jurisdiction of human rights courts, international monitoring systems, and domestic courts.

In their seminal article of 2008, Sassoli and Olson started from the assumption that the interaction between IHL and IHRL could not be examined in the abstract. They decided to focus on the two issues for which, in their judgement, the problem mattered most, namely detention and the protection of the right to life in armed conflict, and made the important point that: ‘on some issues human rights constitute the *lex specialis*’ (M Sassoli, LM Olson, ‘The relationship between interna-

tional 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* 600). Indeed, the question of the different legal regimes (IHRL and IHL) potentially applicable to the right to life and personal liberty in armed conflicts is not new but has not so far received a definitive answer.

The right to life applies to every person under the jurisdiction of a State. While the right is absolute and non derogable, deprivation of life shall not be regarded as inflicted in contravention of the law when it results from the use of force that is no more than absolutely necessary. In addition, a procedural aspect of the right to life is violated when the authorities fail to conduct an effective and impartial investigation in cases of deprivation of life. By contrast, the protection offered by IHL depends on the status of protected person and on the type of armed conflict at stake. Not surprisingly, under IHL, the scope of the duty to investigate violations seems to be less wide.

With respect to detention, permissible grounds for detention under IHRL would appear scarcely to be compatible with the latitude of internment of protected persons under IHL, a tool to which belligerents are likely to have ample recourse during conflicts and situations of occupation. Moreover, the rules of IHL on internment are decidedly less developed when it comes to procedural safeguards and detention review.

Against this background there is a new development: one of the most important international human rights jurisdictions, the European Court on Human Rights (ECtHR), has abandoned its traditional silence on the relationship between IHL and IHRL. Until recently, the ECtHR, despite having heard several cases involving the application of human rights in situations of armed conflict, had never directly addressed the application of IHL, a body of rules which is formally extraneous to its guiding text, the European Convention of Human Rights (ECHR).

A turning point in the ECtHR's case law on armed conflicts is represented by the decision in *Hassan v United Kingdom*. On that occasion the Court dealt with a case of internment of a civilian during the international armed conflict in Iraq. The events took place in the phase in which the invading countries had not yet declared that they were occupying powers in Iraq. As to the interaction between the right to liberty and security of the person under Article 5 of the ECHR and the appli-

cable provisions of IHL on internment, the ECtHR first established, according to its previous case law, that the list of permissible grounds of detention contained in Article 5(1) provided no basis for internment in accordance with IHL. By reason of the co-existence of the safeguards provided by IHL and by the Convention, in cases of international armed conflicts, however, the Court considered that the grounds of permitted deprivation of liberty should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security. The same reasoning is then applied to the procedural safeguards of the right to personal liberty. With reference to the absence of a previous derogation in relation to Article 5 under Article 15 of the ECHR on the part of the United Kingdom, the Court took the view that such a derogation was not necessary in order to permit interpretation of the Convention in the light of IHL. On this, the Court made reference to the consistent absence of derogations in the practice of State parties (Article 31(3)(b) of the Vienna Convention on the Law of Treaties).

Along similar lines, the recent judgment delivered by the Grand Chamber in *Jaloud v The Netherlands* offers fresh food for thought on the law applicable to the right to life in situations of armed conflict and occupation.

The case concerned an Iraqi civilian who was killed at a checkpoint either by Dutch soldiers or by personnel of the Iraqi Civil Defence Corp (ICDC). At the time of the shooting, Netherlands troops had authority in the region as part of the Stabilization Force in Iraq in accordance with UN Security Council Resolution 1483 (2003). The father of the victim complained under Article 2 of the Convention that the investigation into the shooting carried out by the Dutch authorities had been neither sufficiently independent nor effective.

With regard to the alleged violation of the procedural obligations ensuing from Article 2 of the ECHR the Court recalled its precedents according to which such obligations continue to apply also in the context of an armed conflict. The Court also formally acknowledged the need to take account of the particular difficulties faced by State authorities in a situation of armed conflict or occupation. However, despite this acknowledgment, the Court in practice did not seem to give any real effect to the difficulties of the situation in which the Dutch authorities had been operating. In other words, the Court did not seem to con-

sider that the rules of IHL applicable to the investigation were less stringent than those under the Convention.

In the light of the decisions of the ECtHR in *Hassan* and *Jaloud*, the debate on the interaction between IHL and IHRL needed to be further developed. QIL asked Ziv Bohrer and Silvia Borelli, two legal scholars who have considered these questions in their research, to advance some answers to the issues at stake. The two authors chose quite different perspectives. Bohrer calls attention to the problems related to reliance on IHRL as a way of regulating wartime scenarios. He argues that the difference between IHRL and IHL would be better understood if one considered that the first is a system based on rights, whereas the second should be viewed as a system based on obligations. He then uses the Israeli Supreme Court's experience to advance the idea that domestic courts are in a better position to review military actions using IHL instruments. In contrast, Borelli starts from the assumption that the supporters of IHL and IHRL prioritize different values and that inquiring which of the two system is more appropriate to regulate the conduct of States in situations of armed conflict is therefore sterile. She rather focuses her contribution on the question of how IHRL instruments such as the European Convention may apply (in practice) in the context of military operations abroad. In her opinion the recent stand taken by European Court in the *Hassan* case is far from satisfactory and creates problems of uncertainty.