# *Jaloud v Netherlands* and *Hassan v United Kingdom*: Time for a principled approach in the application of the ECHR to military action abroad

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## 1. *Introduction*

The aim of the present piece is not to undertake an examination of which of international human rights law (IHRL) and international humanitarian law (IHL) is 'better' or more appropriate to regulate the conduct of States in situations of armed conflict. Advocates of IHRL argue that it provides heightened protection for individuals, and that, by its own terms, it applies to, and is perfectly equipped to deal with situations of exception, including armed conflicts.[1] On the other hand, supporters of IHL focus on the need not to place unnecessary fetters upon the freedom of States to pursue their military objectives in situations of armed conflict, and argue that IHL provides an adequate level of protection, whilst being more pragmatic, better suited to the specificities of armed conflict and more likely to be observed by the parties to the conflict.[2] Insofar as they prioritise different values, proponents of

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[1] See the extensive discussion in A Sari, 'The Juridification of the British Armed Forces and the European Convention on Human Rights: "Because It's Judgment that Defeats Us"' (March 2014), available at <http://ssrn.com/abstract=2411070>.

[2] These and other commonly invoked arguments in favour of the application of IHL as *lex specialis* displacing IHRL in times of armed conflict are set out (and rejected) in D Jinks, 'International Human Rights Law in Time of Armed Conflict' in A Clapham, P Gaeta, *The Oxford Handbook of International Law in Armed Conflict* (May 2014) available at <www.oxfordhandbooks.com>. See also the discussion in H-P Gas-

the two opposing camps to a large extent talk past each other and the debate is therefore necessarily somewhat sterile.

Without taking a position as to which view is correct, this short comment advocates the need, above all else, for a principled, predictable and consistent approach to the question of *how* IHRL instruments, in particular the European Convention on Human Rights,[3] apply in situations of armed conflict and occupation and, more generally, in the context of military operations abroad.

For a long time, the principal issue raised by military action abroad was the prior, wider question of whether the Convention even applied to extraterritorial conduct of the Contracting Parties. After years of ebbs and flows in the jurisprudence of the European Court of Human Rights ('the Court'), however, that obstacle has now to a large extent fallen away. The most recent jurisprudence of the Court on the topic makes clear that the Convention will indeed apply to the actions of a States' armed forces in situations of extraterritorial military action either where a State exercises effective control over a particular area, or where State agents in fact exercise control over an individual.[4]

As a consequence, after years of grappling with the question of *whether* the ECHR applies to extraterritorial military action, in recent cases the Court has finally had to face up to the question of *how* it should apply. That question implicates fundamental questions as to both the interpretation of the ECHR, and of its interplay and relationship with the relevant rules of IHL.

ser, 'International Humanitarian Law and Human Rights Law in Non-International Armed Conflict: Joint Venture or Mutual Exclusion' (2002) 45 German YB Intl L 149.

[3] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) hereinafter 'ECHR' or 'the Convention'.

[4] See in particular *Al-Skeini v United Kingdom* App no 55721/07 (ECtHR [GC] 7 July 2011); see also *Al-Jedda v United Kingdom* App no 27021/08 (ECtHR [GC] 7 July 2011). The Court has further elaborated upon the principles relevant to the applicability of the ECHR to military action abroad both in *Hassan v United Kingdom* App no 29750/09 (ECtHR [GC] 16 September 2014) and *Jaloud v The Netherlands* App No 47708/08 (ECtHR [GC] 20 November 2014). For comments on the Court's approach to extraterritoriality in *Jaloud*, see A Sari, 'Untangling Extra-Territorial Jurisdiction from International Responsibility in *Jaloud v Netherlands*: Old Problem, New Solutions?' (January 2015), forthcoming in *Military Law and the Law of War Review*; available at <http://ssrn.com/abstract=2554951>.

The present comment takes as points of reference the judgments of the European Court in *Hassan v United Kingdom*[5] and *Jaloud v The Netherlands*.[6] Those judgments, handed down by the Court's Grand Chamber in September and November 2014, respectively, are illustrative of the ambiguous – and arguably inconsistent – approach of the Court to the question of how rights under the ECHR should be applied in situations of international armed conflict and occupation, and in particular how the relevant provisions of the Convention interact (or fail to interact) with those of IHL.

The central thesis is that resort should not be had to the *lex specialis* principle,[7] nor to strained applications of the principle of systemic interpretation enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties.[8] Rather, whenever State Parties act in the context of an armed conflict, the mechanism for derogation under Article 15 ECHR should play the central role in mediating the relationship between the Convention and any concurrently applicable rules of IHL. To the extent that obligations under the ECHR may be inconsistent with the applicable rules of IHL (in the sense of being more restrictive), it should be for States to derogate from their obligations under the ECHR if they wish to benefit from the greater latitude which the rules of IHL afford them.

As a counterpart, it is argued that where a State has failed to enter a derogation from its relevant ECHR obligations in relation to military action abroad, the Court should adopt a principled stance and assess the legality of its actions on the basis of the Convention alone, without seeking to qualify or interpret the State's obligations by reference to IHL standards, in particular where this involves distorting the ordinary meaning of the text of the ECHR.

[5] *Hassan* (n 4).

[6] *Jaloud* (n 4).

[7] For criticism of reliance upon the principle *lex specialis derogat legi generali* as a means of coordination between IHRL (in particular the ECHR) and concurrently applicable rules of IHL, see S Borelli 'The (Mis)-Use of General Principles of Law: *Lex Specialis* and the Relationship Between International Human Rights Law and the Laws of Armed Conflict', in L Pineschi (ed.), *General Principles of Law – The Role of the Judiciary* (Springer International 2015) (forthcoming) available at <http://ssrn.com/abstract=2575076>.

[8] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (hereinafter 'VCLT').

After this brief introduction, Section 2 reviews the 'self-contained' approach which has been traditionally adopted by the Court in both cases involving internal conflict and situations of international armed conflict until as recently as the decisions in *Jaloud*. Section 3 then considers the novel approach introduced by the Court in *Hassan*, according to which, as regards at least some provisions of the Convention, there is no need for derogation in respect of military action abroad, and the operation of certain ECHR norms is implicitly modified by virtue of the concurrent applicability of rules of IHL. Section 4 concludes arguing for the need for express derogation under Article 15 whenever State Parties to the ECHR wish to rely upon the more permissive rules of IHL.

## 2. *The traditional 'self-contained' approach of the European Court to the application of the ECHR in time of armed conflict*

Given that one of the central aims in any armed conflict is to kill, capture or otherwise incapacitate the opposing forces, the Convention rights which are most obviously and directly implicated are the right to life enshrined in Article 2 of the Convention and the right to liberty guaranteed under Article 5. Although the two provisions, on their face, are formulated with a view to a law and order paradigm,[9] the traditional approach of the European Court has been to apply those provisions to situations involving the use of military force with little or no regard being paid to the characterisation of the situation as an 'armed conflict' within the meaning of IHL, or, most importantly, whether any relevant rules of IHL might impose standards different from those under the Convention. This has been the case both as regards cases involving situations arguably rising to the level of internal armed conflict, and to cases involving situations of international armed conflict or occupation.

[9] See FJ Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body' (2008) 90 Intl Rev Red Cross 549, at 564, 571. See also FJ Hampson, 'Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?', in MN Schmitt (ed.), *The War in Afghanistan: A Legal Analysis* [International Law Studies vol 85] (Naval War College 2009) 485, at 496-497.

The approach was initially adopted as regards alleged violations of the right to life occurring in situations which arguably or indisputably amounted to internal armed conflicts. This self-contained approach was particularly evident in the cases arising out of the action of the Turkish security forces against the PKK in South East Turkey in the 1990s,[10] and, perhaps even more strikingly, the cases arising out of the armed conflict in Chechnya in 1999-2002.[11] Whilst noting the exceptional character of the situations at issue and, in the case of Chechnya, on occasion referring to the fact that a conflict was under way,[12] the Court has simply applied the Convention, including both the substantive and procedural aspects of the right to life, as if the issue were no different from that arising in relation to a normal law enforcement operation.[13]

This approach has had both its detractors and its supporters. For instance, Abresch has argued that, in treating armed conflicts as law en-

[10] Despite having delivered more than 280 judgments in relation to conflict between the PKK and the Turkish security forces in the 1990s (see <www.echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf>), the Court has never taken a position as to whether the situation in South East Turkey reached the threshold of a non-international armed conflict for the purpose of applicability of Common art 3 of the Geneva Conventions; whilst at times using a terminology which closely mirrors that of the relevant standards under IHL, it has always dealt with the cases having exclusive regard to the applicable provisions of the ECHR. See *Ergi v Turkey* App no 23818/94 (ECtHR 28 July 1998); the approach has remained unchanged throughout the years: see, eg, *Benzer and Others v Turkey* App no 23502/06 (ECtHR 12 November 2013).

[11] See, eg, *Isayeva v Russia* App no 57950/00 (ECtHR 24 February 2005); *Khashiyev and Akayeva v Russia* App no 57942/00 and 57945/00 (ECtHR 24 February 2005); *Isayeva, Yusupova, and Bazayeva v Russia* (App no 57947/00, 57948/00 and 57949/00 (ECtHR 24 February 2005). For commentary, see W Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005)16 Eur J Intl L 741; A Orakelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' (2008) 19 Eur J Intl L 161; P Leach, 'The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights' (2008) 6 Eur Human Rights L Rev 732; S. Borelli, 'Domestic Investigation and Prosecution of Atrocities Committed during Military Operations: The Impact of Judgments of the European Court of Human Rights' (2013) 46 Israel L Rev 369.

[12] See, eg, *Isayeva* (n 11), where the Court noted that 'the situation that existed in Chechnya at the relevant time called for exceptional measures by the State in order to regain control over the Republic and to suppress the illegal armed insurgency' (para. 180); see also ibid para 181, where the Court referred to 'the conflict in Chechnya' and to the existence of an 'illegal armed insurgency'.

[13] For commentary see Abresch (n 11); Leach (n 11); see also Gasser (n 2).

forcement operations, the Court's approach 'may prove both more protective of victims and more politically viable than that of humanitarian law'.[14] In any case, whatever the merits of such an approach from an abstract perspective, in practice, the Court in general arrived at results which are broadly consistent with IHL, and the outcomes of its judgments has not been very different from the likely result had the Court had regard to the relevant rules of IHL as they apply in non-international armed conflict. That phenomenon is largely explained by the particularly serious nature of the violations at issue, which involved the killing or forced disappearance of civilians, and the fact that the relevant potentially applicable rules of IHL were those applicable to non-international armed conflicts, where there is greater convergence between IHRL and IHL.[15]

With the progressive and now unequivocal recognition of the applicability of the ECHR to military action abroad, the Court's traditional 'self-contained' approach has in recent years been extended and applied to situations of international armed conflict and occupation. This has been the case despite the far more marked divergences between what is permissible under IHL in such situations and the standards of IHRL.

For instance, in a number of cases relating to the occupation of Iraq in the period between 2003 and 2004, the Court simply applied the standards developed in its jurisprudence on the right to life in the context of peacetime law-enforcement operations.[16] Representative of this trend is the 2014 decision of the Grand Chamber in *Jaloud v Netherlands*.[17]

[14] Abresch (n 11) particularly at 767. For a critical view, see, eg, S Hartridge, 'The European Court of Human Rights' Engagement with International Humanitarian Law', in D Jinks, JM Maogoto, S Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies: Domestic and International Aspects* (Asser Press / Springer 2014) 257, at 277-278, 286.

[15] For discussion, see, eg, D Kretzmer, 'Rethinking the Application of IHL in Non-International Armed Conflicts' (2009) 42 Israel L Rev 8.

[16] See, notably, *Al-Skeini* (n 4) and *Al-Jedda* (n 4).

[17] *Jaloud* (n 4). The case also raises interesting issues with regard to the extraterritorial applicability of the ECHR and questions of attribution, which however fall outside the scope of the present comment. For discussion see A Sari, '*Jaloud v. Netherlands*: New Directions in Extra-Territorial Military Operations' in *EJIL:Talk!* (24 November 2014) available at <www.ejiltalk.org/jaloud-v-netherlands-new-directions-in-extra-territorial-military-operations/>.

In *Jaloud*, the applicant's son had been shot and killed in 2004 when a car in which he was travelling was fired upon whilst going through a checkpoint in south-eastern Iraq. The checkpoint had been manned by soldiers of the Iraqi Civil Defence Corps, but Dutch troops had also been present at the checkpoint and it was alleged that the fatal shots had been fired by a Dutch soldier. The application claimed that the investigation carried out by the Dutch authorities into the incident had not been sufficiently independent or effective and was therefore in breach of the Netherlands' procedural obligations under Article 2 ECHR.

The Court affirmed as a matter of principle the full applicability of the procedural obligation to investigate under Article 2 even in 'in difficult security conditions, including in a context of armed conflict',[18] whilst, in line with the approach taken in prior cases, also acknowledging the need to take account of the particular difficulties faced by State authorities in a situation of armed conflict or occupation.[19]

Reading the relevant passages of the judgment in which those principles were applied, one may be justified in wondering to what extent the standards applied by the Court to military operations abroad are in reality different from those which it applies in peace time. In particular, in assessing the cardinal requirement of the effectiveness of the investigation carried out by the Dutch authorities, the Court appeared not to give any real effect to the difficulties of the situation in which those au-

[18] *Jaloud* (n 4) para 186 citing *Al-Skeini* (n 4) para 164. This approach can be traced back to the PKK cases (see, eg, *Ergi v Turkey* App no 23818/94 (ECtHR 28 July 1998) para. 85) and was also adopted in the Chechen cases (see *Isayeva* (n 11) paras 180, 210).

[19] *Jaloud* (n 4) para 186 citing *Al-Skeini* (n 4) para 164: 'where the death to be investigated under Article 2 occurs in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and […] concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed'. Previously, in *Al-Skeini*, the Court in a passage not cited in *Jaloud*, had noted that in assessing the compliance with Article 2 of the investigations carried out, it had to take as its starting point 'the practical problems caused to the investigatory authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war' and had observed that 'in circumstances such as these the procedural duty under Article 2 must be applied realistically, to take account of specific problems faced by investigators' (*Al-Skeini* (n. 4) para 168).

thorities had been operating.[20] Although the investigation suffered from a number of serious deficiencies, the general impression is that, despite paying lip-service to the need to take into account the difficulties faced in a situation of occupation, the Court in fact applied the Convention in a relatively stringent and 'undiluted' fashion.

What is of particular relevance for present purposes is that, despite its recognition that the relevant events had occurred in a situation of belligerent occupation,[21] the Court showed no apparent interest in discussing the way in which the rules of IHL applicable in such a situation regulate the obligation of the occupying power to investigate deaths within occupied territory, still less in considering whether the existence of those parallel rules might justify a less stringent application of the procedural obligations relating to investigation under Article 2 ECHR.

This is perhaps unsurprising in light of the Court's previous case-law. But it bears noting that the applicable rules of IHL are far less stringent than those under the ECHR insofar as they explicitly require investigation of deprivations of life during armed conflict only in certain limited circumstances,[22] and say very little about the characteristics

[20] *Jaloud* (n 4) paras 197-220, concerning, *inter alia*, the deficiencies in the questioning of the soldiers involved, the inadequacy of the autopsy and the lack of ballistic analysis (in particular due to the loss of bullet fragments).

[21] ibid para 56, citing *Al-Skeini* (n 4) paras 9-19.

[22] See, eg, art 121 of the Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 ('GC III'), and art 131 of the 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 ('GC IV'), imposing obligations 'immediately' to carry out 'an official enquiry' into every suspicious death of or serious injury to a prisoner of war or civilian internee, respectively. For detailed discussion, see International Committee of the Red Cross (ICRC), *Guidelines for Investigating Deaths in Custody* (ICRC, 2013), available at <www.icrc.org/eng/assets/files/publications/icrc-002-4126.pdf>. Note also the obligation of State Parties to the 1949 Geneva Conventions and Additional Protocol I to 'bring before their […] courts' individuals suspected of war crimes. See art 49(2) of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 ('GC I'); and, in nearly identical terms, art 50(2) of the Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 ('GC II'), art 129(2) GC III, and art 146(2) GC IV); see also art 85(1), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 ('AP I'). The

which such an investigation must possess.[23] For instance, as a matter of IHL, the criterion of independence of the investigation in general would appear to be far less stringent, in particular insofar as Additional Protocol I expressly envisages the possibility of what Schmitt has called 'a system of military self-policing' as regards certain violations of IHL.[24]

In addition to the right to life, detention is the other area where the applicable standards under the ECHR and IHL clearly differ. Article 5 ECHR sets out what the Court has consistently held to be an exhaustive list of the grounds on which individuals may lawfully be deprived of their liberty, and the long-standing jurisprudence of the Court is that 'security detention' or 'preventive detentions' are not contemplated, at least in peace-time.[25] As such, most instances of detention permissible under IHL during armed conflict and occupation, including the internment of civilians for imperative security reasons[26] and the internment of enemy combatants as POWs,[27] would therefore appear not to be compatible with Article 5(1) ECHR.[28]

Prior to the 2014 decision in *Hassan*, in those few cases in which questions relating to detention during armed conflict arose, the Court applied its normal 'peace-time' case law under Article 5 without adverting to the fact that different, more permissive rules may have been ap-

obligation to prosecute those suspected of war crimes clearly implies the obligation to carry out an effective investigation into conduct which may amount to a war crime. According to the ICRC, such an obligation is also reflected in customary humanitarian law; see J-M Henckaerts, L Doswald-Beck, *Customary International Humanitarian Law* (ICRC 2005) Rule 158.

[23] For instance, art 121 GC III and art 131 GC IV do not specify what the 'official enquiry' into death or serious injury in custody must entail.

[24] See, eg, art 81 AP I, and see M Schmitt, 'Investigating Violations of International Law in Armed Conflict' (2011) 2 Harvard National Security J 31.

[25] The Court has consistently emphasised (including as regards cases of domestic preventive detention) that the grounds for detention set out in art 5(1) are an exhaustive list: see, eg, *Ireland v United Kingdom* App no 5310/71 (ECtHR 18 January 1978) para 194; *Saadi v United Kingdom* App no 13229/03 (ECtHR [GC] 21 January 2008) para. 43; *A and others v United Kingdom* App no 3455/05 (ECtHR [GC] 19 February 2009) paras 162-163. That case law had previously been applied to detention by the military abroad in a situation of international armed conflict, see previously *Al-Jedda* (n 4) paras 99-100.

[26] See arts 78 and 135 GC IV.

[27] See arts 21 and ff GC III.

[28] For commentary, see J Hartmann, 'Detention in International Military Operations: Problems and Process' (2013) 52 Military L and L of War Rev 303.

plicable under IHL. Admittedly, in the most important case prior to Hassan in which the issue of security detention during occupation arose, *Al-Jedda v. United Kingdom*, the principal question before the Court was whether the effect of the relevant Security Council resolutions, and Article 103 of the UN Charter, was that the United Kingdom's obligations under Article 5 ECHR were displaced.[29] Nevertheless, having rejected that argument, the Court went on to assess the legality of the applicant's detention by applying Article 5, concluding that there had been a violation on the basis that the detention of the applicant had not been justified within any of the grounds expressly set out in Article 5.[30] There was no discussion of the extent to which detention may have been justified under IHL.[31]

## 3. *Hassan v United Kingdom*: A new approach to the application of Convention rights in armed conflict and occupation?

If previously it had proved possible for the Court to avoid questions relating to the interplay of the Convention and IHL, those questions came to the fore in the decision of the Grand Chamber in *Hassan v United Kingdom*, handed down in September 2014.[32]

*Hassan* concerned alleged violations of Convention rights arising out of the arrest, detention, and interrogation of an Iraqi civilian in the period immediately preceding the Coalition's declaration of the 'end of active hostilities' arising from the 2003 invasion of Iraq.[33] The applica-

[29] See *Al-Jedda* (n 4), paras 87 ff. The UK government argued that the UK was under an obligation to detain the applicant pursuant to UNSC Resolution 1546 and that that obligation prevailed over any other of the UK's obligations under the ECHR.

[30] *Al-Jedda* (n 4) para 110. Indeed, the UK Government had not contested that, if its obligations under the ECHR were not displaced or modified by the relevant Security Council resolutions, the detention of the applicant could not be justified on any of the grounds contained in art 5(1) (ibid para 100).

[31] For criticism, see J Pejic, 'The European Court of Human Rights' *Al-Jedda* Judgment: The Oversight of International Humanitarian Law', (2011) 93 Intl Rev Red Cross 837.

[32] *Hassan* (n 4).

[33] The victim had been arrested by UK troops on 23 April 2003, a few days before the declaration by the Coalition that 'major hostilities' had ended (1 May 2003) and the commencement of the occupation by the Coalition itself. Following his arrest, he had been detained at the US-run military facility at Camp Bucca and interrogated by UK

tion complained of violations of, *inter alia*, Article 5 ECHR, on the ground that the detention had not been based on any of the grounds foreseen by Article 5(1), and that the procedural guarantees enshrined in Article 5(2) to (4) had been denied.

The conflict between the limited permissible grounds for detention under Article 5(1) ECHR, and the more permissive rules under IHL allowing security internment in an international armed conflict was put squarely in issue by the position of the UK government. In resisting the claim, it argued that the relevant rules of IHL should prevail over Article 5, and in particular that where the ECHR fell to be applied in an international armed conflict, account had to be taken of the relevant rules of IHL 'which applied as the *lex specialis*, and might operate to modify or even displace a given provision of the Convention'.[34] In the alternative, it argued that, even if the Convention was not as such modified or displaced, nevertheless, Article 5 was to be interpreted consistently with other rules of international law, and that, in particular, the list of permissible grounds for detention under Article 5(1) 'had to be interpreted in such a way that it took account of and was compatible with the applicable *lex specialis*, namely international humanitarian law'.[35]

Whilst acknowledging the possibility of derogating from Article 5 pursuant to Article 15 ECHR, the United Kingdom argued that it had not done so 'consistently with the practice of all other Contracting Parties which had been involved in such operations'. Further, in a somewhat question-begging manner, it asserted that 'there had been no need to do so, since the Convention could and did accommodate detention in such cases, having regard to the *lex specialis*, international humanitarian law.'[36]

*Hassan* constitutes a radical departure from the traditional approach of the Court of applying the ECHR in isolation from the rules of IHL. In dealing with the issues of derogation, and the inter-relationship of Article 5 and the powers of detention foreseen under the rules of IHL

intelligence agents. Having been cleared for release, he was released on 2 May 2013 in an unspecified location in Basra province. His body was discovered several months later in a location some 700 km from Basra. In addition to the alleged violation of art 5, the application before the Court alleged violations of arts 2 and 3 ECHR.

[34] *Hassan* (n 4) para 88.

[35] ibid para 89.

[36] ibid para 90.

applicable in an international armed conflict, the Court at the outset reaffirmed its prior case law that the list of permissible grounds of detention contained in Article 5(1) provided no basis for internment or preventive detention. It concluded that detention on the basis of the Third and Fourth Geneva Conventions could not be regarded as 'congruent' with any of the express grounds set out in Article 5(1)(a) to (f).[37]

Nevertheless, the Court accepted the United Kingdom's position that detention in an international armed conflict in accordance with the rules of IHL should not be understood as being incompatible with Article 5(1). It did so having recalled that the United Kingdom had not sought to derogate from Article 5 in respect of the operations of its forces in Iraq, and observed that the case was the first in which a Contracting State had requested the Court to 'disapply its obligations under Article 5 or in some other way to interpret them in the light of powers of detention available to it under international humanitarian law'.[38]

First, as regards derogation, it held that there existed a subsequent practice of the States' parties to the ECHR amounting to an agreement for the purposes of Article 31(3)(b) VCLT, 'not to derogate from their obligations under Article 5 in order to detain persons on the basis of the Third and Fourth Geneva Conventions during international armed conflicts.'[39]

Second, the Court held that it was required 'to interpret and apply the Convention in a manner which is consistent with the framework under international law delineated by the International Court of Jus-

[37] ibid para 97.

[38] ibid para 99. Somewhat pointedly, the Court (ibid) also recalled that in *Al-Jedda*, which had likewise concerned detention in an international armed conflict, the UK had not sought to argue that art 5 ECHR had been modified or displaced by reason of the powers of detention contained in GC III and GC IV. As noted by the Court, the issue had only previously arisen in *Cyprus v Turkey* App no 6780/74 and 6950/75 (Report of the Commission 10 July 1976) para 313, where the Commission had refused to examine allegations of breach of art 5 relating to detention of prisoners of war.

[39] *Hassan* (n 4) para 101. The Court further noted that that practice appeared to be paralleled by the practice of the parties to the ICCPR in similar situations, and that no derogations had been entered even after the Advisory Opinion by the ICJ in *Nuclear Weapons* had made clear that obligations under the ICCPR continued to apply in parallel to IHL in situations of international armed conflict (ibid). Cf the trenchant criticism of the reasoning of the majority in this regard; *Hassan* (n 4), Dissenting Opinion of Judge Spano, joined by Judges Nicolaou, Bianku and Kalaydjieva, paras 12-15.

tice'.[40] In reaching that conclusion, it referred to the principle of 'consistent interpretation' enshrined in Article 31(3)(c) VCLT, and, having recalled its own case law as to the need to interpret the ECHR in light of other rules of international law,[41] quoted, *inter alia*, the dictum of the ICJ in *The Wall* Advisory Opinion as to the inter-relationship of IHRL and IHL (although notably it omitted the ICJ's reference to *lex specialis*).[42]

On that basis, it accepted that the absence of any derogation from Article 5 of the Convention by the United Kingdom did not prevent it taking IHL into account in interpreting that provision.[43] Thereafter, in a third step, it affirmed that 'even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law', and concluded that

> '[b]y reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of that provision 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 under the Third and Fourth Geneva Conventions.'[44]

In that regard, the Court emphasised that the scope of the exception it was creating was limited to international armed conflicts, on the basis that, absent a derogation, it could only be 'in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers.'[45] It further emphasized that

[40] *Hassan* (n 4) para 102.
[41] ibid paras 100 and 102.
[42] ibid para 102.
[43] ibid para 103.
[44] ibid para. 104.
[45] ibid. Cf the decision of the High Court of England and Wales in *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB) (2 May 2014), concerning the incompatibility with art 5 ECHR of the detention of a suspected Taliban leader by UK forces in Afghanistan in a context of non-international armed conflict. The finding

any such detention nevertheless had to be 'lawful' under IHL, and had to be in keeping with the fundamental purpose of Article 5(1) of protecting individuals from arbitrariness.[46]

In light of its conclusion that Article 5 was to be interpreted taking account of the relevant rules of IHL relating to international armed conflict, the Court then proceeded to read down the procedural safeguards contained in Article 5(2) to (4).[47] In that regard, it held that paragraphs (2) and (4) (requiring the giving of information as to the reasons for detention, and the availability of judicial review of the legality of detention, respectively), were to be interpreted 'in a manner which takes into account the context and the applicable rules of international humanitarian law',[48] and accepted that the 'competent body' for periodic review of detention as foreseen by Articles 43 and 78 of GC IV need not necessarily be a 'court' as is normally required by Article 5(4).[49]

As to the safeguard contained in Article 5(3) (i.e. that persons detained pursuant to Article 5(1)(c) must be brought promptly before a judge, and are entitled to trial within a reasonable time, or release pending trial), the Court held, somewhat disingenuously, that the provision was not applicable on the basis that, in the case of security detention or internment under IHL, individuals were not detained pursuant to Article 5(1)(c).[50]

of incompatibility was based, *inter alia*, on the conclusion that IHL applicable to non-international armed conflict provides for no separate power to detain or intern (ibid paras 241-251).

[46] *Hassan* (n 4) para 105.

[47] For analysis of the divergence between IHRL and IHL standards with regard to procedural guarantees for individuals deprived of their liberty, see J Pejic, 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence' (2005) 87 Intl Rev Red Cross 375. Pejic notes that although internment and administrative detention are frequently resorted to in both international and non-international armed conflicts and other situations of violence, the protection under IHL of the rights of those affected 'is insufficiently elaborated' (at 376) and advocates the view that those IHL guarantees should be supplemented by the relevant IHRL standards (at 377-379).

[48] *Hassan* (n 4) para 106.

[49] Ibid. The Court in addition added that the competent body 'should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness', and that the first review should take place shortly after the start of detention, with subsequent reviews taking place at frequent intervals thereafter (ibid.).

[50] ibid.

Applying those principles to the facts of the case, the Court concluded that the detention of Mr Hassan had been consistent with the United Kingdom's powers under IHL, and therefore did not violate Article 5 of the Convention.[51]

## 4. *The need for a principled approach*

The Court's approach in *Hassan* is deeply problematic, and its wisdom open to question, on the one hand as concerns adherence to the express text of the Convention and the previous case law of the Court on derogations and the permissibility of security detention, and, on the other, as regards the practical problems and uncertainty which it is likely to create in the future for State Parties and for the Court itself.

First, the conclusion reached by the Court is inconsistent with the ordinary meaning of the terms of Article 5(1). The text of Article 5 is clear that the only grounds for lawful detention are those listed in Article 5(1)(a)-(f), as the Court itself has previously recognized (and as it itself recalled in *Hassan*). The Court's conclusion to the contrary in *Hassan* is no more and no less than an exercise in *contra legem* interpretation.[52] By interpreting the obligation under Article 5 in light of relevant rules of IHL, the Court has introduced a major qualification to its previous long-standing position of principle that the grounds for detention enumerated in Article 5(1) are exhaustive.[53]

Second, the approach in *Hassan* is also not in line with the long-standing jurisprudence of the Court on derogations. The Court has always been strict in requiring that a derogation should be in place before accepting any claim that rights could be limited in light of the existence of an emergency. Notably, such a strict approach was adopted even in

[51] ibid para 109.

[52] See, in the context of a non-international armed conflict, the conclusions of Mr Justice Leggatt in *Serdar Mohammed* (n 45), that 'Given the specificity of Article 5, there is little scope for *lex specialis* to operate as a principle of interpretation' (para 291).

[53] See the jurisprudence cited above (n 25). In *Al-Jedda* (n 4), the Court specifically emphasised, in a case concerning detention in international armed conflict, that no deprivation of liberty will be compatible with art 5(1) 'unless it falls within one of those grounds or unless it is provided for by a lawful derogation under Article 15 of the Convention' (para 99).

the context of situations which incontrovertibly amounted to internal armed conflict. For instance, in *Isayeva v. Russia*, the Court noted that since '[n]o martial law and no state of emergency has been declared in Chechnya, and no derogation has been made under Article 15 of the Convention', the military operation at issue 'ha[d] to be judged against a normal legal background.'[54]

Finally, and perhaps most importantly, acceptance by the Court of the fact that States may rely on the more permissive rules of IHL without the need to have entered a prior derogation is dangerous for the future integrity of the system of protections under the Convention.

In light of the decision in *Hassan*, it is to be anticipated that the next front for litigation will be in the context of Article 2, with States trying both to limit the negative protection of the right to life in situations of armed conflict in the light of what is permissible under IHL, and to argue that the obligation of investigation of killings in armed conflict should coincide with the more restrictive obligations imposed by IHL.

In that regard, it might be argued that the text of Article 2 and Article 15(2) pose a near insurmountable obstacle, insofar as the latter expressly provides that no derogation is permissible from Article 2 'except in respect of deaths resulting from lawful acts of war'. On its face, Article 15(2) anticipates that, in order to be able to justify a killing as a 'lawful act of war' under IHL, a State must first enter a derogation. However, similarly clear textual limits were present in *Hassan*, yet the Court was prepared both to disregard the need for a derogation, and to interpret the text of Article 5 in a manner which is inconsistent with its 'ordinary meaning'. Such willingness to disregard the clear text of the Convention creates a dangerous precedent which does not bode well for the future and will make it more difficult for the Court to maintain a coherent interpretation of the Convention in the future.

Quite apart from this, the Court's approach in *Hassan* will almost inevitably draw the Court into difficult questions of IHL. For instance, questions are likely to arise as to the appropriate characterisation of particular situations, which is a necessary issue for application of the rele-

[54] *Isayeva* (n 11) para 191. See also, eg, *Al-Jedda* (n 4) paras 99-100; *Georgia v Russia (II)* App no 38263/08 (decision 13 December 2011) para 73, noting that neither Georgia nor Russia had made a derogation in the context of their 2008 conflict.

vant body of rules of IHL, as well as being essential if effect is to be given to the Court's caveat that it is only in international armed conflicts that preventive detention can be regarded as compatible with Article 5.[55] Whilst admittedly for many military operations abroad there may be little doubt as to whether a conflict is international or internal, it is not guaranteed that this will be so in all cases.

Quite apart from those threshold questions, acceptance that ECHR obligations can be automatically modified by virtue of any applicable rules of IHL may also potentially require the Court to deal with complex questions relating to, inter alia, the status of particular individuals, including members of irregular forces or civilians who 'directly participate in hostilities'. This will particularly be the case if actions alleging violation of Article 2 are brought by the relatives of insurgents killed in battle, which will inevitably raise questions as to the circumstances in which it is permissible to kill 'illegal combatants'. As a specialist human rights court, some doubts may legitimately be expressed as to the extent to which the European Court is well-equipped and has the necessary expertise to deal with such issues.[56]

A far simpler solution was available to Court in *Hassan*, which would have maintained coherence with its previous case law, and not required the questionable interpretative gymnastics in which the Court was forced to engage. Rather than dismissing the requirement of derogation on the basis that there existed a subsequent practice of the States parties to that effect, and then creating a new *contra legem* exception to Article 5, the Court could simply have held that, if a State wishes to exercise its power to detain individuals in an international armed conflict on grounds which are not expressly envisaged by Article 5, then it is required to enter a prior derogation to Article 5. Such an approach would have had the significant advantage of remaining faithful to the text of

[55] *Hassan* (n 4) para 104.

[56] Admittedly, many of the same issues are likely to arise to the extent that a State were to make the limited derogation to art 2 foreseen by art 15(2), permitting killings resulting from 'lawful acts of war'. The advantage of requiring derogation is that such issues would arise within the framework expressly contemplated by the ECHR, rather than as implied, *ad hoc* qualifications to the relevant obligations.

the Convention, and would have posed no particular burden upon the States parties.[57]

Similar considerations would apply insofar as issues may arise in the future as to compliance with the substantive or procedural obligations relating to the right to life under Article 2 in the context of military operations abroad. Requiring a State to enter a limited derogation to its obligations under Article 2, as foreseen by Article 15(2), is consistent with the express terms of the Convention, whilst also permitting States to take the measures necessary in combat situations, provided that they comply with IHL.

The great advantage of the application of IHRL to armed conflict, quite apart from the better prospects of enforcement and compliance, has always been seen as resulting from its uniform application and the minimum threshold protections it provides, which apply to all merely by virtue of the fact of being a human being. Depending on the circumstances, a State may be able to limit the application of certain obligations in exceptional circumstances, including armed conflict, notably by way of derogation. But the crucial counterpart of this, which acts as a safeguard against abuse, is that any derogation needs to be clearly formulated and communicated in advance.

By contrast, and just when finally there had started to be a degree of clarity as to the extraterritorial application of the Convention to military action abroad, the decision of the Grand Chamber in *Hassan* has intro-

[57] Despite the doubts advanced by some commentators (see, eg, Pejic (n 31), at 850), there is little doubt that art 15 is relevant (and susceptible of application) in situations where a Contracting State is involved in military operations abroad. Given the evolution of international law since the adoption of the Convention in 1950, and in particular the progressive abandonment in international law of the relevance of a formal state of war (on which, see C Greenwood, 'The Concept of War in Modern International Law' (1987) 36 ICLQ 28), it would be unreasonable to interpret the notion of 'war' in art 15(1) in an overly restrictive manner. Similarly, the right to derogate should not be unduly limited by insistence upon the requirement that any situation of armed conflict abroad should be one 'threatening the life of the nation'. Rather, art 15 should be understood as, at the least, permitting a State to derogate where it is involved in a situation of international armed conflict. For extensive discussion of question of the relevance of art 15 to extraterritorial military operations, see M Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict', in N. Butha (ed.), *Collected Courses of the Academy of European Law* (OUP forthcoming 2015) available at <http://ssrn.com/abstract=2447183>. See also the observations of Mr Justice Leggatt in *Serdar Mohammed* (n 45) at para 155.

duced elements of inconsistence and legal uncertainty into the Court's jurisprudence, as a result of the possibility of 'implied' qualification of the relevant obligations by reference to the relevant rules of IHL. Whilst providing much to comment on for academics, it is bad for States, the scope of whose obligations is now once more subject to a significant degree of uncertainty, and even worse for the individuals affected by the actions of their armed forces.