

## **Application of IHL by the ECtHR**

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The views expressed here are those of the authors and do not necessarily reflect the position of the International Committee of the Red Cross.

### **Introduction**

The International Committee of the Red Cross (ICRC) is a neutral, impartial, independent humanitarian organisation whose mandate is to protect and assist victims of armed conflict and situations of violence all over the world. The ICRC has also been mandated by states to be a guardian of International Humanitarian Law (IHL) and work on its development.

The aim of this presentation on the application of IHL by the ECtHR is not to critique or confirm the Court's findings on cases or its interpretation of IHL or even to give the ICRC's position on those cases but rather to share some observations on the Court's case law from an IHL perspective.

### **Armed conflicts, IHL and ECHR**

IHL applies exclusively to situations of armed conflicts. It is also clear, in particular from Article 15 of the European Convention on Human Rights (ECHR), that human rights also apply to such situations. This has been the ICRC's position for years.

From the perspective of IHL, it is of course important that people have human rights in armed conflict and access to courts.

A number of applications before the ECtHR have been made in situations classified under IHL as armed conflicts (international or non-international) but, until recently, the ECtHR has been reluctant to refer openly to IHL or to apply it.

Two main types of situations of armed conflicts which have been the object of applications before the ECtHR:

- Situations of armed conflict on the territory of a state party to the Convention (e.g. *Georgia v. Russia (II)* on the August 2008 IAC between those countries)
- Situations of armed conflict outside the territory of a state party to the ECtHR but where that state carries out military operations (e.g. Netherlands or United Kingdom in Iraq).

The latter situation raises issues of (extraterritorial) jurisdiction. Indeed, besides the territorial principle, the Court has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a contracting state outside its own territorial boundaries, and some were

related to armed conflicts. That is the case of one of its landmark judgment (*Al-Skeini and Others v. the United Kingdom* (2011) [GC]) that considered the situation of the UK being an occupying power in Iraq.

In this case, the Court recognised two main types of extra-territorial jurisdiction (See *Al-Skeini*, §§132-140): Power (or control) actually exercised over a person or effective control over an area.

It is also worth noting that, in a situation of armed conflict under its jurisdiction, a state could derogate from certain ECHR rights.

### **Article 15 – Derogation**

Article 15 ECHR provides that “In time of war or other public emergency threatening the life of the nation any High Contracting Party can take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”

We note, however, that the practice of states has been not to derogate when carrying out extra-territorial military operations.

Having seen that the ECtHR has been referred cases which occurred in situations of armed conflicts and that some of those cases have raised jurisdictional issues, we will now consider whether the ECtHR had referred to IHL or even applied it in its decisions.

First, we will briefly look at the use of IHL in cases regarding the national prosecution of war crimes or crimes against humanity.

### **Use of IHL in cases on national prosecution of war crimes, crimes against humanity**

The Court has had to consider IHL and refer to it in a number of cases where the applicant had been prosecuted at national level for violations of IHL. In those cases, it considered treaty-based and customary IHL.

*Korbely v. Hungary* (2008) on a conviction for crime against humanity.

*Maktouf and Damjanović v. Bosnia and Herzegovina* [GC] (2013): on convictions for war crimes on the basis of the retroactive application of a more stringent criminal law. Violation of Article 7.

*Marguš v. Croatia* [GC] (2014): on the conviction of a former commander of the Croatian army of war crimes against the civilian population committed in 1991 and the application of amnesties. The Court held that Article 4 of Protocol 7 ECHR (right not to be tried or punished twice) was not applicable as regards the applicant’s right not to be tried or punished twice in respect of the charges dropped by the prosecutor in January 1996 (application of amnesties law).

In relation to situations of armed conflicts, the ECtHR has evolved from indirect references to IHL and the use of IHL as an interpretative tool to actual application of IHL.

## **Indirect reference to IHL by the ECtHR and use of IHL as an interpretative tool**

Whilst in some cases the ECtHR seemed to make some indirect references to IHL (e.g. in *Isayeva v. Russia* (2005) referring to civilians and the need to “avoid or minimise, to the greatest extent possible, harm to civilians” as required under Article 2 ECHR when planning military operations or in *Benzer and Others v. Turkey* (2013), by reiterating that an indiscriminate aerial bombing of civilians and their villages could not be acceptable in a democratic society or reconcilable with any of the grounds regulating the use of force set out in Article 2 § 2 ECHR, the customary rules of international humanitarian law or any of the international treaties regulating the use of force in armed conflicts.), it clearly referred to it as an interpretative tool to determine the scope of the ECHR protection during an armed conflict in *Varnava and Others v. Turkey* (2009).

In that case, the Court underlined that Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of IHL which play an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflict.

The Court took a step further in the *Hassan v. UK* case.

### **Direct application of IHL in *Hassan v. UK***

*Hassan v. the United Kingdom* [GC] (2014)

This case concerned, *inter alia*, the capture of the applicant’s brother by British armed forces and his detention at Camp Bucca in Iraq. In particular, the applicant complained that the arrest and detention had been arbitrary and unlawful and lacking in procedural safeguards. This was the first case in which a contracting state had requested the Court to disapply its obligations under Article 5 ECHR or in some other way to interpret them in the light of powers of detention available to it under IHL.

The question before the Court was whether the internment could be considered consistent with Article 5 of the ECHR despite the absence of any derogation by the UK.

In the present case, the Court held that the applicant’s brother had been within the jurisdiction of the United Kingdom between the time of his arrest by British troops, in April 2003, until his release from the bus that had taken him from Camp Bucca under military escort to a drop-off point, in May 2003.

The Court further held that there had been no violation of Article 5 §§ 1, 2, 3 or 4 ECHR as concerned the actual capture and detention of the applicant’s brother.

#### The Court’s reasoning on application of IHL:

- There has been no subsequent agreement between the High Contracting Parties as to the interpretation of Article 5 in situations of international armed conflict. However, in respect of the criterion set out in Article 31 § 3(b) of the Vienna Convention on the Law of Treaties, the Court has previously stated that a consistent practice on the part of the high contracting parties could be taken as establishing their agreement not only as regards interpretation but even to modify the text of the Convention. The practice of the state parties is 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 (§101).
- The Court has made it clear on many occasions that the Convention must be interpreted in harmony with other rules of international law of which it forms part. This applies no less to IHL. The Court also referred to *Varnava and Others v. Turkey* (§102).

- The Court considers that "the lack of a formal derogation under Article 15 does not prevent the Court from taking account of the context and the provisions of IHL when interpreting and applying Article 5 in this case." (§103)
- Consistently with the case-law of the ICJ, the Court considers 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 IHL. "By reason of the co-existence of the safeguards provided by IHL 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." (§104)
- As regards procedural safeguards, the Court considers that, "in relation to detention taking place during an international armed conflict, Article 5 §§ 2 and 4 must also be interpreted in a manner which takes into account the context and the applicable rules of IHL." (§106)

### Conditions of interpretation of Article 5 in light of IHL

The Court set out some conditions for its interpretation of Article 5 in light of IHL.

- IAC only

§104: "It can 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 IHL, that Article 5 could be interpreted as permitting the exercise of such broad powers."

- If detention not arbitrary under IHL

§ 105: "As with the grounds of permitted detention already set out in those subparagraphs, deprivation of liberty pursuant to powers under IHL must be "lawful" to preclude a violation of Article 5 § 1. This means that the detention must comply with the rules of IHL and, most importantly, that it should be in keeping with the fundamental purpose of Article 5 § 1, which is to protect the individual from arbitrariness".

- Only if specifically pleaded by the respondent state

§107: "Although, (...), the Court does not consider it necessary for a formal derogation to be lodged, the provisions of Article 5 will be interpreted and applied in the light of the relevant provisions of IHL only where this is specifically pleaded by the respondent state. It is not for the Court to assume that a state intends to modify the commitments which it has undertaken by ratifying the Convention in the absence of a clear indication to that effect."

### **Pending cases... What is to come?**

*Georgia v. Russia (II)* [Application pending before the Grand Chamber - 13 December 2011 decision on the admissibility – Relinquishment of jurisdiction in favour of the Grand Chamber in April 2012] : The case concerns the armed conflict between Georgia and the Russian Federation in August 2008 and its aftermath. It raises, *inter alia*, issues under Articles 2, 3, 5 and 8 ECHR, as well as under Article 2 (freedom of movement) of Protocol No. 4 ECHR.

IHL related issues have been raised by both parties.

## Observations on Human Rights mechanisms and IHL

When it comes to human rights mechanisms, such as the ECtHR, it is useful to have a nuanced appreciation of their strengths and weaknesses, especially in the context of their application to situations of armed conflicts:

- All those HR mechanisms (ECHR and ECtHR, national laws and courts) only address states when parties to an armed conflict could include state and non-state actors. This is not an issue in itself, as it is the purpose and *raison d'être* of human rights mechanisms to create rights for individuals and corresponding obligations for states. Besides some of those rights are not even foreseen in IHL, such as a number of civil and political rights.

However, it may lead to a perception of inequality as a state could be held liable and its victims seek a judicial remedy whereas a non-state armed group could not and its victims would be left without such remedy.

- Under IHL, liability is personal and it is individuals that are held accountable for their actions and IHL violations. Those sanctions also serve as a disincentive for others to commit IHL violations. There may be less of a personal disincentive when states are held accountable.
- Focus on accountability and assessment “after the facts” have limits. Indeed, IHL is not limited to accountability and a “post-facto” assessment. In fact, its ultimate purpose is to change the behavior of parties to the conflict during the conflict leading to an increased protection of victims of such conflicts.

IHL, which is a universal law, is a very practical law, which is adapted to the reality of armed conflicts and the specificities of such reality. E.g., specific rules on conduct of hostilities and key principles, such as equality of belligerents, state and non-state parties to ACs, as well as impartiality of IHL towards those it protects.

This specificity of IHL which is adapted to situations of armed conflicts is also reflected in the fact that there can be no derogations to IHL.

Compared to this, human rights mechanisms or some of their provisions may seem less adapted to the field and reality of armed conflicts and it is important they remain realistic and practical in those situations.

- Regional courts are regional and there may be a risk of fragmented interpretation: It may especially be a problem if IHL is interpreted in light of regional jurisprudence and not so much when regional human rights mechanisms are interpreted in light of IHL.
- Whilst some core IHL and HR rights and obligations are the same, others differ (conduct of hostilities rules, review of detention of prisoners of war).

It becomes clear that no single human rights mechanism, including ECtHR, will be able to address *all* those concerns.

Whilst human rights mechanisms can play a role in ensuring individuals' rights are respected in situations of armed conflicts, it is also essential to ensure that IHL is known, respected and fully implemented so that it serves its ultimate purpose of changing the behavior of parties to the conflict in the field and protecting civilians.