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OPINION NOTE

# Reconciling the rules of international humanitarian law with the rules of European human rights law

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## Abstract

*States party to the European Convention for the Protection of Human Rights and Fundamental Freedoms that engage in military operations abroad face an increased risk to be held responsible for violations of the Convention, given the relatively recent case law adopted by the European Court of Human Rights. This article examines some of the issues raised by the concurrent applicability of international humanitarian law and European human rights law. It also seeks to identify ways to reconcile these two different, but not incompatible, branches of international law.*

**Keywords:** European Convention on Human Rights, European Court of Human Rights, European human rights law, extraterritorial armed conflicts, international humanitarian law, right to life, administrative detention.

* The opinions expressed herein are those of the authors and do not necessarily reflect the views of the French Ministry of Defence.

## Introduction

In judgements delivered over the last few years, the European Court of Human Rights (ECtHR or the Court) has ruled that the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is applicable to the actions of the armed forces of States Parties engaged in military operations conducted outside their territory, which are also governed by international humanitarian law (IHL).[1] This extension of the scope of application of the Convention has considerably increased the potential number of complaints that could be brought against Council of Europe member States, as evidenced by the recent cases brought before the Court against the Netherlands and the United Kingdom[2] and also before national judges,[3] the primary enforcers of the Convention.[4] Yet while there is no question that the increasingly important place given to European human rights law (EHRL) in times of extraterritorial armed conflict extends the protections afforded to individuals, a too strict application of its rules could impose unrealistic obligations on States in this type of situation. In the long term, this could make them less inclined to comply with the law, and possibly with more basic rules of other branches of law, in particular with rules of IHL.[5]

The Court does, however, seem to be aware of this risk. When interpreting the Convention "in light of" the relevant rules of the law of international armed conflicts (IACs) relating to internment or administrative detention – even though it involved a "judicial rewriting of an express provision of the Convention"[6] – the Court effectively reconciled it with the rules of IHL, which it readily recognized as playing "an indispensable and universally accepted role in mitigating the

1 See European Court of Human Rights (ECtHR), *Issa and Others v. Turkey*, Application no. 31821/96, 16 November 2004; ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, Application no. 61498/08, 2 March 2010; ECtHR, *Al-Skeini v. the United Kingdom* (Grand Chamber), Application no. 55721/07, 7 July 2011; ECtHR, *Al-Jedda v. the United Kingdom* (Grand Chamber), Application no. 27021/08, 7 July 2011; ECtHR, *Jaloud v. the Netherlands* (Grand Chamber), Application no. 47708/08, 20 November 2014.

2 See ECtHR, *Jaloud v. the Netherlands*, above note 1; ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, above note 1; ECtHR, *Al-Skeini v. the United Kingdom*, above note 1; ECtHR, *Al-Jedda v. the United Kingdom*, above note 1.

3 High Court of Justice of England and Wales (EWHC), *Serdar Mohammed v. Ministry of Defence,* [2014] EWHC 1369 (QB), 2 May 2014; Court of Appeal of England and Wales (EWCA), *Mohammed v. Secretary of State for Defence; Rahmatullah and Others v. Ministry of Defence and Foreign and Commonwealth Office*, [2015] EWCA Civ 843.

4 See Frédéric Sudre, *Droit européen et international des droits de l'homme*, PUF, Paris, 11th ed., 2012, pp. 209–210.

5 Françoise Hampson, "Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law", *International Law Studies*, Vol. 87, No. 1, 2011, p. 192: "If some rules are perceived to be unrealistic, this is likely to lessen respect for those rules that can be applied in practice".

6 Nicolas Hervieu, "La jurisprudence européenne sur les opérations militaires à l'épreuve du feu", *La Revue des droits de l'homme, Actualités Droits'Libertés*, 20 October 2014, para. 52, available at: http://revdh.revues.org/890 (all internet references were accessed in September 2016); see ECtHR, *Hassan v. the United Kingdom*, (Grand Chamber), Application no. 29750/09, 16 September 2014.

savagery and inhumanity of armed conflict".[7] Articles 2 and 5 of the ECHR, guaranteeing the right to life and the right to liberty and security, respectively, can apply to situations also governed by the rules of IHL, which are less precise and sometimes depart from the rules conceived to apply in peacetime.

Interpreting the Convention in the light of IHL, although not part of its core mandate,[8] appears to be the only way for the Court to deal with the issues raised by the concurrent applicability of these two branches of international law – IHL and EHRL – which, while not incompatible, are nonetheless different.

## Reconciling the obligations arising under Article 2 (right to life) with the relevant rules of IHL

Without a comprehensive interpretation, obligation of States party to the ECHR to protect the life of all persons within their jurisdiction[9] – possibly including their military personnel – could pave the way for an excessive judicialization of warfare, through negligence claims. A strict interpretation of Article 2[10] could also lead the Court to consider a military action undertaken in the course of an armed conflict in the light of the criterion of "absolute necessity", in spite of the fact that this is a test specific to EHRL, primarily applicable to law enforcement operations.

7 ECtHR, *Loizidou v. Turkey* (Merits), *Reports* 1996-VI, 18 December 1996, para. 43; ECtHR, *Varnava and Others v. Turkey* (Grand Chamber), Application no. 16064/90, 18 September 2009, para. 185; ECtHR, *Hassan v. the United Kingdom* (Grand Chamber), above note 6, 16 September 2014, para. 102.

8 Article 19 of the ECHR provides that the Court is responsible for ensuring "the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto". It does not therefore *a priori* have jurisdiction to monitor compliance with IHL. However, in some cases brought before the Court, the respondent States themselves referred to the applicability of IHL in their argument. Furthermore, drawing on the case law made by other international judges, the Court has developed techniques that allow it to try cases relating to human rights violations committed during armed conflicts and therefore to address the interplay between EHRL and IHL. See Olivia Martelly, "L'évolution historique de la jurisprudence de la Cour européenne des droits de l'homme face aux conflits armés", in *Les interactions entre le droit international humanitaire et le droit international des droits de l'homme*, Proceedings of the conference organized by the Department of Legal Affairs of the French Ministry of Defence on 22 October 2014, pp. 16–30.

9 European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, 4 November 1950 (entered into force 3 September 1953), (ECHR), Art. 2. Article 2 of the ECHR establishes, first and foremost, a negative obligation binding on States and their agents not to take the lives of individuals. In its case law, the Court has also drawn two positive obligations from this provision, one substantive and the other procedural: States must protect the lives of individuals within their jurisdiction (substantive positive obligation) and they must also conduct an effective, independent and impartial investigation when a person is killed (procedural obligation), regardless of whether a State or individuals are responsible for the act in question.

10 Article 2 of the ECHR provides, in substance, that no one may be deprived of their life intentionally, except when it results from the use of force that is absolutely necessary to: (a) ensure the defence of any person from unlawful violence; (b) effect a lawful arrest or prevent the escape of a person lawfully detained; or (c) take lawful action to quell a riot or insurrection. See ECtHR, *McCann and Others v. the United Kingdom* (Grand Chamber), 27 September 1995, para. 161; ECtHR, *Ergi v. Turkey*, 28 July 1998, Application no. 23818/94, para. 82; ECtHR, *Jaloud v. the Netherlands*, (Grand Chamber), above note 1, 20 November 2014, para. 186.

## Obligation to protect life and the fear of an excessive judicialization of warfare

The Court could interpret the positive obligations it has drawn from Article 2[11] as requiring States – through their military leaders – to protect the lives of their own soldiers, although their work entails an inherent risk of death.

The Court has, in fact, already ruled, in relation to an alleged violation of Article 2, that commanding officers must take "necessary and sufficient measures to protect the physical and mental integrity of the conscripts under their command".[12] If the Court has not had to rule on a case involving a kill in action thus far[13], it was, however, the hypothesis in the case of the Uzbin Valley ambush in Afghanistan, which was brought to court in France. In this case, the relatives of the soldiers who had been killed filed a complaint against the military hierarchy (more precisely against an unnamed person). The charges were endangering the life of others and failing to prevent a crime.[14] This case is unique in France, but similar complaints have been brought before the United Kingdom's courts,[15] and there were fears in France's military circles about the implications it could have on the ground.

However, it is not a given that the ECtHR would rule in favour of the applicants, were such a case to be brought before it. As Nicolas Hervieu points

11 See note 9 above.

12 Frédéric Sudre (ed.), *Les grands arrêts de la Cour européenne des droits de l'homme*, PUF, Paris, 6th ed., 2011, p. 142, citing ECtHR, *Abdullah Yılmaz v. Turkey*, Application no. 21899/02, 17 June 2008, para. 57.

13 An application was lodged with the Court in the case of *Pritchard v. the United Kingdom*, but was struck from the docket of the Court on 18 March 2014, as the parties had reached an out-of-court settlement. It is worth noting that the Court did not, at the outset, rule the application inadmissible on the grounds that it was manifestly ill-founded. See ECtHR, *Pritchard v. the United Kingdom* (Decision), Application no. 1573/11, 18 March 2014.

14 On 18 and 19 August 2008, ten French soldiers belonging to the United Nations Security Council-mandated International Security Assistance Force operating in Afghanistan were killed, while on patrol, in an ambush in the Uzbin Valley, carried out as part of an enemy offensive. This was the biggest loss of life for the French Army since the Beirut Drakkar barracks bombing in 1983. The families of eight of the French soldiers killed in the ambush filed a complaint against an unnamed person. The charges were endangering the life of another and failing to prevent a crime, because they considered that their deaths had occurred as a result of negligence attributable to the military hierarchy. The investigating judge chose to amend the charge to involuntary manslaughter. The proceedings have not yet been concluded. At this stage, subject to appeals, the French courts have not recorded any convictions. See Pierre-Jérôme Delage, "La chambre criminelle et l'embuscade d'Uzbin", in *Revue de sciences criminelles*, No. 2, 2012, pp. 353–360; Judgement No. 12–81.197, 10 May 2012 in Court of Cassation, Criminal Chamber, "Bulletin des Arrêts" (official bulletin of judgments), No. 5, pp 182 ff., May 2012; Sabrina Lavric, "Recevabilité de l'action des familles de soldats français tués en Afghanistan", *Dalloz Actualité*, 22 May 2012. In this judgement, the Criminal Chamber ruled that the complaint with an application for the determination of damages filed by the families of the soldiers killed during the Uzbin Valley ambush was admissible. This admissibility would no longer be recognized, however, under the new wording of Article 698–2 of the Code of Criminal Procedure, as amended by the Military Planning Act of 18 December 2013. See Act 2013–1168 of 18 December 2013 on planning for the period 2014–2019, containing several provisions on defence and national security, available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028338825&categorieLien=id.

15 See the judgement handed down by the UK Supreme Court in the case *Smith and Others v. Ministry of Defence*, [2013] UKSC 41, available at: https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0249_Judgment.pdf.

out, "the Court accepts (…) a considerable degree of flexibility in view of operational requirements and other serious constraints on the ground" and "often refrains from ruling on the appropriateness of operational choices".[16] This comprehensive approach could also help solve the potential conflicts of paradigms between IHL and EHRL that could arise regarding the application of the right to life in an armed conflict situation.

## The right to life and potential conflicts of paradigms between IHL and EHRL

Application of the negative obligation established in Article 2 of the ECHR – the prohibition of arbitrary deprivation of life – does not appear to conflict in real terms with any competing rule of IHL, although Article 2 does not specifically include "lawful acts of war" in the list of circumstances in which deprivation of life may be justified. The only reference to this indeed appears in Article 15(2), which provides, in substance, that no derogation may be made from Article 2 except "in respect of deaths resulting from lawful acts of war". The Court therefore appears to accept that acts that violate the right to life, but could be considered lawful under IHL, are never contrary to Article 2 and not only when a State exercises its right of derogation, as provided for under Article 15 of the Convention.[17] In the judgement handed down in the case of *Varnava and Others*, the Grand Chamber of the Court held that "Article 2 must be interpreted so far as possible in light of the general principles of international law, including the rules of international humanitarian law", although "Contracting States are under obligation to protect the lives of those not, or no longer, engaged in hostilities", even when the respondent State had not exercised its right of derogation and advanced the argument that the actions in question were "lawful acts of war".[18]

However, the Court held on several occasions that "Article 2 covers both intentional killing and also the situations in which it is permitted to use force which may result, as an unintended outcome, in the deprivation of life".[19] The Court could therefore apply case law relating to Article 2 in the case of the incidental killing of a protected person as the result of the use of force in circumstances considered lawful under IHL. The test for determining if there has been an excessive use of force by the agents of a State requires the Court to

16 See Nicolas Hervieu, "La jurisprudence de la Cour européenne des droits de l'homme sur les opérations militaires: entre louables progressions et regrettables imperfections", in *Les interactions entre le droit international humanitaire et le droit international des droits de l'homme*, Proceedings of the conference organized by the Department of Legal Affairs of the French Ministry of Defence, above note 8, citing ECtHR, *Al-Skeini and Others v. the United Kingdom*, above note 1, para. 168; ECtHR, *Vassis and Others v. France*, Application no. 62736/09, 27 June 2013; ECtHR, *Hassan and Others v. France*, Application no. 46695/10, 4 December 2014; ECtHR, *Ali Samatar and Others v. France*, Application no. 17110/10, 4 December 2014.

17 For a case involving an international armed conflict situation, see ECtHR, *Varnava and Others v. Turkey*, above note 7, para. 185. For a situation that could maybe have been classified as a non-international armed conflict, see ECtHR, *Isayeva and Others v. Russia*, Application no. 57947/00, 24 February 2005, para. 181.

18 ECtHR, *Varnava and Others v. Turkey*, above note 7, para. 185.

19 ECtHR, *Al-Skeini v. the United Kingdom*, above note 1, para. 162.

decide whether that use of force was "absolutely necessary" to achieve one of the permitted aims defined in Article 2.[20]

The solution reached in the *Varnava and Others* judgement referred to above suggests that there is no real problem in categorizing use of force under one of these aims. A military engagement in the context of a non-international armed conflict (NIAC) can, it seems, be readily included under the aim described in Article 2(2)(a), which is to act in defence of any person from unlawful violence, as presumed by the Court in its judgement in *Isayeva and Others v. Russia*, "given the context of the conflict in Chechnya at the relevant time".[21]

In contrast, the criterion of absolute necessity, which the Court considers to be a "stricter and more compelling" test,[22] differs significantly from the principles governing the conduct of hostilities established in IHL.[23] In order to be considered "absolutely necessary" within the meaning of Article 2 of the Convention, the force used must be strictly proportionate to the aim pursued and be part of an operation that was planned and controlled so as to minimize, to the greatest extent possible, recourse to lethal force.[24] Therefore, under EHRL, force can only be used as a last resort, even against targets considered legitimate under IHL. The principle of precaution, in particular, which is used by the Court to assess respect for the absolute necessity standard, has a different meaning from the principle of precaution in IHL. It requires all precautions to be taken to avoid, as far as possible, all use of force as such, and not just against protected persons and property, as dictated by the principle of precaution in IHL.[25] Therefore, within a strict interpretation of the Convention, damages inflicted on civilians as the result of an attack that would be considered lawful under IHL – because it complies with the principles governing the conduct of hostilities – could be nevertheless scrutinized by the Court in the light of the principle of "absolute necessity" and deemed to be contrary to Article 2.

These potential conflicts between IHL and EHRL paradigms[26] are not, however, unsolvable. As Professor Frédéric Sudre explains, while IHL is a branch of international law quite distinct from EHRL, the fact remains that they both have "the same concern – to ensure the protection of human life –… and inevitably share a number of basic rules".[27] The interpretative techniques commonly used by the Court allow it to reconcile these different logics. Thus in

20 F. Sudre, above note 12, pp. 125–131.
21 ECtHR, *Isayeva and Others v. Russia*, above note 17, para. 181.
22 ECtHR, *McCann and Others v. the United Kingdom*, above note 10, para. 149.
23 ICRC, *Expert Meeting: The use of force in armed conflicts, interplay between the conduct of hostilities and law enforcement paradigms*, Report, pp. 8–9, available at: https://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf.
24 ECtHR, *McCann and Others v. the United Kingdom*, above note 10, para. 194.
25 See the ICRC study, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I, Rules*, Cambridge University Press, Cambridge, 2005, Rule 15, pp. 51–55; see *Expert Meeting: The use of force in armed conflicts, interplay between the conduct of hostilities and law enforcement paradigms*, above note 23, pp. 8–9.
26 See *Expert Meeting: The use of force in armed conflicts, interplay between the conduct of hostilities and law enforcement paradigms*, above note 23.
27 See F. Sudre, above note 4, p. 33.

the case of *Isayeva and Others v. Russia*, while the Court refrained from automatically applying the rules of IHL and setting aside the potentially competing rules of the Convention, it did not apply the principle of precaution as understood in EHRL, even though this was what its case law appeared to require. It did not seek to determine whether the persons suspected of unlawful violence could have been spared,[28] examining only the question of whether the operation concerned "was planned and executed with the requisite care for the lives of the civilian population".[29]

Such case law developments[30] are crucial in ensuring respect for the complementary relationship between IHL and human rights, recognized in the International Court of Justice (ICJ) case law,[31] which has been referred by the ECtHR as relevant international law.[32] Taking these two branches of international law as a coherent and complete whole appears to be the only satisfactory solution for dealing with the issues raised by their concurrent application.

## Reconciling Article 5 (right to liberty and security) with administrative detention

The existence of a legal basis for internment or administrative detention[33] in IHL texts, and hence the compatibility of this type of detention with EHRL, is a question that has recently been raised both in doctrine and case-law.[34]

In its judgement in the case of *Hassan v. the United Kingdom* of 16 September 2014, the Court accepted for the first time that the exhaustive and limitative list of permitted grounds for restricting the right to liberty and security established in Article 5 of the Convention should be "accommodated"

28 See *Expert Meeting: The use of force in armed conflicts, interplay between the conduct of hostilities and law enforcement paradigms*, above note 23.

29 ECtHR, *Isayeva and Others v. Russia*, above note 17, para. 199.

30 These developments do not necessarily mean that a finding of violation is not made in such cases, as the Court ruled that a violation of Article 2 had occurred in the case of *Isayeva and Others v. Russia* referred to above.

31 See International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, para. 25; see ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004*, para. 106; see ICJ, *Case Concerning Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), Judgement, *ICJ Reports 2005*, para. 216.

32 See O. Martelly, above note 8, p. 24, citing ECtHR, *Al-Skeini v. the United Kingdom*, above note 1, paras 90–91; ECtHR, *Hassan v. the United Kingdom*, above note 6, paras 35–37.

33 Administrative detention or internment is a non-punitive measure that may be taken for security reasons in armed conflict. See Jelena Pejic, "Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence", *International Review of the Red Cross*, Vol. 87, No. 858, 2005, pp. 375–391.

34 *Serdar Mohammed v. Ministry of Defence,* above note 3; *Mohammed v. Secretary of State for Defence; Rahmatullah and Others v. Ministry of Defence and Foreign and Commonwealth Office*, above note 3. See also: Jelena Pejic "The European Court of Human Rights' Al-Jedda judgment: the oversight of international humanitarian law", *International Review of the Red Cross*, Vol. 93, No. 883, 2011, pp. 365–382; Gabor Rona, "Is There a Way Out of the Non-International Armed Conflict Detention Dilemma?", *International Law Studies,* Vol. 91, No. 1, 2015, pp. 32–59.

with the forms of detention referred to in IHL.[35] However, the Court confined its analysis to situations of IAC,[36] as it considered that "[i]t 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".[37] The fact that Articles 43 and 78 of the Fourth Geneva Convention (GC IV) lay down a number of clearly defined procedural safeguards for administrative detention in particular was key to the Court's finding in this case that no violation of Article 5(1) had been committed.

Unfortunately, the safeguards established in Article 3 common to the four Geneva Conventions of 1949 and Article 5 of the Additional Protocol II of 1977 – the only IHL provisions applicable to administrative detention in NIAC – are not as extensive and precise as those laid down for situations of international armed conflict. For its part, the High Court of Justice of England and Wales, in the case of *Mohammed v. Ministry of Defence*, held that there is nothing in the language of these provisions applicable to NIACs to suggest that they are intended to provide a legal basis for the deprivation of liberty.[38]

Several solutions have been put forward to address this thorny issue, which would allow States to comply with their obligations under the Convention, while continuing to carry out administrative detentions for imperative reasons of security in NIACs[39]. However, none of these solutions is in itself sufficient without significant case law developments, such as those introduced by the Grand Chamber of the Court in its judgement in *Hassan v. the United Kingdom* concerning an IAC situation.

## Extraterritorial application of Article 15

The possibility of derogating from obligations established in the Convention, provided for in Article 15, would seem, at first glance, to provide the most appropriate solution, permitting States to continue complying with their obligations under the Convention and, at the same time, use administrative detention in armed conflict situations. However, the Court considers that the meaning of the expression "[i]n time of war or other public emergency threatening the life of the nation", used in Article 15(1) of the Convention[40] refers to "an exceptional situation of crisis or emergency which affects the whole

35 ECtHR, *Hassan v. the United Kingdom*, above note 6, para. 104.
36 *Ibid*., para. 100.
37 *Ibid*., para. 104.
38 *Serdar Mohammed v. Ministry of Defence,* above note 3, para. 243.
39 See in particular, G. Rona, above note 34, pp. 32–59; Marko Milanovic, "Hassan v. United Kingdom, IHL and IHRL, and other News in (Extra-) Territoriality and Shared Responsibility", *EJIL: Talk! – Blog of the European Journal of International Law*, 18 December 2013, available at: http://www.ejiltalk.org/hassan-v-united-kingdom-ihl-and-ihrl-and-other-news-in-extra-territoriality-and-shared-responsibility/.
40 Article 15(1) of the ECHR provides as follows: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this

population and constitutes a threat to the organised life of the community of which the State is composed".[41] As Jelena Pejic puts it, "[i]t would appear that recent armed conflicts involving ECtHR countries in the territory of a third 'host' state could not be deemed to have reached the requisite threat level to them".[42]

The Court made reference to Article 15 in its judgement in *Hassan v. the United Kingdom*, as it had done previously in the *Al-Jedda v. the United Kingdom* judgement.[43] This could indicate that the Court would not rule out the validity of a derogation from the Convention, even when the case brought before it concerned an extraterritorial NIAC. In such a case, however, it would have no choice but to change its previous case law since the criteria relating to the "the whole population" being affected and the "threat to the organised life of the community" could *a priori* not be met.

Furthermore, if the Court were to accept such a derogation, the State that had been authorized to exercise its right to derogate from Article 5 of the Convention in the territory of a third State would be unlikely to want to suspend the application of this provision in its own territory. This would no doubt conflict with the concept of extraterritorial jurisdiction, which is underpinned by the idea that, as the Court's case law reflects, "Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory".[44]

A derogation under Article 15 would not then have the effect of completely exonerating the State from respecting the safeguards established in it. First of all, the State has a duty of notification when it triggers Article 15[45] and is required to justify the decision to take derogating measures in the light of the circumstances of the situation referred to above.[46] While the Court allows States "a wide margin of appreciation to decide on the nature and scope of the derogating measures necessary to avert the emergency",[47] it has already stated that "it is ultimately for

Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law".

41 See ECtHR, *Lawless v. Ireland*, Application no. 332/57, 1 July 1961, para. 28.

42 J. Pejic, above note 34, p. 850.

43 ECtHR, *Al-Jedda v. the United Kingdom*, above note 1, para. 40.

44 ECtHR, *Issa and Others v. Turkey*, above note 1. However, the Court had already ruled that a State party could exercise its right of derogation only in a part of its own territory. See ECtHR, *Sakik and Others v. Turkey*, Application nos 87/1996/67/897–902, 26 November 1997, para. 39. However, some authors do believe that extraterritorial derogations are permissible. See in particular Marko Milanovic, "Extraterritorial Derogations from Human Rights Treaties in Armed Conflict", in Nehal Bhuta (ed.), *The Frontiers of Human Rights: Extraterritoriality and its Challenges*, Oxford University Press, Oxford, 2016 (forthcoming).

45 Article 15(3) of the Convention provides that: "Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed".

46 ECtHR, *Aksoy v. Turkey*, Application no. 21987/93, 18 December 1996, para. 68; ECtHR, *Brannigan and McBride v. the United Kingdom*, Application nos 14553/89 and 14554/89, 26 May 1993, para. 43.

47 ECtHR, *A and Others v. the United Kingdom* (Grand Chamber), Application no. 3455/05, 23 September 1998, para. 184.

the Court to rule whether the measures were 'strictly required'".[48] It has also indicated that "where a derogating measure encroaches upon a fundamental Convention right, such as the right to liberty, the Court must be satisfied that it was a genuine response to the emergency situation, that it was fully justified by the special circumstances of the emergency and that adequate safeguards were provided against abuse".[49] Thus assuming that Article 15 allows States to derogate from the provisions of Article 5 only in relation to administrative detentions carried out in the territory of States that are not party to the Convention – which is not a given – the Court could nevertheless verify that the measures taken by States are strictly required by the exigencies of the situation.

The outcomes of the cases brought before the ECtHR also depend, in this regard, on the safeguards afforded to the persons detained by the State wishing to exercise its right to derogate. The Court accepted British derogations (at the national level) from its obligations under Article 5 of the Convention in its *Brannigan and McBride* judgement in relation to measures authorizing the detention of people suspected of terrorist offences without judicial control for a maximum period of seven days[50]. It did not, however, acknowledge the validity of a State derogation in relation to a fourteen-day detention of a similar nature in its *Aksoy v. Turkey* judgement. The Court stated, in the *Brannigan and McBride* case, that "the remedy of *habeas corpus* was available to test the lawfulness of the original arrest and detention" and that there was "an absolute and legally enforceable right to consult a solicitor forty-eight hours after the time of arrest and detainees were entitled to inform a relative or friend about their detention and to have access to a doctor".[51] In contrast, in the *Aksoy* case, the Court considered that "the denial of access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention meant that he was left completely at the mercy of those holding him".[52]

The solution provided by Article 15 of the Convention is therefore not one that is indisputably available. Furthermore, it would not allow a State to completely disregard the application of Article 5 in relation to administrative detentions made in armed conflict situations outside its own territory and ignore certain safeguards which although not the same as those required for detentions in peacetime, provide parallel protections.

## Authorization to detain granted by the United Nations Security Council

Pursuant to Articles 25 and 103 of the United Nations Charter, UNSC decisions are binding on States and override any other conflicting obligations they have under

48 *Ibid.*
49 *Ibid.*
50 ECtHR, *Brannigan and McBride v. the United Kingdom*, above note 46, paras. 62–66.
51 ECtHR, *Aksoy v. Turkey*, above note 46, para. 82.
52 *Ibid.*, para. 83.

other international treaties, such as the ECHR. However, the Grand Chamber of the Court recently held in the case of *Al Dulimi and Montana Management Inc. v. Switzerland* of 21 June 2016 that

> where a Security Council resolution does not contain any clear or explicit wording excluding or limiting respect for human rights …, the Court must always presume that those measures are compatible with the Convention. In other words, in such cases, in a spirit of systemic harmonization, it will in principle conclude that there is no conflict of obligations capable of engaging the primacy rule in Article 103 of the UN Charter.[53]

In the context of the implementation of sanctions against individuals or entities at the national level, the Court thereby confirmed the presumption it previously established in its judgement of 7 July 2011 in the case of *Al-Jedda v. the United Kingdom*.[54]

Thus the mere inclusion of a reference to administrative detention in a UNSC resolution, without an explicit – and highly unlikely – exclusion of Article 5, could not have the effect of displacing this provision.

Nevertheless, in *Al-Jedda v. the United Kingdom*, the Court did not formally reject the possibility for a UNSC resolution to constitute a legal basis for administrative detention.[55] It seems that the reason why this argument was not accepted by the Court in this case was the lack of an express mention of administrative detention in the resolution in question. It is at least the reading of the Court's case law recently adopted by the High Court of Justice of England and Wales and subsequently confirmed on appeal.[56]

However, if the interpretations of the Court in its judgement in the case of *Hassan v. the United Kingdom* are followed, the UNSC resolution would also have to provide for a number of legal safeguards, in order for it to be deemed constitutive of a legal basis for administrative detention that could be "accommodated" with the theoretically exhaustive list of permitted grounds for deprivation of liberty set out in Article 5(1) of the Convention, which does not include this type of detention.[57]

This solution is therefore likely to encounter political obstacles, as such precise language has not been used in a Security Council resolution to date. It

53 See ECtHR, *Al Dulimi and Montana Management v. Switzerland*, Application no 5809/08, 21 June 2016, para. 140.

54 See ECtHR, *Al-Jedda v. the United Kingdom*, above note 1, paras 101–102.

55 See *Ibid.*, paras 101–102. In the *Al-Jedda* judgement, the Court adopted a narrow reading of Article 103 of the United Nations Charter, considering that it is implied that a mere *authorization* granted by the UNSC to breach an international obligation is not sufficient to allow derogation from it; the resolution would have to contain an explicit *duty* to derogate from the obligations in question. However, it is very likely that the Court was simply responding to the argument advanced by the respondent government, which maintained the existence of such a duty in the Security Council resolution to justify its treatment of the applicant in this case. This is what seems to emerge from the *Hassan* judgement. See ECtHR, *Hassan v. the United Kingdom*, above note 6, para. 99.

56 *Serdar Mohammed v. Ministry of Defence*, above note 3, paras 193–207 and para. 211; *Mohammed v. Secretary of State for Defence; Rahmatullah and Others v. Ministry of Defence and Foreign and Commonwealth Office*, above note 3, paras 158–163.

57 ECtHR, *Hassan v. the United Kingdom*, above note 6, para. 104.

would also have the disadvantage of having to be activated prior to each operation, which would not be ideal as far as the principle of legal certainty is concerned.

## Legal basis in the domestic law of the sending State, of the host State or in a bilateral agreement

In the *Serdar Mohammed* case, before determining whether IHL applicable to NIACs contained a legal basis for administrative detention, the British High Court of Justice examined whether UK domestic law and the law of the host State where the operation took place permitted this form of detention.[58]

However, a solution that involves relying on the domestic law of the host State does not seem wholly satisfactory, as in the majority of cases it would contain no specific provision for administrative detention. The relevant legislation would therefore have to be introduced urgently at the start of the military operation and, more often than not, it would be impossible to enact it in time. In addition, the text would have to provide certain safeguards in order for it to be considered by the Court as constituting a legal basis within the meaning of Article 5. Political obstacles associated with respect for the sovereignty of the host State where the operation takes place – assuming it is not party to the ECHR – could also hamper the success of this legislative or regulatory reform.

Another solution would be to include an explicit reference to the sending State's power to use administrative detention, guaranteeing the required safeguards, in an agreement signed with the host State at the start of the operation. This solution is less likely to encounter political obstacles, as only the sending State, and not the host State, would undertake to provide all the safeguards guaranteed to detained persons. The host State would only undertake to refrain from subjecting individuals transferred to it by the sending State to treatment contrary to Articles 2 and 3 of the Convention, or from taking measures that would violate these provisions.[59] This solution might, however, fail to meet foreseeability and accessibility requirements for constituting a legal basis within the meaning of the Court's case law.[60]

58 *Serdar Mohammed v. Ministry of Defence,* above note 3, paras 110–111.

59 See Article 10 of the status of forces agreement (SOFA) signed between France and Mali in 2013; Decree no. 2013–364 of 29 April 2013 concerning the publication of the agreement in the form of an exchange of letters between the Government of the French Republic and the Government of Mali determining the status of the "Serval" force, signed in Bamako on 7 March 2013 and in Koulouba on 8 March 2013, available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027376103 (in French).

60 The Court considers that where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential, according to the Court's case law, that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard that requires that all law be sufficiently precise to avoid all risk of arbitrariness and to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail. See, among others, ECtHR, *Medvedyev and Others v. France* (Grand Chamber), Application no. 3394/03, 29 March 2010, paras 80–103.

Yet another solution would be to establish a legal basis for administrative detention in the domestic legislation of the sending State. However, in order for the legal basis to be valid according to the Court's case law, the text would have to expressly provide for it to be applicable to NIAC situations and, in particular, to extraterritorial NIACs and be sufficiently comprehensive in terms of procedural guarantees. In addition to the difficulty of achieving a piece of legislation of this kind, the ECtHR would, in the event of such cases being brought before it, undoubtedly have to make adjustments similar to those adopted in the *Hassan* judgement, because administrative detention does not figure among the cases of deprivation of liberty listed in Article 5(1). Such domestic legislation could not be considered as falling within the scope of Article 5(1)(b) of the Convention, which concerns "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", because the Court's case law rules out this possibility. It requires there to be an unfulfilled obligation incumbent on the person concerned by the measure intended to "secure the fulfilment" of an obligation prescribed by law,[61] which must be specific and concrete.[62] Yet administrative detention is motivated simply by imperative reasons of security associated with an armed conflict situation in progress[63] and not by a breach of an obligation to do or not do something.

It is therefore only by interpreting Article 5 in light of the provisions of this source of domestic law, which would supplement the relevant rules of IHL (in particular, those applicable to NIACs), that the Court could consider this type of detention as consistent with Article 5(1).

## *Lex specialis* or systemic interpretation?

Often put forward as a potential solution to conflicts arising between IHL and EHRL, the maxim *lex specialis derogat legi generali*, according to which a law governing a specific subject matter overrides a law which only governs general matters, cannot, however, be invoked to overcome the lack of recognition of administrative detention in EHRL. The Court did not, in any event, rely on this rule in its judgement in *Hassan v. the United Kingdom*,[64] and the British High Court of Justice expressly refused to apply it to the NIAC situation it was examining, holding that, as IHL does not provide a legal basis for this type of detention in NIACs, there is no conflict between IHL rules and the provisions of the Convention.[65]

61 ECtHR, *Guide on Article 5 of the Convention – Right to liberty and security*, p. 13, available at: http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf.

62 ECtHR, *Ciulla v. Italy*, Application no. 11152/84, 22 February 1989, para. 36.

63 See ICRC, *Strengthening international humanitarian law protecting persons deprived of liberty: Concluding Report*, June 2015, EN 32IC/15/XX, p. 29: "A significant number of States considered that the most appropriate articulation of grounds for internment was 'imperative reasons of security'".

64 Despite the fact that both the Government and the Third party did refer to this principle. See ECtHR, *Hassan v. the United Kingdom*, above note 6.

65 *Serdar Mohammed v. Ministry of Defence,* above note 3, para. 287.

In contrast to the principles of *lex posterior* and *lex superior*, the principle of *lex specialis* does not find expression in the provisions of the Vienna Convention on the Law of Treaties of 23 May 1969,[66] although it has been used by the International Law Commission and various international courts and tribunals, including the International Court of Justice.[67]

The principle of systemic interpretation[68] is, on the other hand, included among the principles established in the Vienna Convention, which provides, in Article 31(3)(c), that "[t]here shall be taken into account, together with the context … [a]ny relevant rules of international law applicable in the relations between the parties".

In reality, as Silvia Borrelli explains, the ICJ

> in characterizing international humanitarian law as *lex specialis* in its two Advisory Opinions, did so in a very particular sense. It is relatively clear that it did not intend to refer to the maxim *lex specialis derogat legi generali*, or, at least, that it did not intend the consequence to be the disapplication of international human rights law in favor of international humanitarian law. Rather, the recourse to Latin appears to have been used merely to indicate that the rules of international humanitarian law were to be given effect, as far as possible, where relevant in the assessment of whether there had been compliance with obligations under international human rights law.[69]

The Grand Chamber of the Court has itself applied the principle of systemic interpretation in its judgement in the case of *Hassan v. the United Kingdom*. It indeed ruled that a case of detention not provided for in Article 5 of the Convention did not constitute a violation, considering that this provision should be interpreted in the light of the principles of IHL.[70] In making this ruling, the Court chose to make an exceptional departure from its case law, which holds that the list of permitted grounds for deprivation of liberty contained in Article 5(1) is exhaustive.[71]

It is hard to see what would prevent the Court from using systemic interpretation if a case were brought before it involving administrative detention,

66 See Vienna Convention on the Law of Treaties, 155 UNTS 331, 23 May 1969 (entered into force 27 January 1980), Arts 30(3), 53, 59 and 64.

67 Silvia Borelli, "The (Mis)-Use of General Principles of Law: *Lex Specialis* and the Relationship between International Human Rights Law and the Laws of Armed Conflict", in Laura Pineshi (ed.), *General Principles of Law: The Role of the Judiciary*, Springer, 2015, p. 3, available at: http://ssrn.com/abstract=2575076.

68 Systemic interpretation refers to a reading that "seeks to elucidate the meaning of a fragment of the text with reference to another text or texts". See Denis Alland and Stéphane Rials (eds), *Dictionnaire de la culture juridique*, PUF, Paris, 2003, p. 844. See also Giovanni Distefano and Petros C. Mavroidis, "L'interprétation systémique: le liant de l'ordre international", in Olivier Guillod and Christoph Müller (eds), *Pour un droit équitable, engagé et chaleureux: Mélanges en l'honneur de Pierre Wessner*, Basel, Neuchâtel, 2011, pp. 743–759.

69 S. Borelli, above note 67, p. 10.

70 ECtHR, *Hassan v. the United Kingdom*, above note 6, para. 102.

71 See ECtHR, *Ireland v. the United Kingdom*, Application no. 5310/71, 18 January 1978, para. 194; ECtHR, *A and Others v. the United Kingdom,* above note 47, paras 162–163; ECtHR, *Al-Jedda v. the United Kingdom*, above note 1, paras 99–100; ECtHR, *Hassan v. the United Kingdom*, above note 6, paras 104–105.

with the provision of certain safeguards, occurring in a NIAC rather than in an IAC. While it is true that common Article 3 and Article 5 of Additional Protocol II are not as well detailed as Articles 43 and 78 of the Fourth Geneva Convention, it is also clear that in expressly referring to detention or internment and specifying procedural rules and minimum safeguards in the two texts applicable to NIACs, the States intended to restrict their freedom to use administrative detention and, in doing so, affirmed the existence of this power, which allows them to "mitigate the violence and the human cost of armed conflict".[72]

Contrary to what the British Court of Appeal affirmed in the *Serdar Mohammed* case, the power of States to use administrative detention is not derived solely from the absence of a prohibition,[73] but from a reference to this power and its regulation which, while subject to improvement, are present.[74] Articles 43 and 78 of the Fourth Geneva Convention, on which the ECtHR relied in its judgement in *Hassan v. the United Kingdom* to declare that internment was one of the "accepted features of international humanitarian law" in international armed conflict,[75] merely regulate the exercise of this power and make no reference to an explicit right to detain. In fact, only Article 21 of the Third Geneva Convention explicitly recognizes the right of States to detain in relation to prisoners of war. Article 42 of the Fourth Geneva Convention, cited by the British Court of Appeal in the *Serdar Mohammed* case as conferring a "power … to detain civilians where 'the security of the Detaining Power makes [this] absolutely necessary'"[76] simply regulates the use of detention in the case of protected persons.[77]

Although some States maintained that there was no point trying to regulate detention in NIAC because it was, in their view, essentially a matter of domestic law,[78] at the Diplomatic Conference held to draft Additional Protocol II, the

72 ICRC background document, Meeting of All States on Strengthening International Humanitarian Law Protecting Persons Deprived of their Liberty, Geneva, 27–29 April 2015, p. 3, available at: https://www.icrc.org/en/document/strengthening-compliance-ihl-meeting-all-states-geneva-switzerland-27-29-april-2015.

73 *Mohammed v. Secretary of State for Defence; Rahmatullah and Others v. Ministry of Defence and Foreign and Commonwealth Office*, above note 3, para. 202.

74 See ICRC, Opinion Paper, *Internment in Armed Conflict: Basic Rules and Challenges*, November 2014, p. 7: "One view is that a legal basis for internment would have to be explicit, as it is in the Fourth Geneva Convention; in the absence of such a rule, IHL cannot provide it implicitly. Another view, shared by the ICRC, is that both customary and treaty IHL contain an inherent power to intern and may in this respect be said to provide a legal basis for internment in NIAC. This position is based on the fact that internment is a form of deprivation of liberty which is a common occurrence in armed conflict, not prohibited by Common Article 3, and that Additional Protocol II – which has been ratified by 167 States – refers explicitly to internment".

75 ECtHR, *Hassan v. the United Kingdom*, above note 6, paras. 104–105.

76 *Mohammed v. Secretary of State for Defence; Rahmatullah and Others v. Ministry of Defence and Foreign and Commonwealth Office*, above note 3, para. 173.

77 Article 42 (1) of the Fourth Geneva Convention provides that "[t]he internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary".

78 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, 1974–1977, Vol. IV, p. 333, available at: http://www.loc.gov/rr/frd/Military_Law/RC-dipl-conference-records.html

majority did consider it important to retain Article 5. At this conference, the International Committee of the Red Cross (ICRC) also confirmed, in response to a question raised by the United Kingdom, that draft Article 5 of Additional Protocol II, which it had itself written, covered three forms of detention, one of which was non-criminal detention.[79]

There are various indications that the States have reserved the power to use administrative detention in NIACs. This power was recently reaffirmed at the 32nd International Conference of the Red Cross and Red Crescent in the preamble to the Resolution on Strengthening International Humanitarian Law Protecting Persons Deprived of their Liberty in NIACs.[80] However, the States apparently failed to anticipate the possible interplay between provisions applicable to NIACs and instruments protecting human rights and did not therefore see any point in retaining the set of safeguards initially included in the draft prepared at that time by the ICRC.

## Conclusions

If the Court applied the principle of systemic interpretation each time a case involving an armed conflict situation was brought before it, it could accommodate the rules of Article 2 of the Convention with the rules of IHL governing the conduct of hostilities. This would allow it to reconcile these two sets of rules in a manner fully consistent with ICJ case law related to the complementary nature of the relationship between IHL and human rights law. In the same way, it could bring administrative detention in NIACs within the scope of Article 5 – as it did for IACs in the *Hassan* judgement – respecting the specificity of the rules of IHL applicable to the treatment of persons in the power of the enemy, the majority of which do not have an underlying criminal or legalistic logic. In this regard, it should be noted that IHL applicable to administrative detention does not provide for or govern accessory measures associated with criminal detention, such as identity checks and security searches. An overly strict interpretation of the Convention could result in multiple findings of violations not only in relation to Articles 2 and 5 of the Convention, but also in relation to Article 8, which guarantees the right to private life and family life, solely on the grounds that measures of this kind, which States have sometimes to take for security reasons in extraterritorial armed conflicts, have no clear legal basis.[81]

79 *Ibid.*, p. 350, paras 10 and 17.

80 32nd International Conference of the Red Cross and Red Crescent, Resolution 1: Strengthening international humanitarian law protecting persons deprived of their liberty, 32IC/15/R1, Geneva, 8–10 December 2015. Available in the Reports and documents section of this edition of the *Review*.

81 Article 8(2) of the ECHR states that any restriction to the right to privacy must be "in accordance with the law". A legal basis is therefore needed for interferences with Article 8 of the ECHR. According to the Court's case law, the legal basis in question must be sufficiently precise and contain a measure of protection against arbitrariness by public authorities. When the Court finds a violation on the basis that the powers provided by the legislation were not 'in accordance with the law', it considers that

The use of systemic interpretation, however, would not prejudice any findings of violations of the safeguards listed in Article 5 that might subsequently be made by the Court. For administrative detention to come fully within the scope of Article 5(1) of the Convention and meet the requirements of Articles 5(2) and 5(4),[82] the protections and safeguards applicable in NIACs must be clarified and, above all, effectively afforded to individuals by State authorities that carry out administrative detention. The most recent meeting of States organized as part of the ICRC initiative to strengthen legal protection for persons deprived of their liberty in NIACs, which took place in Geneva from 27 to 29 April 2015, highlighted the keen interest of the majority of States in this subject and their commitment to achieving the goal of strengthening legal protection of individuals in such cases.[83]

Although the use of systemic interpretation could be perceived by EHRL experts as a "capitulation"[84] to IHL, it seems to be the only way for the Court to avoid making the Convention *lex superior* over IHL, which would lead to a regrettable lack of dialogue between the ECtHR judges and the Hague judges.

there is no need to analyse whether the measures were 'necessary'. See Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, Oxford University Press, Oxford, 2011, p. 454.

82 In the judgement in *Hassan v. the United Kingdom*, the Court held that Article 5(3) had no application, because the applicant had not been detained in accordance with the provisions of paragraph (1)(c) of Article 5, that is, with a view to prosecution. See ECtHR, *Hassan v. the United Kingdom*, above note 6, para. 106.

83 ICRC, *Detention in non-international armed conflict, Meeting of all States, Chair's Conclusions*, 27–29 April 2015, p. 3, available at: https://www.icrc.org/en/document/strengthening-compliance-ihl-meeting-all-states-geneva-switzerland-27-29-april-2015.

84 See N. Hervieu, above note 6, para. 72.