

Does Article 15 ECHR Still Matter in Military Operations Abroad?

The UK Government’s “Presumption to Derogate” – Much Ado About Nothing?

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Abstract

Much has been written on the United Kingdom’s (UK’s) “presumption to derogate” from the European Convention on Human Rights (ECHR) in military operations abroad. Obviously, the government’s announcement to anticipate a general derogation under Art. 15 ECHR in case the UK engages in future deployed operations has been subject to severe criticism. Unfortunately, the inquiry of the Joint Committee on Human Rights on the proposed derogation – launched end of 2016 – had to close due to general elections and was – regrettably – not reopened since. Thus, the “presumption to derogate” still lacks a final assessment. Although the Committee received submission from leading scholars in the field, the implications of the European Court of Human Rights’ (ECtHR’s) judgment in *Hassan* were not at the heart of the discussion. Therefore, this contribution will put the spot-

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light on this seminal decision and argue that it effectively deprives Art. 15 of any purpose with regard to detentions in deployed operations. The ECtHR seems to have developed a new standard – the standard of “arbitrariness” – in case of genuine norm conflicts between the ECHR and other international regimes like International Humanitarian Law (IHL). This allows to lower the ECHR’s standard of protection to a mere minimum. What does this mean for the UK’s presumption to derogate? Much ado about nothing? Not quite. *Hassan* did concern *prima facie* only Art. 5 ECHR and was limited to “international armed conflicts”. Although I argue that it is possible to transfer the verdict to other conventional rights and “non-international armed conflicts” as well, it remains to be seen how the ECtHR will decide in this matter.

I. Introduction

In October 2016, *Michael Fallon*, UK Secretary of State, announced the government’s general intention to derogate from the provisions of the European Convention on Human Rights before “embarking on significant future military operations”.¹ In future, it shall be “presumed” that the UK derogates from the Convention each time it engages in deployed operations. This announcement is a response to the increased extraterritorial application of the ECHR and the extended reach of jurisdiction of the European Court of Human Rights.² Two main concerns have been expressed in this respect: first, that the ECHR’s applicability significantly restricts the military’s *marge de manoeuvre* and, second, that it has a corrosive effect on the war-fighting ethos by making the armed forces more risk averse.³ In case of such a derogation, British military would only be bound by the non-derogable rights in Art. 15(2) ECHR and the UK’s other international obligations (like international humanitarian law).

¹ Statement made by *Michael Fallon*, Secretary of State of Defense, Military Operations: European Convention on Human Rights Derogation, Written Statement to the House of Commons (10.10.2016), HCWS168.

² The government’s announcement seems to be inspired by *R. Ekins/J. Morgan/T. Tugendhat*, Clearing the Fog of Law: Saving Our Armed Forces from Defeat by Judicial Diktat, 2015, <<https://policyexchange.org.uk>> which contains a recommendation to derogate in armed conflict (p. 8). See in response *M. Milanović*, A Really, Really Foggy Report, EJIL Talk!, 15.4.2015, <<https://www.ejiltalk.org>>; *E. Bjorge*, The Fogmachine of War, EJIL Talk!, 13.4.2015, <<https://www.ejiltalk.org>>.

³ See *T. Ruys/C. De Koker*, Submission to the Joint Committee on Human Rights, 12.4.2017 referring to *T. Tugendhat/L. Croft*, The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power, 2013, <<https://policyexchange.org.uk>>, 58 et seq.

Prima facie, cases seem indeed to emerge particularly in the UK,⁴ whereas other countries seem less affected. This could be explained on the one hand by the stronger involvement of British forces and on the other by different regimes of state liability for example in Germany⁵ and France,⁶ which are less permissible than Arts. 7 and 8 of the UK Human Rights Act. A closer look, however, reveals that the ECtHR has applied the Convention to other troubled areas as well, like Cyprus, Turkey, Chechnya, Nagorno Karabakh and the conflicts in Ukraine and Georgia. The idea that the UK has been singled out by the Strasbourg Court does not conform with reality.⁷ Also beyond Strasbourg, states – like the Netherlands⁸ and especially Israel⁹ –

⁴ There were at least over 1000 claims seeking compensation from the Ministry of Defense; see *Al-Saadoon and others v. Secretary of State for Defence*, [2015] EWHC 715, paras. 2-3.

⁵ In Germany, the *Bundesverfassungsgericht* has not yet clarified whether constitutional guarantees and human rights apply unqualified during military operations abroad. Further, there are no compensation claims for violations of IHL or IHRL during military operations abroad – see Bundesgerichtshof, Judgment of 6.10.2016, III ZR 140/15 – *Kunduz* Case, concerning compensation for civilian killings during an airstrike in Afghanistan. The *Bundesgerichtshof* held that the German state liability regime (§ 839 German Civil Code) is limited to peacetime. Fearing a flood of (costly) claims, the Court sees the prerogative of the parliament to determine the budget and Germany's capacity to participate in international coalitions endangered and refers the establishment of such claims to the legislator. Thus, the individual is only protected via the principles of diplomatic protection. A constitutional complaint was lodged against the Court's judgment on 28.11.2016. See *P. Starski/L. Beinlich*, *Der Amtshaftungsanspruch und Auslandseinsätze der Bundeswehr. Eine verfassungsrechtliche und rechtsvergleichende Betrachtung aus Anlass des Kunduz-Urteils des Bundesgerichtshofs*, JöR 66 (2018), 299; *E. Henn*, *Individual Compensation Reloaded: German Liability for Unlawful Acts in Bello*, EJIL Talk!, 29.4.2015, <<https://www.ejiltalk.org>>.

⁶ The *Cour de Cassation* declared admissible a claim of relatives of French soldiers killed in an ambush in Afghanistan against the commanding officer; see *Cour de Cassation*, Judgment of 10.5.2012, No. 12-81.197 – *Uzbin Valley Ambush* Case. Shortly after this decision, the respective provision (Art. 698-2 Code de Procédure Pénale) has been modified (Loi No. 2013-1168 du 18.12.2013 – Art. 30). From now on, the *action publique* in case of extraterritorial conduct in military missions is reserved to the public prosecutor. However, there still is the possibility for an *action civile en réparation du dommage* – a civil claim for compensation. See further *C. Landais/L. Bass*, *Reconciling the Rules of International Humanitarian Law with the Rules of European Human Rights Law*, Int'l Rev. of the Red Cross 97 (2015), 1295, 1298.

⁷ *M. Milanović*, Submission to the Joint Committee on Human Rights, 12.4.2017, para. 27.

⁸ The Dutch Supreme Court held the Netherlands to be liable for damages to Bosnian nationals for actions in relation to the evacuation of Dutch military around the fall of Srebrenica in the course of which their relatives were handed over to the Bosnian Serbs to their foreseeable death; see Supreme Court of the Netherlands, Judgment of 6.9.2013, 12/03324 – *Nubanovic v. The Netherlands*.

⁹ The Israeli High Court rejected arguments of non-justiciability in the context of the domestic application of international norms (IHL) regarding targeted killings of suspected

have faced similar, domestic actions. Nevertheless, the UK's reflection on derogations is rather unique.

While it seems unlikely that the UK might become involved in new territorial conflicts in the nearer future, the question of human rights in military operations abroad has not lost its importance. First, the increasing use of air- and drone strikes (e.g. most recently in Syria)¹⁰ could trigger obligations under the ECHR. Although such actions were traditionally deemed insufficient to establish jurisdiction by the ECtHR,¹¹ there have been recent jurisprudential¹² and political¹³ attempts in the UK to eliminate this human rights blind spot. The UK Court of Appeal put a hold on these developments by stating that “it is for the Strasbourg Court to take this further step, if it is to be taken at all”¹⁴ – unfortunately without being appealed again. In my view, however, it does not seem inconceivable *a priori* that the ECtHR would – if confronted with such a case – overturn or “clarify” its consolidated jurisprudence.¹⁵ Second, the question of derogations has sig-

terrorists in the occupied territories; see Supreme Court of Israel acting as High Court, Judgment of 13.12.2006, HCJ 769/02 – *Targeted Killings*.

¹⁰ See for a comprehensive overview of the UK's practice *L. Brooke-Holland*, Overview of Military Drones Used by the UK Armed Forces, House of Commons Library, Briefing Paper 6493, 8.10.2015; see further *N. Quéniwet/A. Sari*, International Law Aspects of the Use of Drones for Lethal Targeting, Written Evidence, DRO0010, <data.parliament.uk>.

¹¹ *Bankovic and Others v. Belgium and Others*, App. No. 52207/99 (ECtHR [GC] 12.12.2001); see further *Al-Skeini v. United Kingdom*, App. No. 55721/07 (ECtHR [GC] 7.7.2011), para. 136 where the Court required “physical power and control over the person in question” in order to establish jurisdiction – regrettably without clarifying whether the “mere power to kill” fulfills these requirements.

¹² *Leggat J, Al-Saadoon and others v. Secretary of State of Defence* (note 4), para. 95. *Leggat J* found it “impossible to say that shooting someone dead does not involve the exercise of physical power and control over that person. Using force to kill is indeed the ultimate exercise physical control over another human being.” See further para. 106, where he proposes to extend jurisdiction to “whenever and wherever a state which is a contracting party to the Convention purports to exercise legal authority or uses physical force”; the UKSC seems to follow this line of reasoning in an *obiter dictum*, see *Serdar Mohammed v. Ministry of Defence*, [2015] EWCA Civ 843, para. 95.

¹³ See the position of the UK Joint Committee on Human Rights, The Governments Policy on the Use of Drones for Targeted Killings, Second Report of Session 2015-2016, <<https://publications.parliament.uk>>, 52 et seq. (paras. 3.58-3.62).

¹⁴ *Lloyd Jones LJ, Al-Saadoon and others v. Secretary of State of Defence*, [2016] EWCA Civ 811, paras. 70-73.

¹⁵ See further *D. S. Goddard*, Applying the European Convention on Human Rights to the Use of Physical Force: Al-Saadoon, *International Law Studies* 91 (2015), 402; see more generally *N. Melzer*, Targeted Killing in International Law, 2009, 51 et seq.; *S. Casey-Maslen*, Unmanned Weapons Systems and the Right to Life, in: *S. Casey-Maslen/N. Weizmann/M. Homayounnejad/H. Stauffer* (eds.), *Drones and Other Unmanned Weapons Systems under International Law*, 2018, 158; *P. V. Kessing*, Transnational Operations Carried Out from a State's Own Territory. Armed Drones and the Extraterritorial Effect of International Human

nificance far beyond the UK. Several ECHR Member States are or could easily get involved in terrestrial military conflicts abroad (e.g. Russia in Ukraine and Syria, where Turkey is involved as well) and might consider following the UK's lead.

Thus, the inquiry of the Joint Committee on Human Rights on the government's proposed derogation – launched end of 2016 – was more than welcome. Unfortunately, the Committee had to close the inquiry due to general elections on in June 2017. Although receiving multiple responses,¹⁶ the different submissions concerned mainly the Convention's extraterritorial application (especially the provision of Art. 15 ECHR), the (unintended) consequences of a derogation and alternative solutions. Surprisingly, only little (to no) attention has been paid to the implications of the ECtHR's judgment from 16.9.2014 in the case of *Hassan v. United Kingdom*.¹⁷ Nevertheless, this judgment seriously raises the question, of whether a derogation under Art. 15 ECHR is likely to have a significant impact in practice.

Therefore, this contribution will concentrate mainly on the implications of this seminal judgment and try to identify the remaining impact of Art. 15 ECHR in deployed operations. In a first step, I will shortly treat the two preliminary questions of whether the Convention applies in armed conflict (see under I.) and whether the conditions of Art. 15 ECHR are met during military operations abroad (see under II.). This will be followed by an analysis of how and to what extent the Convention applies to armed conflict after *Hassan* (see under III.) concluding that Art. 15(1) is practically deprived of its purpose as far as detentions in international armed conflict are concerned. Finally, this paper will raise the question of Art. 15's further practical significance in military operations abroad concentrating especially on the transfer of *Hassan* to “non-international armed conflicts” (see under IV.).

Rights Conventions, in: T. Gammeltoft-Hansen/J. Vedsted-Hansen (eds.), *Human Rights and the Dark Side of Globalisation*, 2016.

¹⁶ The submissions reflect the who's who of scholarship in the field. Among many others, scholars like *Marko Milanović*, *Aurel Sari*, *Alan Greene*, *Françoise Hampson*, *Noam Lubell*, *Ed Bates*, *Tom Ruys*, *Cedric De Koker* and *Katja Ziegler* submitted their views.

¹⁷ *Hassan v. United Kingdom*, App. No. 29750/09 (ECtHR [GC] 16.9.2014).

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II. Does the Convention Apply in Military Operations Abroad?

Before analyzing the government's intention to derogate, it has to be established that the Convention applies in military operations abroad. For a long time, the UK has argued that first, there is no extraterritorial application of the Convention and second, that in armed conflict the conventional obligations are displaced by the obligations resulting from IHL. In this case, a derogation would be useless or even counterproductive.¹⁸

Today, however, contesting the ECHR's extraterritorial application seems obsolete – even nostalgic.¹⁹ The same applies to questioning the co-existence of IHL and International Human Rights Law (IHRL) in situations of armed conflict, which is nearly uncontested nowadays. After a period of uncertainty, provoked by nebulous dicta of the International Court of Justice (ICJ),²⁰ it has been established that “*both* branches of international law, namely international human rights law and international humanitarian law, [have] [...] to be taken into consideration”.²¹ The applicability of IHRL in

¹⁸ Aurel Sari observes that “the new derogation policy may be read as an implicit admission by the government that it has lost the argument about the extra-territorial scope of the Convention [...] Now that the horse has bolted, there is no point in contesting what is becoming settled case-law. Rather than focusing on the applicability of the Convention, the government may have decided to shift its attention to contesting how the ECHR applies abroad and to start making use of derogations”; see his submission to the Joint Committee on Human Rights, 26.4.2017, para. 7.

¹⁹ Indeed, the extraterritorial application of the ECHR is – under specific circumstances – settled case law; see e.g. *Drozd and Janousek v. France and Spain*, App. No. 12747/87 (ECtHR 26.5.1992); *Issa and Others v. Turkey*, App. No. 31821/96 (ECtHR 16.11.2004); *Öcalan v. Turkey*, App. No. 46221/99 (ECtHR [GC] 12.5.2005; *Medvedyev v. France*, App. No. 3394/03 (ECtHR [GC] 29.3.2010); *Al-Skeini v. United Kingdom* (note 11); *Jaloud v. The Netherlands*, App. No. 47708/08 (ECtHR [GC] 20.11.2014); for a very interesting and broad approach see *L. Raible*, The Extraterritoriality of the ECHR: Why Jaloud and Pisari Should Be Read as Game Changers, EHRLR 16 (2016), 161.

²⁰ I am referring to the notion of *lex specialis*; see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, para. 106.

²¹ Armed Activities on the Territory of the Congo (*Democratic Republic of Congo (DRC) v. Uganda*, Judgment, ICJ Reports 2005, 168, para. 216 (emphasis added); Croatian Genocide (*Croatia v. Serbia*), Judgment, ICJ Reports 2015, 3, para. 474: “There can be no doubt that, as a general rule, a particular act may be perfectly lawful under one body of legal rules and unlawful under another”; see further *M. Milanović*, A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law, JCSL 14 (2014), 459, 468 et seq.; *S. Aughey/A. Sari*, Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence, International Law Studies 91 (2015), 60, 111.

armed conflict is well-established in state practice,²² the practice of the United Nations²³ as well as the decisional practice of other international courts.²⁴ The ECHR is no exception in this regard. First, the ECtHR has entertained claims brought in relation to military operations,²⁵ non-international armed conflicts²⁶ and belligerent occupation.²⁷ Second, the explicit reference to “war” in Art. 15 is the best possible evidence that the treaties’ drafters intended it to apply in times of armed conflict.²⁸

III. Are the Conditions for a Derogation Met?

If the Convention applies in armed conflicts, it is necessary to determine whether the derogation clause is applicable in such circumstances and especially in military operations abroad. The prevailing opinion seems to argue generally in favor of an extraterritorial application of derogation clauses.²⁹

²² Even the international community’s “black sheep” – Israel and the U.S. – acknowledge this; see e.g. in Israel, Supreme Court of Israel acting as High Court (note 9), – *Targeted Killings*, para. 18; see further the Fourth Periodic Report of the United States to the UN Committee on Human Rights, 30.12.2011, para. 506: “The United States has not taken the position that the Covenant does not apply ‘in time of war.’ Indeed, a time of war does not suspend the operation of the Covenant to matters within its scope of application.”

²³ See e.g. Human Rights Committee, General Comment No. 31, CCPR/C/21/Rev.1/Add. 1326, para. 11: “both spheres of law are complementary, not mutually exclusive”; see further UN High Commissioner for Human Rights, International Legal Protection for Human Rights in Armed Conflict, HR/PUB/11/01, 5 et seq.: “[I]t is widely recognized nowadays by the international community that [...] international human rights law continues to apply in situations of armed conflict.”

²⁴ *Las Palmeras v. Colombia* (IACtHR 4.2.2000), paras. 32-33; see A. Sari, Derogations from the European Convention on Human Rights in Deployed Operations, Written Evidence to the House of Commons Defence Committee, 4.12.2013, para. 6.

²⁵ See e.g. *Ergi v. Turkey*, App. No. 23818/94 (ECtHR 28.7.1998); *Issa and Others v. Turkey* (note 19), para. 74.

²⁶ See e.g. *Khashiyev and Akayeva v. Russia*, App. Nos. 57942/00 and 57945/00 (ECtHR 24.2.2005).

²⁷ See e.g. *Jaloud v. The Netherlands* (note 19); *Al-Skeini v. United Kingdom* (note 11); *Al-Saadoon and Mufdhi v. United Kingdom*, App. No. 61498/08 (ECtHR 2.3.2010), paras. 87-88; *Loizidou v. Turkey*, App. No. 15318/89 (ECtHR [GC] 23.3.1995).

²⁸ *Leggat J, Serdar Mohammed v. Ministry of Defence*, [2014] EWHC 1369 (QB), paras. 278-279: “the Convention contemplates and makes provision within itself for situations of war [...] The clear and necessary implication of Art. 15 is that the Convention continues to apply in a situation of armed conflict.”; see further M. Milanović, Extraterritorial Derogations from Human Rights Treaties in Armed Conflict, in: N. Bhuta (ed.), *The Frontiers of Human Rights: Extraterritoriality and Its Challenges*, 2016, 55, 62; see further M. Milanović, *Extraterritorial Application of Human Rights Treaties*, 2011.

²⁹ The ECtHR does not seem to object, in principle, to extraterritorial derogations; see *Bankovic and Others v. Belgium and Others* (note 11), para. 62; *Georgia v. Russia*, App. No.

Disputed remains the question of whether the substantive requirements are likely to be satisfied in military actions abroad. Art. 15(1) permits a state to derogate from its obligations under the Convention “in time of war or other public emergency threatening the life of the *nation*”. The ECtHR interpreted this condition quite restrictively as an “exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community”.³⁰ But to which “nation” is the provision referring? Generally, there are two possible readings of this passage:

First, the emergency could require a threat to the “nation seeking to derogate”.³¹ In this case, it seems questionable if the life of the nation (e.g. the UK) could be threatened by an overseas situation (e.g. in Iraq) which a state enters entirely voluntarily and from which he could withdraw any time.³² For this reason, it has been suggested to rely upon the “nation in which the armed conflict takes place”.³³

38263/08 (ECtHR 13.12.2011), para. 73 (noting that neither Georgia nor Russia made a derogation in the context of their 2008 conflict, which took entirely place in Georgia); *Cyprus v. Turkey*, App. No. 6780/74 and 6950/75 (ECommHR 10.7.1976), paras. 527-528; the Human Rights Committee also confirmed the possibility of extraterritorial derogations, see General Comment No. 35, CCPR/C/GC/35, Fn. 185; see further *H. Krieger*, After Al-Jedda: Detention, Derogation, and an Enduring Dilemma, MLLWR 50 (2011), 419, 436; *M. Milanović*, Extraterritorial Derogations (note 28), 57, 72 et seq.; *R. Wilde*, The Extraterritorial Application of International Human Rights Law on Civil and Political Rights, in: S. Sheeran/N. Rodley (eds.), Routledge Handbook of International Human Rights Law, 2014, 635, 654 et seq.; *J. Rooney*, Extraterritorial Derogation from the European Convention on Human Rights in the United Kingdom, EHRLR 16 (2016), 656, 660.

³⁰ *Lawless v. Ireland*, App. No. 332/57 (ECtHR 1.7.1961), para. 28.

³¹ *Lord Bingham, R (Al-Jedda) v. SS for Defence* [2007] UKHL 58, para. 38; *Lord Sumption, Serdar Mohammed v. Ministry of Defence*, [2017] UKSC 2, para. 45.

³² See e.g. *Lord Bingham, R (Al-Jedda) v. SS for Defence* (note 31), para. 38; *Lord Hope, R (Smith) v. SS for Defence*, [2010] UKSC 29, para. 57 and *R (Smith and Others) v. Ministry of Defence*, [2013] UKSC 41, paras. 59-60; see further *M. O’Boyle/J.-P. Costa*, The ECtHR and International Humanitarian Law, in: D. Spielmann/M. Tsirli/P. Voyatzis (eds.), The European Convention on Human Rights, a Living Instrument, 2011, 116; *M. Dennis*, Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation, AJIL 99 (2005), 119, 125 et seq.; *C. Landais/L. Bass* (note 6), 1303; *A. Greene*, Submission to the Joint Committee on Human Rights, 28.3.2017; *J. Pejic*, The European Court of Human Rights’ Al-Jedda Judgment: The Oversight of International Humanitarian Law, Int’l Rev. of the Red Cross 93 (2011), 837, 850.

³³ *Leggat J, Serdar Mohammed v. Ministry of Defence* (note 28), para. 156; see further *R. Ekins/J. Morgan/T. Tugendhat* (note 1), 34 et seq.; *T. Ruys/C. De Koker* (note 3); *A. Sari* (note 24), para. 19; *M. Sassòli*, The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts, in: O. Ben Naftali (ed.), International Humanitarian Law and International Human Rights Law, 2011, 34, 66; *F. Naert*, International Law Aspects of the EU’s Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights, 2010, 578.

Prima facie, this host-nation-model seems hardly convincing.³⁴ Why should the UK be able to derogate from its conventional obligations when the life of *another* nation is threatened? One reason could be the Convention's intention to enable contracting states to act in collective self-defense for another state (Art. 51 UN-Charter), or – in a non-international armed conflict – through “intervention by invitation”. In light of these “relevant rules of international law” (see Art. 31(3)(c) of the Vienna Convention on the Law of the Treaties [VCLT]), it does not seem entirely absurd to interpret Art. 15(1) ECHR as referring to *another* nation. Two arguments, however, might speak against such an interpretation. First, I believe that this juridical “detour” is unnecessary. The ECtHR does not seem reluctant to interpret Art. 15(1) in a broader way.³⁵ The Court has previously held that terrorist attacks could threaten the life of a nation although they have been far from “existential”³⁶ and explicitly stated that the emergency does not need to be so severe as to imperil the state's institutions and the existence of civil community.³⁷ It even accepted a localized emergency, which did not affect the whole population or the “nation” as such.³⁸ Second, the choice for extraterritorial derogations should not be made solely by formal means, but on the basis of whether one believes that they are normatively desirable.³⁹ In this sense, extraterritorial derogations could be “part of the price worth paying” for the Convention's extraterritorial application.⁴⁰

Nonetheless, the Court never explicitly resolved this issue. It only implicitly seemed to assume that Art. 15 could also be applied extraterritorially. In *Hassan* the ECtHR did not decide whether the derogation was availa-

³⁴ See C. Wiesner, *The Application and Interplay of Humanitarian Law and Human Rights Law in Peace Operations*, 2015, PhD Thesis, EUI Florence, 169; defending this model see M. Milanović, *Extraterritorial Derogations* (note 28), 71.

³⁵ See M. Milanović, *Extraterritorial Derogations* (note 28), 69 et seq.; see contrarily a rather restrictive understanding A. Greene (note 32).

³⁶ *Lawless v. Ireland* (note 30), para. 29; *Ireland v. United Kingdom*, App. No. 5310/71 (ECtHR 18.1.1978), para. 205.

³⁷ *A. and others v. United Kingdom*, App. No. 3455/06 (ECtHR [GC] 19.2.2009), paras. 177-181.

³⁸ *Ireland v. United Kingdom* (note 36), para. 205 (emergency in Northern Ireland) or *Aksoy v. Turkey*, App. No. 21987/93 (ECtHR 18.12.1996), para. 70 (emergency in South-East Turkey); see M. Milanović, *Extraterritorial Derogations* (note 28), 70.

³⁹ M. Milanović, *Extraterritorial Derogations* (note 28), 69 et seq.

⁴⁰ M. Milanović, *Extraterritorial Derogations* (note 28), at 58; see further the partly dissenting opinion of Judge Spano in *Hassan*, para 8: “The extra-jurisdictional reach of the Convention under Art. 1 must necessarily go hand in hand with the scope of Art. 15”; see further Leggat J, *Serdar Mohammed v. Ministry of Defence* (note 28), para. 155: “Art. 15, like other provisions of the Convention, can and it seems to me must be ‘tailored’ to such extraterritorial jurisdiction.”

ble in respect of armed conflict in Iraq, but concluded that it was unnecessary to do so, since the UK did not trigger Art. 15. Therefore, the threshold-question remains unresolved.

IV. How and to What Extent Does the Convention Apply in Armed Conflict?

Even if a future military operation abroad wouldn't meet the conditions of Art. 15 ECHR, does this result in the full application of the Convention?⁴¹ At this stage, *Hassan* comes into play. This case concerned an Iraqi citizen, who was detained during the British occupation of Iraq. Under the Convention, his detention would have been probably a violation of Art. 5 ECHR – under IHL, the detention would have been lawful. If the Convention applies in armed conflict together with IHL, the UK would have needed to derogate under Art. 15 ECHR. Failing to do so, the ECtHR would have been obliged to qualify the respective detention as a violation of conventional rights. Yet, the Court provided a new solution, which seems to make a derogation unnecessary: it modified how and to what extent the Convention, more precisely Art. 5 ECHR, applies in armed conflict.

1. The “Accommodation” of IHRL with IHL

The ECtHR accepted

“that the lack of a formal derogation under Art. 15 ECHR does not prevent the Court from taking account of the context and the provisions of IHL when interpreting and applying Art. 5 ECHR in this case”.⁴²

In support of this conclusion the Court referred to the VCLT rules on interpretation. According to its Art. 31(3)(b), the practice of the contracting

⁴¹ This would be the case according to *R. Ekins/J. Morgan/T. Tugendhat* (note 1), 33: “[D]erogation is the only way to guarantee that conflicts are regulated by the appropriate rules of IHL – without a confusing ECHR overlay”; this would have been the evident interpretation from case-law – in *Cyprus v. Turkey* the Commission held that “in the absence of an official and public notice of derogation [...] [Turkey] could not apply Art. 15”; see *Cyprus v. Turkey* (note 29), para. 67; see further *Isayeva v. Russia*, App. No. 57950/00 (ECtHR 24.2.2005), para. 191; *Al-Jedda v. United Kingdom*, App. No. 27021/08 (ECtHR [GC] 7.7.2011), paras. 99-100; *Georgia v. Russia (II)*, App. No. 38263/08 (ECtHR 13.12.2011), para. 73.

⁴² *Hassan v. United Kingdom* (note 17), para. 103.

party has to be taken into account.⁴³ In the present case, this practice indicated that states never derogated from their obligations under the Convention in military operations abroad (basically due to the fact that they didn't know that the Convention was applicable in the first place). Further, Art. 31(3)(c) indicates that the Convention must be interpreted in harmony with other rules of international law (like IHL) of which it forms part.⁴⁴

In principle, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of IHL. For the present case, this means that

“the grounds of permitted deprivation of liberty set out in [Art. 5 ECHR] [...] should be *accommodated*, as far as possible, with [...] the Third and Fourth Geneva Conventions”.⁴⁵

Therefore, the detention must comply with the rules of IHL and regarding the Convention only “with the fundamental purpose of Art. 5 § 1, which is to protect the individual from arbitrariness.”⁴⁶

This seems to lead to exactly the same results we would have obtained in case of a derogation.⁴⁷ Although the Convention applies, it is “levelled down” to the standards of IHL. Following this *dictum*, derogations concerning Art. 5 ECHR can be considered unnecessary⁴⁸ in military operations abroad – with one important limitation: the ECtHR stressed that these findings apply only to “international armed conflicts”.⁴⁹

⁴³ *Hassan v. United Kingdom* (note 17), para. 101.

⁴⁴ *Hassan v. United Kingdom* (note 17), para. 102.

⁴⁵ *Hassan v. United Kingdom* (note 17), para. 104 (emphasis added).

⁴⁶ *Hassan v. United Kingdom* (note 17), para. 105. Interestingly, *Milanović* already predicted such an outcome in 2011, stating that the ECtHR “might in the end forcibly read down Art. 5 ECHR as if setting an arbitrariness standard that could accommodate IHL like Art. 9 ICCPR”; see *M. Milanović*, Norm Conflicts, International Humanitarian Law, and Human Rights Law, in: O. Ben Naftali (note 33), 95, 124.

⁴⁷ See *A. Habteslasie*, Derogation in Time of War: The Application of Art. 15 of the ECHR in Extraterritorial Armed Conflicts, *Judicial Review* 21 (2016), 302, 308.

⁴⁸ Other scholars call this the introduction of an “informal ex-post derogation”; see *J. Jabn*, Die schwierige Aufgabe der Humanisierung des humanitären Völkerrechts, *Völkerrechtsblog*, 17.6.2015, <<https://voelkerrechtsblog.org>>.

⁴⁹ *Hassan v. United Kingdom* (note 17), para. 104: “It can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Art. 5 could be interpreted as permitting the exercise of such broad powers.”

2. The Progressive Blurring of the Courts “Self-Contained” Approach

The accommodation of the Convention and IHL in *Hassan* is no surprise. Indeed, it is just the tip of the iceberg. Analyzing the previous case law, this verdict seems to be the consistent result of a progressive development.

The traditional approach of the ECtHR has been to apply the Convention to situations involving the use of military force with little or even no regard to the question of whether any relevant rules of IHL impose standards different from those under the Convention⁵⁰ (so called “self-contained-approach”⁵¹ or – by some – “humanization” of armed conflict⁵²). However, the ECtHR was never blind to the circumstances, in which an alleged violation took place. In *McCann* the Court held that it won’t “impose an unrealistic burden” on the contracting parties.⁵³ Consistently, it emphasized in *Osman* that an obligation resulting from the Convention “must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities”.⁵⁴ In this spirit, the ECtHR has interpreted Art. 2 with more flexibility during military operations. In many cases, the Court did not question the right of government forces to attack opposition forces and did not require that lethal force be avoided – even in the absence of an immediate threat.⁵⁵

The Court affirmed as a matter of principle the full applicability of the procedural obligation to investigate under Art. 2 even “in difficult security

⁵⁰ See the judgments in the Chechnya conflict e.g. *Khashiyev and Akayeva v. Russia* (note 26); *Isayeva v. Russia* (note 41); see *S. Borelli*, *Jaloud v. Netherlands and Hassan v. United Kingdom: Time for a Principled Approach in the Application of the ECHR to Military Action Abroad*, *Quest. Int’l L.* 15 (2015), 25, 41; *W. Abresch*, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, *EJIL* 16 (2005), 741; *S. Aughey/A. Sari* (note 21), 114.

⁵¹ See e.g. *S. Borelli* (note 50).

⁵² See *T. Meron*, *The Humanization of Humanitarian Law*, *AJIL* 94 (2000), 239; more recently *M. Lippold*, *Between Humanization and Humanitarization? Detention in Armed Conflicts and the European Convention on Human Rights*, *ZaöRV* 76 (2016), 53.

⁵³ *McCann and others v. United Kingdom*, App. No. 18984/91 (ECtHR [GC] 27.9.1995), para. 200.

⁵⁴ *Osman v. United Kingdom*, App. No. 23452/94 (ECtHR [GC] 28.10.1998), para. 116.

⁵⁵ See *Isayeva v. Russia* (note 41), para. 176; *Abuyeva and others v. Russia*, App. No. 27065/05, Judgment of 2.12.2010, para. 203; *Damayev v. Russia*, App. No. 36150/04, Judgment of 29.5.2012, para. 60; see further *S. Wallace*, *Submission to the Joint Committee on Human Rights* (26.4.2017), para. 7; *M. Forowicz*, *The Reception of International Law in the European Court of Human Rights*, 2010, 331.

conditions, including in a context of armed conflict”.⁵⁶ Yet, it also stated that it will interpret these obligations “realistically”⁵⁷ and acknowledged the need to take account of the particular difficulties faced by state authorities in a situation of armed conflict or occupation.⁵⁸ Even if the Court applied the Convention in a relatively stringent manner,⁵⁹ the fact remains that it is possible to take the circumstances of armed conflict into consideration. In the end, the Court arrived in practice at results, which are broadly consistent with IHL.⁶⁰

Although extending the notion of “jurisdiction”, the ECtHR stated in *Al-Skeini* that there is only an extraterritorial application of “relevant” human rights and that the Convention rights can be – in principle – divided and tailored.⁶¹ This argument of “dividing and tailoring” the Convention had been initially rejected by the Court in *Bankovic*. If the Convention had an extrajudicial application, it would have to apply as a whole (so-called “all or nothing approach”).⁶² Such an understanding provided a strong argument against its extraterritorial application – especially in armed conflicts or deployed operations. In the sarcastic words of Lord Justice *Sedley* it seemed indeed

“absurd to expect occupying forces in the near-chaos of Iraq to enforce the right to marry vouchsafed by Art. 12 or the equality guarantees vouchsafed by Art. 14”.⁶³

In *Al-Skeini*, however, the Court has overthrown this line of reasoning by admitting that the Convention does not necessarily have to apply as a whole but that its individual rights can be divided and tailored according to the case at hand.⁶⁴ Therefore, *Al-Skeini* could be seen as a first step towards

⁵⁶ *Jaloud v. The Netherlands* (note 19), para. 186; *Al-Skeini v. United Kingdom* (note 11), para. 164; see *S. Borelli* (note 50), 31.

⁵⁷ *Al-Skeini v. United Kingdom* (note 11), para. 168.

⁵⁸ *Jaloud v. The Netherlands* (note 19), para. 186; *Al-Skeini v. United Kingdom* (note 11), para. 164; *Isayeva v. Russia* (note 41), para. 176; *Ergi v. Turkey* (note 25), para. 79.

⁵⁹ *S. Borelli* (note 50), 32.

⁶⁰ See, however, *S. Borelli* (note 50), 30 who claims that this phenomenon is largely explained by the particularly serious nature of the violations at issue.

⁶¹ *Al-Skeini v. United Kingdom* (note 11), para. 137; see further *A. Williams*, *The European Convention on Human Rights, the EU and the UK: Confronting a Heresy*, EJIL 24 (2013) 1157, 1175.

⁶² *Bankovic and Others v. Belgium and Others* (note 11), para. 75.

⁶³ *Sedley LJ, Al-Skeini and Others v. Secretary of State for Defence*, [2005] EWCA Civ 1609, para. 196.

⁶⁴ *Al-Skeini v. United Kingdom* (note 11), para. 137: “It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Art. 1 to secure to that individual the rights and free-

Hassan.⁶⁵ If the conventional rights can be divided and tailored, why shouldn't it be possible to divide and tailor the standard of protection of *one* right to the respective situation?

Finally, the "harmonization" of IHL and IHRL is nothing revolutionary. The ECtHR stated already in *Varnava* that Art. 2 ECHR should be "interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law".⁶⁶ With this verdict the ECtHR followed the lead of other international courts.⁶⁷ Nevertheless, *Hassan* has been vividly criticized by many scholars. So what is wrong with *Hassan*?

3. Harmonization Even in Genuine Norm Conflicts: An Attempt to Square the Circle?

Hassan's tipping point is the fact that the Court was confronted with a *genuine* norm conflict. Although harmonization provides generally for an acceptable outcome in conflicts, there is a definite limit: it can resolve apparent but not *genuine* norm conflicts.⁶⁸ These are conflicts, which cannot be avoided or resolved by the means of interpretation or harmonization but – due to the lack of clear hierarchies between the various legal regimes of

doms under Section 1 of the Convention that are *relevant* to the situation of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored'" (emphasis added).

⁶⁵ *M. Milanović* (note 7), para. 27.

⁶⁶ *Varnava and Others v. Turkey*, App. Nos. 16064/90 and (ECtHR [GC] 18.9.2009), para. 185.

⁶⁷ With regard to the arbitrary deprivation of life (Art. 6 ICCPR) see *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1966, 66, para. 25: "It is widely recognized under Art. 6 ICCPR that what amounts to an arbitrary deprivation of life in the context of an armed conflict depends on the relevant rules of the law of armed conflict. In times of hostilities, the requirements of Art. 6 are thus tempered by applying them subject to the special rules of the law of armed conflict."; regarding Art. 4 ACHR see *Abella v. Argentina*, Case 11.137, Report No. 55/97 (IACCommHR 18.11.1997), para. 161: "the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of this and other kinds of claims alleging violations of the American Convention in combat situations"; see further *A. Sari* (note 24), para. 14.

⁶⁸ International Law Commission, Report on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682, 13.4.2006, para. 42; *C. Borgen*, Resolving Treaty Conflicts, *George Washington International Law Review* 37 (2005), 57; *M. Milanović* (note 46), 102; *J. Pauwelyn*, Conflict of Norms in Public International Law, 2003, 272.

international law – only through political solutions.⁶⁹ Harmonization seems only possible if provisions of IHL and IHRL present some “similarity” regarding their content or objective⁷⁰ or if they are of such a general nature that it takes changing circumstances into account or leaves interpretative discretion.⁷¹ Both is not the case in *Hassan*.

Generally, IHL and IHRL are significantly different regarding their purpose and objective.⁷² IHL is mainly tailored to military necessity and the principle of humanity. It is based not on rights, but on the obligations of parties to a conflict.⁷³ Finally, the rules applicable to an individual depend on his status as a member of a group (combatant or civilian). Due to these conceptual differences, a reconciling harmonization between IHL and IHRL is *a priori* very difficult. In this sense, both regimes could become – at least when they are openly contradictory like in the case of permitted grounds of detention – a breeding ground for genuine norm conflicts.⁷⁴ For

⁶⁹ Besides Art. 103 of the UN Charter (see *infra* under III. 4.), there are barely common rules of conflict between competing legal regimes of international law, which a judge could apply. As seen above, even the *lex specialis* principle has been continuously challenged and has proven difficult to apply. In this sense many authors argue that only a political solution remains; see only A. Lindroos, Addressing Norm Conflicts in a Fragmented Legal System, Nord. J. Int'l L. 74 (2005) 27, 42; M. Milanović (note 46), 102; J. Pauwelyn (note 68), 418; see the different opinion of S. Aughey/A. Sari (note 21), Fn. 231; C. Droege, The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict, Isr. L. R. 40 (2007), 310, 340: “when there is a genuine conflict of norms, one of the norms must prevail”; see more nuanced L. Doswald-Beck, The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?, Int'l Rev. of the Red Cross 88 (2006) 881, 905; M. Sassòli, Le droit international humanitaire, une *lex specialis* par rapport aux droits humains?, in: A. Auer/A. Flueckiger/M. Hottelier (eds.), Les droits de l'homme et la constitution, 2007, 375, 385 et seq., 395.

⁷⁰ See e.g. the position of the Interamerican Court of Human Rights in *Bámaca Velásquez v. Guatemala* (IACtHR 25.11.2000), para. 209; see further J. Jahn (note 48).

⁷¹ International Law Commission, Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, ILCYB 2 (2006), 175, 181, para. 23.

⁷² For a different view see F. Sudre, Droit européen et international des droits de l'homme, 2012, 33 who explains that IHL and IHRL have “the same concern – to ensure the protection of human life [...] and inevitably share a number of basic rules”; see further C. Landais/L. Bass (note 6), 1300; M. Lippold (note 52), 58 et seq. stating that human rights considerations influenced the drafting of the Geneva Conventions; see also more nuanced W. A. Qureshi, Untangling the Complicated Relationship Between International Humanitarian Law and Human Rights Law in Armed Conflict, JLIA 6 (2018), 203.

⁷³ See, however, more nuanced L. Hill-Cawthorne, Rights under International Humanitarian Law, EJIL 28 (2017), 1187.

⁷⁴ F. Hampson/N. Lubell, Amicus curiae brief submitted in the case *Hassan v. United Kingdom* by the Human Rights Centre, University of Essex, para. 11; M. Milanović (note 46), 116 et seq.; M. Milanović (note 21), 459; heading in this direction without openly stating it, see partly dissenting opinion of Judge Spano in *Hassan*, para. 16; C. De Koker/T. Ruys, Fore-

this reason, the ECtHR explicitly stated in *Varnava* that the Convention should be interpreted “in so far as possible” in light of IHL.⁷⁵ In this case, the Court dealt with a positive obligation under Art. 2 ECHR to protect life in a zone of international conflict, which is flexible enough to take account of IHL.⁷⁶

It seems however impossible to argue that these findings apply to the negative obligations of Art. 5 ECHR as well. There is no available scope to “accommodate”, the powers of internment under IHL within, inherently or alongside Art. 5.⁷⁷ In this sense, the provision leaves basically no interpretative discretion.⁷⁸ It contains an *exhaustive* list of permissible grounds for detention.⁷⁹ This is the fundamental distinction between the wording and scope of Art. 5 ECHR and Art. 9 International Covenant on Civil and Political Rights (ICCPR), where the permissible grounds of detention are limited to a general prohibition against “arbitrary” forms of detention.⁸⁰ The drafters of the Convention had a choice between such a general prohibition and a list of permitted grounds – they deliberately chose the latter.⁸¹ An indefinite and preventive detention (as permitted in IHL) flatly contradicts the very purpose of the grounds in Art. 5 ECHR.⁸² For this reason the “accommodation” of IHRL with IHL – already practiced by the beforementioned human rights bodies – seems impossible in the context of Art. 5 ECHR. Further, the exhaustivity of Art. 5 could be seen as the provision’s very *raison d’être*.⁸³ It explicitly opens up the possibility for states to derogate from Art. 5 but only “to the extent strictly required by the exigencies

going *Lex Specialis*? *Exclusivist v. Symbiotic Approaches to the Concurrent Application of International Humanitarian and Human Rights Law*, RBDI 49 (2016), 240.

⁷⁵ *Varnava and Others v. Turkey* (note 66), para. 185.

⁷⁶ Partly dissenting opinion of Judge *Spano* in *Hassan*, para. 17.

⁷⁷ Partly dissenting opinion of Judge *Spano* in *Hassan*, para. 16; see further *S. Fatima*, Reflections on *Hassan v. UK: A Mixed Bag on the Right to Liberty (Part 2)*, Just Security, 14.10.2014, <<https://www.justsecurity.org>>.

⁷⁸ *S. Borelli* (note 50), 41.

⁷⁹ *Al-Jedda v. United Kingdom* (note 41), para. 99.

⁸⁰ Art. 9(1) ICCPR: “No one shall be subjected to arbitrary arrest or detention.”; Art. 9 of the Universal Declaration of Human Rights: “No one shall be subjected to arbitrary arrest, detention or exile”; for this reason, the Human Rights Committee considered security detentions complying with international humanitarian law “in principle” not to be arbitrary deprivations of liberty, Human Rights Committee, General Comment No. 35 (note 29), paras. 64, 66. See already General Comment on Art. 9, Human Rights Committee, General Comment No. 8, para. 4. See further the wording of Art. 4 ACHR: “No one shall be arbitrarily deprived of his life.”

⁸¹ Partly dissenting opinion of Judge *Spano* in *Hassan*, para. 17.

⁸² Partly dissenting opinion of Judge *Spano* in *Hassan*, para. 17.

⁸³ Partly dissenting opinion of Judge *Spano* in *Hassan*, para. 16.

of the situation”.⁸⁴ Thus, *Hassan* renders Art. 15 effectively obsolete with regard to detentions in international armed conflict.

With this interpretation the Court might have exceeded its competencies. The Convention may be a living instrument, which must be interpreted in the light of present-day conditions.⁸⁵ This is reflected by Art. 32 VCLT reducing the *travaux préparatoires* and thus the initial intent of the Treaty drafters to “supplementary means of interpretation”. Yet, even a dynamic and evolutive interpretation has – despite all benefits⁸⁶ – its limits. It is not in the free discretion of the Court to set aside the clear and unequivocal, initial will of the contracting parties.⁸⁷ In order to do so, the Court needs to prove the expression of a changed consensus among the contracting parties – e.g. in their domestic law.⁸⁸ This has not been argued by the ECtHR in *Hassan*.⁸⁹

⁸⁴ See e.g. *Ireland v. United Kingdom* (note 36), para. 194; *A. and others v. United Kingdom* (note 37), paras. 162-163.

⁸⁵ *Tyrer v. United Kingdom*, App. No. 5856/72 (ECtHR 15.3.1978), para. 31; see from the following case law e.g. *Marckx v. Belgium*, App. No. 6833/74 (ECtHR 13.6.1979), para. 58; *Soering v. United Kingdom*, App. No. 14038/88 (ECtHR 7.7.1988), para. 104; *Goodwin v. United Kingdom*, App. No. 28957/95 (ECtHR [GC] 11.7.2002), para. 74; *Vo v. France*, App. No. 53924/00 (ECtHR [GC] 8.7.2004), para. 82.

⁸⁶ It ensures the effectiveness and acceptability of the Convention; see *K. Dzehtsiarou*, European Consensus and the Evolutive Interpretation of the European Convention on Human Rights, GLJ 12 (2011), 1730, 1732; *C. Rozakis*, The European Judge as Comparativist, Tul. L. Rev. 80 (2005), 257, 260 et seq.; *M. Varju*, Transition as a Concept of European Human Rights Law, EHRLR 9 (2009), 170, 172.

⁸⁷ *Johnston and others v. Ireland*, App. No. 9697/82 (ECtHR 18.12.1983), para. 53: “It is true that the Convention [...] must be interpreted in the light of present-day conditions. However, the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. This is particularly so here, where the omission was deliberate”; see further *A. Williams* (note 61), 1173 arguing that “any court which attempted to do so could be admonished for its lack of respect for the internationally negotiated text and have its judgments questioned on the basis of an unjustified activism that arguably contradicts the authorizing instrument.”

⁸⁸ See e.g. concerning the death penalty *Al-Saadoon and Mufdhi v. United Kingdom* (note 27), paras. 115 et seq.; *Dudgeon v. the United Kingdom*, App. No. 7525/76 (ECtHR 22.10.1981), para. 60; *Tyrer v. United Kingdom* (note 85), para. 31; *Marckx v. Belgium* (note 85), para. 41.

⁸⁹ Yet – due to the benefits for the contracting states which the solution found in *Hassan* entails – it seems very likely that they will align their conduct with the decision legitimizing it with subsequent state practice in the aftermath.

4. *Hassan* in the Light of *Al-Dulimi*: A Reduced Standard of Review in Genuine Norm Conflicts?

The practiced harmonization of the Convention with IHL is not indefinite. The Court in *Hassan* stated that the ECHR should be accommodated “as far as possible”⁹⁰ with IHL. This finding implies a limit. According to the ECtHR, the respective conduct in military operations must not only comply with IHL but “most importantly, [...] it should be in keeping with the *fundamental purpose* of Art. 5 § 1, which is to protect the individual from *arbitrariness*”.⁹¹

Although the Court already used such references to the “fundamental purpose of the Convention” and the “very purpose” or “essential object” of a specific right,⁹² it never established a coherent doctrine around these terms. Nevertheless, the findings in *Hassan* remind of the solutions found in the relation of ECHR and United Nations Security Council (UNSC) Resolutions, where the Court relied upon a similar criterion. Generally, the conventional obligations continue to apply in case of competing obligations resulting from international law.⁹³ This applies to binding UNSC Resolutions as well.⁹⁴ If such a resolution violates the ECHR, the respective state would face an impossible task: conform with the Convention and at the same time implement the resolution. The problem with UNSC Resolutions is that they fall under the supremacy clause of Art. 103 of the United Na-

⁹⁰ *Hassan v. United Kingdom* (note 17), para. 104.

⁹¹ *Hassan v. United Kingdom* (note 17), para. 104 (emphasis added).

⁹² See e.g. *Kurt v. Turkey*, App. No. 24276/94 (ECtHR 25.5.1998), para. 122: “the very purpose of Art. 5, namely to protect the individual from arbitrariness”; *El-Masri v. Macedonia*, App. No. 39630/09 (ECtHR 13.12.2012), para. 230; *Saadi v. United Kingdom*, App. No. 13229/03 (ECtHR [GC] 21.1.2008), paras. 67-74; *Chahal v. United Kingdom*, App. No. 22414/93 (ECtHR 15.11.1996), para. 118; see in the context of other rights *X and Y v. Netherlands*, App. No. 8978/80 (ECtHR 26.3.1985), para. 23: “the object of Art. 8 is essentially that of protecting the individual against arbitrary interference by the public authorities”; *Jäggi v. Switzerland*, App. No. 58757/00 (ECtHR 13.7.2006), para. 33.

⁹³ See with regard to international organizations (in particular the EU) *M.S.S. v. Belgium and Greece*, App. No. 30696/09 (ECtHR [GC] 21.1.2011), para. 338; *Bosphorus v. Ireland*, App. No. 45036/98 (ECtHR [GC] 30.6.2005), para. 154; *Waite and Kennedy v. Germany*, App. No. 26083/94 (ECtHR 18.2.1999), para. 67; *United Communist Party of Turkey and others v. Turkey*, App. No. 19392/92 (ECtHR 30.1.1998), para. 29; *M. & Co. v. Germany*, App. No. 13258/87 (ECommHR 9.2.1990), at 145; regarding the obligation to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention see *Prince Hans-Adam II of Liechtenstein v. Germany*, App. No. 42527/98 (ECtHR [GC] 12.9.2001), para. 47; *Matthews v. United Kingdom*, App. No. 24833/94 (ECtHR [GC] 18.2.1999), paras. 29, 32-34.

⁹⁴ *Al-Dulimi and Montana Management Inc v. Switzerland*, App. No. 5809/08 (ECtHR [GC] 21.6.2016); *Al-Jedda v. United Kingdom* (note 41).

tions (UN) Charter.⁹⁵ Therefore, the Court established a presumption – in view of the UNSC’s genuine obligation to respect human rights⁹⁶ – that its resolutions do not oblige the implementing states to violate other human rights obligations.⁹⁷ If the respective state disposes of some discretion, it has to do anything to conform his acts with his obligations under the Convention.⁹⁸ In case the resolution leaves no discretion at all – well, then we face a genuine norm conflict.⁹⁹ Yet, the Court always avoided such a conflict in identifying discretion – even when it was minimal or inexistent. In order not to leave the contracting states in an impossible situation, the Court applied in *Al-Dulimi* a very narrow level of judicial review to the implementation acts. The respective state has to offer only an “adequate protection against *arbitrariness*”¹⁰⁰ as “one of the fundamental components of European public order”.¹⁰¹

What do these cases – *Hassan* and *Al-Dulimi* – have in common? Both could be seen to face genuine norm conflicts between the Convention and competing obligations (in case of UNSC Resolutions) and standards (in case of IHL)¹⁰² from international law. Many scholars stated that there can only be a political solution for genuine conflicts.¹⁰³ And indeed, the only way to understand *Hassan* as well as *Al-Dulimi* is as a politically influenced verdict. Legally there was no discretion for Switzerland in implementing the UNSC Resolution in *Al-Dulimi*. Legally, it was impossible to accommodate Art. 5 ECHR with the Third and Fourth Geneva Convention.¹⁰⁴ Nevertheless, the ECtHR “avoided” these genuine conflicts.¹⁰⁵ In both cases the ECtHR did not develop a clear supremacy of one of the competing regimes but leveled

⁹⁵ Art. 103 reads as follows: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

⁹⁶ See Art. 1 and 24(2) UN Charter.

⁹⁷ *Al-Jedda v. United Kingdom* (note 41), para. 102.

⁹⁸ *Nada v. Switzerland*, App. No. 10593/08 (ECtHR 12.9.2012), paras. 170, 180.

⁹⁹ In this case, the Court would need to rule on whether Art. 103 of the Charter is capable of displacing the Convention; see *M. Milanović*, Grand Chamber Judgment in *Al-Dulimi v. Switzerland*, EJIL Talk!, 23.6.2016, <<https://www.ejiltalk.org/>>; *L.-A. Sicilianos*, The European Court of Human Rights Facing the Security Council: Towards Systemic Harmonization, ICLQ 66 (2017), 783, 802 et seq.; see further *M. Arcari*, Forgetting Art. 103 of the UN Charter? Equivalent Protection after *Al-Dulimi*, *Quest. Int’l L.* 6 (2014), 31, 33.

¹⁰⁰ *Al-Dulimi and Montana Management Inc v. Switzerland* (note 94), para. 149.

¹⁰¹ *Al-Dulimi and Montana Management Inc v. Switzerland* (note 94), para. 145.

¹⁰² See under III. 3.

¹⁰³ See only *A. Lindroos* (note 69), 42, 66; *M. Milanović* (note 46), 102; *J. Pawwelyn* (note 68), 418; see further the diverging opinion of *C. Droege* (note 69), 340.

¹⁰⁴ See under III. 3.

¹⁰⁵ See *Milanović*, who states that a genuine conflict is neither avoidable nor resolvable, *M. Milanović* (note 46), 102.

down the degree of his judicial review to the limit of “arbitrariness”. This similarity could be seen as the introduction of a new standard in genuine norm conflicts. It seems that the Court establishes a last resort of conventional control – the protection of the individual from arbitrariness. Could “arbitrariness” be the new standard of control in case of genuine conflicts between the Convention and other regimes of international law?

As a new standard of review “arbitrariness” is broad enough to allow the needed flexibility to “avoid” even genuine conflicts. Such leeway is needed in the international legal system, which offers almost no consolidated legal hierarchies.¹⁰⁶ Further, the Court adopted a legal reasoning to which other human rights treaty organs can relate as well.¹⁰⁷ Finally, the Court even strengthens its position and oversight function: by declaring a final limit to the harmonization of the Convention with the international legal system, the Court can decide autonomously, which cases touch the ECHR’s “fundamental purpose” and in which cases other obligations shall prevail.

However, the ECtHR will have to take care to not replace one uncertainty (does the Convention apply?) with another (is the State action arbitrary?). The fuzzy and vague notion of “arbitrariness” needs to be defined to become operational and provide victims as well as contracting parties with legal certainty regarding the scope of their rights and obligations. On the other hand, every specification reduces the *marge de manoeuvre* the Court wanted to establish. This makes it easy to anticipate a new laborious, meandering saga of case-by-case clarifications, in which the Court offers only bits and pieces – buying time and evading an inevitable conflict of hierarchies inherent to the international legal system.¹⁰⁸ And finally, if a notion allows almost any outcome, isn’t that by itself just – “arbitrariness”?

¹⁰⁶ A different view has been taken by Judge *Pinto de Albuquerque*, who denies, with view to its lack of constitutionality, any supremacy to the UN Charter and ascribes it to the ECHR as the “supreme law of the European continent” (see Concurring Opinion in *Al-Dulimi and Montana Management Inc v. Switzerland* (note 94), para. 60, see further paras. 8, 39, 59).

¹⁰⁷ Arbitrary arrest is prohibited by Art. 7(3) ACHR, Art. 6 ACHPR and Art. 9 ICCPR, see also Human Rights Committee General Comment No. 35 (note 29), para. 64; see further Rule 99 in *J.-M. Henckaerts/L. Doswald-Beck*, Customary International Humanitarian Law, Volume 1: Rules, 2005, 344: “Arbitrary deprivation of liberty is prohibited”.

¹⁰⁸ However, there are judges, who would like to solve such conflicts in favor of a supremacy of the Convention, declare the ECHR an autonomous legal order and – in *Milanović*’s words – “pull a Kadi”; see the Concurring Opinion of Judge *Pinto de Albuquerque* (note 106); *M. Milanović* (note 99); see on this also *A. Peters*, The New Arbitrariness and Competing Constitutionalisms: Remarks on ECtHR Grand Chamber *Al-Dulimi*, EJIL Talk!, 30.6.2016, <<https://www.ejiltalk.org>>.

5. A Comparison With the “Bold” CJEU: Why a Return to the “Self-Contained” Approach Seems Unlikely

Does it seem likely – in light of the aforementioned issues – that the ECtHR returns to his “self-contained” approach and reconsiders *Hassan*?

The Court of Justice of the European Union (CJEU) could serve as a potential point of reference since related questions arise under EU Law as well. One emblematic example is the relation of European Union (EU) Refugee law and IHL. Art. 15(c) of the Directive 2011/95 (the so-called Qualification Directive) states that a serious harm – enabling someone to seek subsidiary protection – consists of a “threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict”. *Prima facie*, the Directive refers to notions of IHL (“civilian” and “armed conflict”). Therefore, the question arises to what extent IHL could influence EU Refugee Law? Should the terms in Art. 15(c) be interpreted according to IHL or autonomously? Although the CJEU did not have to deal with a norm conflict *stricto sensu*, the underlying question is similar to that in *Hassan*: What legal regime should prevail – EU Refugee Law or IHL?

Until a clearing judgment of the CJEU, the views were divided. For some scholars, IHL had been treated as primary reference point.¹⁰⁹ This position was heavily criticized in arguing that IHL and International Refugee Law serve different purposes.¹¹⁰ In this spirit, the CJEU decided in *Elgafaji* that “Art. 15(c) [...] has its own field of application”.¹¹¹ Subsequently, the Court came to the conclusion that

“it is not possible to make eligibility for subsidiary protection conditional upon a finding that the conditions for applying international humanitarian law have been met”.¹¹²

¹⁰⁹ H. Storey, *Armed Conflict in Asylum Law: The “War-Flaw”*, *Refugee Survey Quarterly* 31 (2012), 1, 18.

¹¹⁰ Advocate General Mengozzi, Opinion delivered 18.7.2013 in Case C-285/12, *Diakité*, ECLI:EU:C:2013:500, para. 66; *QD & AH (Iraq) v. Secretary of State for the Home Department*, [2009] EWCA Civ 620, para. 16; see further J.-F. Durieux, *Of War, Flows, Laws and Flaws: A Reply to Hugo Storey*, *Refugee Survey Quarterly* 31 (2012), 161; S. Juss, *Problematising the Protection of “War Refugees”*, *Refugee Survey Quarterly* 32 (2013), 122; H. Lambert, *The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence*, *IJRL* 25 (2013), 207.

¹¹¹ ECJ, C-465/07, *Elgafaji*, ECLI:EU:C:2009:94, para. 36.

¹¹² ECJ, C-285/12, *Diakité*, ECLI:EU:C:2014:39, para. 26.

The consequence of this ruling is on the one hand a *notion autonome* or a *sui-generis*¹¹³ conception of EU refugee law and on the other hand a further fragmentation of international law.¹¹⁴

Could the ECtHR take a similarly “bold” position *vis-à-vis* other obligations under international law and return to its “self-contained” approach? From my point of view, this seems highly unlikely. The CJEU always highlighted the *sui generis* nature of EU law, its autonomy and self-referentiality. In contrast, the ECtHR developed – as shown above – a certain self-restraint *vis-à-vis* other, conflicting international obligations and seems firmly placed within the framework of international law.¹¹⁵ As Judge *Rozakis* formulated, the Court in Strasbourg does “not operate in the splendid isolation of an ivory tower built with material originating solely from the ECHR’s interpretative inventions”.¹¹⁶ The Court seeks to promote a coherent view of international law and to stop its further fragmentation.¹¹⁷ In this sense, *Elgafaji* and *Diakité* have been for *Hassan*, what *Kadi I* has been for *Al-Jedda* and *Al-Dulimi*.

Finally, the Court faced increased attempts to delegitimize its role and to challenge its authority in recent years.¹¹⁸ In response, the Court’s decisions seem often cautiously striving for acceptability of its Member States. *Hassan* in particular has been a huge concession to the UK.¹¹⁹ In this sense, the

¹¹³ *S. Juss* (note 110), 130.

¹¹⁴ See e.g. *V. Moreno-Lax*, Of Autonomy, Autarky, Purposiveness and Fragmentation: The Relationship between EU Asylum Law and International Humanitarian Law, in: D. J. Cantor/J.-F. Durieux (eds.), *Refuge from Inhumanity*, 2014, 295; *S. Nicolosi*, Disconnecting Humanitarian Law from EU Subsidiary Protection: A Hypothesis of Defragmentation of International Law, *LJIL* 29 (2016), 463.

¹¹⁵ See only as one example the efforts for “systemic harmonization” in *Al-Dulimi and Montana Management Inc v. Switzerland* (note 94), para. 140; see further *L.-A. Sicilianos* (note 99), 798.

¹¹⁶ *C. Rozakis* (note 86), 278.

¹¹⁷ *L.-A. Sicilianos* (note 99), 802 et seq.

¹¹⁸ See the speech of Judge *Pinto de Albuquerque* at Mansfield College, Oxford, *Is the ECHR Facing an Existential Crisis?*, 28.4.2017; regarding the current conduct of Russia in the *Yukos* Case, see decision of the Russian Constitutional Court of 19.1.2017 allowing Russia to ignore the respective ECtHR decision; see e.g. *I. Marchuk*, Flexing Muscles (Yet Again): The Russian Constitutional Court’s Defiance of the Authority of the ECtHR in the *Yukos* Case, *EJIL Talk!*, 13.2.2017, <<http://www.ejiltalk.org>>; *T. Ruys/C. De Koker* (note 3); another key illustration of this is the UK’s approach towards the ECtHR judgment in *Hirst v. the United Kingdom*, App. No. 40787 (ECtHR 24.6.2001); App. No. 74025 (ECtHR [GC] 6.10.2005) regarding the enfranchisement of prisoners; see *A. Greene* (note 32).

¹¹⁹ See further *Z. Bohrer*, Human Rights vs Humanitarian Law of Rights vs Obligations, *Quest. Int’l L.* 16 (2015), 5, 11: “The flawed legal reasoning in *Hassan* suggests a possible alternative motive behind the decision [...]: a desire of the ECtHR to reassure states that it does not intend to overly scrutinize their actions, after considerably expanding its jurisdiction.”

ECHR faces always an acceptance and implementation challenge.¹²⁰ As *Sari* rightly points out: this situation “requires a nuanced approach and not a hyperbole”.¹²¹

V. The Open Question: Does Article 15 ECHR Still Matter?

The foregoing analysis raises the serious question of Art. 15 ECHR’s remaining relevance. Does Art. 15 still matter in military operations abroad? The ECtHR’s judgment in *Hassan* provides us with two points of certainty and two points of uncertainty.

First, it is certain that the Convention as far as it concerns Art. 5 ECHR has been levelled down to the standard of IHL obligations in *international armed conflict* – even when both regimes present a genuine norm conflict. Second, it is certain that the last resort for conventional control in case of coinciding obligations from ECHR and IHL will be the test of “arbitrariness”. However, the Court will need to further elaborate this criterion. Nevertheless, it is very unlikely that the derogations from the Convention would allow a contracting state to derogate from the “fundamental purpose” of the Convention and in particular Art. 5 ECHR.¹²² Insofar, a derogation would not resolve this uncertainty. Further, a return to the Courts “self-contained” approach seems very unlikely considering the current implementation challenge. Thus, the UK can rely with reasonable certainty on the findings in *Hassan*: a derogation in *international armed conflict* will not be necessary any more – at least with regard to Art. 5 ECHR. In future, it will be sufficient to invoke the diverging standards of IHL before the ECtHR.

¹²⁰ A. Nußberger, The Concept of “Jurisdiction” in the Jurisprudence of the European Court of Human Rights, *Current Legal Probs.* 65 (2012), 214, 254: “If the Court were to interpret its jurisdiction in a way not accepted by the Member States, it would risk that the relevant judgments remain on paper and are not implemented.”

¹²¹ A. Sari (note 18), 16.

¹²² Art. 15(2) ECHR mentions only some rights as non-derogable (and not Arts. 5, 6 and 13 ECHR). Nevertheless, derogations from Art. 6 and the core of the judicial review component in Art. 5(4) would almost certainly not work, since it would be hard to see how this could ever be said to be strictly required by the exigencies of the situation. This has been confirmed with regard to Art. 14 ICCPR by the Human Rights Committee, General Comment No. 29, CCPR/C/21/Rev.1/Add.11, para. 16; see further *M. Milanović* (note 7), paras. 22-23; *T. Ruys/C. De Koker* (note 3), Fn. 38; *M. Lippold* (note 52), 88.

However, *Hassan* leaves two questions unanswered: First, it remains uncertain, if and how the Court will “divide and tailor” other conventional rights and “accommodate” them with IHL in future (e.g. Art. 2 and especially the other non-derogable rights in Art. 15(2) – will there be a levelling-down of non-derogable rights as well?). Second, *Hassan* was specifically restricted to international armed conflicts (IAC). But does it apply to non-international armed conflicts (NIACs) as well?

To start with the first question, there are strong indications that the *Hassan* doctrine of levelling down the Convention to IHL standards is not confined to Art. 5 ECHR but could also extend to other Convention rights. Since the primary aim in any armed conflict is to kill or capture opposing forces, the relevant rights affected by armed conflict are generally the right to life (Art. 2 ECHR) and the right to liberty (Art. 5 ECHR). The most urgent question would therefore be, whether Art. 2 ECHR has to be “accommodated” with IHL in international armed conflicts? The consequence of such an accommodation would be a reduction of both the negative protection of the right to life as well as the procedural obligation to investigate killings to what is permissible/imposed under IHL.

On one hand, Art. 2 is part of a different derogation regime than Art. 5. According to Art. 15(2), Art. 2 is a generally non-derogable right “except in respect of deaths resulting from lawful acts of war”. In this sense, Art. 15(2) implicitly requires that, in order to justify a killing as a “lawful act of war” under IHL, a State must *a priori* derogate from the Convention. On the other hand, similarly textual limits were present in *Hassan*. Nevertheless, the ECtHR was ready to disregard the need for a derogation thus creating – in *Borelli’s* words – a “dangerous precedent”.¹²³ Further, the ECtHR already stated in *Varnava* that Art. 2 ECHR should be “interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law”.¹²⁴ Even though *Hassan* seems to pertain only to Art. 5 ECHR, it strongly relied on *Varnava*, to justify its interpretative approach with regard to Art. 5.¹²⁵ In this sense, the accom-

¹²³ *S. Borelli* (note 50), 40.

¹²⁴ *Varnava and Others v. Turkey* (note 66), para. 185.

¹²⁵ *Hassan v. United Kingdom* (note 17), para. 102: “The Court has already held that Article 2 of the Convention should be interpreted in so far as possible in light of [...] the rules of international humanitarian law which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict (see *Varnava and Others v. Turkey* [...]), and it considers that these observations apply *equally* in relation to Article 5” (my emphasis).

modation of the Convention with IHL seems to apply *all the more* to Art. 2 ECHR.¹²⁶

With regard to the nature of the conflict, in which the respective military operation takes place, the ECtHR stated in *Hassan*:

“It can only be in cases of *international armed conflict*, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Art. 5 ECHR could be interpreted as permitting the exercise of such broad powers.”¹²⁷

And what about NIACs? Could *Hassan* apply to NIACs as well?

At first glance, there are two reasons why *Hassan* could be confined to IACs. First, the Court dismissed a “self-contained” application of Art. 5 ECHR since the exhaustively listed grounds for detention mentioned in this provision were not – as such – applicable in the case at hand. The only provision, which could have been considered, was Art. 5(1)(c) ECHR allowing the detention of a person in order to bring her before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent her committing an offence. In armed conflict, however, combatants benefit – although committing acts normally considered to be criminal offences (like e.g. the killing of a person) – of “combatant immunity” allowing them to participate in hostilities without incurring criminal sanctions.¹²⁸ Yet, this privilege is a specific characteristic of IACs and does not feature in NIACs. Thus, Art. 5(1)(c) ECHR could be in principle applicable in NIACs.

Second, the idea behind *Hassan* was that the Geneva Conventions provided an appropriate “alternative legal standard” to the literal application of Art. 5.¹²⁹ In this sense, the ECtHR argued that “the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law” in case of international armed conflict. *Prima facie*, the Geneva Convention provisions for NIACs are silent on matter of detention powers – Common Art. 3 covers the treatment of persons *hors de combat* but makes no mention of grounds or procedures

¹²⁶ *N. Quénivet/A. Sari* (note 10), para. 28.

¹²⁷ *Hassan v. United Kingdom* (note 17), para. 104 (emphasis added).

¹²⁸ *Hassan v. United Kingdom* (note 17), para. 97.

¹²⁹ *Hassan v. United Kingdom* (note 17), para. 104: “By reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in [Art. 5(1)] subparagraphs (a) to (f) of that provision should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions” (my emphasis); see further *Lord Sumption, Serdar Mohammed v. Ministry of Defence* (note 31), para. 63.

of detention.¹³⁰ In light of the possible application of Art. 5 ECHR in NIAC contexts and in lack of any alternative NIAC standards of detention, there would be no potential for norm conflicts. Art. 5 ECHR could apply without the need of being “accommodated” with diverging standards of protection. There would simply be no need to level down the Convention’s scope of protection to the standard of “arbitrariness”. According to such a reading, Art. 15 ECHR’s impact in military operations abroad would be reduced to NIACs thus preserving a proper scope of application.¹³¹

Despite these considerations, the recent UK Supreme Court’s decision in *Serdar Mohammed* presents an attempt to identify alternative legal standards of detention in NIACs as well. As a matter of fact, the majority concluded that

“the taking of prisoners of war and the detention of civilians posing a threat to security are inherent in international and non-international armed conflicts alike”.¹³²

This judgment can be seen as a general trend towards the juridification of NIACs over the past few years.¹³³ The International Committee of the Red Cross (ICRC) study on customary international humanitarian law applied 138 of 161 rules to armed conflicts irrespective of their classification as international or non-international.¹³⁴ In the light of these developments the distinction between both types of conflict has been called into question.¹³⁵ Thus, the ICRC consistently maintained that IHL provides for a legal basis

¹³⁰ See further *G. Rona*, Is There a Way Out of the NIAC Detention Dilemma?, *International Law Studies* 91 (2015), 32, 33, 37 and 57, who refers to the “NIAC detention regulation gap”.

¹³¹ This seems, indeed, to be the opinion of several submission to the Joint Committee on Human Rights, see e.g. *F. Hampson/N. Lubell/D. Murray*, Submission to the Joint Committee on Human Rights, 26.4.2017, Chapter 5.2.

¹³² *Lord Sumption, Serdar Mohammed v. Ministry of Defence* (note 31), para. 61 (see further paras. 134-136, 164 and 224 [emphasis added]); see differently in the dissenting opinion of *Lord Reed*, paras. 271-276 who argued that IHL did not provide authority to detain in non-international armed conflicts.

¹³³ Especially on detention in NIACS, see *The Copenhagen Process on the Handling of Detainees in International Military Operations: Principles and Guidelines*, 2012, reprinted in: *ILM* 51 (2012), 1368; see further *T. Winkler*, *The Copenhagen Process on Detainees: A Necessity*, *Nord. J. Int’l L.* 78 (2009), 489; *B. Oswald/T. Winkler*, *The Copenhagen Process: Principles and Guidelines on the Handling of Detainees in International Military Operations*, *Nord. J. Int’l L.* 83 (2014) 128.

¹³⁴ *E. Crawford*, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*, 2010, 31 et seq.

¹³⁵ *Lord Sumption, Serdar Mohammed v. Ministry of Defence* (note 31), 40 et seq., 170.

to detain both in IACs and NIACs.¹³⁶ This view can be supported by three arguments:

First, Arts. 43 and 78 of the Fourth Geneva Convention, on which the ECtHR relied in *Hassan* to declare that detention was an “accepted feature” of IHL, only regulate the *exercise* of the power to detain and make no reference to an explicit *right* to detain. In the same sense, Common Arts. 3 and 5 of Additional Protocol II (both applying to NIACs) are not referring to a specific right but expressly refer to detention and specify rules and minimum safeguards. In restricting the *freedom* to detain, these provisions affirm the existence of such a power.¹³⁷ Second, without a legal basis in IHL, detentions would be subject to domestic law, which leads to the question of which law applies: the detaining state’s law or the law of the state where the detention takes place? Such uncertainties are detrimental when pursuing the aim to encourage capture and reduce the killing of enemy forces.¹³⁸ Third, states have accepted more restrictive obligations under IHL in international than in non-international armed conflicts. According to *Goodman*, if states have authority to engage in particular practices in IACs (e.g. targeting), they possess the authority to undertake those practices in NIACs as well. “Simply put, whatever is permitted in international armed conflict is permitted in non-international armed conflict.”¹³⁹ Finally, there are many possible ways to establish detention powers in NIACs. They could be seen as customary law or inherent to IHL treaty law,¹⁴⁰ they could be included *maiores ad minus* in the power to target¹⁴¹ or they could be established by analogy.¹⁴²

¹³⁶ ICRC, Internment in Armed Conflict: Basic Rules and Challenges (Opinion Paper, November 2014), 6 et seq.; yet, many scholars doubt these findings and reject an IHL or customary based authorization. They all argue that a basis must instead be located elsewhere, such as in domestic law; see only *G. Rona* (note 130), 40 et seq.; *M. Lippold* (note 52), 89 et seq.; *F. Hampson/N. Lubell/D. Murray* (note 131), para. 25; *E. Debuf*, Captured in War: Lawful Internment in Armed Conflict, 2013, 469; *R. Goodman*, Authorization versus Regulation of Detention in Non-International Armed Conflict, *International Law Studies* 91 (2015), 155, 159; *L. Hill-Cawthorne*, Detention in Non-International Armed Conflict, 2016, 66 et seq.; *T. Gill/D. Fleck*, *The Handbook of the International Law of Military Operations*, 2011, 471; see further *Leggat J, Serdar Mohammed v. Ministry of Defence* (note 28), paras. 241-243.

¹³⁷ See *C. Landais/L. Bass* (note 6), 1309; see further ICRC (note 136), 6 et seq.

¹³⁸ *G. Rona* (note 130), 34.

¹³⁹ *R. Goodman*, The Detention of Civilians in Armed Conflict, *AJIL* 102 (2009), 48, 50, the author states, however, that this relates *only* to IHL. He admits that the application of other legal regimes – e.g. human rights law – might complicate this account; see Fn. 9; see further critically *P. Rowe*, Is There a Right to Detain Civilians by Foreign Armed Forces During a Non-International Armed Conflict?, *ICLQ* 61 (2012), 697, 701 et seq.; *M. Lippold* (note 52), 92.

¹⁴⁰ See ICRC (note 136), 6 et seq.: “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”; ICRC, Strengthening Legal Protection for Persons deprived of their Liberty in relation

Nevertheless, to come fully within the scope of Art. 5(1)-(4) ECHR, the protections and safeguards applicable in NIACs still lack specificity and must be clarified.¹⁴³ For this reason, the Supreme Court of the United Kingdom (UKSC) relied upon an UNSC Resolution as sufficient legal basis for the detention in *Serdar Mohammed*.¹⁴⁴ This would lead to *ad hoc* solutions subject to “the vagaries of Security Council politics”.¹⁴⁵ A long lasting solution seems preferable. Thus – given a further development of juridifica-

to Non-International Armed Conflict (Regional Consultations 2012-13 Background Paper), 4; more cautious ICRC, Report on the ICRC-Chatham House Expert Meeting on Procedural Safeguards for Security Detention in Non-international Armed Conflict, London, 22./23.9.2008, 3 et seq.: “the experts agreed that there was not so much a ‘right’ but rather an ‘authorization’ inherent in IHL to intern persons in NIAC. It was suggested to speak of the ‘power to intern’ or of a ‘qualified or conditional right to intern’”; see further *J.-M. Henckerts/L. Doswald-Beck* (note 107), 347: “Prohibition of arbitrary deprivation of liberty in non-international armed conflicts is established by State practice in the form of military manuals, national legislation and official statements, as well as on the basis of international human rights law [...] Most of this legislation applies the prohibition of unlawful deprivation of liberty to both international and non-international armed conflicts”; see further *D. Murray*, Non-State Armed Groups, Detention Authority in Non-International Armed Conflict, and the Coherence of International Law: Searching a Way Forward, *LJIL* 30 (2017), 435, 448; see further *K. Dörmann*, Detention in Non-International Armed Conflicts, in: K. Watkin/A. Norris (eds.), *Non-International Armed Conflict in the Twenty-First Century*, 2012, 347, 349; *D. Tuck*, Taking of Hostages, in: A. Clapham/P. Gaeta/M. Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary*, 2015, 297, 310; see more nuanced *J. Pejic*, Procedural Principles and Safeguards for Internment – Administrative Detention in Armed Conflict and Other Situations of Violence, *Int’l Rev. of the Red Cross* 87 (2005), 375, 377.

¹⁴¹ See e.g. the submission on behalf of the Ministry of Defence in *Serdar Mohammed* before the High Court: “the ability to detain insurgents, whilst hostilities are ongoing, is an essential corollary of the authorisation to kill them”; see further *R. Goodman* (note 139), 55 et seq.; *S. Aughey/A. Sari* (note 21), 104, 106: “the right to deprive a person of his life must imply the right to inflict the lesser evil to detain him: a maiore ad minus”; see rejecting this argument *Leggat J, Serdar Mohammed v. Ministry of Defence* (note 28), para. 252; see further *E. Debuf* (note 136), 389, 464 et seq. who denies that there is an inherent right to intern in NIACs. She argues that the authority to target civilians directly participating in hostilities does not include an authority to intern them after capture since at that point they will have regained their immunity from attack. An argument “maiore ad minus” is further predicated on the assumption that IHL provides authorization or permission to kill fighters in an NIAC; this has been rejected e.g. by *L. Hill-Cawthorne/D. Akande*, Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts?, *EJIL Talk!*, 7.5.2014, <<https://www.ejiltalk.org>>.

¹⁴² But see again *G. Rona* (note 130), 45: “For ‘IHL by analogy’ to have the force of international law, it would need to be grounded in much more than the voice of human rights advocates.”

¹⁴³ *C. Landais/L. Bass* (note 6), 1311; *F. Hampson/N. Lubell/D. Murray* (note 131), para. 25.

¹⁴⁴ *Lord Sumption, Serdar Mohammed v. Ministry of Defence* (note 31), paras. 63-65.

¹⁴⁵ *G. Rona* (note 130), 57.

tion (e.g. initiated by the ICRC¹⁴⁶) – the application of *Hassan* to NIACs does not seem – *a priori* – impossible.

Hassan has placed a huge question mark on the further relevance of Art. 15 ECHR in military operations abroad. Yet, especially the last considerations have shown that there are still two possible fields of application for this provision: conventional rights other than the right to liberty and the context of NIACs – two fields, which might become, especially interrelatedly, of utmost relevance in the future (see e.g. the targeted killings in Syria). Although there are good reasons to assume that the *Hassan* doctrine applies here as well, it remains for the ECtHR to shed some light into these clouded fields. In this context, the case of *Serdar Mohammed* was a missed opportunity since it never reached the realms of Strasbourg. Yet, one thing seems almost certain: it will unfortunately be only a matter of time until the next case emerges.

¹⁴⁶ Pursuant to Resolution 1 of the 31st International Conference 2011 the ICRC is facilitating consultations on how to address the above gaps; see further the ICRC's initiative on strengthening legal protection for deprived of their liberty in NIACs, see Background Paper, Regional Consultations 2012-13, <<https://www.icrc.org>>; see further a short overview of the initiative under <<https://www.icrc.org>>.

