COUNCIL OF EUROPE CONSEIL DE L'EUROPE

DH-SYSC-II(2018)11

25/06/2018

STEERING COMMITTEE FOR HUMAN RIGHTS /
COMITE DIRECTEUR POUR LES DROITS DE L'HOMME
(CDDH)

_____

COMMITTEE OF EXPERTS ON THE SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS /
COMITE D'EXPERTS SUR LE SYSTEME DE LA CONVENTION EUROPEENNE DES DROITS DE L'HOMME
(DH-SYSC)

_____

**DRAFTING GROUP ON THE PLACE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE EUROPEAN AND INTERNATIONAL LEGAL ORDER /**
**GROUPE DE REDACTION SUR LA PLACE DE LA CONVENTION EUROPEENNE DES DROITS DE L'HOMME DANS L'ORDRE JURIDIQUE EUROPEEN ET INTERNATIONAL**
**(DH-SYSC-II)**

_____

# External voluntary contribution for the preparation of the draft chapter of Theme 1, subtheme iv): The interaction between international humanitarian law and the European Convention on Human Rights

# Contribution volontaire externe à la préparation du projet de chapitre du Thème 1, sous-thème iv): L'interaction entre le droit international humanitaire et la Convention européenne des droits de l'homme

submitted by / soumise par Prof. Dr. Ilaria Viarengo and / et Dr. Federica Favuzza,
University of Milan (Italy) / Université de Milan (Italie)

(*available in English only / disponible en anglais uniquement*)

# THE INTERACTION BETWEEN INTERNATIONAL HUMANITARIAN LAW AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS[*]

## 1. Introduction

The present contribution deals with the interaction between the European Convention on Human Rights (ECHR) and International Humanitarian Law (IHL). After briefly defining the scope of application and sources of IHL (para 2.1) and addressing the question as to whether international human rights law (IHRL) and, in particular, the ECHR also apply in times of armed conflict (para 2.2), this contribution examines the case-law of the European Court of Human Rights (ECtHR) relating to situations of armed conflicts and the relationship with IHL (para 2.3). It then seeks to identify the main challenges arising from the interaction between these two legal regimes as dealt with by the ECtHR (para 3), and to provide possible solutions thereto (para 4).

## 2. Observations

### *2.1. Scope of application and sources of IHL*

IHL may be defined as a set of international customary and treaty-based rules that specifically applies in times of armed conflict.[1] These rules seek both to restrain the conduct of hostilities by limiting recourse to certain methods and means of warfare

[*] Drafted by Prof. Dr Ilaria Viarengo, Full Professor of International Law at the University of Milan (Italy), and Dr Federica Favuzza, Postdoctoral Fellow in International Law at the same university. Whilst the research conducted for the purposes of the drafting this contribution has clearly taken into account existing legal literature concerning the interaction between international human rights and humanitarian rules, the contribution itself mainly relies on and refers to the case-law of the European Court of Human Rights.

[1] The expression IHL is generally considered to cover both the so-called 'Hague Law', which of the Hague Conventions of 1899 and 1907 mainly dealing with the conduct of hostilities, and the 'Geneva Law', which consists of a set of Conventions that were adopted in Geneva and mainly deal with the protection of those individuals who do not or no longer take part in hostilities. See, *inter alia*, Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2016, p. 21.

and to protect the individuals and objects affected by the conflict.[2] IHL rules applicable to a certain situation of armed conflict differ to a considerable extent depending on the classification of said conflict.[3]

As regards IACs, it is generally accepted that an IAC exists 'whenever there is resort to armed force between States'.[4] Indeed, the term 'armed conflict' in this legal meaning first appeared in the four Geneva Conventions of 1949,[5] whose Common Article 2 para 1 states that the Conventions 'shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them'. Thus, the determination of the existence of an IAC 'must be based solely on the prevailing facts demonstrating the *de facto* existence of hostilities between the belligerents', irrespective of whether a war has been declared.[6] IHL rules applicable to IACs are set out in numerous multilateral treaties, as well as in customary international law.[7] As far as treaty law is concerned, the main instruments regulating the conduct of hostilities are the Hague Conventions of 1899 and 1907, which specifically deal with hostilities on land, at sea and in the air (through balloons),[8] whereas treaty-based rules on the protection of war victims are mainly provided by the four Geneva Conventions of 1949[9] and their additional Protocols of 1977.[10]

---

[2] See, *inter alia*, H-P Gasser, 'Humanitarian Law, International' (2015) *Max Planck Encyclopedia of Public International Law*, available at: http://opil.ouplaw.com, at para. 3; N Ronzitti, *Diritto internazionale dei conflitti armati*, Giappichelli, Turin, 2017, p. 19.

[3] See, among others, GD Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press, Cambridge, 2016, p. 159.

[4] ICTY, *Tadić* IT-94-1, Decision on the defence motion for interlocutory appeal on jurisdiction, Appeals Chamber, 2 October 1995, at 70.

[5] See E Crawford, 'Armed Conflict, International' (2015) *Max Planck Encyclopedia of Public International Law*, at 2.

[6] ICRC, *Commentary on the First Geneva Convention*, 2016, at 211, available at: ihl-databases.icrc.org/ihl/full/GCI-commentary.

[7] For a study of IHL customary rules, see the International Committee of the Red Cross extensive study: *Customary IHL Database* (on-line version), available at: http://ihl-databases.icrc.org/customary-ihl/eng/.

[8] See Dinstein, supra n 1, p. 21.

[9] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (hereinafter, GC I); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II); Convention (III) relative to the Treatment of Prisoners of War (GC III); Convention (IV) relative to the Protection of Civilian Persons in Time of War (GC IV).

As for military occupation, it may be defined as the situation in which 'the forces of one or more States exercise effective control over a territory of another State without the latter State's volition'.[11] Although a military occupation presupposes the existence of an IAC,[12] the two are clearly not identical, and applicable rules differ. As a matter of fact, alongside several provisions that apply to any IAC, IHL applicable to occupation includes a sub-set of rules within IHL that only applies in respect of occupied territories (the so-called 'occupation law'). This legal framework is embodied in the 1907 Regulations concerning the Laws and Customs of War on Land annexed to the Convention (IV) respecting the Laws and Customs of War on Land (hereinafter, the Hague Regulations), in the IV Geneva Convention Relative to the Protection of War Victims of 1949 (GC IV), and in some provisions within Additional Protocol I of 1977 (AP I), as well as in other treaties relating to specific fields, e.g. the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict.

As for NIACs, they are generally defined as armed conflicts opposing governmental forces and insurgents within the territory of a State, or two or more armed groups fighting against each other within a State.[13] The definition of a situation as a NIAC for the purposes of the application of IHL rules varies depending on the rules themselves. Common Article 3 to the Geneva Conventions – which contains the minimum fundamental guarantees to be respected in the context of NIACs – merely refers to an 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'. As for the criteria that must be satisfied for such a conflict to exist and common Article 3 to apply, in the silence of the latter, international criminal tribunals have turned to relevant customary international rules.

---

[10] See, in particular, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (AP II).

[11] E Benvenisti, 'Occupation, Belligerent' (2009) *Max Planck Encyclopedia of Public International Law*, at 1.

[12] See Dinstein, supra n 1, p. 34.

[13] See R Kolb, *Advanced Introduction to International Humanitarian Law*, Edward Elgar, Cheltenham-Northampton, 2014, p. 22.

They have thus identified two main requirements for the existence of a NIAC, namely (*a*) that one of the parties to the conflict be a non-State actor attaining a certain degree of organisation,[14] and (*b*) that the violence or fighting reach a certain level of intensity.[15]

Article 1 para 1 of Additional Protocol II to the four Geneva Conventions (AP II) provides for a different definition of NIAC for the purposes of its scope of application.[16] Indeed, this provision not only limits the scope of application of AP II to non-international armed conflict, but also expressly excludes its applicability to armed conflicts involving two or more armed groups fighting against each other within the territory of a State. The provision under consideration further requires that the 'dissident armed forces or other organized armed groups' engaged in hostilities against governmental forces be organised 'under responsible command' and 'exercise such control' over a part of the State's territory 'as to enable them to carry out sustained and concerted military operations and to implement this Protocol'.

Unlike the plethora of treaty-based rules applicable to IACs, those applying to NIACs are limited to common Article 3 to the Geneva Conventions, the 28 provisions of AP II (out of which only 15 are substantive), and a few other treaty rules that apply to all armed conflicts, such as the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.[17] However, when it comes to customary IHL, it is generally argued that the legal framework applicable to IACs and the one applicable to NIACs have gradually converged in certain respects.[18]

[14] ICTY, *Haradinaj at al.* IT-04-84-T, Judgment, Trial Chamber, 3 April 2008, at 60.
[15] See ICTY, *Tadić* IT-94-1, Decision on the defence motion for interlocutory appeal on jurisdiction, Appeals Chamber, 2 October 1995, at 70; *Haradinaj at al.*, supra n 14, at 49.
[16] Article 8 para 2 lit. *f*) of the ICC Statute provides for yet another definition of NIAC, as the situation which takes place in the territory of a State 'when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups'.
[17] See, among others, E David, *Principes de droit des conflits armés*, Bruylant, Brussels, 2012, p. 130.
[18] See, for instance, *Tadić*, supra n 15, at 119.

### *2.2. Applicability of IHRL in times of armed conflict and the relationship with IHL*

The applicability *ratione materiae* of IHRL in times of armed conflict has been affirmed on several occasions by the International Court of Justice (ICJ)[19] and by several UN organs,[20] and is generally accepted in legal literature.[21] After all, this view appears to be confirmed, *inter alia*, by the wording of certain provisions within international human rights treaties. As far as the ECHR is concerned, not only is it the case that, in defining the ECHR's scope of application, Article 1 does not expressly exclude its applicability in situations of armed conflict, but Article 15 also provides for a derogation clause to be triggered 'in time of war or other public emergency threatening the life of the nation' and, though affirming the non-derogable nature of the right to life under Article 2, expressly allows for derogations related to 'deaths resulting from lawful acts of war'.[22]

In the light of the applicability *ratione materiae* of IHRL in times of armed conflict and the fact that IHL rules are clearly specifically meant to apply in those situations, it is generally considered that these two legal regimes coexist (as neither regime prevails *en bloc* over the other), and that a situation may thus be simultaneously regulated by

[19] See, *inter alia*, *Legality of the threat or use of nuclear weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, para 25; *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, para 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, ICJ Reports 2005, p. 168, para 216.

[20] See, for instance, UN GA Res 2675(XXV), Basic principles for the protection of civilian populations in armed conflicts, 9 December 1970, A/RES/2675; UN SC Res 1265, 17 September 1999, S/RES/1265.

[21] See, *inter alia*, F Hampson, 'The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body' (2008) 90, 871 *International Review of the Red Cross* 549 at 560; R Kolb and S Vité, *Le droit de l'occupation militaire: perspectives historiques et enjeux juridiques actuels*, Bruylant, Brussels, 2005, p. 304; E Greppi, 'To what extent do the international rules on human rights matter?' in F Pocar, M Pedrazzi and M Frulli (eds), *War Crimes and the Conduct of Hostilities. Challenges in Adjudication and Investigation*, Edward Elgar, Cheltenham-Northampton, 2013, p. 38 at p. 41. *Contra*, among others, MJ Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99, 1 *American Journal of International Law* 119 at 141; Human Rights Committee, Fourth periodic report of Israel on the implementation of the ICCPR, 14 October 2013, CCPR/C/ISR/4, para 47.

[22] On derogation clauses in human rights treaties, see, *inter alia*, I Viarengo, 'Deroghe e restrizioni alla tutela dei diritti umani nei sistemi internazionali di garanzia' (2005) 88, 4 *Rivista di diritto internazionale* 955.

different norms pertaining to both regimes.[23] In other words, as far as the ECHR is concerned, the existence of an armed conflict does not mean that the ECHR ceases to apply. This is indeed the approach taken by the ECtHR in its case-law relating to situations of IACs (including military occupations) and NIACs, as the ECtHR has never held that the ECHR had to be disapplied in favour of IHL but has instead consistently found it to be applicable even in situations of armed conflict.

Against this background, for the purposes of the present contribution, regard must be had to the relationship between different, yet overlapping norms pertaining to these two regimes. In this respect, it should be noted that the degree of protection that some IHL rules afford individuals may differ to a considerable extent from that provided by the provisions of the ECHR. The reason for this mainly lies in the different rationales underlying these two legal regimes. Indeed, although the overarching purpose of IHL is to alleviate the suffering necessarily caused by war, its rules are clearly the result of a constant tension between these humanitarian considerations, on the one hand, and military necessity, on the other hand.[24] It may thus come as no surprise that, in some instances, IHL rules are definitely not as protective of individual rights as the provisions of the ECHR. As the ECtHR's case-law demonstrates,[25] this is especially true when it comes to deprivations of life and personal liberty in times of armed conflict.

As regards the former, whilst IHL rules admit that, in the context of an armed conflict, combatants who are not placed *hors de combat* and civilians taking direct part in hostilities be considered as lawful targets of attack and therefore deprived of their life (without any obligation to prove *necessity* and in accordance with a rather different

[23] See *Legal consequences*, supra n 19, para 106. For legal literature supporting this view, see, *inter alia*, David, supra n 17, p. 99; M Milanović, 'Norm Conflicts, International Humanitarian Law and Human Rights Law' in O Ben-Naftali (ed.), *International Human Rights and International Humanitarian Law: Pas de Deux*, Oxford University Press, Oxford, 2011, p. 95 at p. 100; Kolb and Vité, supra n 21, p. 304; C Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflicts' (2007) 40, 2 *Israel Law Review* 310 at 322.
[24] See Dinstein, supra n 1, p. 8.
[25] See below a Section 2.3.

notion of proportionality),[26] Article 2 ECHR prohibits deprivations of life except when they take place 'in the execution of a sentence of a court following [a person's] conviction of a crime for which this penalty is provided by law',[27] or when said deprivations of life result 'from the use of force which is no more than *absolutely necessary*: (*a*) in defence of any person from unlawful violence; (*b*) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (*c*) in action lawfully taken for the purpose of quelling a riot or insurrection'. It should also be noted that States parties' obligations under Article 2 ECHR further include positive obligations, e.g. that to carry out effective investigations into instances of deprivation of liberty.[28]

As for the right to personal liberty, the differences between the ECHR and IHL rules concern both the grounds and procedure for deprivations of liberty, and certain important procedural safeguards.[29] Indeed, similarly to what has previously been noted in respect of Article 2 ECHR, Article 5 para 1 ECHR provides for an exhaustive list of cases of admissible deprivation of liberty, none of which is generally considered to include administrative detention on security grounds as authorised by certain IHL rules (namely, Article 21 GC III and Articles 42, 43 and 78 GC IV).[30] Moreover, paras 2 to 5 set out several procedural safeguards that ought to be accorded to any individual who has been deprived of his or her liberty, e.g. the right to be informed of the reasons for the arrest (Article 5 para 2) and the right to challenge the lawfulness of his or her detention in the context of so-called habeas corpus proceedings (Article 5 para 4).

[26] See, *inter alia*, Dinstein, supra n 1, p. 102; Milanović, supra n 23, p. 118.
[27] On the alleged abolition of the death penalty in the ECHR system, see in particular the Factsheet prepared by the ECtHR's Press Unit on this issue: www.echr.coe.int/Documents/FS_Death_penalty_ENG.pdf (last updated October 2015).
[28] See below at Section 2.2.1.
[29] On this issue, see, *inter alia*, F Favuzza, *Security Detention in Times of Armed Conflict: The Relevance of International Human Rights Law*, Wolters Kluwer-CEDAM, Padua, 2018, p. 266.
[30] See, among others, Milanović, supra n 23, p. 116. See also, *inter alia*, the ECtHR's case-law on security detention in Iraq, which is briefly discussed below at Section 2.3.

In the light of the above, the question as to how the ECHR and IHL interact in times of armed conflict is of paramount importance for the protection of individual rights. The following sub-section will describe the approach that the ECtHR has followed in its case-law so far.

### *2.3. Case-Law of the ECtHR*

The ECtHR has often dealt with alleged violations of the rights enshrined in the ECHR in the context of situations that may be considered as either IACs (including military occupations) or NIACs.[31] Whereas a few of the cases that have been or are being dealt with by the ECtHR were initiated by inter-State applications, most of them were instead initiated by individual applications. As regards inter-State applications, consider, among others, the 2001 Grand Chamber's judgment in the case of *Cyprus v Turkey*,[32] the pending case of *Georgia v Russia (II)*,[33] and the group of inter-State applications lodged by Ukraine against Russia and still pending before the ECtHR.[34] As for cases originated in individual applications, these have mostly concerned violations that had allegedly taken place in Northern Cyprus, Turkey, Nagorno-Karabakh, former Yugoslavia, Chechnya, Afghanistan, Iraq, Georgia, and Ukraine.[35] Overall, violations frequently complained of include, but are not limited to, those of the right to life enshrined in Article 2, the right to personal liberty under Article 5, the prohibition of torture established by Article 3, the right to property under Article 1 of Protocol No 1, and the right to an effective remedy under Article 13.[36]

---

[31] It should be noted that, in most cases, the State concerned had not recognised the situation in question as an armed conflict and the ECtHR did not expressly qualified it as such in its judgment or decision. Nevertheless, the cases mentioned in this contribution have all been included in the factsheet on armed conflicts prepared by the ECtHR's Press Unit: www.echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf (last updated May 2018). Furthermore, it should be noted that IHL applies irrespective of whether the parties to an armed conflict recognise it as such. See above at Section 2.1.

[32] *Cyprus v Turkey* (GC), Application No 25781/94, Judgment of 10 May 2001.

[33] *Georgia v Russia (II)*, Application No 38263/08.

[34] Applications Nos 20958/14, 42410/15, 8019/16, and 70856/16.

[35] For an overview of the ECtHR's judgments and decisions concerning situations of armed conflict, see the factsheet on this issue that has been published by the ECtHR's Press Unit: www.echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf (last updated May 2018).

[36] Ibid.

In spite of the significant number of cases concerning situations of armed conflict that have been brought before the ECtHR, so far the Court has only expressly addressed the issue of the interaction between the ECHR and IHL on one occasion, namely in the case of *Hassan v the United Kingdom* in 2014.[37] Indeed, that was the first time that a respondent State had expressly asked the ECtHR 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 [IHL]'.[38] In previous cases, the respondent State had never asked the ECtHR to do so, and the ECtHR had then simply applied the ECHR. In doing so, it had at times made reference to IHL or taken the difficult circumstances of a situation of armed conflict into account in determining whether a violation had occurred, especially in respect of positive obligations. However, the ECtHR had always appeared to apply the ECHR as such, irrespective of whether the situation in question qualified as an armed conflict. Its case-law concerning the right to life is an illustrative example of this approach.[39] Therefore, the following sub-section will consider it briefly (Section 2.2.1), before turning to the abovementioned *Hassan* case (Sections 2.2.2 and 2.2.3).

*2.3.1. The ECtHR's case law on the right to life pursuant to Article 2 ECHR in situations of armed conflict*

As previously mentioned, Article 2 ECHR enshrines the right to life and sets out the circumstances in which a deprivation of life may be justified.[40] Over the years, the ECtHR has dealt with several cases in which the applicants complained the alleged violation of negative and/or positive obligations stemming from this provision in connection with States parties' involvement in either IACs (including military occupations) or NIACs.

[37] *Hassan v United Kingdom* (GC), Application No 29750/09, Judgment of 16 September 2014.
[38] *Hassan v United Kingdom*, supra n 37, para 99.
[39] Ibid.
[40] See above at Section 2.2.

As regards the negative obligation not to deprive individuals of their life except for those cases that are expressly authorised by Article 2 itself and under a strict necessity/proportionality test, the ECtHR has generally considered it to apply even in situations that would normally be considered as armed conflicts,[41] though expressly referring, at times, to IHL, or even using IHL wording. Consider, *inter alia*, the case of *Benzer and Others v Turkey*, which concerned the alleged bombing of two villages and the ensuing killing of more than 30 people,[42] and in which the ECtHR held that 'an indiscriminate aerial bombardment of civilians and their villages cannot be acceptable in a democratic society […], and cannot be reconcilable with any of the grounds regulating the use of force which are set out in Article 2 § 2 of the Convention or, indeed, with the customary rules of international humanitarian law or any of the international treaties regulating the use of force in armed conflicts'.[43]

The ECtHR appears to have followed a similar approach with regard to positive procedural obligations stemming from Article 2 ECHR. It is particularly in this respect that it has, at times, taken into account the difficulties of complying with this type of obligation in the context of an armed conflict and conceded to some degree of flexibility. An illustrative case is that of *Al-Skeini and Others v the United Kingdom*, which concerned the deprivation of life of six persons in Basrah (Iraq) in 2003. At that time, 'major combat operations were declared to be complete and the United States of America and the United Kingdom became Occupying Powers within the meaning of Article 42 of the Hague Regulations'.[44] The Grand Chamber recalled that 'the obligation to protect the right to life under Article 2, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", require[d] by implication that there should be some form of effective official investigation when

[41] Take, for instance, the case of *Andreou v Turkey*, Application No 45653/99, Judgment of 27 October 2009, in which the applicant was a UK national who had been shot and injured by Turkish armed forces during tensions at the UN buffer zone in Cyprus and therefore complained the alleged violation of Article 2 ECHR.
[42] *Benzer and Others v Turkey*, Application No 23502/06, Judgment of 12 November 2013.
[43] Ibid., para 184.
[44] *Al-Skeini and Others v United Kingdom* (GC), Application No 55721/07, Judgment of 7 July 2011, para 143.

individuals have been killed as a result of the use of force by agents of the State'.[45] The respondent State argued, *inter alia*, that 'the procedural duty under Article 2 had to be interpreted in harmony with the relevant principles of international law'.[46] The ECtHR acknowledged that the facts of the case had taken place 'in the aftermath of the invasion, during a period when crime and violence were endemic'.[47] It expressly declared that, in considering the case at issue, it had taken 'as its starting-point the practical problems caused to the investigating 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', mentioning, in particular, 'the breakdown in the civil infrastructure, leading, inter alia, to shortages of local pathologists and facilities for autopsies; the scope for linguistic and cultural misunderstandings between the occupiers and the local population; and the danger inherent in any activity in Iraq at that time'.[48] It admitted 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'.[49] However, after recalling that, as clearly stated in its previous case-law, 'the procedural obligation under Article 2 continues to apply in difficult security conditions, including in a context of armed conflict',[50] the ECtHR ultimately held that, even under the looser standards that it was prepared to apply in the case under consideration, the United Kingdom had violated the procedural duty to investigate those deprivations of life stemming from Article 2.[51]

[45] Ibid., para 163.
[46] Ibid., para 152.
[47] Ibid., para 161.
[48] *Al-Skeini and Others v United Kingdom*, supra n 44, para 168.
[49] Ibid.
[50] Ibid., para 164. The ECtHR mentioned, in particular, several cases brought against Turkey and Russia. See, among others, *Güleç v Turkey*, Application No 21593/93, Judgment of 27 July 1998, para 81; *Isayeva v Russia*, Application No 57950/00, Judgment of 24 February 2005, paras 180 and 210.
[51] *Al-Skeini v United Kingdom*, supra n 44, para 177.

In conclusion, absent any lawful derogation pursuant to Article 15 ECHR – which, as mentioned, expressly includes Article 2 amongst the non-derogable provisions but, at the same time, allows for derogations concerning 'deaths resulting from lawful acts of war' –, the ECtHR has generally considered it necessary to judge the facts of cases involving armed conflicts 'against a normal legal background'[52] and has therefore applied Article 2 to situations of armed conflict,[53] even though at times expressly referring to IHL.[54]

*2.3.2. The case of* Hassan v the United Kingdom

The case under consideration originated in an application filed against the United Kingdom by Mr Khadim Resaan Hassan in 2009. The applicant alleged that his brother's arrest and detention by UK forces in Iraq 'were arbitrary and unlawful and lacking in procedural safeguards' and therefore violated Article 5 paras 1, 2, 3 and 4 ECHR.[55]

[52] See, among others, *Isayeva v Russia*, supra n 50, para 191; *Kerimova and Others v Russia*, Application No 17170/04 and others, Judgment of 3 May 2011, para 253. In this respect, see M Pedrazzi, 'La protezione del diritto alla vita tra diritto internazionale umanitario e tutela internazionale dei diritti umani', in A Di Stefano and R Sapienza (eds), *La tutela dei diritti umani e il diritto internazionale*, Società italiana di diritto internazionale, XVI Convegno, Catania, 23-24 giugno 2011, Editoriale Scientifica, Naples, 2011, p. 79 at p. 86.

[53] On the ECtHR's case-law relating to NIACs, see, *inter alia*, W Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya', 16 *European Journal of International Law* 741 at 759.

[54] See Pedrazzi, supra n 52, p. 88. Consider, for instance, the case of *Varnava and Others v. Turkey* (GC), Application No 16064/90 and Others, Judgment of 18 September 2009. In this case, which concerned several disappearances occurred during the 1974 conflict in Northern Cyprus, the ECtHR expressly held that 'Article 2 of the Convention should be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict' (ibid., para 185, quotations omitted).

[55] *Hassan v United Kingdom*, supra n 37, para 3.

As previously mentioned, in the case of *Al-Skeini v United Kingdom*, the ECtHR's had already qualified the UK as the Occupying Power of South East Iraq during the period 1 May 2003-28 June 2004.[56] As for the situation in Iraq at the time of the arrest and detention of the applicant's brother, the ECtHR qualified it in the following terms:

> On 20 March 2003 a coalition of armed forces under unified command, led by the United States of America with a large force from the United Kingdom and small contingents from Australia, Denmark and Poland, commenced the invasion of Iraq from their assembly point across the border with Kuwait. By 5 April 2003 British forces had captured Basrah and by 9 April 2003 United States troops had gained control of Baghdad. Major combat operations in Iraq were declared complete on 1 May 2003.[57]

The applicant's brother, Mr Tarek Hassan, had been captured by UK forces at the applicant's house on suspicion of being a combatant or a civilian posing a threat to security sometimes between 22 and 23 April 2003; he had then been transferred to the detention facility of Camp Bucca and, according to official records, released on 2 May 2003 after being interrogated by both UK and US forces.[58] Thus, the facts of this case concerned the last phase of the invasion and first days of the occupation of Iraq in 2003.[59]

*2.3.3. The majority's ruling in the* Hassan *case*

As previously mentioned, the case at issue was the first (and, to our knowledge, only) case in which a respondent State openly asked the ECtHR 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 [IHL]'.[60]

[56] *Al-Skeini v United Kingdom*, supra n 44, paras 143-148.
[57] *Hassan v United Kingdom*, supra n 37, para 9.
[58] *Hassan v United Kingdom*, supra n 37, para 10 ff.
[59] As for the ECtHR's findings in respect of the respondent State's jurisdiction pursuant to Article 1 ECHR, it deemed it unnecessary to determine whether the UK was already an Occupying Power at the time of Mr Hassan's arrest and detention, as it held that he 'was within the physical power and control of the United Kingdom soldiers and therefore fell within United Kingdom jurisdiction'. Ibid., para 76.
[60] *Hassan v United Kingdom*, supra n 37, para 99.

The ECtHR itself noted that, in the earlier *Al-Jedda* case,[61] the UK authorities had not contended 'that Article 5 was modified or displaced by the powers of detention provided for by the Third and Fourth Geneva Conventions', but they had instead relied on UN Security Council Resolution 1546 and annexed letters – which arguably 'had the effect of maintaining the obligations placed on occupying powers under [IHL], in particular Article 43 of the Hague Regulations' – to argue 'that the United Kingdom was under an obligation to the United Nations Security Council to place the applicant in internment and that, because of Article 103 of the United Nations Charter, this obligation had to take primacy over the United Kingdom's obligations under the Convention'. [62] In that case, the ECtHR had 'found that no such obligation arose' and ultimately held that the applicant's continued detention was a violation of Article 5 ECHR.

In the *Hassan* case, whilst the United Kingdom's primary contention was that it lacked jurisdiction as the facts had taken place extraterritorially in the active hostilities phase of an IAC, one of its alternative arguments was that 'Article 5 had to be interpreted and applied in conformity and harmony with international law', and that, 'where provisions of the Convention fell to be applied in the context of an [IAC], and in particular the active phase of such a conflict, the application had to take account of [IHL], which applied as the *lex specialis*, and might operate to modify or even displace a given provision of the Convention'.[63]

After confirming the jurisdiction of the United Kingdom in the case at hand,[64] the ECtHR delivered its judgment on the merits along the following lines.

As expected, it confirmed its earlier case-law on Article 5 ECHR by recalling that 'the list of grounds of permissible detention in Article 5 § 1 does not include internment or preventive detention where there is no intention to bring criminal charges within a

[61] *Al-Jedda v United Kingdom* (GC), Application No 27021/08, Judgment of 7 July 2011.
[62] *Hassan v United Kingdom*, supra n 37, para 99, recalling *Al-Jedda*, supra n 61, para 107.
[63] *Hassan v United Kingdom*, supra n 37, para 87.
[64] Ibid., para 80. Indeed, the ECtHR held that the applicant's brother 'was within the physical power and control of the United Kingdom soldiers and therefore fell within United Kingdom jurisdiction'. Ibid., para 76.

reasonable time'.[65] It then stressed that detention as allowed by GC III and IV is not 'congruent with any of the categories set out in subparagraphs (a) to (f)'. In particular, the ECtHR noted that, 'although Article 5 § 1(c) might at first glance seem the most relevant provision, there does not need to be any correlation between security internment and suspicion of having committed an offence or risk of the commission of a criminal offence', therefore excluding that the internment of Prisoners of War (POWs) and civilians posing a threat to the detaining State could be seen as falling within the scope of Article 5 para 1 lit. *c*).[66] As regards procedural safeguards, it recalled the right of anyone who has been deprived of his or her liberty to be informed promptly of the reasons for his or her arrest under Article 5 para 2 ECHR, as well as to take proceedings to have the lawfulness of his or her deprivation of liberty decided speedily by a court (i.e. habeas corpus proceedings) pursuant to Article 5 para 4 ECHR.[67] The ECtHR then noted that, in the case at issue, the United Kingdom had 'not purport[ed] to derogate under Article 15 from any of its obligations under Article 5'.[68]

All of this notwithstanding, the majority ruled that, in this case, the United Kingdom had not violated Mr Hassan's right to personal liberty under Article 5 paras 1 to 4 ECHR. The ECtHR mainly drew this conclusion on the basis of treaty interpretation pursuant to Article 31 para 3 of the Vienna Convention on the Law of Treaties (VCLT).

First of all, it relied on lit. *b*), which states that, when interpreting a treaty, 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' must be taken into account. In particular, the majority's ruling stressed that 'a consistent practice on the part of the High Contracting Parties, subsequent to their ratification of the Convention, could be taken as establishing their agreement not only as regards interpretation but even to modify

[65] Ibid., para 97.
[66] Ibid.
[67] Ibid., para 98.
[68] Ibid.

the text of the Convention'.[69] In the majority's view, 'the practice of the High Contracting Parties is not to derogate from their obligations under Article 5 in order to detain persons on the basis of' IHL, as none of the Contracting States that had been acting extra-territorially since their ratification of the Convention had ever made a derogation pursuant to Article 15 ECHR in respect of these activities.[70] The ECtHR thus accepted the United Kingdom's 'argument that the lack of a formal derogation under Article 15 [did] not prevent the Court from taking account of the context and the provisions of IHL when interpreting and applying Article 5 in this case'.[71]

Moreover, the majority's ruling relied on Article 31 para 3 lit. *c*) VCLT, which states that, when interpreting a treaty, 'any relevant rules of international law applicable in the relations between the parties' must be taken into account. In this respect, the judges referred to IHL rules on internment as 'other relevant rules of international law applicable in the relations between the parties' and concluded that, 'by reason of the *co-existence* of the safeguards provided by [IHL] and by the [ECHR] 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 [POW] and the detention of civilians who pose a risk to security' under GC III and GC IV.[72] Thus, it appears that, in the case at hand, the ECtHR rejected the United Kingdom's argument that IHL should be considered *lex specialis* capable of displacing or modifying Article 5 ECHR, and instead stressed the co-existence of these two sets of norms, by emphasising that, even in times of IAC, the safeguards enshrined in the ECHR 'continue to apply'.[73] Nevertheless, the majority also referred to the need to 'accommodate' the list of permissible grounds for deprivation of liberty established by Article 5 para 1 with the grounds provided by IHL, and argued that, in times of armed conflict, the safeguards under the ECHR must be 'interpreted against the background of the provisions of [IHL]'.[74]

[69] *Hassan v United Kingdom*, supra n 37, para 101.
[70] Ibid. (references omitted).
[71] Ibid., para 103.
[72] *Hassan v United Kingdom*, supra n 37, at para 104 (emphasis added).
[73] Ibid.
[74] Ibid., para 104.

In other words, in the majority's view, 'internment in peacetime does not fall within the scheme of deprivation of liberty governed by Article 5 [ECHR] without the exercise of the power of derogation under Article 15', but, in times of IAC, 'where the taking of POW and the detention of civilians who pose a threat to security are accepted features of [IHL]', Article 5 ECHR 'could be interpreted as permitting the exercise of such broad powers'.[75] As for procedural safeguards, the majority's ruling similarly held that Article 5 paras 2 to 4 ECHR also had to be interpreted in a manner which took into account the context and applicable IHL rules'.[76] The ECtHR therefore concluded, by 13 votes to 4, that the arrest and detention of the applicant's brother complied with IHL rules, and, 'most importantly', that they were 'in keeping with the fundamental purpose of Article 5 para 1, which is to protect the individual from arbitrariness'.[77]

*2.3.4. The partly dissenting opinion in the* Hassan *case*

In his partly dissenting opinion, Judge Spano (joined by Judges Nicolaou, Bianku and Kalaydjieva) criticised the abovementioned majority's findings in the *Hassan* case. In his view, the judgment delivered by the ECtHR constituted 'an attempt to reconcile norms of international law that are irreconcilable', as it did 'not conform with the text, object or purpose of Article 5 para 1 of the Convention, as this provision has been consistently interpreted by [the ECtHR] for decades, and the structural mechanism of derogation in times of war provided by Article 15'.[78]

[75] Ibid., para 104 (references omitted).
[76] Ibid., para 106.
[77] Ibid., para 105.
[78] *Hassan v the United Kingdom* (GC) Application No 29750/09, Merits and Just Satisfaction, 16 September 2014 (Partly dissenting opinion of Judge Spano, Joined by Judges Nicolaou, Bianku and Kalaydjieva), para 6.

Indeed, Judge Spano expressed his views in the following terms:

> The Convention applies equally in both peacetime and wartime. That is the whole point of the mechanism of derogation provided by Article 15 of the Convention. There would have been no reason to include this structural feature if, when war rages, the Convention's fundamental guarantees automatically became silent or were displaced in substance, by granting the Member States additional and unwritten grounds for limiting fundamental rights based solely on other applicable norms of international law. Nothing in the wording of that provision, when taking its purpose into account, excludes its application when the Member States engage in armed conflict, either within the Convention's *legal space* or on the territory of a State not Party to the Convention. The extra-jurisdictional reach of the Convention under Article 1 must necessarily go hand in hand with the scope of Article 15 (see *Bankovič and Others v. Belgium and Others* [GC], no. 52207/99, § 62, 12 December 2001).

Hence, Judge Spano held that, 'if the United Kingdom considered it likely that it would be "required by the exigencies of the situation" during the invasion of Iraq to detain' individuals on security grounds as allowed by GC III and GC IV, 'a derogation under Article 15 was the only legally available mechanism for that State to apply the rules on internment under international humanitarian law without the Member State violating Article 5 § 1 of the Convention'.[79] He mainly based these conclusions on the following arguments. As regards the majority's reliance on Article 31 para 3 lit. *b*) VCLT, he argued that the majority's rationale was flawed, *inter alia*, because the practice that it had relied upon (i.e. the absence of derogations in the event of extraterritorial IACs) was not actually meant to establish the agreement of the parties regarding the interpretation of the ECHR, but reflected instead the resistance of States parties to the extraterritorial reach of the ECHR.[80]

[79] Ibid., paras 8-9.
[80] *Hassan v United Kingdom*, supra n 78, para 12.

He also noted that,

> in assessing whether a State practice fulfils the criteria flowing from Article 31 § 3 (b), and thus plausibly modifies the text of the Convention […], there is, on the one hand, a fundamental difference between a State practice clearly mani-festing a concordant, common and consistent will of the Member States to collectively modify the fundamental rights enshrined in the Con-vention, towards a more expansive or generous understanding of their scope than originally envisaged, and, on the other, a State practice that limits or restricts those rights, as in the present case, in direct contravention of an exhaustive and narrowly tailored limitation clause of the Convention protecting a fundamental right.[81]

Moreover, Judge Spano criticised the majority's attempt at harmonisation and 'accommodation' of Article 5 ECHR, on the one hand, and relevant IHL rules on internment on security grounds, on the other hand. In particular, he stressed that, whilst 'it is certainly true that the Convention must be interpreted in harmony with other rules of international law of which it forms part', 'the doctrine of consistent interpretation of the Convention with other norms of international law has its limits, as does any other harmonious method of legal interpretation'.[82] In particular, as Article 5 para 1 'is worded exhaustively', in his opinion 'there is simply no available scope to "accommodate" […] the powers of internment under [IHL] within, inherently or alongside Article 5 § 1'.[83]

In conclusion, the dissenting judges argued that, in the *Hassan* case, the ECtHR had ultimately disapplied or displaced 'the fundamental safeguards underlying the exhaustive and narrowly interpreted grounds for permissible detention under the Convention by judicially creating a new, unwritten ground for a deprivation of liberty and, hence, incorporating norms from another and distinct regime of international law, in direct conflict with the Convention provision'.[84]

[81] Ibid., para 13.
[82] Ibid., para 16.
[83] Ibid.
[84] Ibid.

### 3. Analysis of the challenges

The stance that the ECtHR took in the *Hassan* case in respect of the interaction between the ECHR and IHL is likely to be applied in similar cases in the future. Indeed, as clarified by the ECtHR itself,

> 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 international humanitarian law *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.[85]

Thus, in the light of the *Hassan* jurisprudence, it seems reasonable to assume that, in times of extraterritorial IACs (and military occupations), Article 5 will be set aside and IHL rules will instead be factored into the ECtHR's assessment.

However, this approach gives rise to several potential challenges. First of all, it is not entirely clear whether and how the *Hassan* approach is supposed to apply in respect of other provisions of the ECHR. One cannot help but wonder whether all of the provisions of the ECHR will have to succumb to IHL potentially looser rules, should States ask the ECtHR to decide so. Clearly, this leaves the door open to legal uncertainty.

Legal uncertainty also surrounds the possible application of the *Hassan* approach in respect of extraterritorial NIACs (i.e. Afghanistan),[86] as IHL rules applicable to this type of conflict are not as developed as the ones applying to IACs, thus making it extremely difficult to foresee what the ECtHR's approach will be in these cases.

---

[85] *Hassan v United Kingdom*, supra n 78, para 105 (emphasis added).

[86] See, for instance, the recent case-law of UK courts in the *Serdar Mohammed* case: *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB); *Serdar Mohammed and Others v Ministry of Defence* [2015] EWCA Civ 843; *Abd Ali Hameed Al-Waheed v Ministry of Defence and Serdar Mohammed v Ministry of Defence* [2017] UKSC 2. On extraterritorial NIACs, see, *inter alia*, L Hill-Cawthorne, *Detention in Non-International Armed Conflict*, Oxford University Press, Oxford, 2016, p. 174. On the right to personal liberty under Article 5 ECHR in NIACs and the relationship with IHRL, see, among others, Favuzza, supra n 29, p. 347.

Moreover, at least to some extent, Judge Spano's criticism against the majority's ruling in the *Hassan* case is to be shared, especially in the light of the consideration that certain provisions of the ECHR do not leave any room for harmonisation with other international rules. With its exhaustive list of admissible grounds for deprivation of liberty, Article 5 ECHR is certainly one of these provisions, and the ECtHR's approach in the *Hassan* case ultimately resulted in a decreased degree of protection of human rights, one that was very difficult to foresee given the ECtHR's earlier jurisprudence. The same could be said, for instance, in respect of the abovementioned necessity requirement under Article 2 ECHR concerning the right to life. Should the ECtHR deviate from its jurisprudence as developed up to the *Hassan* case and 'accommodate' Article 2 to IHL rules as well, this could result in a decreased level of protection of the right to life.

It should finally be noted that the *Hassan* approach is likely to lead to significant differences in the scope of application of the provisions of the ECHR depending on the territorial or extra-territorial nature of the armed conflict under consideration. Indeed, the ECtHR has only excluded the need for derogations pursuant to Article 15 ECHR in respect of extraterritorial IACs and, as mentioned, it is not entirely clear how this approach affects the obligations of States parties engaged in NIACs extraterritorially or even in IACs within their own territory. If the ECtHR were to confirm a differentiated approach in future cases, this would ultimately result in a difference in the scope of application of the provisions of the ECHR that would be difficult to justify in the light of the ECtHR's approach to the ECHR's scope of application *ratione loci*.[87]

[87] See, in particular, *Banković and Others v Belgium and Others* (GC), Application No 52207/99, Decision of 12 December 2001, para 62, in which the ECtHR had expressly linked the scope of application of Article 15 ECHR to that of Article 1 ECHR.

## 4. Possible responses

It is submitted that the challenges that have been identified above could easily be addressed by endorsing the approach developed by Judge Spano, together with Judges Nicolaou, Bianku and Kalaydjieva, in the aforementioned partly dissenting opinion in the *Hassan* case.[88] Indeed, given the existence within the ECHR of a derogation clause that is meant to apply 'in time of war and other public emergency threatening the life of the nation' (Artice 15) and considering that, notwithstanding some divergent opinions, this clause is generally interpreted as admitting extraterritorial derogations,[89] it seems reasonable to conclude that the ECHR already provides an answer to the question of the interaction between its own provisions and IHL.

After all, as expressly provided by Article 32 para 1 ECHR, 'the jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto'. In other words, the ECtHR is mandated with the interpretation and application of the ECHR only and, whilst it is certainly advisable for it to take the difficult circumstances of an armed conflict and IHL rules into account *as far as possible*, it is not supposed to apply IHL *in lieu* of provisions of the ECHR that are worded exhaustively and leave no room for harmonisation by means of treaty interpretation, which simply cannot result in *contra legem* interpretation of the ECHR.[90]

[88] See above at Section 2.2.3. Indeed, the approach to norm conflicts that has been developed in this partly dissenting opinion finds support in the writings of renowned legal scholars. See, among others, J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, Cambridge University Press, Cambridge, 2003; Milanović, supra n 23.

[89] This issue is outside of the scope of this contribution. In this respect, see, among others, M Milanović, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict', in N Bhuta (ed.), *The Frontiers of Human Rights*, Oxford University Press, Oxford, 2016, p. 55. See also the UK Government's proposal to introduce a presumption of derogation from the ECHR in future armed conflict: www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2015/echr-derogation-launch-16-17/ (last accessed 30 May 2018).

[90] See A Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) 14, 3 *European Journal of International Law* 529 at 537, who stresses that '"relevant rules" may not, generally speaking, override or limit the scope or effect of a provision for whose clarification they are referred to'.