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STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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COMMITTEE OF EXPERTS ON THE SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS
(DH-SYSC)

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DRAFTING GROUP ON THE PLACE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE EUROPEAN AND INTERNATIONAL LEGAL ORDER (DH-SYSC-II)

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Chapter of Theme 1, subtheme iv):

Interaction between international humanitarian law and the European Convention on Human Rights

Preliminary Note

1. The present text is to be part of the future report of the CDDH on "The place of the European Convention on Human Rights in the European and international legal order". It constitutes the fourth sub-chapter of part / theme 1 of that future report, which addresses "The challenge of the interaction between the Convention and other branches of international law, including international customary law".

2. The text has been drafted by the co-Rapporteurs Mr Alexei ISPOLINOV (Russian Federation) and Mr Chanaka WICKREMASINGHE (United Kingdom). It has been revised and provisionally adopted by the DH-SYSC-II at its 5th meeting, 5-8 February 2019. Provisional adoption means that the Group has examined the text of the draft chapter paragraph by paragraph and made amendments, both on the content and on the form of the text. The text may be updated in case the European Court of Human Rights delivers new important judgments prior to the final adoption of the entire future report in 2019, in order to harmonise the entire text of the future report and to take into account possible orientations given by the CDDH.

3. The DH-SYSC-II further decided that § 13 of the present text shall be consolidated at the occasion of the final adoption of the future report.

Theme 1 subtheme iv – the relationship of the Convention and international humanitarian law (IHL)

1. Introduction

1. One of the areas in which the interaction of different bodies of international law has been most discussed in recent years is that between international human rights law and international humanitarian law (IHL). And it is no surprise that the case law of the Strasbourg Court features prominently in those discussions. However before reviewing the evolving case law of the Court, and considering challenges and possible solutions that may arise from it, it may be useful to frame that discussion with a few introductory words on the nature and application of IHL and the situations in which its interaction with the ECHR might arise.

2. International Humanitarian Law is the body of international customary and treaty based rules that specifically applies in armed conflict.[1] It does not cover internal tensions or disturbances such as isolated acts of violence that do not reach the threshold of an armed conflict. It has its own particular characteristics, but its primary aim is to limit the effects of armed conflict by ensuring that considerations of humanity continue to be weighed against the requirements of military necessity in armed conflict situations.

3. The content of IHL differentiates to some extent between: (a) situations of international armed conflict (IAC) (i.e conflict between two or more States); (b) situations of non-international conflict (NIAC) (conflict between one or more States on the one part and one or more non-State armed groups on the other part, or conflict between two or more non-State armed groups). The law of international armed conflict is also applicable in situations of belligerent occupation (i.e. where the armed forces of one State occupy territory belonging to another State, even if the said occupation meets with no armed resistance).

4. The Geneva Conventions and their Additional Protocols are at the core of IHL. In relation to IHL applicable to international armed conflicts, the most important rules of international law are now codified in the four Geneva Conventions of 1949 and in Additional Protocol 1 of 1977, which have been widely taken up by States. In addition there are a large number of other treaties that make up the corpus of IHL and may apply in a given situation, and customary international law is as well a significant source of the law applicable to IAC. Of particular note for present purposes are the provisions of the Third Geneva Convention on Prisoners of War, the Fourth Geneva Convention on the Protection of Civilians (including in situations of belligerent occupation), and Protocol I which developed the law further on both subjects.

5. By contrast, in relation to non-international armed conflict much of the law remains uncodified, although there are important provisions in conventional law notably Common Article 3 of the Geneva Conventions and Protocol II of 1977. It is therefore often necessary to turn to customary international law to determine the content of the law in a situation of non-international armed conflict. The law is based on the same fundamental principles of necessity, humanity, precaution and proportionality as underlie the law on IAC. Recent years

[1] As such International Humanitarian Law (IHL), sometimes also called the Law of Armed Conflict (LOAC), has traditionally been divided into two branches: “Hague law” which is mainly concerned with how military operations are conducted, and “Geneva law” concerned with the protection of persons directly affected by the conflict.

have seen a development of practice in the development and application of customary international law to situations of NIAC.

6. The development of international criminal law in the last two decades has been particularly significant, following the establishment of a number of international criminal courts and tribunals, including the negotiation of the Rome Statute of the International Criminal Court. These courts and tribunals have produced an extensive jurisprudence in relation to the prosecution of breaches of IHL that can result in individual criminal liability. In that context there has been an observable trend towards applying standards first developed in relation to IAC in the context of NIAC.

7. As noted above, IHL has developed as a body of legal standards applicable to the very specific context of armed conflict, to ensure respect for basic standards of humanity often in a context where ordering principles of society have broken down or are under threat deliberately through organised violence. Given that goal, and the fact that both IHL and international human rights law has significantly developed in the Post WW II period in reaction to the horrors that occurred during the immediately preceding period, it is notable that for a long time the two bodies of law developed in parallel but largely separately.

8. That separation has traditionally been explained by the specificity of the field of application of IHL. IHL applies in situations of armed conflict, governing primarily the conduct of hostilities and the protection of persons hors de combat. By contrast human rights law will apply in principle in times both of peace and conflict. In its first statement on the relationship between these two bodies of law the International Court of Justice said:

> *"The Court observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable* lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.*" (*Legality of the Threat or Use of Nuclear Weapons* (1996), Advisory Opinion of the ICJ, at para 25)

9. In a similar vein in its Advisory Opinion on *The Construction of a Wall in the Occupied Palestinian Territory* the ICJ held:

> *"the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the questions put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as* lex specialis*, international humanitarian law.* " (I.C.J. Reports 2004, p. 178, para. 106).

10. The use of the term *lex specialis* in both of these Advisory Opinions may suggest the displacement of a general obligation by a more specific one, in line with the maxim *lex specialis derogat legi generali*. However in its subsequent decision in *DRC v Uganda*, the ICJ cited the above description of the relationship between the two bodies of law from *The Wall* Advisory Opinion, but without the final sentence referencing the *lex specialis* principle. It went on to find that activities of the Ugandan forces in occupation of DRC territory breached both obligations of both IHL and human rights law that were incumbent upon both Uganda and DRC (including Art 6 and 7 of the ICCPR and Art 4 and 5 of the African Charter). In that context therefore the ICJ seems to have found that both bodies of law could apply to the same situation.

11. To the extent that both bodies of law may overlap, the key issues with respect to the ECHR are likely to include:

- how the right to life in Article 2 ECHR applies in the conduct of hostilities (including for example its interaction with the law on targeting);
- how Article 5 ECHR applies to the detention of prisoners of war or internment;
- how Article 15 ECHR can be invoked in situations of armed conflict;
- how Article 1 of Protocol 1 ECHR applies to persons displaced from their property by conflict;
- how far a Contracting Party has to apply the ECHR in situations of armed conflict beyond its own territory .

2. The approach of the European Court of Human Rights to situations of armed conflict

12. Whilst there have been a considerable number of applications to the Strasbourg Court arising from situations of armed conflict, there are in fact relatively few in which the Court has had to consider the application of IHL and its relationship to the ECHR. There are at least two factors which may be adduced in the explanation of this. Firstly there may well be an unwillingness on the part of States to characterise a situation in their territory as one of non-international armed conflict. As a result a State may not seek to defend its actions before the Strasbourg Court by reference to IHL, but rather seek to rely on the right ultimately to use forcible means to enforce law and order. The second is that it is only in recent years that the Court has been more open to the application of IHL.[2] . A number of stages to that evolution have been identified.

(a) Cases concerning military activity without reference to IHL

13. At the starting point of this evolution, an apparent reluctance on the part of the Court to consider the provisions of IHL has been observed in some of its earlier case-law.[3] For example in the case of *Isayeva v. Russia* (concerning deaths and injuries to IDPs as a result of the military led response to Chechen separatist violence around Grozny) the Court determined the case on the basis of the ECHR alone, despite the applicants' submissions

[2] See, for instance, L.A. Sicilianos, L'articulation entre droit international humanitaire et droits de l'homme dans la jurisprudence de la Cour européenne des droits de l'homme, Revue Suisse de droit international et droit européen, Vol. 27, No. 1, 2017, pp. 3-17; and also W. Schabas, *The European Convention on Human Rights: A Commentary,* (2015) OUP, at pp. 153-158.

[3] See the Contributions of Professor A. Kovler (DH-SYSC-II (2018)10) and Professor S. Touzé (DH-SYSC-II(2018)13). See also G. Gaggioli and R. Kolb, *A Right to Life in Armed Conflicts? The Contribution of the European Court of Human Rights*, (2007) Israel Yearbook of Human Rights, pp. 115-163.

that the military action contravened IHL, and the Court's own reference to the situation as one of conflict.[4]

(b) Cases in which secondary reference is made to IHL

14. In some cases, the ECtHR has acknowledged provisions of IHL as part of the legal context in which the ECHR applies. In *Varnava v. Turkey* (concerning missing persons following Turkey's military operations in northern Cyprus in 1974), the Court considered the application of Article 2 ECHR against the context of IHL in the following terms:

> *"… Article 2 must 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 (see Loizidou, cited above, § 43). The Court therefore concurs with the reasoning of the Chamber in holding that in a zone of international conflict Contracting States are under obligation to protect the lives of those not, or no longer, engaged in hostilities. This would also extend to the provision of medical assistance to the wounded; where combatants have died, or succumbed to wounds, the need for accountability would necessitate proper disposal of remains and require the authorities to collect and provide information about the identity and fate of those concerned, or permit bodies such as the ICRC to do so.*
>
> *186. In the present case, the respondent Government have not put forward any materials or concrete information that would show that any of the missing men were found dead or were killed in the conflict zone under their control. Nor is there any other convincing explanation as to what might have happened to them that might counter the applicants' claims that the men disappeared in areas under the respondent Government's exclusive control. In the light of the findings in the fourth inter-State case, which have not been controverted, these disappearances occurred in life-threatening circumstances where the conduct of military operations was accompanied by widespread arrests and killings. Article 2 therefore imposes a continuing obligation on the respondent Government to account for the whereabouts and fate of the missing men in the present case; if warranted, consequent measures for redress could then be effectively adopted*."

(c) Cases which examine IHL, but exclude it

15. In the case of *Sargsyan v Azerbaijan* (concerning a claim by an IDP claiming that his inability to return to his home in a village (Gulastan) at the frontline of the Nagorno-Karabakh conflict was an interference with his right to property (Art. 1 Protocol 1) and his right to respect for his home (Art. 8)), the Court considered whether there was a basis in IHL for the Government's denial of access to his home, in the following passage:

> *230. The Government argued in particular that the refusal to grant any civilian access to Gulistan was justified by the security situation pertaining in and around the village. While referring briefly to their obligations under international humanitarian law, the Government relied mainly on interests of defence and national security and on their obligation under Article 2 of the Convention to protect life against dangers emanating from landmines or military activity.*

[4] See *Isayeva v. Russia*, no. 57950/00, § 167 and §§ 180 and 184, 24 February 2005; and also *Isayeva and Others v. Russia*, nos. 57947/00 and 2 others, § 157 and § 181, 24 February 2005.

231. The Government have not submitted any detailed argument in respect of their claim that their refusal to grant civilians access to Gulistan was grounded in international humanitarian law. The Court observes that international humanitarian law contains rules on forced displacement in occupied territory but does not explicitly address the question of displaced persons' access to home or other property. Article 49 of the Fourth Geneva Convention (see paragraph 95 above) prohibits individual or mass forcible transfers or deportations in or from occupied territory, allowing for the evacuation of a given area only if the security of the population or imperative military reasons so require; in that case, displaced persons have a right to return as soon as hostilities in the area have ceased. However, these rules are not applicable in the present context as they only apply in occupied territory, while Gulistan is situated on the respondent Government's own internationally recognised territory.

232. What is rather of relevance in the present case, is the right of displaced persons to return voluntarily and in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist, which is regarded as a rule of customary international humanitarian law applying to all territory whether "occupied" or "own" (Rule 132 of the ICRC Study on Customary International Humanitarian Law – see paragraph 95 above). However, it may be open to debate whether the reasons for the applicant's displacement have ceased to exist. In sum, the Court observes that international humanitarian law does not appear to provide a conclusive answer to the question whether the Government are justified in refusing the applicant access to Gulistan.

16. The Court went on to find that whilst the applicant's home was in an area of military activity the respondent Government had not done sufficient to take alternative measures to restore his property rights or to provide him with compensation for his loss.

(d) Cases in which IHL has been directly applied by the Court

17. The case in which the Court has considered the relationship between IHL and the Convention in the greatest detail is the case of *Hassan v UK.* The case concerned the detention of the applicant's brother in Iraq, Tarek Hassan, on suspicion of being a combatant or a civilian who constituted a threat to security on 22 or 23 April 2003. He was taken to Camp Bucca, a US-run detention facility in which the UK retained its own compounds. Following his interrogation by both British and US forces the Camp records showed that he was released on or around 2 May. However he did not contact his family on his release and in September 2003 he was found dead in the town of Samara. The applicant brought proceedings alleging that the UK had breached Article 2, 3 and 5 in respect of his brother. However as the claims under Articles 2 and 3 were not established on the facts, it was the claim under Article 5 that became central.

18. In responding, the UK argued first that the Convention did not apply extraterritorially during the active hostilities of an international armed conflict. However in the alternative it also argued that to the extent that the Convention did apply in such circumstances, it had to be applied 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.

19. The Court did not accept the Respondent Government's arguments against the extraterritorial application of the Convention in these circumstances, on the basis that the applicant came within the physical control of UK forces on his detention, and remained under their authority and control even when he was subsequently transferred to US detention

within Camp Bucca. The Court therefore emphasised that both IHL and the Convention were applicable in the circumstances.

20. The Court therefore had to face the difficulty that the legal bases for detention set out in Article 5(1) ECHR make no provision for some of the powers of detention that are permissible under the Third and Fourth Geneva Conventions (notably in relation to prisoners of war and the powers of internment necessary for reasons of security). The Court noted that this was the first occasion on which a State had requested it not to apply or to interpret Article 5 in the light of powers of detention permissible under IHL. The Court chose to seek an "accommodation" between these two apparently conflicting legal provisions through interpretive approach based on the rules of interpretation in Article 31 of the Vienna Convention on the Law of Treaties. In particular paragraph 3 which permits that for the purposes of interpretation account shall be taken of:

> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.

21. The Court found that there was no subsequent agreement for the purposes of paragraph (a). In relation to paragraph (b), the Court looked at the practice of the Parties to the ECHR and found their consistent practice was not to use the derogation mechanism in Article 15 to modify their Convention obligations when undertaking military activity extra-territorially in an international armed conflict. In relation to (c) the Court underlined its previous caselaw requiring an interpretation of the Convention "in harmony with" other rules of international law, which applied also to IHL (*Varnava v Turkey* cited above).

> *"… 103. In the light of the above considerations, the Court accepts the Government's argument 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 international humanitarian law when interpreting and applying Article 5 in this case.*
>
> *104. Nonetheless, and consistently with the case-law of the International Court of Justice, 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 international humanitarian law. By 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. The Court is mindful of the fact that internment in peacetime does not fall within the scheme of deprivation of liberty governed by Article 5 of the Convention without the exercise of the power of derogation under Article 15 (see paragraph 97 above).*
> *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 international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers.*
>
> *105. As with the grounds of permitted detention already set out in those subparagraphs, deprivation of liberty pursuant to powers under international humanitarian law must be "lawful" to preclude a violation of Article 5 § 1. This means that the detention must comply with the rules of international humanitarian law 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 (see, for example, Kurt v. Turkey, 25 May 1998, § 122, Reports of Judgments and Decisions 1998-III; El-Masri, cited above, § 230; see also Saadi v. the United Kingdom [GC], no. 13229/03, §§ 67-74, ECHR 2008, and the cases cited therein).

106. 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 international humanitarian law. Articles 43 and 78 of the Fourth Geneva Convention provide that internment "shall be subject to periodical review, if possible every six months, by a competent body". Whilst it might not be practicable, in the course of an international armed conflict, for the legality of detention to be determined by an independent "court" in the sense generally required by Article 5 § 4 (see, in the latter context, Reinprecht v. Austria, no. 67175/01, § 31, ECHR 2005-XII), nonetheless, if the Contracting State is to comply with its obligations under Article 5 § 4 in this context, the "competent body" should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness. Moreover, the first review should take place shortly after the person is taken into detention, with subsequent reviews at frequent intervals, to ensure that any person who does not fall into one of the categories subject to internment under international humanitarian law is released without undue delay. …" [5]

22. Lastly, note should be taken of the fact that the Court has on occasion been called upon to indirectly consider questions of IHL in the context of cases concerning the compatibility of a criminal conviction for war crimes and crimes against humanity – which can result from serious violations of international humanitarian law – with Article 7 ECHR and the principle of *nullum crime sine lege*.[6]

3. Challenges and possible solutions

23. The desirability of establishing clarity as to the applicable law is of course a constant in all situations, but it has an obvious and particular importance in armed conflict situations. This underlines the need for a reconciliation between the different bodies of law to the extent that they are both applicable.

24. Any reconciliation must take account of the nature of conflict. These are situations in which the costs of both action and inaction can have profound consequences on the lives of those affected (both combatants and non-combatants); and where decisions may have to be made very quickly and at times on the basis of limited information, sometimes at the level of the individual soldiers, in the context of ongoing violence whether actual or threatened. In that sense the IHL is undeniably a *lex specialis* that has been fashioned specifically to be applied in conflict situations in order to uphold its underlying core principles.

25. The judgment in *Hassan* suggests a possible approach to the reconciliation of the two bodies of law, in the context of detention of prisoners of war and internment of individuals

[5] See also the partly dissenting opinion of Judge Spano, joined by Judges Nicolaou, Bianku and Kalaydjieva, differing from the majority's approach of seeking to address the apparently conflicting legal provisions through a "harmonious" interpretation. In their view the only way for a State to reconcile its obligations under Article 5 of the ECHR with the exercise of IHL powers to detain/intern under the Third and Fourth Geneva Conventions, was to make a valid derogation under Article 15.

[6] See the judgments in the cases of *Vasiliauskas v. Lithuania [GC], no. 35343/05, ECHR 2015*; *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, §§ 55 and 74, ECHR 2013; *Kononov v. Latvia* [GC], no. 36376/04, §§ 200 ss., ECHR 2010; and *Korbely v. Hungary* [GC], no. 9174/02, §§ 86 ss., ECHR 2008.

who constitute security threats in the context of an international armed conflict. The provisions of IHL in this respect are clear and well-established, enabling the Court to find that they were reconcilable with the fundamental purpose of Article 5(1) to protect the individual from arbitrary detention. It is imaginable that there are other areas of IHL in which the rules are similarly clearly established where a similar solution may be possible.

26. Adopting a similar solution in relation to NIACs may be possible in some respects, but there may be additional complexities. A first set of complexities arises from very different circumstances in which NIACs can occur. There may be threshold questions about the existence of NIAC, for example States may be disinclined to characterise a situation on its own territory as a NIAC. Other complexities may arise where the forces of a contracting party to the ECHR are involved in a non-international armed conflict extraterritorially. Another complexity may arise from determining the content of some of the rules relating to NIAC, which are still largely derived from customary international law. It should be noted, however, that States are bound in any case by the fundamental principles of IHL (necessity, humanity, precaution and proportionality) as a minimum, and that States should operate on a clear framework to avoid arbitrariness. Any possible "accommodation" or "harmonious" interpretation of IHL and human rights obligations is likely to require this as a minimum.

27. It has been suggested that an alternative solution to the question of determining conflicts between (at least some) provisions of the two bodies of law is for a State to derogate from the ECHR in accordance with Article 15.[7]

28. However, as the judgment in *Hassan* noted, States have not derogated in relation to situations of IAC in which they have engaged extraterritorially, and given the approach in that judgment the need to derogate would have to be weighed carefully.[8] It is conceivable that there may be cases where derogation may provide an appropriate route in relation to an extra-territorial conflict situation. There may be questions as to the applicability of Art 15, but to the extent that the Convention is applicable extra-territorially it would seem logical that Article 15 is also applicable. Any actual derogation would require justification in any event, but it would seem that the terms of Article 15 should be read sufficiently broadly to allow a derogation in principle when a State is acting extra-territorially.

29. A further set of questions might then arise as to the extent of possible derogations, again particularly in respect of extra-territorial application. For a start, there may be difficult issues in determining which ECHR obligations are applicable, arising from the notion of "dividing and tailoring" Convention rights in situations of extraterritorial application. Even where a derogation is permissible on the face of Article 15, it is not clear how far derogations may be permitted. Thus for example a derogation from Article 2 is permissible in respect of deaths resulting from lawful acts of war, however, as regards the scope of the procedural obligations under Article 2 ECHR, it is not necessarily clear how far they would apply.

30. All of this suggests that the invocation of Article 15 may assist in answering some questions, but it is also likely to raise further questions, and careful assessments would have to be made of its overall contribution to creating greater legal certainty.

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[7] According to the partly dissenting opinion of Judge Spano, joined by Judges Nicolaou, Bianku and Kalaydjieva in *Hassan*, this is the only possible solution under the Convention. Differing from the majority's approach of seeking to address the apparently conflicting legal provisions through a "harmonious" interpretation, they argued that the only way for a State to reconcile its obligations under Article 5 of the ECHR with the exercise of IHL powers to detain/intern under the Third and Fourth Geneva Conventions, was to make a valid derogation under Article 15. It is notable too that the Human Rights Committee in General Comment No. 35 seems to accept the possibility of States derogating from the right to liberty in conflict situations under certain conditions, including conflict situations outside their own territories in which they are engaged (see para. 65).

[8] States in practice do not appear to derogate in situations of extraterritorial NIAC.