22 International Humanitarian Law Questions before the European Court of Human Rights

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22.1 Introduction

The text of the European Convention on Human Rights and Fundamental Freedoms (ECHR) clarifies that, as a matter of principle, the Convention continues to apply in times of armed conflict. A clear textual argument pointing to the Convention's continued application in situations of armed conflict can in fact be derived from Article 15 I ECHR, which allows a state to derogate from the Convention "in time of war or other public emergency threatening the life of the nation". Although this provision provides that the application of the ECHR may be subject to limitations, it also entails that the Convention continues to apply in such situations, and that these may include armed conflicts: even if the term 'war' is taken to refer, as it did traditionally refer, to an international armed conflict, the expression 'other public emergency' is wide enough to include both a situation of internal disturbances or tensions falling short of an armed conflict and a fully-fledged civil war.

It may be interesting to recall that, faced with a similar provision (Article 4) in the 1966 International Covenant on Civil and Political Rights (ICCPR), the International Court of Justice (ICJ), in its famous 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, clearly stated that "the protection of the CCPR 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."[1] In the more recent 2004 advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ also stated, in rather more general terms, that "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 ICCPR."[2]

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1 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July1996, 1996 ICJ Rep. 226, at 240, para. 25.

2 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, 2004 ICJ Rep. 136, at 178, para. 106.

However, when the ECHR was adopted, in 1950, and for many years thereafter, it was commonly assumed that the Convention would *mainly* apply in times of peace and, consequently, the question of its relationship with the rules of international humanitarian law (IHL), i.e. the international law of armed conflicts, remained moot and did not attract much attention from legal writers. It must be kept in mind that until 1989 the Council of Europe, the ECHR 'parent' organization, was mainly a club of Western European states which were either not involved in armed conflicts or had not yet ratified the ECHR when they were so involved. But since 1989 the Council of Europe has become a pan-European organization, all of its members are expected to be party to the ECHR, and some of them have unfortunately been involved in situations of armed conflict. Even if the European Court of Human Rights (the Court) was never so explicit as the ICJ as regards the continuing application of the ECHR in situations of armed conflict, it did proceed on this assumption whenever it was asked to review the conduct of a state in such situations, and often expressly referred to the above-mentioned advisory opinions of the ICJ. As a result, the question of the relationship between the ECHR and IHL turned into a very topical one, one that would sooner or later have to be addressed by the Court.[3]

22.2 The Extra-Territorial Application of the ECHR

As far as international armed conflicts are concerned, the need for the Court to address the relationship between the ECHR and IHL was made even more pressing as a result of its case law regarding the extra-territorial application of the Convention: in fact, the situations of international armed conflict in which states party to the ECHR were involved as respondent states in ECHR cases occurred outside their territory, and sometimes even outside the territory of any state party to the Convention (e.g. in Iraq).

In this respect, Article 1 ECHR provides that the states party thereto are to secure the rights and freedoms defined in the Convention to "everyone *within their jurisdiction*" (emphasis added). Although under international law a state's 'jurisdiction', intended as the exercise of state powers, is mainly territorial, it is generally recognized that there are a number of exceptional cases where such 'jurisdiction' is exercised outside the state's territory, e.g. within the state's diplomatic missions abroad or on board ships or aircraft flying the state's flag, in particular when they are on the high seas or in the international airspace, but also in territories which do not legally belong to the state but are nonetheless subject to its authority.

3 I already examined the role of the Court in applying IHL when I gave a course on this subject at the Academy of European Law Summer School in Florence in June 2008. The course was later published: *see* A. Gioia, . The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict, inO. Ben-Naftali (Ed.), *International Humanitarian Law and International Human Rights Law*, Oxford University Press, UK, 2011, p. 200 *et seq*. The present article is also intended as a partial update to that more detailed study.

In my opinion, the Court's case law on the extent of a state's extra-territorial jurisdiction under Article 1 ECHR has not been very consistent over time, but the 2011 decision in the case of *Al-Skeini and Others v. the United Kingdom*[4] may be considered as a good point of departure for assessing the current legal situation. In this case, which related to alleged violations by the United Kingdom (UK) of the procedural aspect of the right to life (Article 2 ECHR) – i.e. of the obligation to effectively investigate into deaths – during the joint belligerent occupation of Iraq by the UK and the United States of America in 2003-2004, the Court found that a number of individuals killed in the course of UK security operations in Iraq were under the jurisdiction of the UK for the purposes of Article 1 ECHR.

First of all, in *Al-Skeini* the Court definitively dispensed with a controversial concept that had arisen in its previous case law – most notably in the 2001 decision in the *case of Bankovic and Others v. Belgium and Others*,[5] relating to NATO's aerial bombardment of Belgrade in 1999 – namely the so called 'legal space' of the ECHR: in *Bankovic* the Court had *inter alia* referred to this concept in order to justify its decision to decline jurisdiction by stating that the Convention essentially applies "in a regional context" and "was not designed to be applied throughout the world, even in respect of the conduct of contracting states."[6] Since Yugoslavia was not at the time a party to the ECHR, the Court clearly used this argument, among others, to distinguish the case from previous cases where it had found that it had jurisdiction for acts committed by Turkey in Northern Cyprus, Cyprus being a party to the ECHR.[7] But the argument had already been contradicted in a number of later cases relating to alleged violations of the Convention in Iraq,[8] and in *Al-Skeini* the Court appeared to definitively put it to rest.[9] As a result, the fact that a state party has acted within the territory of a state not party to the ECHR can no longer justify that state's alleged violations of the Convention: on the contrary – save perhaps in cases of aerial bombardment where *Bancovic* may still appear as relevant – the ECHR may now be seen to 'follow' a state party's military contingents wherever in the world they may be.

Secondly, as to the situations where the ECHR applies extra-territorially, in *Al-Skeini* the Court went beyond its established case law in identifying such situations. I am not referring here to the finding that the ECHR applies in situations where, "as a consequence of lawful or unlawful military action", a state exercises effective control of an area outside its national territory, either directly or through a subordinate local administration".[10]

4 *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, Judgment of 7 July 2011, ECHR 2011-IV 99.

5 *Bankovic and Others v. Belgium and Others* [GC], no. 52207/99, Decision of 12 December 2001, ECHR 2001-XII 333.

6 *Bankovic and Others v. Belgium and Others, supra*, at 358, para. 80.

7 Ibid.

8 See the discussion in A. Gioia, *supra*, at 211-212.

9 *Al-Skeini and Others v. the United Kingdom, supra*, at 170, para. 142. Unlike me, the Court appears to see no contradiction between the aforementioned statements in *Bankovic* and its later case law.

10 *Al-Skeini and Others v. the United Kingdom, supra*, at 169, paras. 138-140.

These situations obviously include, though they are not limited to, all cases of belligerent occupation as defined by IHL, but in this respect *Al-Skeini* is in line with the Court's previous case law – relating, in particular, to the Turkish occupation of Northern Cyprus or to the "overall control" exercised over Transnistria by the Russian Federation[11]– and with corresponding findings by the ICJ, to the effect that all international human rights instruments can be applied extra-territorially, in particular in occupied territories.[12] A more controversial aspect of *Al-Skeini* relates, in my opinion, to the extra-territorial application of the Convention in cases other that military occupation or effective control of foreign territory, which are labelled by the Court as cases of so-called "state agent authority and control".[13]

Apart from the non-controversial cases of acts of diplomatic and consular agents and other cases where a state carries out executive or judicial functions in foreign territory "through the consent, invitation or acquiescence of the government of that territory",[14] what matters here is the Court's finding that "whenever the state, through its agents, exercises control and authority *over an individual*, and thus jurisdiction, the state is under an obligation under Article 1 to secure to that individual the rights and freedoms under section 1 of the Convention that are relevant to the situation of that individual" (emphasis added), and this even where the "physical control over the person in question" is exercised outside buildings, aircraft or ships controlled by the state.[15] As was made clear by later cases, this statement has opened the door for the application of the ECHR in the context of military operations in foreign territory even where the territory is not effectively occupied, and even outside military bases or other premises held by the state.[16] Therefore, the question of the relationship between the rules of the ECHR and IHL

11 See the discussion of previous cases in A. Gioia, *supra*, at 207-208.

12 See, in particular, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, supra*, at 178-181, paras. 107-113; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, 2006 ICJ Rep. 168, at 243, para. 216. In its turn, the European Court referred to this and later ICJ cases to the same effect in its more recent case law, including in *Al-Skeini*.

13 *Al-Skeini and Others v. the United Kingdom, supra*, at 167-168, paras. 133-137.

14 *Al-Skeini and Others v. the United Kingdom, supra*, at 167, paras. 134-135.

15 *Al-Skeini and Others v. the United Kingdom, supra*, at 168, paras. 136-137.

16 Previous case law on alleged violations committed outside a state's military camps or bases in foreign territory was not very conclusive: see the discussion in A. Gioia, *supra*, at 209-211. Indeed, *Al-Skeini* itself may be seen as not entirely relevant in this respect, inasmuch all the deaths examined by the Court occurred before the formal end of the military occupation of Iraq: it could therefore be argued that there was no need for the Court to resort to this additional argument in order to uphold its jurisdiction, and that the nature of the argument was that of a mere *obiter dictum*. But in the 2014 decision in *Hassan v. the United Kingdom*, a case relating to alleged violations of the right to freedom (Article 5), also during UK security operations in Iraq, the Court expressly rejected the UK argument that the fact that a person may be within a state's "physical power and control" should not be a basis for the Court's jurisdiction "in the active hostilities phase of an international armed conflict, where the agents of the contracting state are operating in territory of which they are not the occupying power, and where the conduct of the state will instead be subject to the requirements of IHL" (*Hassan v. the United Kingdom* [GC], no. 29750/09, Judgment of 16 September 2014, ECHR 2014-VI 1, at 49, paras. 76-77. See also *Jaloud v. the Netherlands, infra*, paras. 139-142).

may now also arise whenever a state party to the Convention is engaged in military operations in foreign territory, irrespective of whether or not this territory is effectively occupied.

Finally, there is another aspect of *Al-Skeini* that should be highlighted here. I had personally always wondered how the Court's case law could be reconciled with Article 56 ECHR, which explicitly deals with the "territorial application" of the ECHR.[17] This provision makes the Convention inapplicable to the territories for whose international relations a state party is responsible, unless that state expressly declares, at the time of ratification or at any time thereafter, that it wishes to extend the application of the Convention to all or any of such territories. Although the drafting history of Article 56 ECHR clarifies that its provisions were specifically meant to apply to colonial territories ('dependent territories' in the strict sense), a contextual interpretation of Article 1 ECHR in the light of Article 56 ECHR might arguably have led to the conclusion that, since the Convention does not automatically apply to non-metropolitan territories which are *de jure* subject to a state's territorial sovereignty, *a fortiori* it could not automatically apply to territories only *de facto* subject to a state's governmental power, such as territories which are militarily occupied as a result of an armed conflict.

After a long silence, in *Al Skeini* the Court had to deal with the effect of Article 56 ECHR because the UK expressly referred to this provision when pleading that the Court lacked jurisdiction.[18] The Court, however, merely stated in this respect that, although the 'effective control' principle of jurisdiction does not replace the system of declarations under Article 56 ECHR, "the existence of this mechanism, which was included in the Convention for historical reasons, cannot be interpreted in present conditions as limiting the scope of the term 'jurisdiction' in Article 1", since the two situations are "clearly separate and distinct".[19] While this language may not appear to be entirely satisfactory, it definitively confirmed the irrelevance of Article 56 ECHR in this context.

22.3 ECHR Violations in the Context of Multinational Military Operations

In addition to the case law on the extra-territorial application of the ECHR, there is another aspect of the Court's recent case law that has potentially further broadened the situations where the issue of the relationship between the ECHR and IHL may arise: I refer to the attribution to a state party of alleged violations committed by members of its military contingents employed in the context of multinational operations under the command of another state or of an international organization, i.e. another jurisdictional issue

17 See the discussion in A. Gioia, *supra*, at 206-207.

18 *Al-Skeini and Others v. the United Kingdom, supra*, at 157, para. 111.

19 *Al-Skeini and Others v. the United Kingdom, supra*, at 169-170, para. 140.

that may often arise in situations of armed conflict, though by no means only in such situations.

In this respect, I have no doubt that the evolution of the Court's case law has been a positive one: in fact, a worrying development had been, in my opinion, the unwillingness of the Court, in the famous 2007 decision in the *Behrami and Saramati* cases,[20] to hold a state responsible for violations of the Convention allegedly committed during multinational operations in Kosovo, on the basis of the argument that such operations had been established by UN Security Council resolutions – adopted under Chapter VII of the UN Charter – and that, therefore, the conduct of national contingents was exclusively attributable to the UN organization. Even more questionable was the Court's unwillingness to distinguish between the United Nations Mission in Kosovo (UNMIK), which is indeed a UN operation under UN command and control, and the Kosovo Force (KFOR), which is actually a NATO-led operation merely 'authorized' by the UN.[21] The result of this surprizing attitude was that although, as a rule, the ECHR could be said to 'follow' a state party's soldiers wherever in the world they might be, an exception could be conveniently provided when the same soldiers were acting in the context of a UN-led, and even a UN-authorized, military operation.

In its recent case-law, the Court appears to have more correctly applied the international law rules relating to attribution of conduct to a state, as codified *inter alia* in the Draft Articles on the Responsibility of International Organizations adopted in 2004 by the UN International law Commission (ILC).[22] In the case of *Al-Jedda v. the United Kingdom*,[23] concerning an alleged violation of Article 5 ECHR as a consequence of the internment of a joint Iraqi/British national by the UK in Iraq from 2004 to 2007, the British Government contended that the internment was attributable to the UN and not to the UK because the UK forces in Iraq were operating as part of a multinational force authorized by the UN, and expressly referred to the precedent of *Behrami and Saramati*.[24] This time, however, the Court distinguished the case from *Behrami and Saramati* and applied instead the test of effective control over the acts or omissions of troops:[25] it, therefore, held that, because the UN Security Council had "had neither effective control nor ultimate authority and control" over acts and omissions of the multinational force in Iraq, the applicant's detention was not attributable to the UN but was rather attributable to the UK.[26]

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20 *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* [GC], nos. 71412/01 and 78166/01, Decision of 2 May 2007 (not published in the ECHR.

21 See the discussion in A. Gioia, *supra*, at 208-209.

22 The text of the Draft Articles is reproduced in GA Res. 200166/100, 9 December 2011, Annex.

23 *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, Judgment of 7 July 2011, ECHR 2011-IV 305.

24 *Al-Jedda v. the United Kingdom, supra*, at 355-357, paras. 64-67.

25 The Court specifically referred to Article 5 of the ILC Draft Articles on the Responsibility of International Organizations: see *Al-Jedda v. the United Kingdom, supra*, at 365, para. 84.

26 *Al-Jedda v. the United Kingdom, supra*, at 365-366, paras. 83-86.

Similarly, in the 2014 decision in the case of *Jaloud v. the Netherlands*,[27] a case relating like *Al-Skeini* to alleged violations of the procedural aspect of the right to life in Iraq, but this time by the Netherlands, the Court found that a state cannot justify violations of the ECHR on the basis that it participated in a multinational operation under another state's command (in this case the UK as the occupying power in Iraq) and noted in this respect that the Netherlands retained "full command" over its own military personnel, in particular in respect of the provision of security in the relevant area, to the exclusion of other participating states: that being the case, the Court found that the Dutch troops could not be said to have been placed "at the disposal" of any foreign power, or that they were "under the exclusive control of any other state",[28] and in so doing it expressly referred to Article 6 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the ILC in 2001.[29]

22.4 The Court's Competence to Apply IHL

Although, under Article 19 ECHR, the Court's specific function is "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and in the Protocols thereto", the Court has repeatedly and rightly recognized that, as an international treaty, the ECHR cannot be interpreted and applied in a vacuum and that, on the contrary, it should be interpreted as far as possible in harmony with other principles and rules of international law.[30] Indeed, the Court has often referred to the general rules on the interpretation of treaties, as now codified in the 1969 Vienna Convention on the Law of Treaties. According to such rules, although a treaty is to be interpreted in accordance with the ordinary meaning to be given to its terms in their context and in the light of the object and purpose of the treaty, account must also be taken of any relevant rules of international law applicable in the relations between the parties.[31]

There is, therefore, no reason why, as a matter of principle, the Court should not apply IHL in situations of armed conflict, both as a means of interpretation of the relevant rules of the ECHR and, in some cases, even as a direct source of normative standards of state

27 *Jaloud v. The Netherlands* [GC], no. 47708/08, Judgment of 20 November 2014, not yet published in ECHR.
28 *Jaloud v. The Netherlands, supra*, paras. 143-153.
29 The text of the Draft Articles is reproduced in GA Res. 56/83, 12 December 2001, Annex. The Court also quoted *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, 2007 ICJ Rep. 43, at 210, para. 406.
30 See, e.g., *Loizidou v. Turkey* (merits), no. 1531/89, Judgment of 18 December 1996, ECHR 1996-VI 70, para. 43; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, Judgment of 21 November 2001, ECHR 2001-XI 79, at 100, para. 55; and many subsequent cases, including *Hassan v. the United Kingdom, supra*, at 49-50, para. 77.
31 See Article 31 of the 1969 Vienna Convention on the Law of Treaties.

behaviour. However, the question of how far the Court can go in applying that body of law may legitimately arise.

The answer to this question is arguably made more complicated by the well-known characterization made by the ICJ of IHL as *lex specialis* with respect to international human rights law.[32] Although this is not the place to examine the discussions that this characterization has given rise to in the legal literature,[33] it is interesting to quote, in particular, the 2004 advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, where the ICJ stated that:

> "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 question 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."[34]

In this respect, there is no doubt that the Court can, when necessary, apply IHL directly in order to fill gaps in the ECHR: this is also confirmed by the Court's case law and, in particular, by some recent decisions that will be referred to later.[35] But in a situation where there is no gap in the ECHR and the Convention and IHL both apply to a particular state conduct, what does the 'speciality' of IHL mean in practice? In my opinion, there can be no doubt that in such situations the Court can, and indeed should, interpret the rules of the Convention in light of the relevant rules of IHL, as it often does with other rules of international law, in order to arrive at a solution that is in harmony with both branches of the law.[36] But when this is not possible and there is an actual conflict between a rule of the ECHR and a rule of IHL, may the Court go as far as allowing for derogations from the ECHR and directly apply IHL instead?

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32 See *Legality of the Threat or Use of Nuclear Weapons, supra*, at 226, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, supra*, at 178, para. 106; and *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), supra*, at 243, para. 216.

33 Although I do not necessarily agree with all of the Author's conclusions, see, e.g., the discussion in M. Milanović, Norm Conflicts, International Humanitarian Law, and Human Rights Law, in Ben Naftali (Ed.), *supra*, p. 95 *et seq*.

34 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, supra*, at 178, para. 106.

35 See paragraph 22.5.1.

36 The Court expressly recognized this in *Hassan v. the United Kingdom, supra*, at 61, para. 102.

22.4.1 The Role of Article 15 ECHR

As I mentioned above, Article 15 I ECHR allows a state party to derogate from the Convention "in time of war or other public emergency threatening the life of the nation", i.e. in emergency situations that may *inter alia* consist of an armed conflict, whether international or non-international. When Article 15 I ECHR is invoked, a state may "take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation", provided that such measures must not be "inconsistent with other obligations under international law". Since in a situation of armed conflict such "other" obligations include obligations under IHL,[37] Article 15 I ECHR provides a clear mandate for the Court to apply IHL in order to ascertain whether or not derogations from the Conventions are justified.

However, in the practice of the parties resort to Article 15 I ECHR has been the exception rather than the rule, and there have been several cases where a state party was in fact involved in an armed conflict, international or non-international, and no declaration was made by that state pursuant to Article 15 1 ECHR.[38] In such a situation, the competence of the Court to allow for derogations from the Convention and directly apply IHL instead is not immediately evident and, indeed, could even be denied on the basis of an *argumentum a contrario*. Fortunately, there are very few situations where an actual conflict between a provision of the ECHR and IHL may actually arise, and in most cases the Court is only called to interpret the ECHR in light of the relevant rules of IHL. But the Court's recent case law has confirmed that there are some situations where a conflict may in fact arise and that in such situations the difference between the interpretation of the Convention in light of IHL and the direct application of IHL in derogation of the Convention may become very thin indeed.

22.5 The Application of IHL by the Court

Until very recently, the Court showed a very marked reluctance to refer to IHL when deciding cases submitted to it: it was only in respect of older cases relating to the Turkish occupation of Northern Cyprus that the Court appeared to be willing to expressly refer to

37 This is also confirmed by Article 15 II ECHR, which clarifies that even when a state invokes war or other public emergency in order to derogate from the Convention, there are certain fundamental human rights that cannot be derogated from such as, among others, the right to life (Article 2 ECHR) "except in respect of deaths resulting from lawful acts of war": it seems obvious that in order to determine whether or not acts of war are lawful resort must be had to the relevant rules of IHL.

38 An interesting *resumé* of the practice relating to Article 15 ECHR was made by the Court itself in *Hassan v. the United Kingdom, supra*, at 30-32, paras. 4-42. In my opinion, as far as international armed conflicts are concerned, the reluctance of states to invoke Article 15 ECHR can at least partially be explained by the fact that such states did not expect the Convention to apply extra-territorially. The recent case law of the Court on this issue will probably make the invocation of Article 15 ECHR more likely in the future.

IHL, whereas in more recent cases relating to Chechnya the Court was faced with a situation that clearly amounted to an armed conflict and yet it chose to make no explicit reference to the relevant rules of IHL. In light of the Court's readiness to refer to other branches of international law, such as e.g. the law of jurisdictional immunities, this attitude towards IHL – sometimes referred to as an 'ivory tower' attitude by commentators – was the source of much surprize and speculation.[39]

Some commentators argued that the Court's attitude was the outcome of a specific judicial policy not to apply IHL – whatever the reasons for such a supposed policy might have been.[40] Others, including myself, preferred to explain the Court's attitude by pointing to other factors, such as the fact that the Court was mainly confronted with situations of non-international armed conflict, i.e. situations in respect of which IHL is traditionally not as well-developed as for international armed conflicts, or the unwillingness of the respondent states themselves to refer to IHL in order to justify their behaviour, in particular in the absence of a declaration under Article 15 I.[41]

In this context, the Court's more recent case law has inaugurated a new season characterized by a more open attitude towards IHL. First of all, it is by now customary for the Court to extensively refer, when outlining the 'international law materials' relevant for a case, to the relevant provisions of IHL, and even to the well-known ICJ case law on the relationship between international human rights law and IHL to which I have already referred. Secondly, as I will explain in the next paragraph, the Court has confirmed its readiness to directly apply IHL to decide on preliminary issues which are not regulated by the ECHR. Thirdly and more importantly, although the Court is still reluctant to interpret the rules of the Convention in order to avoid conflicts with IHL, there has been at least one recent and very important judgment where the Court did precisely this and, indeed, may even be seen to have allowed for derogations from the Convention: it is significant that this judgment, which I will discuss in detail later, was in the context of a case relating to a situation of international armed conflict, and where the respondent State had expressly asked the Court to apply IHL.[42]

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39 See A. Gioia, *supra*, at 218 *et seq*. To speak of an 'ivory tower' attitude on the part of the Court was in fact a little ungenerous since, although the Court did not refer to IHL when deciding these cases, it clearly did not apply the Convention as if the situation on the ground was a normal 'peacetime' situation. The language sometimes used by the Court made it clear that it was in fact aware of the relevant rules of IHL and in most cases the Court appeared to be careful not to squarely contradict IHL. Indeed, in some cases the Court even contributed to a better legal regulation of armed conflict, both international and non-international, as is demonstrated by the fact that its case law was relied upon by national courts, when filling perceived gaps in IHL.

40 See, e.g., W. Abresch 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya', 16 *EJIL* 2005, p. 741 *et seq*., at 755.

41 See A. Gioia, *supra*, at 218-219.

42 See *Hassan v. the United Kingdom, supra*. This case, to which I already referred to when discussing the extent of the extra-territorial application of the ECHR, will also be discussed in more detail in paragraph 22.5.3.

22.5.1 The Application of IHL to Fill Gaps in the ECHR

Although the ICJ stated that there are some 'rights' which may be exclusively matters of IHL, the application of IHL in order to fill gaps in the ECHR does not necessarily mean that the Court should recognize individual rights which are not expressly envisaged by the ECHR. Rather, in applying a provision of the ECHR, the Court may have to decide on preliminary questions which are not regulated by the Convention itself and require the application of the relevant rules of IHL.

For example, the question may arise of whether or not a respondent state is involved in an armed conflict, or whether or not a territory is militarily occupied, and in order to answer such questions the Court may have no choice but to directly apply the relevant rules of IHL. Although this was often done implicitly,[43] an interesting recent case where the Court expressly applied IHL in order to determine whether or not a territory is militarily occupied is the case of *Sargsyan v. Azerbaijan*,[44] relating to alleged violations of Article 1 Protocol 1 of ECHR – on the right to property – and of Article 8 ECHR –on respect for private and family life.

This case specifically related to the alleged denial of the applicant's right to return to the village of Gulistan and have access to his property there, or to be compensated for its loss, and to the denial of access to his home and to the graves of his relatives. The applicant was an Armenian national and the village of Gulistan was, at the time when the USSR still existed, part of the territory of the Soviet Republic of Azerbaijan but, following Azerbaijan's declaration of independence and the proclamation of the unrecognized "Nagorno-Karabakh Republic" (NKR), in 1991, was claimed by the NKR as part of its territory. The applicant claimed that Gulistan was within the internationally recognized territory of Azerbaijan and this was of course accepted by the respondent government. Azerbaijan, however, denied that it exercised jurisdiction in the area because the territory was under foreign occupation and, in addition, was rendered inaccessible by circumstances.[45]

In its 2015 judgment the Court expressly referred to Article 42 of the 1907 Hague Regulations Concerning the Laws and Customs of War on Land on this basis it noted that "under international law […] a territory is considered occupied when it is actually placed under the authority of a hostile army, 'actual authority' being widely considered as translating to effective control and requiring such elements as presence of foreign troops, which are in a position to exercise effective control without the consent of the sovereign".

43 See A. Gioia, *supra*, at 219-223.

44 *Sargsyan v. Azerbaijan* [GC], no. 40167/06, Judgment of 16 June 2015 (merits), not yet published in ECHR.

45 *Sargsyan v. Azerbaijan, supra*, paras. 46-49 and 123-124.

It, therefore, concluded that "Gulistan is not occupied by or under the effective control of foreign forces as this would require a presence of foreign troops in Gulistan."[46]

Another and even more interesting example relates to war crimes. In the case of *Kononov v. Latvia*,[47] the Court had to decide on the applicant's allegation that his conviction for war crimes, as a result of his participation in 1944 in a Soviet military expedition in Latvia, then under German occupation, violated Article 7 of the Convention, whereby "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed". The applicant had been the head of a Soviet commando unit which, wearing German uniforms, had entered a village in Latvia and summarily executed villagers, allegedly because they belonged to German auxiliary police, although they were not at the time carrying arms and did not even try to defend themselves.[48] In this case also, the Court had no choice but to directly apply IHL, *as in force in 1944*, in order to assess whether or not the crimes for which the applicant was convicted constituted war crimes at the time when they were committed.

The first issue that arose in this respect related to the legal status under IHL of both the applicant, on the one hand, and the victims of his conduct, on the other. As regards the applicant, the Court decided to proceed on the basis that he and his unit qualified as 'combatants' under IHL, i.e. the assumption most favourable to him: under IHL, 'combatants' are in fact members of the armed forces of one party to the conflict, and other persons who may be assimilated to them, who have the 'right' to take part in hostilities and cannot, therefore, be charged with a criminal offence for the mere fact that they have done so. In this respect, the Court merely recalled that the parties, the intervening third parties and the Chamber in earlier proceedings had all agreed that the applicant qualified as a 'combatant'. However, in resuming the discussions within the Chamber, the Court made some important observations on the status of IHL in 1944, in particular as regards

46 *Sargsyan v. Azerbaijan, supra*, para. 144. This notwithstanding, the Court found that the alleged violations did occur within Azerbaijan's jurisdiction under Article 1 since the territory was not "occupied by the armed forces of another state or […] under the control of a separatist regime", but was merely an area over which territorial sovereignty was disputed. However, the Court recognized that the difficulties encountered by Azerbaijan "at the practical level in exercising its authority in the area of Gulistan" would have to be taken into account when assessing the proportionality of the acts or omissions complained of by the applicant (paras. 145-150).

47 *Kononov v. Latvia* [GC], no. 36376/04, Judgment of 17 May 2010, ECHR 2010-IV 35. Mention may be made, in addition, of an earlier judgment specifically concerning Hungary: *Korbely v. Hungary* [GC], no. 9174/02, Judgment of 19 September 2008, ECHR 2008-IV 299. This case related to alleged crimes against humanity committed in a situation of internal insurgency which the respondent Government qualified as an internal armed conflict to which Article 3 common to the 19549 Geneva Conventions applied. The Court found that the conviction of the applicant for the murder of an insurgent in 1956 constituted a violation of Article 7 ECHR because the insurgent could not be considered as a non-combatant and, therefore, there had been no violation of common Article 3 of the 1949 Geneva Conventions.

48 *Kononov v. Latvia, supra*, at 45 et seq.

Article 1 of the Regulations annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 18 October 1907 (the Hague Regulations).

First of all the Court recalled that, given the applicant's military engagement in the USSR and his command of a Red Partisan Unit at the time of the alleges war crimes, "he was in principle a combatant having regard to the qualifying criteria for 'combatant' status under international law which had crystallised prior to the Hague Regulations, which were consolidated by those Regulations and which were solidly part of international law by 1949". However, the Court also recalled that, inasmuch as the applicant and his unit were wearing German *Wehrmacht* uniforms during the attack on the villagers, "this could mean that the applicant had lost 'combatant' status (thereby losing the 'right' to attack), and wearing the enemy's uniform during combat could of itself have amounted to an offence." Although the domestic courts in Latvia had not charged him with a separate war crime on this account, the Court rightly observed that "this factor does have some bearing, nonetheless, on other related war crimes of which he was accused (notably, treacherous killing and wounding)"[49]

As regards the status of the villagers, here again the Court refrained from making a direct determination but chose to proceed "on the basis of the hypothesis most favourable to the applicant, namely that they were not innocent 'civilians', as had been found by the Latvian domestic courts. Rather, the Court was prepared to assume, on the basis of the extent to which they had previously themselves participated in hostilities, that the villagers could be considered, as was pleaded by the Russian Federation intervening, as 'combatants' themselves, in view of the auxiliary roles they had allegedly had in the German military administration of the occupied territory. Alternatively, they could at least be considered as 'collaborators' or 'civilians who had participated in hostilities', in view of the alleged passing of information on their part to the German military administration.[50] The Court also rightly noted *en passant* that the notion of *levée en masse*, which is embedded in Article 2 of the Hague Regulations, had no application in this case since the village was already under German military occupation.[51]

Even on these assumptions, however, the Court found that the state of international law in 1944 provided a sufficient legal basis for the applicant's subsequent conviction for war crimes, since the villagers, whether they qualified as 'combatants' or as 'civilians who had participated in hostilities', could certainly not be summarily executed. Rather, as 'combatants' they had "the right to prisoner of war status" if captured, surrendered or rendered *hors de combat*.[52] As 'civilians who had participated in hostilities', "it was a […] rule of customary international law in 1944 that civilians could only be attacked *for as*

49 *Kononov v. Latvia, supra*, at 110-111, paras. 200-201.
50 See *Kononov v. Latvia, supra*, at 109, paras. 192-194.
51 *Kononov v. Latvia, supra*, at 109, para. 195.
52 *Kononov v. Latvia, supra*, at 111, para. 202.

long as they took a direct part in hostilities."[53] If it was suspected, as was the case for the villagers, that they had committed violations of *jus in bello* when taking part in hostilities, "then they remained subject to arrest, fair trial and punishment by military or civilian tribunals for any such acts, and their summary execution without that trial would be contrary to the laws and customs of war".[54]

The Court also found that already in 1944 IHL provided for individual criminal responsibility for war crimes, including on the basis of command responsibility,[55] and that the ill-treatment and murder of the villagers, as well as the treachery implied in the wearing of German uniforms, did already constitute war crimes entailing individual criminal responsibility.[56] Although the Court was criticized by some of its own judges as having gone too far in assessing that this was the status of the law in 1944,[57] these findings would certainly be in line with IHL as in force today.

Moreover, inasmuch as the concept of war crimes only applied at the time to international armed conflicts, it is interesting to add that the Court also found that, despite the incorporation of Latvia into the USSR in 1940, and quite irrespective of its lawfulness, there was a direct nexus between the acts committed by the applicant and his unit and an international armed conflict because the operation was mounted by the USSR based on the suspicion that certain villagers had cooperated with the occupying power's military administration and was, therefore, ostensibly carried out in furtherance of the Soviet war objectives.[58]

But perhaps the most important aspect of the Court's decision in *Kononov* does not relate to the finding that the acts committed in 1944 constituted war crimes at that time, but the finding that the applicant could legitimately be charged for such crimes in 1998. The Court found in this respect that because in 1944 no limitation period was fixed by international law as regards the prosecution of war crimes, and no such period was provided for by subsequent developments in the law, the charges against the applicant were never prescribed under international law, and any prescription provision that may have been included in Latvian domestic law was not applicable.[59] In view *inter alia* of the comparatively low number of states party to the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity,[60] this finding, which was also criticized by some concurring and dissenting judges as allowing for a

53 *Kononov v. Latvia, supra*, at 112, para. 203.
54 *Kononov v. Latvia, supra*, at 112, para. 204.
55 *Kononov v. Latvia, supra*, at 112 *et seq*., paras. 205-213.
56 *Kononov v. Latvia, supra*, at 117-121, paras. 214-227.
57 See the concurring opinion of Judges Rozakis, Tulkens, Spielmann and Jebens, and the dissenting opinion of Judge Costa, joined by Judges Kalaydjeva and Poalelungi, in *Kononov v. Latvia, supra*, respectively at 127-129 and 130-136.
58 *Kononov v. Latvia, supra* at 115, para. 210.
59 *Kononov v. Latvia, supra*, at 121-122, paras. 228-233.
60 The Convention has at the moment 55 parties. See: <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-6&chapter=4&clang=_en>, visited on 20 July 2017.

retrospective application of the criminal law,[61] appears to be a significant contribution made by the Court to the non-applicability of prescription to war crimes.

22.5.2 The Interpretation of the ECHR in Accordance with IHL

Coming now to the case where both IHL and the ECHR apply to a state's conduct in a particular situation, I have already pointed out that there are not many cases where a state's legal obligations under the ECHRL conflict with its obligations under IHL, or vice versa, and that, therefore, the 'speciality' of IHL can in most cases be explained in terms of complementarity, in the sense that in times of armed conflict the rules of the ECHRL continue to apply but should be interpreted and applied in light of the relevant rules of IHL. However, there are a few situations where a potential conflict may indeed arise such as, in particular, in the application of Article 2 ECHR, relating to the right to life, and of Article 5 ECHR, relating to the right to liberty.

The corresponding provisions in the ICCPR – Articles 6 and 9, respectively – provide that no one is to be *arbitrarily* deprived of his or her life and that *arbitrary* detention is prohibited. With specific reference to Article 6 ICCPR, the ICJ famously stated that "the test of what is an arbitrary deprivation of life in time of armed conflict falls to be determined by "the applicable *lex specialis*" – i.e. IHL – "which is designed to regulate the conduct of hostilities",[62] and a similar reasoning could no doubt be applied to Article 9 ICCPR as regards the test for arbitrary detention. But neither Article 2 nor Article 5 ECHR apply the generic criterion of arbitrariness, and rather enunciate the general rule regarding the protection, respectively, of the right to life and of the right to liberty, and then list a number of cases where the deprivation of life or the deprivation of liberty can be considered as lawful. It appears, therefore, that the question of what may or may not be an arbitrary deprivation of life or liberty is not left open to interpretation by the ECHR, since any such deprivation must always fall within one of the exceptions to the prohibition provided for in the ECHR itself in order to be regarded as lawful.

In a situation where Article 15 ECHR is invoked by a state party, IHL could indeed be directly applied by the Court in order to assess whether derogations from Articles 2 and 5 ECHR are consistent with that state's "other obligations under international law", as is required by Article 15 I ECHR. Moreover, as specifically concerns the right to life, Article 15 II ECHR expressly provides that derogations from Article 2 are allowed "in respect of deaths resulting from lawful acts of war". On the other hand, in a situation where Article 15 is not invoked by a state party, it may be very difficult for the Court to itself allow for

61 See the concurring opinion of Judges Rozakis, Tulkens, Spielmann and Jebens, and the dissenting opinion of Judge Costa, joined by Judges Kalaydjeva and Poalelungi, in *Kononov v. Latvia, supra*, respectively at 127-129 and 130-136.

62 *Legality of the Threat or Use of Nuclear Weapons, supra*, at 240, para. 25.

derogations from Articles 2 and 5 ECHR and directly apply IHL in order to assess the legitimacy of that state's conduct. The mere interpretation of Articles 2 or 5 ECHR in order to harmonize their provisions with the relevant rules of IHL without actually going as far as allowing for derogations therefrom may prove to be very difficult indeed in view of the *numerus clausus* of exceptions allowed by those two Articles. In this context, I will only expressly refer to the Court's recent case law on Article 5 ECHR because it is in respect of this provision that the Court delivered its most important decision so far.[63]

22.5.3 The Right to Liberty in Armed Conflict

Article 5 I ECHR states that "everyone has the right to liberty and security of person" and then refers to cases where the deprivation of liberty can be considered lawful, provided that such deprivation is "in accordance with a procedure prescribed by law". Article 5 I ECHR then gives a list of cases where the deprivation of liberty can be considered as lawful, but this list does not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time.[64] Moreover, Article 5 II and IV provide for procedural guarantees requiring, in particular, that every person arrested be promptly informed of the reasons for the arrest and of any charge against him or her, and that every person deprived of liberty by arrest or detention be entitled to take proceedings whereby a 'court' can decide on the lawfulness of his or her detention.[65]

These provisions are hard to reconcile with the rules of IHL relating, in particular, to 'combatants'.[66] Under IHL applicable to international armed conflicts, 'combatants' fall-

63 For a discussion of earlier cases relating to Article 2 ECHR, see; A. Gioia, *supra*, at 223 *et seq*. However, most of the relevant case law therein discussed related to non-international armed conflicts. As far as international armed conflicts are concerned, the case of *Kononov v. Latvia*, which was extensively discussed in paragraph 21.3.2 above, although not relating to Article 2 ECHR, may be seen as indirectly relevant for assessing how the Court may in the future apply IHL to assess the legitimacy of "deaths resulting from lawful acts of war" in the context of Article 2 ECHR, at least where the respondent state had previously involved Article 15 ECHR.

64 The grounds of permissible detention under Article 5 I ECHR are: "(a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

65 Article 5 III specifically applies to the situation where a person is arrested or detained under Article 5 I c), which relates to the situation where there *is* the intention to bring criminal charges against that person and, therefore, does not require close examination in this context.

66 The meaning of this term in IHL was briefly referred to in paragraph 22.5.1 above.

ing into the power of the enemy are entitled to the status of prisoners of war, which is regulated in detail by the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III). Inasmuch as they have the 'right' to directly participate in hostilities, 'combatants' captured as prisoners of war cannot be charged with a criminal offence for the mere fact of such participation; on the other hand, they can be 'interned' by the enemy until the end of active hostilities, irrespective of whether or not they are charged with any criminal offence and without any need for an individual court or administrative decision.[67] The only requirement is that, in case of doubt as to whether or not a person is entitled to the status of prisoner of war, that person is to be treated as such until such time as his or her status has been determined by "a competent tribunal."[68]

The Court was never faced with the question of the lawfulness of the detention of 'prisoners of war' during an international armed conflict. On the other hand, when examining the detention of prisoners of war by the Turkish army as a result of the invasion of Cyprus in 1974, the European Commission of Human Rights *had* taken account of the fact that both Cyprus and Turkey were party to the Geneva Convention III and that Turkey had made its intention to respect the Convention clear to the International Committee of the Red Cross: as a result, the Commission had not "found it necessary" to examine the question of a breach of Article 5 ECHR with regard to persons accorded the status of prisoners of war.[69] This conclusion was all the more significant inasmuch as the Commission had found, on the one hand, that the detention of Greek Cypriot military personnel was *per se* a violation of Article 5 I ECHR and, on the other, that Article 15 ECHR could not be applied to measures taken by Turkey in the absence of a formal and public act of derogation on its part.[70] This had led a dissenting Commissioner to point out that, even in the absence of such a formal and public act, "measures which are in themselves contrary to a provision of the ECHR but which are taken legitimately under the international law applicable to an armed conflict are to be considered as legitimate measures of derogation from the obligations flowing from the Convention",[71] a statement that proved to be prophetic in light of the more recent case law of the Court.

But the issue of whether or not Article 5 ECHR may be reconciled with IHL may arise not only with respect to lawful 'combatants', but also with respect to civilians directly participating in hostilities or otherwise posing a security risk to a party to the conflict. It was mentioned in the preceding paragraph that, in case of doubt as to whether or not a person is entitled to the status of prisoner of war, that person is to be treated as such until

67 See Articles 21 and 118 of Geneva Convention III.

68 Article 5 of Geneva Convention III.

69 *Cyprus v. Turkey* [European Commission of Human Rights], nos. 6780/74 and 6950/75, Report of 10 July 1976, Vol. I, available at <http://hudoc.echr.coe.int/eng#{"itemid":["001-142540"]}>, at 101 *et seq*., para. 313.

70 *Cyprus v. Turkey, supra*, paras. 309-312 and, on Article 15 ECHR, at. 157 *et seq*., paras. 524-531.

71 Dissenting opinion by Mr G. Sperduti joined by Mr S. Trechsel on Article 15 of the Convention, *Cyprus v. Turkey, supra*, at 168 *et seq*., para. 7.

such time as his or her status has been determined by a competent tribunal. However, inasmuch as a person is found *not* to be a lawful 'combatant' and, therefore, not to be entitled to the status of prisoner of war, that person may be charged with a criminal offence for the mere fact of the participation in hostilities. Whether or not that person can also be detained for the entire duration of the conflict without being charged and brought to trial is not as clear as it is in respect of a prisoner of war, but IHL certainly provides for grounds of permissible detention even irrespective of the bringing of criminal charges.

In case of belligerent occupation of territory, the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) expressly allows the 'internment' of civilians for *imperative reasons of security*, provided that such internment is made in accordance with regular procedures, which have to include the right of appeal and the periodic review of any decision to intern.[72] This provision appears to allow the 'internment' of civilians even irrespective of whether or not they actually participated in hostilities, e.g. on the basis of their membership of an insurgent or terrorist organization. But the difficulty to prove such membership, let alone direct participation in hostilities (unless a civilian is caught in the act) justifies the need for periodic review. Moreover, even apart from situations of belligerent occupation the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict (1977 Geneva Protocol I) provides that *any* person arrested, detained or interned for actions related to the armed conflict is to be promptly informed of the reasons why such measures were taken and, except in case of an arrest or detention for a penal offence, is to be released with the minimum delay possible and in any event *as soon as the circumstances justifying the arrest, detention or internment have ceased to exist*.[73]

Until recently, these issues were never directly examined by the Court, or indeed by the Commission earlier: in cases relating to armed conflict situations, the Court only had to deal with the unacknowledged detention of missing persons or with the detention of civilians on grounds other than their direct participation in hostilities.[74] The same issues, however, came squarely before the Court in the case of *Hassan v. the United Kingdom*, a case relating to an alleged violation of Article 5 ECHR as a result of the arrest and detention by British forces in Iraq of an Iraqi national who was subsequently found dead under unexplained circumstances. In its 2014 judgment, the Court found for the first time that no violation of Article 5 ECHR could be ascribed to the UK because its conduct was in compliance with the relevant rules of IHL.[75]

72 See Articles 42-43 and 78 of Geneva Convention IV. Article 147 of the same Convention lists the unlawful confinement of civilians among the 'grave breaches' of the Convention.

73 See Article 75.3 of 1977 Geneva Protocol I.

74 See A. Gioia, *supra*, at p. 240.

75 *Hassan v. the United Kingdom, supra*.

The Court recalled at the outset that "it has long been established" that the list of grounds of permissible detention in Article 5 I "does not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time" and specifically added that "there are important differences of context and purpose between arrest carried out during peacetime and the arrest of a combatant in the course of an armed conflict." The Court did not specifically refer to the 1977 Additional Protocol I, but expressly stated that:

> "It does not take the view that detention under the powers provided for in the Third and Fourth Geneva Conventions is congruent with any of the categories set out in subparagraphs (a) to (f). 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."[76]

The issue, therefore, was whether it was compatible with the obligations under Article 5 ECHR to detain a person under IHL in the absence of a valid derogation under Article 15 of the Convention. As the Court itself noted, this was "the first case in which a respondent state has requested the Court to disapply its obligations under Article 5 or in some other way to interpret them in light of powers of detention available to it under international humanitarian law."[77] Interestingly, the Court also recalled that a similar question had previously arisen only before the European Commission of Human Rights – in the case of *Cyprus v. Turkey* which was referred to earlier in this paragraph – and added that it had now the opportunity to review the approach of the Commission and to "determine such a question itself".[78]

Indeed, in *Hassan*, the British Government went as far as arguing that, "since Hassan had been captured and initially detained as a suspected combatant, Article 5 was displaced by international humanitarian law as *lex specialis*, or modified so as to incorporate or allow for the capture and detention of actual or suspected combatants in accordance with the Third and/or Fourth Geneva Conventions".[79] Alternatively, if the Court was not

76 *Hassan v. the United Kingdom, supra*, at 58-59, para. 97. As specifically concerns "combatants detained as prisoners of war", which was of no direct relevance in this case, the Court added that "since this category of person enjoys combatant privileges, allowing them to participate in hostilities without incurring in criminal sanctions, it would not be appropriate for the Court to hold that this form of detention falls within the scope of Article 5 § 1 (c)."

77 *Hassan v. the United Kingdom, supra*, at 59, para. 99. In previous cases also relating to British military operations in Iraq, the UK had not expressly asked the Court to apply IHL and had resorted to other arguments, such as the arguments that the relevant conduct had taken place outside its jurisdiction or that relevant UN Security Council resolutions adopted under Chapter VII of the UN Charter prevailed over the ECHR, which the Court had always rejected.

78 *Hassan v. the United Kingdom, supra*, at 60, para. 99.

79 *Hassan v. the United Kingdom, supra*, at 54, para. 88.

prepared to go as far as 'displacing' or 'modifying' Article 5 ECHR, the UK pleaded that the list of permissible purposes of detention in Article 5 'had to be interpreted in such a way that it took account of and was compatible with the applicable *lex specialis* namely international humanitarian law."[80] Even more significantly, the UK added that IHL should be applied even though it had made no declaration under Article 15: the UK stated in this respect that "the inclusion of Article 15 in the Convention in no sense indicated that, in time of war or public emergency threatening the life of the nation, obligations under the Convention would at all times be interpreted in exactly the same way as in peacetime" and that any argument to this effect "would risk diminishing the protections available to combatants and civilians (in effect precipitating derogations by concerned states)."[81]

Faced with these new and powerful arguments – and, perhaps, taken by surprize by them – the Court surprisingly accepted that the absence of a formal declaration under Article 15 "does not prevent the Court from taking into account of the context and the provisions of IHL when interpreting and applying Article 5in this case."[82] However, in a final effort of resistance, the Court added that, although a formal declaration under Article 15 is not necessary for this purpose, "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" since "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."[83] Moreover, as regards the extent to which IHL could be applied in the context of Article 5 ECHR, the Court was not prepared, as a matter of principle, to allow for Article 5 ECHR to be 'displaced' by IHL: rather, it referred to the relevant case law of the ICJ and considered that "even in situations of armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of IHL."[84] In practice, however, given the difficulty to reconcile the requirements of Article 5 ECHR with the above-mentioned provisions of IHL, it could be argued that the Court went beyond the mere interpretation of Article 5 "against the background" of IHL and actually allowed for derogations therefrom.

As regards the grounds of permitted deprivation of liberty set out Article 5 ECHR, the Court stated that these "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 added that, although "internment in peacetime does not fall within the scheme of deprivation of liberty governed by Article 5 of the

80 *Hassan v. the United Kingdom, supra*, at 54-55, para. 89.
81 *Hassan v. the United Kingdom, supra*, at 55, para. 90.
82 *Hassan v. the United Kingdom, supra*, at 62, para. 103.
83 *Hassan v. the United Kingdom, supra*, at 63, para. 107.
84 *Hassan v. the United Kingdom, supra*, at 62, para. 104.

Convention without the exercise of the power of derogation under Article 15", "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."[85] In such cases, in order to preclude a violation of Article 5, the detention must be "lawful", i.e. it must comply with the relevant rules of IHL and, "most importantly, it should be in keeping with the fundamental purpose of [Article 5 I], which is to protect the individual from arbitrariness."[86] The criterion of arbitrariness – which, as was mentioned above, is explicit in Article 9 ICCPR – can thus also apply, by way of 'interpretation', to Article 5 ECHR.

As concerns procedural safeguards contained in Article 5 II-IV, the Court found that these "must also be interpreted in a manner which takes into account the context and the applicable rules of IHL."[87] Thus, although Article 5 IV ECHR requires that a person who is deprived of liberty "shall be entitled to take proceedings by which the lawfulness of his detention be decided speedily by a court and his release ordered if the detention is not lawful", the Court stated that in the course of an international armed conflict it may not be practicable to allow resort to a "court" and that it may be sufficient to allow resort to a "competent body", as provided for in Articles 43 and 78 of Geneva Convention IV, provided that such competent body "should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness."[88]

In light of these principles, the Court found that the UK had fully complied with the applicable rules of IHL and that, therefore, there had been no violation of Article 5 and the capture and detention of the Iraqi national had not been arbitrary: in fact UK authorities had reason to believe that he might either be a person who could be detained as a prisoner of war or whose internment was necessary for imperative reasons of security. Moreover, since, as a result of a screening process, he had been physically released a short time after capture, the Court found it unnecessary to examine whether that screening process constituted an adequate safeguard to protect against arbitrary detention. Finally, the Court also observed that it appeared from the context and the questions that were put to him during the screening interviews that the reason for his detention would have been apparent to him.[89]

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85 *Hassan v. the United Kingdom, supra*, at 62, para. 104.

86 *Hassan v. the United Kingdom, supra*, at 62, para. 105.

87 *Hassan v. the United Kingdom, supra*, at 63, para. 106. The Court specifically referred to Article 5 II and IV: although the applicant had also relied on Article 5 III, the Court considered that this provision could not be applied in this case because Mr Hassan had not been detained in accordance with the provisions of Article 5 I c).

88 *Hassan v. the United Kingdom, supra*, at 63, para. 106. The Court added that: "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 IHL is released without undue delay."

89 *Hassan v. the United Kingdom, supra*, at 63-64, paras. 108-111.

22.6 Concluding Remarks

The Court's recent case law has showed a remarkable change in the Court's attitude towards IHL. The so called 'ivory tower' attitude has been replaced by the application of IHL not only where a preliminary question not regulated by the ECHR has to be decided, but also in order to interpret and apply the rules of the ECHR in a manner which is also consistent with IHL.

In this latter case, the Court is not prepared, as a matter of principle, to allow for derogations from the Convention in the absence of a declaration by a state under Article 15, but in practice the difference between interpreting a given rule in light of IHL and allowing for derogations therefrom has proved to be very thin.

The limitation still placed by the Court on the 'interpretation' of the Convention against the background of IHL, namely that the respondent state needs to expressly refer to IHL in order to justify its conduct may appear at first sight to contradict the general principle *iura novit curia* but, in my opinion, is not unreasonable in a situation where a state is unwilling to invoke Article 15.

It remains to be seen whether the Court will fully apply the principles enunciated in the *Hassan* case, which related to the right to liberty under Article 5 ECHR, to future cases relating to other provisions of the Convention, such as Article 2 ECHR relating to the right to life. In this respect Article 15 ECHR expressly allows for derogations from Article 2 in case of deaths resulting from "lawful acts of war", but the reasoning in *Hassan* may lead the Court to apply IHL even in the absence of a declaration under Article 15.[90]

Moreover, *Hassan* related to a situation of international armed conflict, and the language used by the Court indicates that, for the time being, the same reasoning will not be applied in the context of a non-international armed conflict, at least not in the absence of a declaration under Article 15. In view of the reluctance of states to invoke Article 15, in particular in the event of an internal emergency situation, this may be regarded as a significant limitation on the possibility for the Court to apply IHL. In practice, however, the reluctance to invoke Article 15 reflects a more general reluctance on the part of states to admit they are involved in a non-international armed conflict and, therefore, it is unlikely that any of them would expressly ask the Court to apply IHL as is required under *Hassan*.

But there can be no doubt that the Court's recent case law represents a major new development in the effort to strike a balance between the Court's role in assessing alleged violations of the ECHR and the need to take into account the realities of a situation of armed conflict. At least in case of an international armed conflict, ignoring the rules of IHL would be counterproductive: those rules are in fact well-developed and very detailed, and could not be ignored without openly disregarding the express intention of states. As

90 Para. 102 referring to earlier case law.

for non-international armed conflicts, in view of the undoubtedly less-developed and often fragmented character of IHL, the main rationale that makes resort to IHL as *lex specialis* appealing – i.e. that its rules have greater specificity – would be missing in respect of internal armed conflicts. Moreover, the Court's past case law relating to situations of internal armed conflict has demonstrated that, even when it does not specifically apply IHL, the Court is willing, as far as possible, to interpret the ECHR in a way that takes into account the realities of armed conflict.[91]

91 See the cases relating to the right to life discussed in A. Gioia, *supra*, at p. 223 et seq.