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CASE NOTE

Hassan v United Kingdom: The Interaction of Human Rights Law and International Humanitarian Law with regard to the Deprivation of Liberty in Armed Conflicts

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In *Hassan v United Kingdom*, the Grand Chamber of the European Court of Human Rights reviewed the deprivation of liberty of a young male by British armed forces during the phase of active hostilities in Iraq, which had raised issues relating to extraterritoriality, the right to liberty and security in times of armed conflict and the relationship between international humanitarian law (IHL) and human rights law (HRL).[1] In its judgment of 16 September 2014, the Court ruled that by reason of the co-existence of the safeguards provided by IHL and by the European Convention on Human Rights (ECHR) in time of armed conflict, the grounds of permitted deprivation of liberty found in both bodies of law should, as far as possible, be accommodated and applied concomitantly. The greatest merit of the judgment is that for the first time it explicitly offered its view on the interaction between IHL and HRL and did not rely on the *lex specialis* principle, the traditional but flawed method for explaining the relationship between these spheres of law. However, the judgment is also a missed opportunity as the Court limited its analysis to the case at hand and provided limited guidance for the future, leaving a number of questions unaddressed.

Keywords: Deprivation of liberty; Armed conflict; Humanitarian law; European Court of Human Rights

Umm Qasr, a city in the region of Basra, Iraq, 23 April 2003. Upon approaching the applicant's house, members of a British Army unit encountered the applicant's brother, Tarek Hassan, positioned on the roof of the building and armed with an AK-47. Although the unit's mission was to apprehend the applicant for being a member of the Ba'ath Party and a general in the Al-Quds Army (its military branch), the soldiers arrested his brother instead (the applicant himself being absent), on the suspicion that he may be a combatant or a civilian posing a threat to security. They brought him to Camp Bucca, a detention facility run jointly by the United States (US) and the United Kingdom (UK), where he was subsequently detained and interrogated by military intelligence personnel. Once it was established that he was not a security risk, Tarek Hassan was cleared for release, which, according to records provided by the British Army, took place a week later on 2 May 2003, as part of a collective drop-off of former detainees in nearby Umm Qasr. After his release the applicant's brother disappeared, only to be discovered dead four months later in the city of Samarra, some 125km north of Bagdad and some 700km from the drop-off point. He had eight bullet wounds in his chest and his body showed physical signs of other ill treatment.

Having exhausted domestic legal remedies in the UK, the applicant brought a case before the European Court of Human Rights (hereafter, 'the Court') in 2009, claiming under Article 5 §§1, 2, 3 and 4 of the Convention that the arrest and subsequent detention of his brother were arbitrary, unlawful and lacking in procedural safeguards and under Articles 2, 3 and 5 that the UK failed to carry out an investigation into the circumstances of his detention, ill treatment and death. Because the Court easily and unanimously

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[1] *Hassan v United Kingdom* App no 29750/09 (Grand Chamber, ECtHR, 16 September 2014).

dismissed the claims under Articles 2 and 3 ECHR, deeming them to be manifestly unfounded, the analysis of the judgment will be limited here to the complaints under Article 5 ECHR.

In this regard, it can be noted, as a preliminary point, that the Court had to determine whether the case fell within the ambit of the Convention and thus whether, with respect to the concrete circumstance of the case, the Convention could be said to apply extraterritorially. To this end, it had to check if the applicant's brother came within the jurisdiction of the UK as required by Article 1 ECHR. Since the applicant's case had already been rejected by the domestic courts on this ground, the UK unsurprisingly disputed whether Article 1 jurisdiction applied, arguing that the exercise of extraterritorial jurisdiction remained exceptional and that none of the established instances in which a State can be expected to exercise jurisdiction outside its territory applied. First, it argued that there was no territorial basis for establishing extraterritoriality, as it could not be said that the British Armed Forces were in 'effective control' of the Basra area. Second, while the UK Government acknowledged that internment of individuals could at times give rise to extraterritorial jurisdiction under the 'total and exclusive control over an individual' model, they stated that this was not such an occasion. According to the UK representatives, the fact that the conduct of States is exclusively regulated by IHL during the active hostilities phase of an international armed conflict that does not amount to an occupation precluded that their detention operations fell within their jurisdiction for the purposes of Article 1 ECHR. In addition, they contended that there was no 'total and exclusive control' anyway, as the detention facility where Tarek Hassan was held was jointly run by the US and the UK, with the former shouldering the majority of tasks and responsibilities.

Unconvinced by these arguments, the Court, again unanimously, found that Tarek Hassan fell within the jurisdiction of the UK from the moment of his capture until his release, and rightly so. Whether or not the British Armed Forces exercised 'effective control over the Basra area' during the final phase of hostilities (but before the state of occupation was declared) is open to debate, and the Court acknowledged this. However, at the same time, it made clear that no such discussion could exist with regard to the 'total and exclusive control over an individual' model. Notwithstanding the division of labour and the transfer of certain operational aspects of the detention to the US, the majority argued that the concrete circumstances plainly demonstrated that the UK 'retained authority and control over all aspects of the detention relevant to the applicant's complaints under Article 5'.[2] Although Camp Bucca was under the operational command of the US, the fact that the applicant's brother was listed as a UK prisoner in the detainee information database, the fact that he was interrogated under the supervision of UK military personnel and the fact that the UK had determined his status and ultimately ordered his release clearly indicated that the final responsibility for decisions regarding the detainee rested solely with the UK, rendering any assertion to the contrary untenable.

Having resolved the Article 1 ECHR jurisdiction question, the Court shifted its attention to the merits of the complaints under Article 5 §§1, 2, 3 and 4 ECHR. Central to the case was the fact that in detaining Tarek Hassan the UK had relied on IHL, and more specifically on the Third and Fourth Geneva Convention (GC III and IV), which provide a legal basis and procedure to intern combatants and civilians (respectively) who pose a threat to security during armed conflict. As the list of grounds of permissible detention in Article 5 ECHR does not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time, the applicant had argued that absent any derogation under Article 15 ECHR the UK had violated its international commitments under the European Convention on Human Rights by interning Tarek Hassan. The UK Government had disputed this claim, contending that IHL, as the *lex specialis* in times of armed conflict, would prevail over conflicting norms of the ECHR, and with regard to the case under review had served to modify or even displace Article 5 ECHR and so allow internment. Consequently, the Court was, in essence, dealing with a norm conflict between the GC III and IV and the ECHR, as these instruments provided for contradictory, yet equally valid, legal rules. To pronounce on the case, the judges therefore had to articulate their view on the relationship between these bodies of law and determine whether the existence of an armed conflict and the corresponding applicability of IHL required them to disapply States' obligations under Article 5 ECHR or in some other way called for an interpretation of these obligations in the light of powers of detention available to states under IHL.

Whereas the Court had unanimously decided on earlier issues, this vexing and complex subject caused a rift amongst the judges as they could not agree on the correct legal approach. Ultimately, the majority of judges (ten to four) accepted that State Parties to the Geneva Conventions specifically wanted to regulate the deprivation of liberty during international armed conflict and therefore the majority recognized the existence of an extra permissible ground for detention alongside those enumerated in Article 5, §1,

[2] ibid para 80.

subparagraphs (a) to (f) ECHR. As such, they found the internment of the applicant's brother, as far as it complied with IHL, to be considered non-arbitrary and Article 5 ECHR compliant. To come to this conclusion, the majority relied mainly on Article 31, §3 of the Vienna Convention on the Law of Treaties (VCLT), which requires that in interpreting treaty norms, *in casu* those of ECHR, account should be taken of subsequent state practice as well as any other relevant rule of international law applicable to the case at hand, such as IHL. First, it determined that the State practice in this context was not to derogate from obligations under Article 5 ECHR when interning individuals pursuant to the GC III and IV. From this, the majority deduced that States do not consider Article 5 ECHR to prohibit lawful internment during armed conflict, even though it does not feature on the list of grounds of permissible detention, and consequently stipulated that the Convention should be interpreted as such, making any derogation redundant. Second, and building on this argument, the majority pointed to the doctrine of consistent interpretation of the ECHR with other norms of international law, well established in previous case law, and postulated that:

> by reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of that provision should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions.[3]

In essence, the majority stated that when parties to the conflict lawfully rely on GC III and IV to intern individuals and adhere to procedural safeguards provided therein, the deprivation of liberty cannot simultaneously violate the prohibition against arbitrary detention enclosed in Article 5, §1 of the Convention, thus exonerating the UK on this account. They then went on to say that this approach could also be applied with regard to the procedural safeguards enumerated in §2 (the right to be informed promptly of the reason for one's arrest) and §4 (the right to a review of one's detention by a court), which continued to apply, but were also to be interpreted with reference to comparable safeguards prescribed in GC III and IV. In this sense, they noted that the requirement for review by a 'court' could be read down to allow for review by an administrative body with regard to civilians in times of armed conflict, if it provided 'sufficient guarantees of impartiality and fair procedure to protect against arbitrariness' and the review 'took place shortly after the person was taken into detention, with subsequent reviews at frequent intervals'.[4] Applying these principles to the arrest and detention of Tarek Hassan, the majority took the view that the UK had also abided by all these 'read down' requirements and thus had committed no violation of Article 5, §§2, 3, 4 ECHR.

Four judges dissented, and in rather strong wording stated that 'the majority's resolution of this case constitutes an attempt to reconcile norms of international law that are irreconcilable on the facts of this case'.[5] First, they submitted that by not requiring a derogation to rely on GC III and IV, the norms of which contradict Article 5 ECHR, the majority had effectively deprived Article 15 ECHR of any significance with respect to the deprivation of liberty in times of war. Second, while acknowledging that the Court must endeavour to interpret and apply the Convention in a manner that is consistent with international law, the dissenting judges argued at the same time that the majority had overstepped the boundaries of treaty interpretation and had ventured into the domain of treaty amendment, a prerogative of States. Article 5 ECHR was, after all, worded exhaustively and had in the past consistently been interpreted narrowly by the Court, which allowed for no other grounds for detention than those explicitly listed in subparagraphs (a) to (f). Accordingly, they argued that 'there was no room to accommodate the powers of internment under IHL within, inherently or alongside Article 5, §1', as the majority did (dissenting opinion, par. 16). In the end, they concluded that:

> on the facts of this case, the powers of internment under the Third and Fourth Geneva Convention, relied on by the Government as a permitted ground for the capture and detention of Tarek Hassan, are in direct conflict with Article 5, §1 of the Convention. […] By attempting to reconcile the irreconcilable, the majority's finding today does not, with respect, reflect an accurate understanding of the scope and substance of the fundamental right to liberty under the convention.[6]

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[3] ibid para 104.
[4] ibid para 106.
[5] *Partly Dissenting Opinion of Judge Spano, Joined by Judges Nicalaou, Bianku and Kalaydjieva, Hassan v United Kingdom,* App no 29750/09 (Grand Chamber, ECtHR, 16 September 2014), (hereafter, 'Dissenting Opinion'), para 6.
[6] ibid para 19.

Comments

The decision in *Hassan v United Kingdom* touches upon one of the most controversial and complex issues in contemporary international law discourse, namely the relationship and interplay between norms of IHL and HRL. Regardless of whether one tends to agree with the majority – as the present writer does – or is inclined to side with the dissenting judges, the mere fact that the Court is tackling this issue head-on is commendable in and of itself. In the past the Court has generally shied away from pronouncing on the relationship and has 'resolutely avoided applying [IHL], even when dealing with cases which have arisen out of armed conflict or occupation'.[7] This had left the Court open to criticism. While it, on the one hand, had adopted a more generous approach with regard to the extraterritorial application of the ECHR and as such, had extended the reach of the Convention to apply i.a. to military operation deployed abroad, it refused, on the other, to come to terms with the concrete consequences of this development by examining and pronouncing on the concurrent application of HRL and IHL[8]. Hereby, it created confusion on how the norms of HRL relate to conflicting ones of IHL and should be applied together. Additionally, by looking at armed conflict-related cases unequivocally from a human rights perspective, the Court was accused of judicial imperialism,[9] or at least, of ignorance of the cumulative effect its earlier decisions had on the freedom to conduct military operations.[10] Now, for the first time, the Court has explicitly offered its view on the interaction between IHL and HRL, here with regard to the deprivation of liberty during international armed conflict, and has engaged with the spectrum of intricate issues involved. In this sense, the decision may prove to be instructive and take away some of the confusion on how the human rights obligations of the State Parties of the ECHR translate to armed conflict situations.

Another positive point about the Court's approach in this case is that the judges refused to follow the UK's argument regarding *lex specialis*, with respect to both the jurisdiction issue and the interpretation of Article 5 ECHR. Regarding the former, the Judges were absolutely correct in discarding the UK's argument that no jurisdiction could arise when IHL applied. Accepting this position would have rendered any reference to human rights entirely obsolete, since it implied the total displacement of the Convention in times of armed conflict. Such an argument could not be maintained in the light of the widespread acceptance by judicial and quasi-judicial (human rights) bodies of the idea that HRL does not cease to apply during armed conflict. Regarding the interpretation of Article 5 ECHR, accepting the argument regarding *lex specialis* would have been erroneous as well, since the maxim cannot be considered a sound and suitable legal technique to refer to when discussing questions of the interplay between the norms of these two spheres of law. On the contrary, with regard to the IHL/HRL conundrum, references to the *lex specialis* principle have generally been unhelpful and the 'use of this term has served to obfuscate the debate rather than provide clarification'.[11]

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[7] Christine Byron, 'A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies' (2007) 47 Virginia Journal of International Law 839, 851.

[8] The path to the extraterritorial application of the ECHR is far too complex to be dealt with in detail here and I would kindly like to refer the readers to the relevant literature on this topic for more information. For present purposes, suffice it to say that whereas the Court in *Bankovic v Belgium* (2001, App no 52207/99) had severely limited the possibility of the ECHR to apply in the context of military operations abroad, it has steadily but surely extended the reach of the Convention since *Al-Skeini v United Kingdom* (2011, App no 55721/07) to the point that it is now generally accepted that its provisions apply not only within the territory of the State parties, but under certain circumstances also extend to their extraterritorial activities. What circumstances can give rise to the extraterritorial application, however, has not been definitively settled. The current state of art as regards the case law of the Court can be found in *Jaloud v the Netherlands* where the Grand Chamber accepted that persons passing through a checkpoint manned by the armed forces of a State party come within their jurisdiction for the purposes of Article 1, see *Jaloud v the Netherlands* App no 47708/08 (Grand Chamber, ECtHR, 20 November 2014). However, with judges taking even more expansive approaches towards the extraterritorial application of the ECHR in several domestic cases, the last word on the subject has not been said and it will be interesting to see how far the Court is willing to go, e.g. *Al-Saadoon & others v Secretary of State for Defence* [2015] EWHC 715 (Admin).

[9] This reproach was made in a recent report of Policy Exchange, a leading right-wing think tank, which denounces that 'the reach of imperial judiciary is increasing relentlessly, both functionally and geographically' and that the 'Courts, once kept awy from judging the confusion of the battlefield, can now consider with the benefit of hindsight how those commanders should have trained, prepared and equipped for – or even how they should have fought – the very conflicts in which they serve', see Richard Ekins, Jonathan Morgan and Tom Tugendhat, 'Clearing the Fog of Law: Saving Our Armed Forces from Defeat by Judicial Diktat' (2015) <http://www.policyexchange.org.uk/images/publications/clearing%20the%20fog%20of%20law.pdf> accessed 29 April 2015, para 9.

[10] Such statements have been made out of concern of the 'juridification' of armed conflict, as 'human rights life is often said to expose the armed forces to civilian standards of conduct which are ill-suited to the demands of military life', see Aurel Sari, 'The Juridification of the British Armed Forces and the European Convention on Human Rights: 'Because it's Judgment that Defeats Us' (2014) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2447183> accessed 17 March 2015, 26 ff.

[11] Françoise J Hampson and Noam Lubell, 'Amicus Curiae Brief Submitted in the Case of Hassan v United Kingdom' (2013) <https://www.essex.ac.uk/hrc/documents/practice/amicus-curae.pdf> accessed 31 march 2015, para 18.

As has been aptly demonstrated elsewhere, *lex specialis* is a broad and vague principle that has no clear and agreed content, provides no guidance as to which norm should be considered the more specific one and 'tends to abrogate the scope for more nuanced legal findings, most obviously through failing to allow space for an analysis which suggest the simultaneous, though not coterminous, applicability of both regimes in an appropriate context'.[12]

It is argued here that, seen in this light, the Court's 'symbiotic' approach, which rests on the treaty interpretation techniques of Article 31 (3) VCLT, is preferable. Instead of opting to let the more specific norms prevail and disapply the conflicting general standards, this approach attempts to resolve the IHL/HRL conundrum by taking account of the particularities of the two bodies of law, by considering them 'as existing along a spectrum of legal relevancy to the factual circumstances at issue', and by blending their rules together, to a degree.[13] The Court does not pick one body of law over the other, but applies both by allowing the more permissive regime of IHL to step in through a reading-down of Article 5 ECHR. In this sense, it gave meaning to the phrase 'the two spheres of law are complementary, not mutually exclusive'[14] and provided a more sophisticated answer than the binary logic of *lex specialis* would allow with regard to the complex and multifaceted questions that arise as a result of the simultaneous application of IHL and HRL. Since it is highly unlikely that the Court would have completely relinquished the power to test the States' conduct in armed conflict on ECHR conformity, this outcome essentially provides a true middle-way solution by accommodating internment under IHL, while securing the Court's oversight function. In summary, it is the view of this author that the Court came up with a nuanced, well-balanced solution to an old and heavily disputed issue. For these reasons, the outcome of the case can be defended.

Yet the critique of those opposing the judgment is understandable, if not justified. While it is true that the Court came up with a workable framework in which IHL and HRL could be reconciled in a way that takes accounts of their respective objectives, characteristics and intricacies, its *modus operandi* raises some questions. To begin with, the Court's reliance on subsequent state practice to demonstrate that to intern individuals pursuant to GC III and IV no derogation is needed because Article 5 ECHR does not prohibit lawful internment during armed conflict is dubious. Because States often act in a certain way out of political reasons, rather than legal motives, it is not clear whether the absence of derogations so readily points to the conclusion at which the Court arrived. Moreover, because Article 5 ECHR is worded exhaustively and had in the past consistently been interpreted narrowly by the Court, the majority are walking on thin ice by re-interpreting the article as expansively as they have. By accommodating the taking of prisoners of war and the detention of civilians who pose a risk to security under GC III and IV, the Court came very close to rewriting the Article and thus amending the treaty. Seen in this light, the reproach of the dissenting judges that the majority overstepped the boundaries of treaty interpretation is not necessarily inaccurate. Overall, it might be argued – and not be entirely wrong – that the Court's reasoning is at times shaky and that the reliance on Article 31, §3 VCLT served as nothing more than 'a legalistic fig leaf' for a choice made on the basis of what the judges found to be the most sensible, realistic and practicable solution in the given situation.[15]

As a final point, it is noteworthy that the judgment has not pre-empted all questions relating to the IHL/HRL conundrum, as several issues were left unaddressed by the Court's decision. Specifically with regard to non-international armed conflicts, uncertainties remain since it was stated that 'only 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 law, could Article 5 be interpreted as permitting the exercise of such broad powers'. With regard to non-international armed conflicts, the functioning of Article 5 ECHR has yet to be clarified. In this regard, it can be noted the issue of the concurrent application of IHL and HRL with regard to the deprivation of liberty during said types of conflict, stood central in the case of

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[12] Conor McCarthy, 'Legal Conclusion or Interpretative Process? Lex Specialis and the Applicability of International Human Rights Standards' in Roberta Arnold and Noëlle Quénivet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff Publishers 2008) 109. See also Anja Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis' (2005) 74 Nordic Journal of International Law 27; Laura M Olsen, 'Practical Challenges of Implementing the Complementarity between International Humanitarian and Human Rights Law – Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict' (2009) 40 Case Western Reserve Journal of International Law 437; Nancie Prud'homme, 'Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?' (2007) 40 Israel Law Review 355.

[13] McCarthy (n 12) 110.

[14] Human Rights Committee, General Comment n° 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para 11.

[15] Marko Milanovic, 'A Few Thoughts on Hassan v United Kingdom' (2014) EJIL:Talk! <http://www.ejiltalk.org/a-few-thoughts-on-hassan-v-united-kingdom/> accessed 17 March 2015.

Serdar Mohammed v Ministry of Defence.[16] Here, Mr. Justice Legatt, deciding for the UK High Court of Justice, adopted a different approach, requiring derogations under Article 15 to reconcile IHL and HRL. However, as the judgment predates the decision in *Hassan v United Kingdom*, no definite conclusions can be drawn from it and we will have to wait for the case to reach the Court (which in all likelihood it will) for further explanation. A second point of uncertainty, is whether the Court would adopt a similar, lenient approach with regard to other rights under the Convention. Here, again, the decision of the Court provides no further information. In sum, Milanovic was right in stating that 'In Hassan, we thus have yet another incremental decision, with The Court deciding only what it absolutely needed to on the facts of the case, but providing limited guidance for the future'.[17] In this sense, the judgment could be seen as a missed opportunity, and it is indeed regrettable that the Court did not elaborate on this point, because 'a well-coordinated application of IHL and HRL is vital to ensuring adequate protection during armed conflict and the effective implementation of the legal framework'.[18]

Competing Interests

The author declares that they have no competing interests.

[16] Serdar Mohammed v. Ministry of Defence [2014] EWHC 1369 (QB).
[17] Milanovic (n 15).
[18] Prud'homme (n 12) 356.

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